101 Ways to Improve State Legal Systems

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

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HOW TO USE THIS GUIDE

This document provides a compilation of legal reforms in 23 areas for potential consideration by state legislatures. Within each area, the report briefly discusses the purpose of and need for each reform. In several areas, the report notes whether the reform is needed in particular states.

This report does not provide an assessment of the general political feasibility of enacting legal reform in any individual state. Some states, such as Texas, have a reputation as being generally supportive of legal reform. Other states, such as Massachusetts, are hostile to any legislation that would be opposed by the plaintiffs' bar. The analysis in this report does not purport to include any such state-specific political evaluation, which must occur before the effectiveness and feasibility of any reform can be fully understood.

In addition, each legal reform may contain many variations and options, especially when evaluated in light of a specific state's political landscape. To this end, reform options that include monetary values have been left open regarding the actual proposed dollar amount. These numbers would need to be individualized to each state according to what is feasible from a policy and political perspective within each jurisdiction.

In addition to using the legal reform options in stand-alone legislation or as part of a broader legislative package, several of the proposals may also have significant value as defensive measures or as potential amendments to other liability-expanding legislation.

This report presents legal reform options in a conceptual manner. It does not provide bill language, which must be tailored to fit current law and the statutory scheme of each individual state.

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

PROTECTING THE RIGHT TO APPEAL

Purpose:

Defendants, in order to stay the execution of a judgment and protect their assets during an appeal, must post appeal bonds, which can run up to 150% of the judgment against them in some states. If a defendant cannot post the required bond, then it may have no way to protect against the plaintiff seizing its assets during the appeal besides filing for bankruptcy. Most states adopted bonding statutes before the creation of novel and expansive theories of liability, in a time when judgments were generally more reasonable in scale. Bonding rules stand as unfair roadblocks to appeals of such crushing verdicts and place inordinate pressure to settle even cases likely to be reversed on appeal.

Note:

Thirty-eight states currently have appeal bond limits of some sort and five states do not require appeal bonds at all. Only Alaska, Arizona, District of Columbia, Delaware, Illinois, Maryland, Montana, and New York are without limits. In many other states, however, appeal bond limits only apply to the punitive damages portion of the judgment or to signatories to the Master Settlement Agreement (tobacco companies).

Options:

- Limit appeal bonds for all civil case judgments regardless of legal theory.
- Use a separate, lesser cap for small businesses.
- Limit appeal bonds to only the punitive damages portion of the verdict.

ADDRESSING RISING NONECONOMIC DAMAGE AWARDS

Purpose:

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

Options:

- Limit noneconomic damages to a certain amount per entity, indexed to inflation, applicable in all civil cases under all theories.
- Cap the total allowable noneconomic damages award.
- Preclude juries from considering evidence of a defendant's alleged wrongdoing, misconduct, or guilt; evidence of the defendant's wealth or financial resources; or any other evidence that is offered for the purpose of punishing the defendant when determining pain and suffering, and require jury instructions regarding same (ALEC Full and Fair Noneconomic Damages Act approach).

PROVIDING TRANSPARENCY IN HIRING OUTSIDE COUNSEL BY STATE OFFICIALS

Purpose:

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

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

Note:

This proposal might be included in a package of transparency reforms, including Protecting the Rights of Legal Consumers (p. 25) and Ensuring Honesty in Lawyering (p. 27).

Options:

- Incorporate all aspects of the ALEC model Private Attorney Retention Sunshine Act, including open and competitive bidding for contracts at or above $100,000, legislative oversight or review of contracts at or above $1 million in potential fees, time and expense record-keeping requirements, and $1,000 effective hourly rate caps on contingency fees.
- Require that any proposed contract for the services of a private attorney or law firm with an expected cost of $1 million includes a disclosure of any past or present business relationships between the state agency or official and the proposed firm or attorneys.

ADDRESSING EXCESSIVE PUNITIVE DAMAGES AWARDS

Purpose:

The U.S. Supreme Court has observed that punitive damages have "run wild." Although the Court has provided guidelines for determining whether an award is constitutionally excessive, state court decisions frequently evade or ignore the law. Some states have adopted statutory limits on punitive damages, but many others have not. Statutory limits provide greater predictability and certainty in litigation, eliminate outlier verdicts, and avoid constitutionally excessive awards.

Options:

- Limit punitive damages awards to the greater of three times compensatory damages or a specific cap (possibly adjusting periodically for inflation).
- In cases where the fact finder finds a specific intent to harm or malice, limit punitive damages awards to the greater of four times compensatory damages or a specific cap.
- For individuals or small businesses, limit punitive damages awards to three times compensatory damages or a certain percent of net worth, whichever is less.
- Provide that the limit shall not be disclosed to the trier of fact, but applied by the court to any punitive damages verdict.
- When compensatory damages are above a certain amount, require that punitive damages are not to exceed compensatory damages.

PROTECTING DUE PROCESS IN PUNITIVE DAMAGES DETERMINATIONS

Purpose:

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

Options:

- Allow optional bifurcation. Upon motion by any party, in the first stage of a proceeding, the trier of fact would determine whether and to what extent compensatory damages should be awarded. Only if the trier of fact awards compensatory damages does the proceeding continue to the second stage, where evidence relevant to the question of punitive or exemplary damages is presented.
- Stop duplicative punishment for the same conduct. Punitive damages may not be awarded if the defendant establishes before trial that punitive damages have previously been awarded against it for the same action or course of conduct. If the court determines by clear and convincing evidence that the punitive damages award was insufficient, then the court may permit the jury to consider a subsequent award.
- Require "clear and convincing" evidence to support an award of punitive damages (needed in Connecticut, Delaware, Illinois, New Mexico, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wyoming), which is a standard in between "beyond a reasonable doubt" of criminal law and "preponderance of the evidence" of civil liability.
- Eliminate prejudgment interest on punitive or exemplary damages (*see* Promoting Fairness in Prejudgment Interest Accrual, p. 30).

SUPPORTING SOUND SCIENCE IN THE COURTROOM

Purpose:

Prior to 1993, federal courts permitted parties to present expert testimony involving novel scientific theories if the underlying theory or basis of opinion was generally accepted as reliable within the expert's particular field. The general acceptance test, known as the *Frye* standard, was applied liberally to favor admissibility of expert testimony. The U.S. Supreme Court's landmark decision in *Daubert* emphasized the obligation of the trial court to serve as a gatekeeper, guarding the courthouse against untrustworthy expert testimony. The *Daubert* decision, however, is only binding in federal courts. For this reason, a clear gap remains between evidentiary standards in federal courts and the state courts.

Note:

Thirty states have adopted *Daubert* or deemed their state rule consistent with its approach: Alaska, Arkansas, Connecticut, Delaware, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, and Wyoming. Fourteen states and the District of Columbia have rejected *Daubert* and may continue to apply a *Frye* general acceptance test: Arizona, California, Colorado, District of Columbia, Florida, Illinois, Kansas, Maryland, Nevada, New York, North Dakota, Pennsylvania, South Carolina, Washington, and Wisconsin. Six states have neither accepted nor rejected *Daubert* and may apply their own standard: Alabama, Hawaii, Minnesota, Missouri, North Carolina, and Virginia. Florida and Illinois have ongoing legislative efforts to adopt *Daubert*. (Note: Some jurisdictions apply different standards depending on the type of evidence at issue, so surveys may vary as to which states have adopted *Daubert*, *Frye* or an alternative standard.)

Options:

- Amend state rules for admission of expert testimony to be consistent with the Federal Rules of Evidence, Rules 701, 702, and 703.
- Provide that the state's standard for admission of expert testimony is to be interpreted consistently with *Daubert* and its progeny.
- Require courts to hold a pretrial hearing on an expert's proposed testimony upon motion of a party.
- Mandate pretrial disclosure of expert testimony.
- Limit an expert's testimony to the particular field in which the expert is qualified.

PROVIDING FAIRNESS IN ALLOCATING FAULT BETWEEN PLAINTIFF AND DEFENDANT

Purpose:

Fairness and common sense suggest that a party should not be required to compensate an individual who was the primary cause of his or her own injury. Rules of apportionment have developed to reflect this basic principle; however, some states permit a plaintiff to recover even if he or she was 50% or more at fault. A modified comparative fault system corrects this unfair result.

Note:

Thirteen states currently follow a pure comparative fault system: Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, South Dakota, and Washington. Thirty-three states follow a modified comparative fault system. Five jurisdictions follow a pure contributory fault system that does not permit a plaintiff to recover if responsible to any degree for his or her injuries, subject to various exceptions: Alabama, District of Columbia, Maryland, North Carolina, and Virginia.

Options:

- Amend pure comparative fault laws that permit recovery if the defendant is to any degree at fault.
- Move the jurisdiction in line with the majority of states that prevent recovery where a plaintiff is at least 50% or 51% at fault for his or her injury. This approach does not seek to go from one end of the apportionment spectrum to the other (i.e., pure comparative negligence to pure contributory negligence). Rather, this approach sets a balance based on whether the injured party was the primary cause of his or her injury.

FURTHERING REPRESENTATIVE JURIES

Purpose:

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

Note:

Jury service laws and court structures vary significantly from state to state. Fourteen states have adopted legislation based on whole or in part on ALEC's Jury Patriotism Act (JPA). Many other state legislatures or courts have adopted some provisions on their own initiative.

Options:

- Update state jury service laws to incorporate all provisions of the JPA, including a procedure to automatically reschedule jury service, a one-day or one-trial term of service, a strengthened hardship excuse standard, elimination of all exemptions based on profession or occupation, prohibition on employers requiring use of leave or vacation time for jury service, protection for small businesses that may suffer from a temporary loss of more than one employee on jury service, and increased civil fines for failure to respond to a juror summons (e.g., $500).
- Adopt a "Lengthy Trial Fund" providing supplemental compensation to jurors selected to serve on trials of more than 10 days who do not receive their full regular compensation during jury service from their employers or who are self-employed. This fee could be financed by a nominal fee on filing of civil complaints.

ALLOCATING LIABILITY AMONG PARTIES FAIRLY AND PROPORTIONATELY

Purpose:

Joint and several liability reform is intended to fairly and proportionately allocate liability based on the percentage of fault attributed to each party's negligence. Where multiple defendants are sued for causing a plaintiff's injuries, the fact finder attributes to each party a percentage of fault in causing the plaintiff's injuries under the presumption that each defendant will pay his or her corresponding percentage of damages.

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

Note:

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

Options:

- Adopt pure several liability: limit a defendant's liability only to the percentage of fault attributed to that defendant.
    - Currently law in Alaska, Arizona, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Michigan, Mississippi, Tennessee, Utah, Vermont, and Wyoming.
- Authorize the fact finder to apportion fault to nonparties.
- Implement modified joint and several liability: joint liability is barred for defendants found to be less than 50% at fault.
    - Variants currently law in Iowa, Minnesota, Missouri (less than 51%), Montana, New Hampshire, New Jersey (less than 60%), Ohio (for economic damages), Oklahoma, South Carolina, Texas, and Wisconsin (less than 51%).
- Bar joint liability for recovery of noneconomic damages, retaining joint liability for economic damages only.
    - Currently law in California, Nebraska, and New York (for defendants less than 50% at fault).

PROTECTING ACCESSIBILITY OF HEALTH CARE

Purpose:

The lottery-like aspect of civil liability is nowhere more evident than in medical liability. Widely disparate awards across states for the same or substantially similar injuries demonstrate medical liability's systemic problems. These inequities and inefficiencies negatively affect the affordability and accessibility of health care. They also encourage the practice of defensive medicine as a means of reducing or avoiding tort liability, which is a major contributor to skyrocketing health care costs.

Options:

- Establish a limit on total damages (e.g., $1 million) in medical liability cases.
  - Limits on the total award exist in Colorado, Indiana, Nebraska, Texas, and Virginia.
- Establish a limit on noneconomic damages in medical liability cases (*see* Addressing Rising Noneconomic Damage Awards, p. 3).
  - This can be accomplished through a flat limit (e.g., $250,000 or $500,000), a ratio limit (e.g., two times economic damages), or both.
- Limit punitive damages in medical liability cases (*see* Addressing Excessive Punitive Damages Awards, p. 5).
- Limit contingency fees in medical liability cases:
  - Provide a sliding scale for contingency fees (e.g., up to 40% of the first $150,000 recovered, 33⅓% of the next $150,000, 25% of the next $200,000, and 20% of any amount recovered over $500,000). States with scaled fee provisions include California, Connecticut, Delaware, Florida, Illinois, Massachusetts, Nevada, New Hampshire, New Jersey, New York, and Wisconsin.
  - Provide a flat percentage limit for contingency fees (e.g., 33⅓%).
  - Provide that contingency fees must be calculated exclusive of any punitive damages awards.

- Set conditions on the use of expert witnesses:
  - Require that an expert witness be licensed and trained in the relevant discipline, certified by a board recognized by the state, and substantially familiar with the standard of care on the date of injury.
  - Require that an expert witness be licensed in the forum state or a contiguous state and has practiced for one year preceding the date of injury.
  - Prohibit testimony from expert witnesses whose compensation depends upon the outcome of the lawsuit.
  - Prohibit a health care provider from being required to give expert opinion testimony against himself or herself except with respect to discovery.
- Establish a collateral source rule to admit evidence of payments by other defendants (*see* Providing Jury Full Information on the Plaintiff's Actual Damages, p. 29).
  - This reform exists in a majority of states, but it was held unconstitutional in Georgia, Kansas, Kentucky, and New Hampshire.
- Require claim submission to pretrial screening or an arbitration panel to determine the validity of a case, or rely on an impartial third party for resolution.

STOPPING NEW, UNINTENDED LAWSUITS

Purpose:

On occasion, courts create an "implied" cause of action or a right to sue based on their views of a state legislature's intent in enacting legislation. The principles for when courts will or will not create these implied causes of action are vague and uncertain. The result is that defendants may face unexpected liability. In addition, plaintiffs waste time and money litigating claims that courts may later find do not exist. Courts spend substantial judicial resources considering such issues. Whether a private right to sue exists may also have unanticipated implications for government policymaking and enforcement of a law. For these reasons, there should be transparency in legislation as to whether any act of the legislature creates a new right to sue. This proposal would provide greater transparency in the legislative process and clarity in the courts.

Options:

- Ensure that any legislation enacted in the state creating a private right of action must contain express language providing for such a right. Courts of the state may not construe a statute to imply a private right of action in the absence of such express language.

ENCOURAGING COMPLIANCE WITH GOVERNMENT REGULATIONS

Purpose:

State legislatures and Congress have charged certain government agencies with ensuring that products are safe for public use and that services are provided in a manner that adequately protects consumers. Nevertheless, even the most closely regulated businesses face lawsuits advancing theories of liability that create tension with the reasoned decisions of government regulators. Such claims impose liability, and sometimes even punitive damages, on businesses that faithfully comply with the law. By adding congruity between government regulations and the liability system, state reforms based on ALEC's model Regulatory Compliance Congruity with Liability Act provide much needed clarity, stability, and predictability in the law; treat manufacturers, product sellers, and service providers with fairness; and protect the public interest.

Options:

- Provide that a manufacturer or seller is not subject to liability (except for manufacturing defects) if one of the following conditions exists:
    - The product was designed, manufactured, packaged, labeled, sold, or represented in relevant and material respects in accordance with the terms of an approval, license, or similar determination of a government agency; or
    - The product was in compliance with a state or federal statute, or a standard, rule, regulation, order, or other action of a government agency pursuant to statutory authority, where such statute or agency action is relevant to the event or risk allegedly causing the harm and the product was in compliance at the time the product left the control of the manufacturer or seller; or
    - The act or transaction forming the basis of the claim involves terms of service, contract provisions, representations, or other practices authorized by, or in compliance with, the rules, regulations, standards, or orders of, or a statute administered by, a government agency.
    - Protection would not apply if the manufacturer or seller sold the product or service after a recall order; intentionally, and in violation of applicable regulations, withheld or misrepresented information material to securing or maintaining approval of the product or service; or bribed a government official to secure or maintain approval.

IMPROVING PRODUCT LIABILITY LAW

Purpose:

In many ways, product liability is a different animal than other areas of tort law and justifies unique and separate protections to maintain a fair balance. Too often, product manufacturers and sellers are faced with potentially crippling litigation where their products are lawfully made and safe. This is due to a variety of factors within the legal system and to the result of abuses by some plaintiffs' attorneys. In certain instances, such as with asbestos and silica litigation, these abuses are so widespread as to create the need for product-specific liability safeguards.

Options:

"Innocent Seller" Protection

- Limit the scope of product liability actions such that they may only be permitted against the manufacturer of the allegedly defective product and not the seller who had no knowledge of or control over the defect.
    - This limitation would prevent retailers from being sued in product liability actions against out-of-state manufacturers solely for the purpose of retaining the suit in state court.

Product Misuse Safeguard

- Limit the scope of product liability actions against a manufacturer or seller of a product where the product was used in a manner other than the product's intended use and where such use could not reasonably have been expected.

Statute of Repose

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

Objective Evidence in Product Liability Cases

- Establish affidavit requirements in product liability actions to state that the claimant's injury resulted from specific use of or exposure to the allegedly defective product.

Codification of Definitive Product Liability Standards

- Provide that a product may be unreasonably dangerous *only* because of one or more of the following characteristics: (1) defective construction or composition; (2) defective design; (3) failure to warn or inadequate warning; or (4) nonconformity with an express warranty.

State-of-the-Art Defense

- Establish a state-of-the-art defense for defendants in product liability based upon the reasonably available scientific and technological knowledge existing at the time of manufacture.

Removal of Joint and Several Liability in Product Liability

- Amend laws of jurisdictions providing joint and several liability (*see* Allocating Liability Among Parties Fairly and Proportionately, p. 10) to provide that, in product liability cases, liability is several only.

Known Unsafe Products

- Preclude specific product liability lawsuits, such as for unhealthy food products, alcohol, or cigarettes, which are inherently unsafe and which ordinary consumers know to be unsafe or unhealthy.

RESTORING COMMON SENSE TO PRIVATE CONSUMER PROTECTION LAWSUITS

Purpose:

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

Over the past few years, CPAs have morphed to provide something of a universal claim. Today, CPA claims are increasingly tacked on to product liability, public nuisance, and other claims where plaintiffs are unable to otherwise satisfy the well-reasoned elements of these claims. CPAs are frequently being used to stretch tort law and expand liability in unanticipated and unpredictable ways, improperly regulating entire industries through litigation.

Options (Incorporate all elements of ALEC's model Private Enforcement of Consumer Protection Statutes Act into state law):

- Require the individual to show (1) reliance on an unfair or deceptive act or practice that is objectively reasonable; (2) an ascertainable loss of money or property; and (3) proof that the violation caused the plaintiff's injury.
- Provide that a court may not find conduct unfair or deceptive if the conduct is required or permitted by or in accord with state or federal law, rule or regulation, judicial or administrative decision, or formal or informal agency action.
    - The majority of states have adopted regulatory compliance provisions, though the scope or application varies considerably: Alaska, Arizona (FTC-regulated conduct only), Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Indiana, Iowa (FTC-regulated conduct only), Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New York (federally regulated conduct only), Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

- Require proof that the defendant willfully deceived the public for an award of treble damages where they are available or required.
- Provide that punitive or exemplary damages are not permitted in a CPA action to avoid double punishment of a defendant that has already been required to pay treble damages.
- Encourage courts to apply traditional class action safeguards, such as requiring that common questions of law and fact predominate, where class actions are available.
    - Note: Alabama, Georgia, Louisiana, Mississippi, Montana, and South Carolina do not allow consumer protection claims to be brought as class actions.
- Do not permit statutory damages in class actions.
    - Currently law in Colorado, New York, Ohio, Oregon, and Utah.
- Require a person, prior to bringing a private action under a CPA, to provide the prospective defendant with 10 days' notice of the intended action to promote prompt resolution of the dispute without the need for litigation.
    - Currently law in Georgia.
- Allow awards of attorney's fees and costs to prevailing plaintiffs only in cases in which the defendant's conduct was willful.
    - Currently law in Minnesota, North Carolina, and North Dakota

PRIORITIZING THE CLAIMS OF THE SICK AND ADDRESSING FRAUD AND ABUSE IN ASBESTOS AND SILICA LITIGATION

Purpose:

Asbestos litigation is the longest-running mass tort in U.S. history. In the earlier years of asbestos litigation, most cases were filed by people with cancer and other serious conditions. From the late 1990s until recently, the vast majority of claimants were not sick. The target defendants have changed too. First, the litigation was focused on companies that made asbestos-containing products. Then, when most of those companies went bankrupt, the litigation spread to premises owners in claims brought by independent contractors. Now, new companies and industries are being targeted, and new theories are being raised.

The reforms below prioritize the claims of those who are truly sick, allow those who are impaired to bring a claim should they develop a condition and require greater transparency in asbestos litigation to address fraud and abuse.*

Options:

Medical Criteria

- Define procedures and minimum medical requirements for filing in asbestos- or silica-related litigation.
    - Currently law in Florida, Georgia, Kansas, Ohio, Oklahoma, South Carolina, Tennessee, and Texas.
- Require a medical affidavit or certificate of diagnosis and impairment to maintain a claim.

Asbestos Recovery Disclosure

- Require reporting of any asbestos or silica recoveries from bankruptcy trusts or other funds that act to offset a defendant's payment of damages.

**The asbestos and silica reforms are of high benefit but applicable to a limited group of interested businesses and their insurers. In addition, reforms are likely to face constitutional challenges.*

ADDRESSING CLASS ACTION ABUSE

Purpose:

Class action abuse has been a long-standing issue on both the federal and state levels. Many of these lawsuits have led to inappropriate applications of rules governing class certification, choice of law, and remedy and have sometimes placed lawyers' interests above clients. In 2005, Congress passed the Class Action Fairness Act (CAFA) in response to many of these widespread abuses. CAFA, however, does not directly affect state class actions where many of these issues remain unaddressed. As such, state class action reform is needed to complement federal improvements.

Options:

- Provide for interlocutory appeal of the grant or denial of class certification.
    - Currently law in Alabama, Colorado, Georgia, Kansas, Missouri, Ohio, Oklahoma, and Texas.
- Provide that classes may be certified only after the class representative makes a preliminary factual showing of a reasonable likelihood of success on the merits.
- Reform attorney's fee arrangements through adoption of a "declining percentage principle," whereby the percentage of recovery allocated to attorney's fees decreases as the size of the recovery increases.
- Establish in the case of a coupon class action settlement that an attorney's contingency fee is determined based on the value to class members of coupons that are actually redeemed as opposed to the total award.
- Direct courts to provide greater scrutiny to class action settlements, especially those involving coupons or other noncash settlements.

CURBING FRIVOLOUS LAWSUITS

Purpose:

It often takes little more than a small filing fee and generation of a form complaint to begin a lawsuit. It costs much more for a small business to defend against a lawsuit. The weaponry against frivolous lawsuits was considerably weakened when Rule 11 of the Federal Rules of Civil Procedure was changed in 1993. Rule 11 provides for sanctions against those who file claims for an improper purpose or to harass or cause unnecessary delay, or include claims that are not warranted by existing law or lack a factual or evidentiary basis.

The 1993 changes rendered Rule 11 toothless by (1) allowing judges to refuse to sanction a violating lawyer; (2) substantially reducing the likelihood that a plaintiff's lawyer would be sanctioned to pay a defendant's needless legal expenses engendered by the frivolous claim; and (3) providing a 21-day "safe harbor" that gives the plaintiff a free pass to withdraw frivolous pleadings without sanction.

Note:

Thirteen states and the District of Columbia have adopted rules identical to or very similar to the current, weakened Federal Rule 11: Delaware, District of Columbia, Hawaii, Minnesota, Missouri, Nevada, New Jersey, North Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

Twelve states retain a rule identical to or very similar to the pre-1993 version of the federal rule, which includes mandatory sanctions and does not include a safe harbor: Arizona, Idaho, Iowa, Kansas, Kentucky, Louisiana, Michigan, Montana, North Carolina, South Dakota, Texas, and Virginia.

Six states retain an older version of the federal rule, which provides only that by signing a pleading an attorney certifies that there are good grounds to support it and that the court may strike pleadings that violate the rule: Alabama, Alaska, Indiana, Maryland, Massachusetts, and New Mexico.

Nineteen states have a rule combining elements of the current and prior federal rules or that is unique: Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Maine, Mississippi, Nebraska, New Hampshire, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, and Washington. A handful of these rules are stronger than the federal version.

It is important to consider the constitutionality of legislative changes to court rules or special procedures applicable to rule changes in moving proposals.

Options:

- Return to or adopt the pre-1993 approach in appropriate states—require the court to award attorney's fees when it finds a pleading or motion violates the rule.
- Eliminate the 21-day "safe harbor."
- Eliminate language that limits sanctions to the amount necessary to deter future similar conduct, recognizing the need to fully reimburse a party subject to a frivolous claim for its attorney's fees and costs.
- Consider stronger statutes regarding frivolous claims adopted by the states:
    - ***Florida:*** "Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) was not supported by the material facts necessary to establish the claim or defense; or (b) would not be supported by the application of then-existing law to those material facts."

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

- ***Nebraska:*** "The court shall assess attorney's fees and costs if, upon the motion of any party or the court itself, the court finds that an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment. If the court finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct, including, but not limited to, abuses of civil discovery procedures, the court shall assess attorney's fees and costs."

- ***New Hampshire:*** "If upon hearing of any contract or tort action it clearly appears to the court that the action or any defense is frivolous or intended to harass or intimidate the prevailing party, then the court, upon motion of the prevailing party or on its own motion, may order summary judgment against the party who brought such action or raised such defense, and award the amount of costs and attorneys' fees incurred by the prevailing party plus $1,000 to be paid to the prevailing party, provided such costs and fees are reasonable. The trial judge shall also report such conduct to the supreme court committee on professional conduct."

- ***Oregon:*** "Sanctions under this section must be limited to amounts sufficient to reimburse the moving party for attorney's fees and other expenses incurred by reason of the false certification, including reasonable attorney fees and other expenses incurred by reason of the motion for sanctions, and upon clear and convincing evidence of wanton misconduct amounts sufficient to deter future false certification by the party or attorney and by other parties and attorneys. The sanction may include monetary penalties payable to the court. The sanction must include an order requiring payment of reasonable attorney's fees and expenses incurred by the moving party by reason of the false certification."

REDUCING FORUM SHOPPING

Purpose:

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

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

Options:

- Prohibit nonresidents of the state from bringing an action in state court unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in the state.
- Require that, in any civil action where more than one plaintiff is joined, each plaintiff shall independently establish proper venue.
- Limit the ability of a plaintiff to file a lawsuit in a jurisdiction other than where the action arose, where the plaintiff resides, or where the defendant resides or has a principal place of business.
- Tighten venue rules by providing that owning property and transacting business in a county is insufficient in and of itself to establish the principal place of business for a corporation.
- Specify *forum non conveniens* factors pursuant to which a court may decline to exercise jurisdiction in a cause of action of a nonresident occurring outside the state. Factors may include (1) the ease of access of proof; (2) the place of accrual of the cause of action; (3) the location of witnesses and the availability and cost of obtaining witnesses; (4) the residence(s) of the parties; (5) the possibility of harassment of the defendant in litigating in an inconvenient forum; (6) the enforceability of any judgment obtained; (7) whether a litigant is attempting to circumvent the applicable statute of limitations of another state; (8) consideration of the state law that must govern the case; and (9) the public factor of the convenience to and burden upon the court of litigating matters not of local concern.

PROTECTING THE RIGHTS OF LEGAL CONSUMERS

Purpose:

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

Note:

This proposal may be used as an amendment to legislation that would expand state consumer protection acts.

Options:

- Require personal injury lawyers to provide a full written explanation of the fee agreement and alternative billing options, as well as an up-front estimate of the probability of success, likely recovery, hours of work to be expended, and all expenses that may be incurred.
- Mandate that attorneys keep accurate time records and at the end of the case provide the client with detailed information regarding the amount of time spent on the case and any fees and expenses to be charged.
- Give legal consumers the right to an objective review of the contingent fee by a court or bar association committee.
- Require that if an attorney advertisement uses the word "free," the phrases "no legal fee," "no fee," "no expense," or any other phrase indicating that legal services are provided at no cost to the client, the statement must also provide, in the same size print, whether or not the client will be responsible for costs associated with litigation and the possible range of contingency fees that will be charged by the attorney if the client does recover.

- Forbid an attorney and any of his or her representatives from making unsolicited contact with a potential claimant for 45 days after an event resulting in personal injury or death that could give rise to a cause of action by that claimant.
- Provide that failure to comply with these requirements renders the fee agreement voidable at the option of the plaintiff, and the attorney shall thereupon be limited in recovery to a reasonable fee for services rendered.
- Provide that failure to meet these disclosure obligations is considered an unfair or deceptive trade practice under state law.
- Provide that an attorney who intentionally fails to disclose to a claimant any information required shall additionally be liable for treble or exemplary damages.

ENSURING HONESTY IN LAWYERING

Purpose:

This reform would establish greater protection for average consumers of legal services against deceitful practices of attorneys and provide transparency requirements and checks to rectify attorney misconduct.

Note:

This proposal can be used in whole or in part as a new law. It also can be a helpful defensive tool as an amendment to harmful legislation advocated by the personal injury and mass tort bars.

Options (Incorporate all elements of ALEC's model Honesty in Lawyering Act):

- Require that any agreement to provide legal services must be in writing. It shall affirm that the attorney possesses the requisite knowledge, skill, time, and resources to provide the legal services adequately and competently.
- Give the client at least three days to review the agreement for services.
- Provide that an attorney must disclose any agreement or intent to have an outside counsel provide any of the legal services, including the scope and anticipated costs associated with engaging outside counsel. If the decision to use outside counsel is made after the legal services agreement is entered into, the attorney must receive the client's consent in writing.
- Mandate that, in any contingent fee agreement, the attorney must disclose all fees and costs anticipated and provide an explanation of how the contingent fee will be calculated and how costs will be handled.
- Require the attorney to provide the client with a signed closing statement and complete accounting of all financial transactions related to the provision of legal services.
- Prevent the attorney from acquiring absolute authority to control major decisions in the matter from the client.
- Provide that the attorney must communicate reasonably, promptly, and frankly with clients when they inquire about their cases. The attorney must provide copies of all major documents and must notify the client within a reasonable time of any settlement offer, dispositive motion, or court ruling.

- Offer an exception to the model Honesty in Lawyering Act for a client that is a "knowledgeable consumer of legal services," including a sole proprietorship or a business that has counsel to review such an agreement or at least 30 employees.
- Require an attorney who maintains a fiduciary or escrow account with collective deposits in excess of $1 million during a calendar year to file a certification from an outside financial expert that the account has been maintained in accordance with all applicable laws and regulations.
- Mandate that the attorney disclose to the court the existence of any financial, familial, or material personal relationship that the attorney or his or her client has with any judge, juror, witness, mediator, magistrate, or any other person who is in a position to directly impact the matter.
- Require attorney certification that all factual information contained in claims, pleadings, motions, briefs, etc., is not false based on the attorney's reasonable belief and is not inconsistent with any other claim made for the same injury.
- Provide that the elements of the model Honesty in Lawyering Act are in addition to and not in lieu of any other available remedies or penalties, including any ethics rules applicable to attorneys which provide additional protections for legal consumers. An attorney who fails to comply shall be subject to court sanctions, disciplinary action by the state bar association or other such professional organization(s) through existing procedures, and civil liability in an action brought by a party alleging injury from failure to comply with the model Act.

PROVIDING JURY FULL INFORMATION ON THE PLAINTIFF'S ACTUAL DAMAGES

Purpose:

Generally, the Collateral Source Rule prohibits admission of evidence that all or some of a plaintiff's damages will be or have been paid by a source other than the defendant(s) (through health insurance, workers' compensation, or previous settlements), enabling the plaintiff to receive a double recovery—first from the collateral source and again from the defendant. To ensure a system that is equitable to all parties and to prevent double-dipping by plaintiffs, states should enact reforms that allow a judgment to be offset by the amount a claimant will receive or has received for the injuries giving rise to the lawsuit from sources other than the defendant(s).

Note:

States most in need of reform (those maintaining the Collateral Source Rule) include: Georgia, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Nevada, New Hampshire, New Mexico, North Carolina, South Carolina, Texas, Vermont, Virginia, Wisconsin, and Wyoming.

Options:

- Abolish the Collateral Source Rule in all civil actions. Provide that the court (judge) must consider after the verdict but prior to judgment any evidence showing that a plaintiff received compensation for the injuries or harm that gave rise to the cause of action from a source other than the defendant and must offset the judgment by the amount of the payments from collateral sources.
- Variations on this theme are currently law in Alaska, Colorado, Connecticut (except where a right of subrogation exists), Florida (except where a right of subrogation exists), Idaho (except life insurance and where a right of subrogation exists), Indiana (except life insurance or death benefits, insurance premiums paid directly by the plaintiff, and amounts that the plaintiff is required to repay), Michigan, Missouri (for special damages), New Jersey, New York, and Oregon.

PROMOTING FAIRNESS IN PREJUDGMENT INTEREST ACCRUAL

Purpose:

Many state legislatures have enacted laws that allow for prejudgment interest under particular circumstances to compensate tort plaintiffs for the often considerable lag between the event giving rise to the cause of action, or filing of the lawsuit, and the actual payment of the damages. In addition to seeking to compensate the plaintiff fully for losses incurred, the goal of such statutes is to encourage early settlements and to reduce delay in the disposition of cases, thereby lessening congestion in the courts. Although well-intended, the practical effects of prejudgment interest statutes can be inequitable and counterproductive. Prejudgment interest laws can, for example, result in overcompensation, hold a defendant financially responsible for delay the defendant may not have caused, and impede settlement.

Options:

- Set a reasonable prejudgment interest rate. Examples include the following:
  - Alaska: Twelfth Federal Reserve District discount rate plus 3%.
  - Georgia: Federal Reserve prime rate plus 3%.
  - Iowa: U.S.Treasury rate constant maturity index plus 2%.
  - Nebraska: Two percentage points above the United States Treasury bills rate in effect on the date of entry of the judgment. Interest accrues from the date of the plaintiff's first offer of settlement that is exceeded by the judgment until the entry of judgment if certain conditions are met.
  - Oklahoma: Rate equal to the average U.S.Treasury bill rate of preceding calendar year as certified to the administrative director of the courts by the state treasurer on the first regular business day in January of each year. Prejudgment interest begins to accrue not earlier than two years after the suit was commenced.
  - South Carolina: Prime rate plus 4%.
  - Texas: New York Federal Reserve prime rate, with a floor of 5% and a ceiling of 15%.
  - Washington: U.S.Treasury bill rate plus 2%.
- Provide that prejudgment interest may not be awarded for future economic or noneconomic damages.
- Ensure that prejudgment interest may not be awarded for punitive damages.

ADDRESSING UNFAIR IMPOSITION OF PREMISES LIABILITY FOR THE CRIMINAL ACTS OF OTHERS

Purpose:

In some states, courts have imposed substantial liability on businesses, such as convenience and retail stores, for harm to actual or prospective customers caused by criminal acts of third parties, such as assaults, shootings, or robberies.

Options:

- Provide property owners with immunity from liability for failure to prevent criminal acts of a third party unless the owner knew or should have known of the risk of criminal conduct and consciously or deliberately ignored the risk.

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