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THE CASE IN FAVOR OF CIVIL JUSTICE REFORM

Victor E. Schwartz
*Cary Silverman**

In October 2015, Emory University School of Law hosted a provocatively titled symposium, “The ‘War’ on the U.S. Civil Justice System.” The program was co-sponsored by the Pound Civil Justice Institute, a “think tank” founded and controlled by leaders of the plaintiffs’ bar that advocates for expansions in liability through presenting legal education seminars and publishing papers.¹ The distinguished law professors invited to participate in this symposium generally view tort reform as making it more challenging to bring lawsuits. Advocates for legal reform unsurprisingly have a different perspective. They view reform as creating greater fairness in the legal system, reducing unnecessary costs, and helping to assure sound results for all parties.

The introduction to the symposium edition waxes nostalgic for the civil justice system of “[a] half-century ago,” which was “a much-admired, well-organized process for resolving disputes, generally in public, before juries and independent judges.”² As this Essay will show, at that time, the nation was in the midst of the most rapid expansion of liability exposure in its history. Civil justice reform is an effort, not to turn back the clock, but to achieve balance in areas where courts went too far in relaxing requirements for both imposing liability and awarding damages.³

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¹ See CTR. FOR LEGAL POLICY, MANHATTAN INST., TRIAL LAWYERS INC.: K STREET—A REPORT ON THE LITIGATION LOBBY 2010, at 9 (2010), <http://www.manhattan-institute.org/pdf/TLI-KStreet.pdf> (discussing origin of Pound Civil Justice Institute).

² 2015 Symposium—*The “War” on the U.S. Civil Justice System*, POUND CIV. JUST. INST., <http://www.poundinstitute.org/content/academic-symposium> (last visited May 2, 2016).

³ The focus of this article is on legislative adoption of civil justice reform. State courts also play an important role in responding to excesses in liability exposure and abusive litigation practices. The adoption of a “gatekeeper” role for judges in evaluating the reliability of proposed expert testimony, first in the federal courts, and then in most states, is one example. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

I. THE RAPID RISE IN LIABILITY: 1950S TO 1970S

Between the 1950s and 1970s, the civil justice system experienced unprecedented change, including expansion of liability exposure, elimination of defenses, creation of modern class action and mass tort litigation, and larger damage awards. The plaintiffs' bar proved itself adept at persuading a number of courts to shift the law to favor increased liability during this period. Below are some milestones.

1950s: The Rise of Pain and Suffering Damages. Plaintiffs' lawyers became more creative in their search for what Melvin Belli—the “King of Torts” at the time—called the “adequate award.”⁴ Historically, noneconomic damages were modest and rarely exceeded a claimant's economic damages. Courts typically reversed awards that were larger.⁵ Mr. Belli and other plaintiffs' lawyers changed that. They used a new type of proof in personal injury cases they labeled “demonstrative evidence.” Rather than rely on the victim's testimony, the lawyers used graphic pictures and other non-testimonial means to create in juries a sense of empathy for the plaintiff and outrage against the defendant. This tactic increased the size of pain and suffering awards from modest amounts to six-figure awards that sometimes reached millions of dollars.⁶ By the 1970s, “in personal injuries litigation the intangible factor of ‘pain, suffering, and inconvenience’ constitutes the largest single item of recovery, exceeding by far the out-of-pocket ‘specials’ of medical expenses and loss of wages.”⁷

Over time, plaintiffs' lawyers created an expectation that plaintiffs in personal injury lawsuit are entitled to large pain and suffering awards, where there had been no such belief before. They were able to accomplish this even though pain and suffering awards, unlike economic damages or arguably punitive damages, are nonfunctional. There is no evidence that a noneconomic damage award reduces a person's pain and suffering. However, as Fourth

⁴ See Melvin M. Belli, *The Adequate Award*, 39 CALIF. L. REV. 1 (1951).

⁵ See Ronald J. Allen & Alexia Brunet, *The Judicial Treatment of Noneconomic Compensatory Damages in the 19th Century*, 4 J. EMPIRICAL LEGAL STUD. 365, 379–87 (2007) (finding that there was no tort case prior to the 20th century that permitted a noneconomic damage award that exceeded \$450,000 in current dollars).

⁶ See, e.g., Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Responses*, 34 CAP. U. L. REV. 545, 567–68 (2006) (finding that, during a nine-month period in 1957, there were fifty-three verdicts of \$100,000 or more).

⁷ Nelson v. Keefer, 451 F.2d 289, 294 (3d Cir. 1971) (citing *Domeracki v. Humble Oil & Refining Co.*, 443 F.2d 1245, 1249–50 (3d Cir. 1971)).

Circuit Judge Paul Niemeyer has said, “[M]oney for pain and suffering . . . provides the grist for the mill of our tort industry.”⁸

1963: Strict Product Liability and Mass Tort Litigation Begins. The Supreme Court of California became the first to recognize strict product liability under tort law, allowing plaintiffs to recover for harms caused by defective products without proving that the manufacturer was negligent.⁹ The American Law Institute then adopted § 402A of the Restatement (Second) of Torts in 1965, creating strict product liability. Section 402A’s authors, Deans William Prosser and John Wade, intended strict liability to apply when a product did not meet a manufacturer’s own design standard (as in, for example, finding a mouse in a beverage bottle).¹⁰ Some courts extended strict liability to claims challenging a product’s design and warnings, creating both vast, uncertain liability exposure and litigation.

Around this time, plaintiffs’ lawyers succeeded in extending “mass tort” litigation, previously reserved for mass disasters such as airplane crashes where all people involved suffered the exact same fate at the same time, to cases involving a single product or substance, but with significantly different facts at different times in individual cases.¹¹ While there can be benefits to coordinating procedural issues, faced with hundreds or thousands of claims, some judges adopted procedural shortcuts that placed efficiency before due process, such as bundling lawsuits and holding joint trials involving multiple plaintiffs with varying injuries and numerous defendants.

1966: The Modern Class Action Era. A newly-revised Rule 23 of the Federal Rules of Civil Procedure took effect on July 1, 1966, marking the current era of class action litigation. Development of class action doctrine in state courts followed. As University of Arizona Law Professor David Marcus colorfully put it, “To anyone interested in buccaneering attorneys, maverick judges, mind-boggling settlement sums, idealistic lawyering, or base legal corruption, the next forty-odd years have yielded a rich harvest.”¹²

⁸ Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 VA. L. REV. 1401, 1401 (2004).

⁹ *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963).

¹⁰ See George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301, 2320–22 (1989).

¹¹ See Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116, 142 (1968) (discussing *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967)).

¹² David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 588 (2013).

The revised rule required plaintiffs to opt out of a class action rather than opt in. As a practical matter, most recipients of class action notices tossed them in the garbage, but they became part of “the class.” When settlement time came, the plaintiffs’ lawyers made a fortune in fees, the defendants bought peace, and the class members generally received only modest recoveries, such as the right to obtain a coupon for a product they did not like in the first place.

Late 1960s: Punitive Damages “Run Wild.” American courts began to depart from the “intentional tort” moorings of punitive damages. Historically, the common law strictly limited punitive damages to a narrow category of torts involving conscious and intentional harm in which the defendant’s conduct was an “affront[] to the honor of the victims.”¹³ They later became firmly established as a means to punish the defendant and deter others from similar conduct, and typically involved situations in which one person intentionally harmed another. For much of early American jurisprudence, punitive damages awards “merited scant attention,” because they “were rarely assessed and likely to be small in amount.”¹⁴ Then, states began to allow punitive damages for reckless actions and even gross negligence.¹⁵ The standards fell so low that punitive damages were “awarded in cases in which liability of any sort would have been almost out of the question” a decade or two earlier.¹⁶ Awards became highly unpredictable and increasingly commonplace, particularly with the advent of strict product liability and mass tort litigation. The size of punitive awards “increased dramatically.”¹⁷

By the late 1980s, practitioners observed that “hardly a month [went] by without a multi-million dollar punitive damage verdict . . .”¹⁸ It was not long before the U.S. Supreme Court recognized that punitive damages had “run

¹³ Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 14–15 (1982); see also James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1121–22 (1984) (observing that early punitive damage awards provided compensation in addition to that which was recoverable at the time).

¹⁴ Ellis, *supra* note 13, at 2.

¹⁵ See Victor E. Schwartz, Mark A. Behrens & Joseph P. Mastrosimone, *Reining in Punitive Damages “Run Wild”: Proposals for Reform By Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1008–09 (2000).

¹⁶ Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 133 (1982).

¹⁷ George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123 (1982); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986) (recognizing “unprecedented numbers of punitive awards in product liability and other mass tort situations”).

¹⁸ Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 919 (1989).

wild”¹⁹ and placed procedural and substantive due process safeguards on such awards.

1960s–1970s: Relaxation of Requirements for Consumer Lawsuits.

During the heyday of consumerism, states adopted consumer protection laws that, unlike the Federal Trade Commission Act, included a private right of action.²⁰ These laws allowed plaintiffs to sue for any conduct that could be viewed as “unfair” or “deceptive.” They eliminated the need for the plaintiff to show that the deception was intentional or that the consumer was actually deceived, as required under common law. Many of the statutes also authorized a plaintiff to recover statutory damages, treble damages, and attorneys’ fees. Congress decided not to provide a private right of action for unfair or deceptive conduct when enacting the FTC Act both because of the vagueness of the prohibited conduct²¹ and concern that “a certain class of lawyers, especially in large communities, will arise to ply the vocation of hunting up and working up such suits.”²²

In this instance, Congress was prophetic. Those excesses have in fact occurred under state laws. They can be seen in the surge of class actions alleging that foods are improperly advertised as “natural,”²³ that some “Footlong” subs are only eleven-and-a-half inches,²⁴ or claims that Red Bull did not give a consumer “wings.”²⁵

1960s–1970s: Rise of the Regulatory State. Agencies such as the FDA, EPA, and OSHA received more power and subjected businesses to increased federal oversight and complex and costly regulations. Businesses that meticulously follow government standards, however, in most cases remain subject to tort liability and even punitive damages and civil penalties. The

¹⁹ *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991); *see also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993) (O’Connor, J., dissenting) (“[T]he frequency and size of such awards have been skyrocketing” and “it appears that the upward trajectory continues unabated.”).

²⁰ Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 15–16 (2006).

²¹ *See id.* at 13.

²² 51 CONG. REC. 13,120 (1914) (statement of Sen. Stone).

²³ *See* Victor E. Schwartz & Cary Silverman, *THE NEW LAWSUIT ECOSYSTEM: TRENDS, TARGETS AND PLAYERS* 88–100 (U.S. Chamber Inst. for Legal Reform 2013), http://www.instituteforlegalreform.com/uploads/sites/1/web-The_New-Lawsuit-Ecosystem-Report-Oct2013_2.pdf.

²⁴ *In re Subway Footlong Sandwich Mktg. and Sales Practices Litig.*, No. 13-02439, 2016 WL 755640 (E.D. Wis. Feb. 25, 2016).

²⁵ *See Energy Drink Settlement*, GCG, <http://energydrinksettlement.com> (last visited Apr. 21, 2016).

result is today's debate over federal preemption²⁶ and efforts to enact state laws that recognize regulatory compliance in determining liability and the appropriateness of punishment.²⁷

1970s: Replacement of Contributory Negligence with Comparative Fault. Courts and legislatures began replacing the contributory negligence defense with the more plaintiff-friendly comparative fault.²⁸ Contributory negligence provided that a person who is partially responsible for his or her own injury cannot recover any damages in a personal injury lawsuit. Courts and legislators replaced it with comparative fault, which allows a plaintiff to recover when partially at fault for his or her own injury, but proportionally reduces the plaintiff's damages.²⁹ After adopting comparative fault, some courts eliminated long-recognized affirmative defenses such as assumption of risk, the open and obvious danger rule, and product misuse, finding that a plaintiff's knowledge, carelessness, or recklessness could be factored into damages, rather than bar a claim.

1973: Asbestos Litigation, the Nation's Longest Running Mass Tort. The modern history of asbestos litigation began in 1973.³⁰ Over the years, plaintiffs' lawyers generated asbestos and silica lawsuits through mass screenings.³¹ They brought thousands of lawsuits on behalf of people who have no physical impairment,³² causing a spiral of company bankruptcies and jeopardizing recovery for those who are sick.³³ The asbestos litigation reached such proportions that the Supreme Court referred to the litigation as a

²⁶ See generally Victor E. Schwartz & Cary Silverman, *Preemption of State Common Law by Federal Agency Action: Striking the Appropriate Balance that Protects Public Safety*, 84 TUL. L. REV. 1203 (2010).

²⁷ See Victor E. Schwartz & Phil Goldberg, *Carrots and Sticks: Placing Rewards as Well as Punishment in Regulatory and Tort Law*, 51 HARV. J. ON LEGIS. 315, 357–62 (2014).

²⁸ See, e.g., *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975); *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

²⁹ See VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 2–5 (5th ed. 2010).

³⁰ See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1081 (5th Cir. 1973) (finding asbestos manufacturers strictly liable for injuries to industrial insulation workers exposed to their products).

³¹ See STEPHEN J. CARROLL ET AL., RAND, INST. FOR CIVIL JUSTICE, *THE ABUSE OF MEDICAL DIAGNOSTIC PRACTICES IN MASS LITIGATION: THE CASE OF SILICA* 9 (2009), http://www.rand.org/content/dam/rand/pubs/technical_reports/2009/RAND_TR774.pdf; Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 168 (2003); David Maron & Walker W. (Bill) Jones, *Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms*, 26 MISS. C. L. REV. 253, 261 (2007).

³² See James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 823 (2002).

³³ See Mark D. Plevin et al., *Where Are They Now, Part Seven: An Update On Developments in Asbestos-Related Bankruptcy Cases*, 13 MEALEY'S ASBESTOS BANKR. REP. 1, 18 chart 1 (July 2014) (finding over 100 companies have filed for bankruptcy due to asbestos liability).

“crisis.”³⁴ Some claims were exposed as potentially fraudulent.³⁵ Today, the plaintiffs’ bar continues to widen the next of asbestos litigation, targeting businesses with increasingly attenuated connections to the plaintiff’s injury. Commentators have characterized the litigation as an “endless search for a solvent bystander.”³⁶

1977: ATLA - From Trade Association to Lobbying Force. The Association of Trial Lawyers of America (now renamed the “American Association for Justice” (AAJ)) moved its headquarters from Boston to Washington, D.C. ATLA, which had acted primarily as a trade association for plaintiffs’ lawyers became a lobbying force to support liability-enhancing policy and fight proposals that would reduce litigation.³⁷ Its first victory was to kill a federal bill that substituted a no-fault system for automobile accidents. That legislation threatened the basic “bread-and-butter” of the plaintiffs’ bar. AAJ is now one of the most powerful lobbying groups in Washington,³⁸ posing an obstacle to federal civil justice reform and at the same time advancing its liability-expanding mission in both Congress and federal agencies.³⁹

Continuing: More Lawyers, More Lawsuits. In 1950, there were 221,605 active lawyers in the United States,⁴⁰ or about 1 lawyer for approximately

³⁴ *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

³⁵ See, e.g., Paul M. Barrett, *After CSX Settlement, More Trial Lawyers Will Be Sued Under RICO*, BLOOMBERG (Nov. 10, 2014, 6:02 AM), <http://www.bloomberg.com/news/articles/2014-11-10/after-csx-settlement-more-trial-lawyers-will-be-sued-under-rico>; Jonathan D. Glater, *The Tort Wars, at a Turning Point*, N.Y. TIMES (Oct. 9, 2005), <http://www.nytimes.com/2005/10/09/business/the-tort-wars-at-a-turning-point.html>; Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, WALL ST. J. (Mar. 11, 2013, 5:55 AM), <http://www.wsj.com/articles/SB10001424127887323864304578318611662911912>; see also *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 635, 675 (S.D. Tex. 2005) (finding that all but one of 10,000 silica cases aggregated for pretrial purposes were based on “fatally unreliable” diagnoses and that the claims “were driven by neither health nor justice: they were manufactured for money”).

³⁶ See generally Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The “Endless Search for a Solvent Bystander,”* 23 WIDENER L.J. 59, 59 (2013) (quoting former plaintiffs’ lawyer Richard “Dickie” Scruggs).

³⁷ See *An Expanded History of the Association of Trial Lawyers of America (ALTA®)/American Association for Justice (AAJ)*, AM. ASS’N FOR JUST., <https://www.justice.org/who-we-are/mission-history/expanded-history-association-trial-lawyers-america-atla%C2%AEamerican>.

³⁸ See, e.g., Anna Palmer & John Bresnahan, *Reid rakes in \$1M from trial lawyers by invoking Koch Bros.*, POLITICO (July 23, 2015), <http://www.politico.com/story/2015/07/harry-reid-1-million-fundraising-trial-lawyers-120540>.

³⁹ See generally VICTOR E. SCHWARTZ & CARY SILVERMAN, *THE TRIAL LAWYER UNDERGROUND: COVERTLY LOBBYING THE EXECUTIVE BRANCH* (U.S. Chamber Inst. for Legal Reform & Am. Tort Reform Found. 2015), <http://www.instituteforlegalreform.com/uploads/sites/1/TrialLawyerUndergroundWeb.pdf>.

⁴⁰ *ABA National Lawyer Population Survey: Historic Trend in Total National Lawyer Population 1878–2015*, AM. B. ASS’N (2015) [hereinafter *ABA Population Survey*], http://www.americanbar.org/content/dam/aba/administrative/market_research/total-national-lawyer-population-1878-2015.authcheckdam.pdf.

every 700 persons in the country.⁴¹ By the late 1970s, it was Chief Justice Warren Burger who warned that “unless we devise substitutes for the courtroom processes—and do so quickly—we may be well on our way to a society overrun by hordes of lawyers, hungry as locusts, and brigades of judges in numbers never before contemplated.”⁴² While the U.S. population has steadily grown, the number of lawyers is growing far faster. Today, there are six times as many active lawyers as in 1950—a total of 1.3 million.⁴³ That is roughly 1 lawyer for every 250 people.⁴⁴ It is no surprise that America is more litigious than ever.

II. THE RESPONSE: CIVIL JUSTICE REFORM

Newton’s Third Law of Motion is that “for every action, there is an equal and opposite reaction.” Civil justice reform is a reaction to the decades-long relaxation of legal standards. Calls for legal reform grow louder when excesses in liability adversely affect society, including making it difficult to find a doctor in some areas, more expensive to get certain goods and services, or difficult to manage a business or find a job. Legal reform is also motivated by meritless and frivolous claims that impose unwarranted costs, extraordinary awards, windfall attorney fees, and lawsuits that appear to serve the interests of lawyers rather than address an actual harm.

A. *State Tort Reform on the March*

Constraining Subjective Pain & Suffering Awards. Civil justice reform has moved at a steady pace at the state level. One of the earliest responses to the adverse effects of liability occurred in California in 1975, where, in response to a medical liability crisis, the state adopted the landmark Medical Injury Compensation Reform Act (MICRA).⁴⁵ The law limits noneconomic damages to \$250,000 in medical negligence cases.⁴⁶ Following California’s

⁴¹ U.S. Census, *Historical National Population Estimates: July 1, 1900 to July 1, 1999* (2000), <https://www.census.gov/popest/data/national/totals/pre-1980/tables/popclockest.txt> (estimating U.S. population at 152,271,417 in 1950).

⁴² Chief Justice Warren E. Burger, Remarks at the American Bar Association Minor Disputes Resolution Conference (May 27, 1977), in *State of the Judiciary and Access to Justice: Hearing Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary*, 95th Cong. 291 (1977).

⁴³ See *ABA Population Survey*, *supra* note 40.

⁴⁴ See U.S. Census, *Population Estimates 2015* (estimating U.S. population at approximately 321 million in July 2015).

⁴⁵ See *Fein v. Permanente Med. Grp.*, 695 P.2d 665, 680 (Cal. 1985).

⁴⁶ CAL. CIV. CODE § 3333.2 (West 1997).

lead, many states have limited noneconomic damages in the healthcare liability context.⁴⁷ Several states have a statutory limit that extends to all personal injury claims.⁴⁸ These limits range from \$250,000 to over \$1 million.

Placing bounds on noneconomic damage awards does not affect an individual's ability to recover medical expenses, lost income, or other financial losses. A multi-million dollar award does nothing to ease the pain and suffering of a person who has suffered a tragic injury. Reasonable limits, however, are important for preserving access to critical medical specialists, keeping health insurance affordable and accessible, and reducing unnecessary defensive medicine.⁴⁹ Statutory limits also promote more uniform treatment of individuals with comparable injuries, control outlier awards, and facilitate settlements.⁵⁰ When California voters had an opportunity to significantly raise the statutory limit in 2014, two-thirds of the voters said “no,” and the proposition failed in every county of the state.⁵¹

Providing Procedural Safeguards and Proportionality in Punitive Damages. Another early reform required “clear and convincing” evidence of misconduct to support an award of punitive damages.⁵² This standard reflects the quasi-criminal nature of punitive damages and falls between the “preponderance of the evidence” standard of proof used to establish liability in an ordinary civil case and the “beyond a reasonable doubt” standard applied in criminal cases.⁵³ States also limited the size of punitive damage awards, typically to the greater of a fixed dollar amount or a multiple of the plaintiff's

⁴⁷ See, e.g., ALASKA STAT. ANN. § 09.55.549 (West 2007); COLO. REV. STAT. ANN. § 13-64-302 (West 2014); MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-09 (West 2011); MASS. GEN. LAWS ANN. ch. 231 § 60H (West 2000); MICH. COM. LAWS ANN. § 600.1483 (West Supp. 2016); MISS. CODE ANN. § 11-1-60(2)(a) (West 2008); MONT. CODE ANN. § 25-9-411 (West 2009); NEV. REV. STAT. ANN. § 41A.035 (West Supp. 2015); N.C. GEN. STAT. ANN. § 90-21.19 (West Supp. 2015); OHIO REV. CODE ANN. § 2323.43 (West 2004); S.C. CODE ANN. § 15-32-220 (Supp. 2015); TENN. CODE ANN. § 29-39-102 (West Supp. 2016); TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (West 2011); UTAH CODE ANN. § 78B-3-410 (West Supp. 2015); W. VA. CODE ANN. § 55-7B-8 (West Supp. 2016); WIS. STAT. ANN. § 893.55 (West Supp. 2015).

⁴⁸ See, e.g., ALASKA STAT. ANN. § 09.17.010 (West 2007); COLO. REV. STAT. ANN. § 13-21-102.5 (West 2014); HAW. REV. STAT. ANN. § 663-8.7 (West 2008); IDAHO CODE ANN. § 6-1603 (West 2006); KAN. STAT. ANN. §§ 60-19a01, 60-19a02 (West Supp. 2015); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (West 2011); MISS. CODE ANN. § 11-1-60(2)(b) (West 2008); OHIO REV. CODE ANN. § 2315.18 (West Supp. 2016); OKLA. STAT. ANN. tit. 23, § 61.2 (West Supp. 2015); TENN. CODE ANN. § 29-39-102 (West Supp. 2016).

⁴⁹ See Ronald M. Stewart et al., *Malpractice Risk and Cost Are Significantly Reduced after Tort Reform*, 212 J. AM. C. SURGEONS 463, 466-67 (2011).

⁵⁰ See Mark A. Behrens & Cary Silverman, *The Constitutional Foundation for Federal Medical Liability Reform*, 15 J. HEALTH CARE L. & POL'Y 173, 192-95 (2012).

⁵¹ See Cal. Sec. of State, *State Ballot Measures* (Dec. 10, 2014) (Proposition 46).

⁵² See Schwartz et al., *supra* note 15, at 1005.

⁵³ See *id.* at 1013.

compensatory damages. These laws embrace the due process principles of proportionality and notice. Florida may have been the first state to place a statutory limit on punitive damages in 1986.⁵⁴ Today, approximately half of the states have such a law.⁵⁵

Turning Joint Liability into Fair Share Liability. A cascade of states has abandoned or sharply limited joint and several liability.⁵⁶ Joint and several liability exposes any individual or business that is partially responsible for a plaintiff's harm to liability for paying the entire damage award. The unfairness of requiring a minimally at fault defendant to pay 100% of the plaintiff's damages came more into focus as states replaced the contributory negligence defense with comparative fault. Since juries could readily apportion fault between a plaintiff and a defendant, juries could do so among a plaintiff and multiple defendants. Today, only a handful of jurisdictions continue to apply full joint liability, and most of those are states that continue to recognize contributory negligence by the plaintiff as a defense to liability.⁵⁷

Holding Product Sellers Responsible Only for Their Actual Fault. States began to respond to court decisions that vastly expanded the liability of those who manufacture and sell products. In the late 1970s and early 1980s, many states enacted statutes of repose, which end liability exposure many years after a product is sold or its "useful safe life" expires,⁵⁸ or after an improvement to real property is completed.⁵⁹ Later, many states adopted "innocent seller" laws, limiting the liability of retailers, often small businesses,

⁵⁴ See FLA. STAT. ANN. § 768.73 (West 2011) (originally enacted in 1986).

⁵⁵ See Mark A. Behrens & Cary Silverman, *Building on the Foundation: Mississippi's Civil Justice Reform Success and a Path Forward*, 34 MISS. C. L. REV. 113, 119 (2015) (citing statutes). In addition, Louisiana, Massachusetts, Michigan, Nebraska, New Hampshire, and Washington do not permit punitive damage awards or allow them only when expressly authorized for a specific action by statute. See *id.* at 119–20 n.55.

⁵⁶ See *Joint and Several Liability Rule Reform*, AM. TORT REFORM ASS'N, <http://www.atra.org/issues/joint-and-several-liability-rule-reform> (last visited May 1, 2016).

⁵⁷ These states include Alabama, Delaware, District of Columbia, Maine, Maryland, Massachusetts (limited to proportionate share of common liability), North Carolina, Rhode Island, and Virginia. Alabama, District of Columbia, Maryland, North Carolina, and Virginia also retain contributory negligence as a defense to liability.

⁵⁸ See Alan R. Levy, *Limited Respite Is Found in Statutes of Repose*, DRI TODAY, Dec. 2010, at 62 (providing detailed history of enactment of product liability statutes of repose and noting that, in late 1970s, over half of the states enacted such laws, but that courts struck down several of these reforms as unconstitutional).

⁵⁹ See, e.g., AM. INST. OF ARCHITECTS, STATUTE OF REPOSE: STATE STATUTE COMPENDIUM (2011), <http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aia078872.pdf>.

which had no part in designing an allegedly defective product or its warnings, to negligent conduct based on their own actions.

Removing Roadblocks to Appeal. Appeal bond reform, which took root in the 2000s, addresses the problem of civil defendants being blocked from the ability to appeal a judgment because they lack the financial wherewithal to post a bond covering an extraordinary judgment.⁶⁰ Excessive appeal bond requirements may preclude even the largest corporations from being able to appeal an unjust verdict, forcing settlement regardless of the merits. States adopted reforms that placed reasonable limits on bond requirements so that defendants are better able to exercise their right to an appeal.

Other Reforms. Other popular and just reforms in recent years include providing an immediate appeal of class certification rulings, reducing excessive rates of interest on court judgments, allowing juries to consider compensation for an injury provided to the plaintiff from sources other than the defendant, requiring asbestos and silica claimants to present credible and objective medical evidence of physical impairment in order to bring or proceed with a claim, and requiring attorneys to file claims where their client lives or was injured. States also adopted, through legislative action and court rulings, stronger standards for admission of expert testimony intended to root out junk science.

While some states have gradually enacted reforms, others have adopted comprehensive bills or focused on civil justice reform during a particular session.

The Plaintiffs' Bar's Technique to Challenge Reform. The plaintiffs' bar has reacted by challenging the constitutionality of civil justice reforms in the courts under state constitutions, not the U.S. Constitution. State constitutions offer unique and ambiguous provisions, such as single subject rules or a right to "open courts."⁶¹ These provisions are open to broad interpretation. Plaintiffs' lawyers also invite state courts to read the right to jury trial, equal protection, or separation of powers under a state constitution differently than under the U.S. Constitution.⁶² Through these tactics, plaintiffs'

⁶⁰ See Mark A. Behrens & Donald J. Kochan, *Protecting the Right to Appellate Review in the New Era of Civil Actions: A Call for Bonding Fairness*, 2 CLASS ACTION LITIG. REP. (BNA) 644 (2001).

⁶¹ See Victor Schwartz, *Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 SETON HALL L. REV. 688 (2001).

⁶² For a recent example, compare *Estate of McCall ex rel. McCall v. United States*, 642 F.3d 944 (11th Cir. 2011) (finding limit on noneconomic damages in medical malpractice cases did not violate Equal

lawyers have persuaded several state high courts to invalidate tort reforms. Since state courts base these decisions purely on state law, as the plaintiffs' bar fully appreciates, these cases are not subject to review by the U.S. Supreme Court.⁶³ Many perceptive judges, however, have not let these provisions be unreasonably stretched. Most have upheld and respected the legislature's authority to establish the contours of civil claims, defenses, remedies, and penalties.

B. Federal Achievements

Civil justice reform largely occurs at the state level, but in some areas of national concern, Congress has passed targeted laws designed to address areas where expansive liability has adversely affected the public or hurt interstate commerce and thus the national economy.⁶⁴ At the same time, Congress has also sought to encourage a wide range of socially beneficial activities.

For example, when liability concerns threatened public health by jeopardizing access to vaccines, Congress enacted the National Childhood Vaccine Injury Act of 1986. This law created a no-fault compensation program for childhood vaccine-injury victims funded by an excise tax on each dose of vaccine. During the 1990s, Congress also limited the liability of persons who donate food and grocery products to nonprofit organizations for distribution to needy individuals (Bill Emerson Good Samaritan Food Donation Act of 1996); volunteers who act on behalf of nonprofit organizations (Volunteer Protection Act of 1997); air carriers and qualified passengers who provide in-flight assistance during medical emergencies (Aviation Medical Assistance Act of 1998); and companies that provide raw materials and component parts needed for medical devices (Biomaterials Access Assurance Act of 1998). Congress also protected teachers and principals who follow school rules from lawsuits (Paul D. Coverdell Teacher Protection Act of 2001).

Protection Clause of the U.S. Constitution), with *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014) (answering certified question in the same case and finding that the statute, as applied in a wrongful death case involving multiple claimants, violated the Equal Protection Clause of the Florida Constitution).

⁶³ See Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 RUTGERS L.J. 907, 918–19 (2001).

⁶⁴ Broader reform efforts have not been successful at the federal level, including product liability reform in the 1990s and asbestos litigation reform between 1998 and 2007.

When lawsuits based on accidents involving very old planes threatened to destroy America's light aircraft industry, Congress enacted the General Aviation Revitalization Act of 1994. The law created an 18-year statute of repose.⁶⁵ It successfully resulted in a revitalization of the piston-driven aircraft industry and helped create thousands of well-paying jobs.⁶⁶

In response to reports from families of those killed in the 1996 crashes of TWA Flight 800 off the coast of New York and ValuJet Flight 592 in the Florida Everglades, Congress passed the Aviation Disaster Family Assistance Act of 1996 to restrict lawyers from contacting family members immediately after a crash.

When a surge of securities-fraud lawsuits against public companies and accounting firms deterred companies from voluntarily disclosing information to their investors or shareholders and led to loss of productivity and jobs, Congress passed the Private Securities Litigation Reform Act in 1995 and the Securities Litigation Uniform Standards Act in 1998. These reforms established important procedural and substantive restrictions on securities lawsuits, including the creation of a heightened pleading standard that generally makes it more difficult for plaintiffs to file allegations of securities fraud without having solid information beforehand on which to base such a claim.

In the late 1990s and early 2000s, it became apparent that plaintiffs' lawyers were abusing the class action procedural tool.⁶⁷ Class actions are intended to make it worthwhile to bring small claims stemming from a common practice or incident. Plaintiffs' lawyers, however, were stretching the class action device by bringing massive lawsuits on behalf of thousands of individuals nationwide based on different laws and different factual situations.⁶⁸ They filed these lawsuits before friendly judges in local courts,

⁶⁵ See U.S. GOV'T ACCOUNTABILITY OFF., GAO-01-916, GENERAL AVIATION: STATUS OF THE INDUSTRY, RELATED INFRASTRUCTURE, AND SAFETY ISSUES 28 (2001).

⁶⁶ *Id.*; see also Victor E. Schwartz & Leah Lorber, *The General Aviation Revitalization Act: How Rational Civil Justice Reform Revitalized an Industry*, 67 J. AIR L. & COM. 1269 (2002); Scott David Smith, Note, *The General Aviation Revitalization Act of 1994: The Initial Necessity for, Outright Success of, and Continued Need for the Act to Maintain American General Aviation Predominance Throughout the World*, 34 OKLA. CITY U. L. REV. 75 (2009).

⁶⁷ See John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 HARV. J.L. & PUB. POL'Y 143 (2001).

⁶⁸ See Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483 (2000).

such as Madison County, Illinois, which became known as “magnets” for class action litigation. Many of these cases were called “coupon class actions,” because the plaintiffs’ lawyers often took home millions of dollars in fees, while the consumers they purportedly represented received coupons from the targeted company as their recovery.⁶⁹ Congress responded by passing the Class Action Fairness Act of 2005 (CAFA). CAFA’s expansion of federal diversity jurisdiction moved class actions of national importance from state to federal court—and the more rigorous application of class-certification standards that exists in most federal courts.⁷⁰

III. TODAY’S LEGAL REFORM PRIORITIES

While states such as Tennessee and Wisconsin (2011), South Carolina (2012), Oklahoma (2013), and West Virginia (2015) continue to make progress in enacting the types of laws above, today’s civil justice reforms are largely not the reforms of the 1980s. They respond to new areas of excess and abuse in the liability system. Below are examples of priorities on the legal reform agenda both at the federal and state level.

Transparency in state retention of lawyers on a contingency-fee basis. Plaintiffs’ lawyers are increasingly reaching out to state attorneys general and other state and local officials to offer their services. In these cases, private attorneys often develop the innovative theories of liability, approach AGs, and then litigate the state’s enforcement action in exchange for a contingency fee. Placing the government’s power to investigate business and bring enforcement actions in private individuals whose compensation increases based on the amount of damages or fines imposed raises serious ethical and constitutional concerns. The history of AGs hiring lawyers and firms that heavily contribute to their campaigns through no-bid contracts contributes to a “pay-to-play” culture.⁷¹ Such arrangements hurt the public, since a significant portion of the recovery that would have otherwise gone to the state had the government pursued the action with its own attorneys, goes to a few private lawyers. For

⁶⁹ See Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor’s Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343 (2005).

⁷⁰ The plaintiffs’ bar has worked to weaken CAFA’s impact by exploiting and expanding several exceptions and loopholes in the law. See John Beisner, Jessica Miller & Jordan Schwartz, *A Roadmap For Reform: Lessons From Eight Years of The Class Action Fairness Act* (U.S. Chamber Inst. for Legal Reform 2013), http://www.instituteforlegalreform.com/uploads/sites/1/A_Roadmap_For_Reform_pages_web.pdf.

⁷¹ See Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. TIMES (Dec. 18, 2014), <http://www.nytimes.com/2014/12/19/us/politics/lawyers-create-big-paydays-by-coaxing-attorneys-general-to-sue.html>.

these reasons scholarship,⁷² think tank papers,⁷³ reports,⁷⁴ congressional testimony,⁷⁵ and the mainstream media have widely criticized state hiring of outside counsel on a contingency-fee basis.⁷⁶

To address concern with state retention of private attorneys on a contingency-fee basis, since 2010, fifteen state legislatures have adopted safeguards providing for transparency in government hiring and payment of outside counsel, and adopting a sliding scale for fee awards.⁷⁷ Some state laws go further to protect the legislature's appropriation authority by requiring the AG to obtain legislative approval before retaining an attorney on a contingency-fee basis.⁷⁸

Asbestos trust transparency. As a result of asbestos-related bankruptcies, 60 trusts collectively hold over \$30 billion to pay for harms caused by former insulation defendants.⁷⁹ The asbestos litigation has morphed into a two-tiered system of bankruptcy trust claims and tort claims against still-solvent defendants. The lack of transparency between these two systems has led to abuse.⁸⁰ For example, in a January 2014 ruling involving Garlock Sealing

⁷² See, e.g., Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 SUP. CT. ECON. REV. 77 (2010).

⁷³ See, e.g., CTR. FOR LEGAL POLICY, MANHATTAN INST., TRIAL LAWYERS, INC.—ATTORNEYS GENERAL: A REPORT ON THE ALLIANCE BETWEEN STATE AGS AND THE PLAINTIFFS' BAR 2011 (2011), <http://www.triallawyersinc.com/TLI-ag.pdf>.

⁷⁴ See BERNARD NASH ET AL., PRIVATIZING PUBLIC ENFORCEMENT: THE LEGAL, ETHICAL AND DUE-PROCESS IMPLICATIONS OF CONTINGENCY-FEE ARRANGEMENTS IN THE PUBLIC SECTOR (U.S. Chamber Inst. for Legal Reform 2013), http://www.instituteforlegalreform.com/uploads/sites/1/PublicInterestPrivateProfit_FINAL.pdf.

⁷⁵ See *Contingency Fees and Conflicts of Interest in State AG Enforcement of Federal Law, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 12–14 (2012) (statement of the Hon. Bill McCollum, Partner, SNR Denton); *id.* (statement of James R. Copeland, Dir., Ctr. for Legal Policy, Manhattan Inst.).

⁷⁶ See, e.g., Lipton, *supra* note 71; Editorial, *The Pay-to-Sue Business*, WALL ST. J. (Apr. 16, 2009, 12:01 AM), <http://www.wsj.com/articles/SB123984994639523745>.

⁷⁷ See ALA. CODE § 41-16-72; ARIZ. REV. STAT. § 41-4801; S.B. 204 (Ark. 2015) (to be codified at ARK. CODE ANN. § 25-16-714); FLA. STAT. ANN. § 16.0155; IND. CODE ANN. § 4-6-3-2.5; IOWA CODE § 23B.1; LA. REV. STAT. §§ 42:262, 49:259; MISS. CODE ANN. §§ 7-5-5, -5-8, -5-21, -5-39; MO. REV. STAT. §§ 34.376, 34.378, 34.380; S.B. 244 (Nev. 2015) (to be codified at NEV. REV. STAT. ch. 228); N.C. GEN. STAT. § 114-9.2; S.B. 38 (Ohio 2015) (to be codified at Ohio Rev. Code Ann. § 9.49 et seq.); UTAH CODE § 63G-6a-106; H.B. 4007, Reg. Sess. (W. Va. 2016) (amending W. VA. CODE §§ 5-3-3, 5-3-4); WIS. STAT. §§ 14.11, 20.9305.

⁷⁸ See H.B. 799, Reg. Sess. (La. 2014).

⁷⁹ U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-819, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 3 (2011) (finding asbestos trusts collectively held \$36.8 billion)

⁸⁰ See PETER KELSO & MARC SCARCELLA, THE WAITING GAME: DELAY AND NON-DISCLOSURE OF ASBESTOS TRUST CLAIMS 8 (U.S. Chamber Inst. for Legal Reform 2015), http://www.instituteforlegalreform.com/uploads/sites/1/TheWaitingGame_Pages.pdf.

Technologies, LLC, a federal bankruptcy judge described how Garlock became a target defendant after asbestos plaintiffs' lawyers bankrupted the primary historical insulation defendants.⁸¹ According to the federal judge, Garlock's participation in the tort system became "infected by the manipulation of exposure evidence by plaintiffs and their lawyers."⁸² Evidence that Garlock needed to attribute plaintiffs' injuries to the insulation companies' products "disappeared."⁸³ The judge said this "occurrence was a result of the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants)."⁸⁴

Legislatures are responding to this gamesmanship by providing defendants with greater access to asbestos bankruptcy trust claim submissions by plaintiffs.⁸⁵ These materials contain important exposure history information, giving tort defendants a tool to identify fraudulent or exaggerated exposure claims, and to establish that trust-related exposures were partly or entirely responsible for the plaintiff's harm.

Third-party litigation funding. Third parties have increasingly invested money into litigation. This lending comes in two forms: (1) companies that promise quick cash to consumers while they await their day in court or payment of a settlement; and (2) investment firms that infuse money into mass tort and other large-scale cases, contributing not only to legal costs, but also plaintiff recruitment and other litigation advertising costs, in return for a portion of any recovery. Both types of arrangements have negative consequences.

The first variant takes advantage of the most vulnerable people, often subjecting them to exorbitant interest rates and fees that may leave them with little, if any, recovery after taking a relatively small loan.⁸⁶ Rates charged by

⁸¹ *In re* Garlock Sealing Tech., LLC, 504 B.R. 71 (Bankr. W.D.N.C. 2014).

⁸² *Id.* at 82.

⁸³ *Id.* at 84.

⁸⁴ *Id.*

⁸⁵ Texas, Ohio, Tennessee, Utah, West Virginia, Oklahoma, Arizona, and Wisconsin have adopted legislation providing a mechanism to require plaintiffs to file and disclose their trust claims before trial. Proposed federal legislation also addresses this area. *See* Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016, H.R. 1927, 114th Cong. § 3 (2016).

⁸⁶ *See* Ashby Jones, *Loan & Order: States Object to 'Payday' Lawsuit Lending*, WALL ST. J. (Apr. 28, 2013, 7:24 PM), <http://www.wsj.com/articles/SB10001424127887324743704578446903171978648> (reporting that some plaintiffs' lawyers agree that lawsuit loans should be subject to closer oversight); Febe Zepeda &

lenders often exceed 100% annually, according to a review by the *New York Times* and the Center for Public Integrity.⁸⁷ Some states are taking action by limiting interest rates, requiring disclosure of information to consumers, and adopting other safeguards.⁸⁸

The second variant can prolong questionable litigation, inject a third party with its own financial interests into litigation-related decisions, and pose an obstacle to settlement.⁸⁹ At minimum, requiring disclosure of third-party investments in litigation would begin to address the inherent risks of these arrangements.

Class action abuse. While CAFA has helped provide a neutral federal forum for multi-state class actions and eliminated “coupon” recovery for consumers in federal courts, new abuses have emerged. Lawyers often sue on behalf of classes so broad that they include people who have experienced no injury—they had no problem with the product at issue, were not influenced by labeling or an advertisement that lawyers claim was misleading, or otherwise experienced no financial loss from the allegedly improper practice at issue.⁹⁰ These “no injury” claims are lucrative for the lawyers who bring them, often with the aid of hired-gun experts that develop creative theories of damages as a substitute for an actual loss. But consumers, who typically are offered the opportunity to file paperwork for a nominal sum, view them as worthless.⁹¹

Baldomero Garza, *Opinion: How ‘Lawsuit Lending’ Is Putting Families at Risk*, NBC LATINO (Oct. 7, 2013, 5:00 AM), <http://nbclatino.com/2013/10/07/opinion-lawsuit-funders-offer-empty-promise-in-predatory-lending/> (discussing abusive practices employed by lawsuit lenders).

⁸⁷ See Binyamin Appelbaum, *Lawsuit Loans Add New Risk for the Injured*, N.Y. TIMES (Jan. 16, 2011), <http://www.nytimes.com/2011/01/17/business/17lawsuit.html>.

⁸⁸ See, e.g., S.B. 882, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (codified at ARK. CODE ANN. § 4-57-109 (West 2016)); H.B. 1127, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016) (to be codified at IND. CODE ANN. § 24-4.5-1-201.1); S.B. 1360, 108th Gen. Assemb., Reg. Sess. (Tenn. 2014) (codified at TENN. CODE ANN. §§ 47-51-101 (West Supp. 2016)).

⁸⁹ See JOHN H. BEISNER & GARY A. RUBIN, STOPPING THE SALE ON LAWSUITS: A PROPOSAL TO REGULATE THIRD-PARTY INVESTMENTS IN LITIGATION (U.S. Chamber Inst. for Legal Reform 2012), http://www.instituteforlegalreform.com/uploads/sites/1/TPLF_Solutions.pdf; see also Alison Frankel, *The Dubious Business of Investing in Mass Torts*, REUTERS (Apr. 18, 2016), <http://blogs.reuters.com/alison-frankel/2016/04/18/the-dubious-business-of-investing-in-mass-torts/>.

⁹⁰ See Victor E. Schwartz & Cary Silverman, *The Rise of “Empty Suit” Litigation™: Where Should Tort Law Draw the Line?*, 80 BROOK. L. REV. 599, 628–73 (2015) (examining class actions targeting unmanifested product defects and advertising where most reasonable consumers were not misled).

⁹¹ See Joanna Shepherd, *An Empirical Survey of No-Injury Class Actions* (Emory Legal Studies Research Paper No. 16-402, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726905 (finding that in class actions meeting certain criteria, most recovery went to pay attorney’s fees or was distributed to outside groups as unclaimed funds, while consumers received little benefit).

A recent U.S. Supreme Court ruling reaffirming that Article III standing requires all private plaintiffs to allege a concrete injury in fact may curb class actions that allege a mere technical statutory violation that caused no real harm.⁹² States are tightening consumer and other laws to require private plaintiffs who seek monetary damages to show an actual injury.⁹³ Congress is also considering legislation that would instruct federal courts not to certify class actions where the class includes individuals who have not experienced an injury.⁹⁴

Another area of concern is the archaic Telephone Consumer Protection Act (TCPA), a federal law that has given rise to a cottage industry for lawyers and serial plaintiffs who take advantage of the statute's uncapped \$500 statutory damage provision.⁹⁵ TCPA filings went from 14 in 2007 to 3,710 in 2015.⁹⁶ Under this law, a business that intends to communicate with its customers or employees through a phone, fax, or text message, but inadvertently reach others, is subject to millions of dollars in liability. As Professor Adonis Hoffman, a former FCC lawyer, has observed, when the average consumer receives \$4.12 in a settlement and lawyers receive an average of \$2.4 million, "[s]omething is wrong with this picture."⁹⁷ While the FCC could have clarified the law to reduce litigation, it instead issued a ruling in 2015 that observers expect to be a gold mine for plaintiffs' lawyers.⁹⁸

Congress should update the antiquated law and reduce the opportunity for abuse. It can do so through such measures as an aggregate cap on statutory damages recoverable in class actions, a defense for calls placed to reassigned numbers, and carefully considering how the TCPA applies to technology that did not exist when Congress enacted the law, such as text messaging.

⁹² See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548–50 (2016).

⁹³ See, e.g., S.B. 315 (W. Va. 2015) (amending W. VA. CODE 46A-6-106 to require plaintiffs to show proof of "an actual out-of-pocket loss" proximately caused by a violation of the statute).

⁹⁴ See Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016, H.R. 1927, 114th Cong. § 2 (2016).

⁹⁵ See *The Telephone Consumer Protection Act at 25: Effects on Consumers and Business: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 114th Cong. (2016) (testimony of Becca Wahlquist, Partner, Snell and Wilmer).

⁹⁶ Adonis Hoffman, Opinion, *Does TCPA Stand for 'Total Cash for Plaintiffs' Attorneys'?*, HILL: PUNDITS BLOG (Feb. 17, 2016, 6:30 AM), <http://thehill.com/blogs/pundits-blog/technology/269656-does-tcpa-stand-for-total-cash-for-plaintiffs-attorneys> (citing data compiled by WebRecon).

⁹⁷ *Id.*

⁹⁸ See Jimmy Hoover, *FCC Robocall Rules A Potential Gold Mine For TCPA Lawyers*, LAW 360 (June 18, 2015, 7:49 PM), <http://www.law360.com/articles/669877/fcc-robocall-rules-a-potential-gold-mine-for-tcpa-lawyers>.

Misleading lawsuit advertising. Americans are increasingly bombarded on television and the internet with advertising urging them to file lawsuits. A recent analysis found that lawsuit advertising on television rose 68% from \$531 million in 2008 to a projected \$892 million in 2015.⁹⁹ Such aggressive recruitment of clients leads to many claims that are meritless. Some may even be fraudulent.¹⁰⁰ Individuals and firms known as “lead generators” use call-centers, some located abroad, to find, trade, bundle, and sell potential mass tort claims – with the goal of generating so many claims that businesses feel compelled to settle.¹⁰¹

These advertisements not only generate questionable litigation, but growing evidence suggests that they may adversely affect public health. Scientifically unsupported or exaggerated claims that drugs or medical devices cause serious injury or death may frighten people, leading them to not seek treatment that would improve their lives.¹⁰² Even worse, misleading advertising could lead patients to stop taking a prescribed drug without consulting their doctors, posing a risk of harm.¹⁰³ The FDA, FTC, and state officials should consider taking action to stop deceptive lawsuit advertising.

Fraudulent joinder. Plaintiffs’ lawyers frequently drag in an individual or local business as additional defendants in a case targeting an out-of-state business. Doing so destroys “complete diversity,” thwarting the ability of the

⁹⁹ See KEN GOLDSTEIN & DHAVAN V. SHAH, TRIAL LAWYER MARKETING: BROADCAST, SEARCH AND SOCIAL STRATEGIES 2 (U.S. Chamber Inst. for Legal Reform 2015), http://www.instituteforlegalreform.com/uploads/sites/1/KEETrialLawyerMarketing_2_Web.pdf; see also Amanda Bronstad, *Ad Spending Up, Defense Bar Irked*, NAT’L L.J. (Apr. 27, 2015) <http://www.nationallawjournal.com/home/id=1202724543814/Ad-Spending-Up-Defense-Bar-Irked?mcode=1202615432992>.

¹⁰⁰ See Anita Lee, *Indictment Says Lawyer’s Bogus BP Clients Included Dog, Dead People*, SUN HERALD (Nov. 23, 2015, 9:33 PM), <http://www.sunherald.com/news/article41801127.html>; David Voreacos & Jef Feeley, *J&J Claims Pelvic Mesh Users Were Solicited to File Cases*, BLOOMBERG (Jan. 14, 2015, 2:03 PM), <http://www.bloomberg.com/news/articles/2015-01-14/jj-claims-vaginal-mesh-users-illegally-solicited-to-file-cases>.

¹⁰¹ See Paul M. Barrett, *Inside Massive Injury Lawsuits, Clients Get Traded Like Commodities for Big Money*, BLOOMBERG (Oct. 22, 2015, 2:05 PM), <http://www.bloomberg.com/news/articles/2015-10-22/inside-massive-injury-lawsuits-clients-get-traded-like-commodities-for-big-money>; Paul M. Barrett, *Need Victims for Your Mass Lawsuit? Call Jesse Levine*, BLOOMBERG (Dec. 12, 2013, 9:41 PM), <http://www.bloomberg.com/news/articles/2013-12-12/mass-tort-lawsuit-lead-generator-jesse-levine-has-victims-for-sale>.

¹⁰² See, e.g., Craig Hansen et al., *Assessment of YouTube Videos as a Source of Information on Medication Use in Pregnancy*, 25 PHARMACOEPIDEMIOLOGY & DRUG SAFETY 35, 41–42 (2015); see also Elizabeth Tippet, *Medical Advice from Lawyers: A Content Analysis of Advertising for Drug Injury Lawsuits*, 41 AM. J. L. & MED. 7 (2015); Daniel M. Schaffzin, *Warning: Lawyer Advertising May Be Hazardous to Your Health! A Call to Fairly Balance Solicitation of Clients in Pharmaceutical Litigation*, 8 CHARLESTON L. REV. 319 (2014).

¹⁰³ See Schaffzin, *supra* note 99.

out-of-state business to have its case decided in a neutral federal court. Examples include local store managers, salespeople, retailers, distributors, pharmacies, claims adjusters, and small businesses that, under applicable state law, are not legally responsible for an injury. Once the case is remanded to a state court viewed favorable to a plaintiff, the local defendant is typically dropped from the case or not pursued. The doctrine of fraudulent joinder allows federal courts to retain jurisdiction when the plaintiff has no viable claim against the local defendant. The standard for finding fraudulent joinder, however, is remarkably high, requiring remand to state court if the plaintiff has even a “glimmer of hope,”¹⁰⁴ and it is inconsistently applied.

Proposed federal legislation would provide a uniform approach to deciding fraudulent joinder, eliminating confusion and unnecessary litigation.¹⁰⁵ It will also adopt a more realistic and fair assessment of whether a plaintiff has stated a viable claim against a local defendant and intends to pursue a judgment against that person.¹⁰⁶

“Phantom damages.” Plaintiffs’ lawyers argue in personal injury cases that their clients should receive damages for medical expenses for the amount *billed* by their healthcare providers, even when providers accepted a substantially lower amount as payment in full. It has become common for billed rates to be three to four times higher than the amounts paid by patients or their insurers (including private insurers, Medicare, or Medicaid) due to negotiated rates, discounts, and write-offs.¹⁰⁷ This difference, the amount that no one ever paid but is sought in personal injury litigation, is sometimes referred to as “phantom damages.”

As a result, defendants pay significantly inflated judgments and settlements to reimburse a plaintiff for nonexistent medical expenses. Such damages serve

¹⁰⁴ Hartley v. CSX Transp., Inc., 187 F.3d 422, 426 (4th Cir. 1999).

¹⁰⁵ See generally Arthur D. Hellman, *The “Fraudulent Joinder Prevention Act of 2016”: A New Standard and a New Rationale for an Old Doctrine*, 17 FEDERALIST SOC’Y REV. (forthcoming 2016).

¹⁰⁶ See *Fraudulent Joinder Prevention Act of 2015: Hearing on H.R. 3624 Before the Subcomm. on the Constitution & Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. (2015).

¹⁰⁷ See Glenn A. Melnick & Katya Fonkych, *Hospital Pricing And The Uninsured: Do The Uninsured Pay Higher Prices?*, 27 HEALTH AFF. 116, 118–19 (2008) (finding that the charge-to-cost ratio at California hospitals increased from 3.1 to 3.8 between 2001 and 2005, indicating that hospitals routinely charge, on average, four times what they actually collect). The list price for a treatment often varies tremendously among healthcare providers. As a *Washington Post* investigation found, “even on the same street, hospitals can vary by upwards of 300 percent in price for the same service.” See Wilson Andrews et al., *Disparity in Medical Billing*, WASH. POST (May 8, 2013), <http://www.washingtonpost.com/wp-srv/special/national/actual-cost-of-medical-care/>.

no compensatory purpose. These phantom damages can unjustly place costs on small businesses and nonprofits that are sued for common accidents such as slip-and-falls. States have responded by enacting legislation providing that only amounts actually paid for medical bills, not the billed rates, are admissible at trial.¹⁰⁸ Some state courts have interpreted the collateral source rule to reach the same result.¹⁰⁹

Other civil justice priorities include providing a remedy to those who are harmed by frivolous claims and defenses,¹¹⁰ and facilitating consistency between regulatory obligations and the liability system. In addition, civil justice reform advocates will continue to respond to attempts to restrict alternatives to litigation,¹¹¹ misuse public nuisance law to impose liability on entire industries when legal activities have societal costs,¹¹² or impose excessive liability on companies that experience a data breach.¹¹³

CONCLUSION

Civil justice reform should not be viewed through a trial-lawyer prism. It does not create unreasonable barriers to recovery. To the contrary, civil justice reform is designed to preserve legitimate claims while putting a damper on excesses in the system. As this Essay shows, those excesses are decades in the making.

When aspects of the civil justice system become imbalanced, society experiences adverse effects. Businesses cannot expand and grow. Doctors face challenges when practicing medicine. Innocent people are saddled with

¹⁰⁸ See, e.g., OKLA. STAT. ANN. tit. 12, § 3009.1 (West Supp. 2015); N.C. GEN. STAT. ANN. ch. 8C, Rule 414 (West 2016); TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2014).

¹⁰⁹ See, e.g., *Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130 (Cal. 2011); *Haygood v. De Escabedo*, 356 S.W.3d 390 (Tex. 2011).

¹¹⁰ See *Lawsuit Abuse Reduction Act of 2015, Hearing on H.R. 758 Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 44–58 (2015) (statement of Cary Silverman, Partner, Shook, Hardy & Bacon, LLP).

¹¹¹ See Hans A. von Spakovsky, *The Unfair Attack on Arbitration: Harming Consumers by Eliminating a Proven Dispute Resolution System*, LEGAL MEMORANDUM, July 17, 2013, at 1, http://thf_media.s3.amazonaws.com/2013/pdf/lm97.pdf.

¹¹² See Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The “No-Fault” Theories Behind Today’s High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. REV. 923 (2009).

¹¹³ See LIISA M. THOMAS, ROBERT H. NEWMAN & ALESSANDRA SWANSON, A PERILOUS PATCHWORK: DATA PRIVACY AND CIVIL LIABILITY IN THE ERA OF THE DATA BREACH 17–29 (U.S. Chamber Inst. for Legal Reform 2015), http://www.instituteforlegalreform.com/uploads/sites/1/APerilousPatchwork_Web.pdf.

unrecoverable defense costs. Ridiculous lawsuits and extraordinary awards take a toll on the public's faith in the judicial system.

When litigation shifts from helping people to primarily benefiting attorneys, correction is needed. Civil justice reform makes modest changes to address patterns of abuse and unevenness in the law. It does so while ensuring that people receive fair recovery from those who are responsible, that punishment for misconduct is consistent principles of due process, and that the civil justice system treats all parties fairly.