



# LAWSUIT REFORM

## FOR COMPETITIVE STATE ECONOMIES

———— A GUIDE FOR STATE LEGISLATORS ————

*ALEC* | American  
Legislative  
Exchange  
Council

LIMITED GOVERNMENT • FREE MARKETS • FEDERALISM

***Lawsuit Reform for Competitive State Economies: A Guide for State Legislators***

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The American Legislative Exchange Council is the nation's largest nonpartisan, voluntary membership organization, comprised of nearly one-third of the country's state legislators and hundreds of leading businesses and think tanks. The Exchange Council provides a unique opportunity for state lawmakers, business leaders and citizen organizations from around the country to share experiences and develop state-based, pro-growth models based on academic research, existing state policy and proven business practices.

The Civil Justice Task Force promotes systematic fairness in the courts through model legislation that discourages frivolous lawsuits, fairly balances judicial and legislative authority, treats defendants in a consistent manner, and installs accountability in the trial system.

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## About the American Legislative Exchange Council

**T**he American Legislative Exchange Council is America's largest nonpartisan, voluntary membership organization of state legislators. Made up of nearly one-third of America's state elected officials, the Council provides a unique opportunity for state lawmakers, business leaders and citizen organizations from around the country to share experiences and develop state-based, pro-growth models based on academic research, existing state policy and proven business practices. The ultimate goal of the Exchange Council is to help state lawmakers make government work more efficiently and move government closer to the communities they serve, thereby creating opportunity for all Americans.

### The Process

In state legislatures around the country, citizen groups foster ideas, participate in discussions and provide their points of view to lawmakers. This process is an important part of American Democracy.

The Exchange Council and its eight task forces closely imitate the state legislative process: resolutions are introduced and assigned to an appropriate task force based on subject and scope; meetings are conducted where experts present facts and opinion for discussion, just as they would in committee hearings; these discussions are followed by a vote.

Council task forces serve as testing grounds to judge whether resolutions can achieve consensus and enough support to survive the legislative process in a state capitol. All adopted model policies are published at [www.alec.org](http://www.alec.org) to promote increased education and the open exchange of ideas across America.

The Civil Justice Task Force develops model policies that promote systematic fairness in the courts by discouraging frivolous lawsuits, tightening loopholes that encourage fraud, fostering sound judgments, and installing accountability in the system.

## What is Lawsuit Reform?



A poll conducted in the summer of 2012 found that 89 percent of voters consider lawsuit abuse a problem and 83 percent think improvements need to be made to our lawsuit system.<sup>1</sup> While many recognize that the legal system needs to be reformed, few know how to go about doing this.

This Guide is intended to give policymakers an overview of lawsuit reform policy and some of the specific reforms helpful to the end goal of tempering excess in the legal system and efficiently delivering justice.

In short, lawsuit reform is policy aiming to reform state tort systems, the legal systems created to provide justice to the wrongly injured. The commonly heralded reform of caps on non-economic damages is a type of lawsuit reform but is not the only reform. Enclosed in this book are discourses on numerous meaningful tort reforms, some more traditional and some more innovative and transparency based.

### Tort Reform and Health Care

Tort reform gets discussed so often in the health-care debate because of its particular relevance to doctors. Doctors face medical malpractice lawsuits, claims involving injury allegedly due to the negligence of medical professionals. Occasionally, these cases are abusive. A 2006 study by researchers at the Harvard School of Public Health and Brigham and Women's Hospital estimated that 37 percent of medical malpractice claims lack sufficient evidence of wrongdoing and are likely meritless. Certainly, not all of these claims are won, but litigating cases without merit uses valuable resources and bloats medical malpractice insurance rates. The same study found that the average expenses of litigating a case fall around \$52,000.<sup>2</sup> That's just for the legal fees and defense costs without giving anything to the patient. \$52,000 times the 37 percent of cases supposedly without merit is a large number. Here, the current tort system inefficiently transfers funds from the injurer to the injured. The Council's model legislation is aimed at reducing such inefficiency.

Another argument for tort reform as part of health-care reform lies with the practice of defensive medicine—the ordering and performing

of unnecessary tests, procedures, and referrals by doctors out of fear of litigation. PriceWaterhouseCoopers estimated that the practice of defensive medicine increased health-care expenditures by 10 percent or \$210 billion in 2006.<sup>3</sup> Ninety-three percent and 83 percent of doctors in Pennsylvania and Massachusetts, respectively, admitted to practicing defensive medicine.<sup>4</sup> Thirty-eight percent of Massachusetts doctors even admitted to limiting the number of high-risk procedures for fear of litigation. The practice of defensive medicine is adversely affecting both cost and quality of care.<sup>5</sup> And reforms to state legal systems will be effective in alleviating the concerns that beget the practice of defensive medicine.

### Lawsuit Reform and the Economy

In addition to being part of the fix for strained health-care systems, lawsuit reform is essential in encouraging economic health. It supports a fair and productive economy by minimizing frivolous litigation and boosting predictability in the business climate. In a recent study, businesses confirmed their consideration of a state's legal system when making such important business decisions as where to locate or do business.<sup>6</sup> States with predictable legal systems that discourage abuse will be more competitive, and the Council's model legislation is crafted with such a purpose. Fostering reliable justice will in turn promote a fair business climate and pave the way for job creation.

In tort cases, an average of 50 cents of each dollar spent is actually returned to the victim, with the rest being spent on the costs of litigation.<sup>7</sup> The excessive expense of this inefficient system often gets sprung on defendants who are forced to pay awards and expenses inflated by high administrative costs. By enhancing the efficiency of the system, this burden can be lessened and fewer funds will be detoured from jobs, research, and development.

### Goals of Tort Reform Proposals

With the high cost of even litigating cases, lawsuit reform proposals should focus in part on filtering out meritless cases before they get to trial and rack up significant legal expenses. Helpful reforms will fairly and cautiously raise the standards to bring suits and lessen the incentives to bring weakly supported cases. Enclosed in this publication are numerous such reforms.

Reforms should also consider removing loopholes in areas of the law that beget excessive lawsuits and that are noticeably abused. The Council's Civil Justice Task Force works to spot these inefficiencies and craft legal reforms to mend state laws.

Lawsuit Reform for Competitive State Economies is intended to provide legislators with the basic training needed to understand and work on lawsuit reform. Take advantage of the Council's model legislation and resources for further guidance.

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#### ENDNOTES

- 1 Luce Research Group, July 11-19, 2012.
- 2 Frank A. Sloan and Lindsey M. Chepke, *Medical Malpractice*, Massachusetts Institute of Technology (2008).
- 3 PriceWaterhouseCoopers, *The Factors Fueling Rising Healthcare Costs 2006* (2006), <http://www.ahip.org/redirect/PwCCostOfHC2006.pdf>.
- 4 David M. Studdert ET AL., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 J. of the Am. Med. Ass'n. 2609, 2609-17 (2005), available at <http://jama.jamanetwork.com/data/Journals/JAMA/4978/JOC42215.pdf>.
- 5 Massachusetts Medical Society. *Investigation of Defensive Medicine in Massachusetts*. (November 2008), available at [http://www.ncrponline.org/PDFs/2008/Mass\\_Med\\_Soc.pdf](http://www.ncrponline.org/PDFs/2008/Mass_Med_Soc.pdf).
- 6 U.S. Chamber Institute for Legal Reform, *Ranking the States: Lawsuit Climate* 2010.
- 7 Lawrence J. McQuillan ET AL., *Jackpot Justice*, Pacific Research Institute (2007).



# Understanding the Basics

How does a lawsuit work?





## VERDICT

The jury's answer to the questions posed by the judge is the verdict. The jury weighs the evidence presented at trial to reach a conclusion on the facts.

## JUDGMENT

After the jury reaches a verdict, the judge is tasked with applying the jury's factual findings to the law before entering a judgment.

## POSSIBLE APPEAL

A party may appeal a decision if they believe there was an error in the interpretation or application of the law. Here, briefs are filed on each side and oral argument may be held.

## SETTLEMENT

A lawsuit can be settled out of court at any point during litigation if the parties reach an agreement.

## PLEADING

### What is involved in a pleading?

During pleading, the plaintiff submits a complaint to the court alleging injury caused by the named defendant. Once the defendant receives the complaint, it has a specified amount of time to file its answer. The defendant may also file a motion to dismiss, which must show that even if the allegations made in the complaint are true, the law does not support liability. Motions to dismiss are rarely granted and, when there is a deficiency, it is common for courts to allow plaintiffs to amend their complaints. Here, well before the lawsuit goes to trial, legal fees and expenses start adding up.

## DISCOVERY

### What is discovery?

Discovery is the process by which relevant information is shared between the lawyers for the plaintiff and defendant (and at times requested from third parties). The discovery process typically includes interrogatories (questions submitted for response), request for production of documents relevant to the dispute, and depositions of the plaintiff, defendant, and potential witnesses. In complex cases, discovery also may involve submission of reports by expert witnesses. With technological advances and no shortage of mediums for communication, there is quite a bit of data to be shared. Between emails, computer files, text messages and phone calls, and data storage devices, discovery can be an expensive undertaking. In fact, in mid-sized cases, discovery is estimated to cost about \$3 million. It is often the longest part of the litigation process. After discovery ends, either side may file a “motion for summary judgment,” through which a judge may find that the plaintiff or defendant wins all or part of the case, based on undisputed facts. If factual disputes prevent such a decision, then the case goes to trial.

### What happens at trial?

Most civil cases that go to trial are decided by juries, which serve as the “finders of fact.” The size of juries in civil trials varies from state to state, with some providing a full 12 person jury plus alternates, and others providing for a small number of jurors, frequently 6 members. At the conclusion of the trial, the judge instructs the jury, providing it with specific questions that it must answer based on the applicable law. The average jury trial lasts about four days, but complex trials can go significantly longer.

#### TRIAL

### How does the jury reach a verdict?

The jury’s answer to the questions posed by the judge is the verdict. The jury weighs the evidence presented at trial to reach a conclusion on the facts. Its findings are typically based on a “preponderance” of the evidence, meaning that it is “more likely than not.” This is a significantly lower standard than the “beyond a reasonable doubt” standard used in criminal trials. Only about one-third of state courts require a unanimous verdict in civil cases.

#### VERDICT

### What is a judgment?

After the jury reaches a verdict, the judge is tasked with applying the jury’s factual findings to the law. For example, if a state legislature has enacted a limit on the size of an award for pain and suffering and the jury’s award exceeds the maximum amount, the judge will reduce the award in accordance with the law before entering a judgment.

#### JUDGMENT

### What goes into appealing a court decision?

In most states, a defendant with an outstanding judgment must pay a bond to suspend collection of the judgment while it appeals a

#### POSSIBLE APPEAL

decision. (See the section on Appeal Bond Reform for more information.) Appealing a decision typically involves each side filing briefs arguing whether there were errors made by the trial court judge in interpreting and applying the law, or in ruling on the admissibility of evidence. The appellate court may hold oral argument in which each side presents its argument and answers the judges' questions. This process may take anywhere from a few months to several years.

## SETTLEMENT

### When do cases settle?

A lawsuit can be settled out of court at any point during litigation. A court may attempt to facilitate a settlement through asking the parties to agree to mediation.

### Is it true that most lawsuits settle?

Yes, an overwhelming majority of cases settle. Most estimates find that somewhere between 95 and 98 percent of cases settle. But that doesn't mean that legislative reforms are any less impactful. Meaningful and fair laws on the books create an important framework to encourage appropriate settlement.

COMMON  
QUESTIONS

### What is tort reform?

Tort reform is a more technical way of saying lawsuit reform. A “tort claim” is a personal injury lawsuit. Some prefer to use the phrase “civil justice” reform because the need for legal reform often extends beyond personal injury lawsuits to consumer litigation, public nuisance claims, or even liability for harm to pets. Those who support tort reform view it as means for restoring balance to a system in which liability has significantly and continually expanded over time, often through court rulings in individual cases.

### Don't lawsuit payments just come from insurers?

A significant portion of lawsuit awards against companies are paid by their insurers, but businesses also incur expenses. Small businesses, on average, directly cover about a quarter of their litigation costs. This does not include the higher insurance premiums paid once a business becomes a target of litigation. In addition, most insurance coverage has a policy limit and liability above that time must be covered by the business.

### What kinds of damages can be awarded in a lawsuit verdict?

Compensatory damages, including economic and noneconomic damages, are most common. Courts may also award punitive damages to punish misconduct. Plaintiffs can also obtain injunctive relief, which is a court-ordered action or prohibition.

**What are economic damages?** Economic damages are the amount of money that will fairly and adequately compensate a plaintiff for measurable losses of money or property caused by the defendant's fault. Economic damages include reimbursement for such items as medical expenses, lost wages or other income, and property damage.

**What are non-economic damages?** Noneconomic damages are intended to provide monetary relief for aspects of loss and harm that cannot be precisely measured. They can include recovery for pain and suffering, emotional distress, loss of companionship or consortium, and loss of enjoyment of life. Given the highly subjective nature of

non-economic damages, and the significant public policy implications of rising awards, about two-thirds of state legislatures have adopted reasonable limits on such awards either in medical negligence or all personal injury cases.

***What are punitive damages?*** Punitive damages may be awarded against a defendant whose conduct was particularly egregious. These damages are not intended to compensate a plaintiff for an injury, but are used to punish the defendant and deter future similar activity. Punitive damages may be awarded when the defendant acted with actual malice toward the plaintiff, showed deliberate indifference or reckless disregard for the safety of others, or committed fraud. Most states require juries to find “clear and convincing” evidence of such misconduct to support an award of punitive damages, a standard that falls between the “preponderance of the evidence” standard ordinarily used in civil trials and the “beyond a reasonable doubt” standard required for criminal convictions.

# Damages Reform



## Understanding Damages to Understand How to Moderate Them

To be able to understand the case for tempering damages (whether through caps, rules, etc.), you must understand the categories of damages awarded and the purpose of those damages.

### Relevant Types of Damages

| Economic Damages  | Economic Damages  | Punitive Damages  |
|---|---|---|
| Economic damages are the amount of money that will fairly and adequately compensate a plaintiff for measurable losses of money or property caused by the defendant's fault. Economic damages include reimbursement for such items as medical expenses, lost wages or other income, and property damage. | Noneconomic damages are intended to provide monetary relief for aspects of loss and harm that cannot be precisely measured. They can include recovery for pain and suffering, emotional distress, loss of companionship or consortium, and loss of enjoyment of life. | Punitive damages may be awarded against a defendant whose conduct was particularly egregious. These damages are not intended to compensate a plaintiff for an injury, but are used to punish the defendant and deter future similar activity. |

In the United States, the tort system costs us about two percent of GDP, while in most developed nations, that number falls around one percent, a gap that cost the U.S. economy around \$140 million in 2009. That \$140 million represents an enormous inefficiency in the tort system at accomplishing its core function, transferring funds from the injurer to the injured. These costs not only fall to businesses that are forced to pay

### The Problem: An Expensive and Inefficient Justice System

excessive awards for damages, but they are passed to individuals and businesses alike in the form of higher rates of insurance against liability and higher costs for products and services. Moreover, absent standards to guide awarding of damages, jury verdicts can be highly random, varying case to case and district to district. When a particular tortious act earns a much higher penalty in one district than in another, or similar victims are compensated differently in one district than in another, state civil justice systems lack the critical characteristics of predictability and fairness.

The Solution:  
Guiding Damage  
Awards

Caps on Non-Economic Damages

Placing caps on the amount that can be recovered for non-economic losses can be an effective way of rationing damages to avoid excessive awards. A cap on recoverable non-economic damages helps to place value on inherently subjective awards and provides guidance for awards aiming to make whole those found to have experienced extreme non-economic harm. From this, caps can serve to normalize an inherently random system.

Additionally, among tort reforms, caps are arguably easier to measure for their positive effect on the tort system. Businesses looking to open facilities in a particular state and insurance companies looking to set insurance prices based on liability risks will respond accordingly to this rationalization. And caps upheld over the long run can have the affect of tempering insurance premiums and encouraging economic activity.

The Council’s *Non-Economic Damages Awards Act* provides legislative language to cap non-economic damages but leaves the ceiling number up to each state.

Punitive Multipliers and Standards

Punitive damages can be rationalized by fitting them within a ratio of compensatory damages (economic and non-economic combined). The Supreme Court has recognized that a 1 to 1 ratio of punitive to compensatory damages may be the highest level permitted by the Constitution when those compensatory damages are substantial, and only recognizes higher rations in cases with low damages or especially egregious



defendant conduct. The Council's *Punitive Damages Standards Act* provides guidelines for these damages multipliers, for the egregiousness of activity that merits punitive damages and for determining whether rendered punitive damages are excessive.

## Full and Fair Non-Economic Damages

ALEC developed its *Full and Fair Non-Economic Damages Act* to aid in rationalizing non-economic damages in those states where caps may be impracticable or may face constitutional concerns. This model bill would ensure that only evidence relevant to the non-economic loss is used in determining the amount of non-economic damages awards. Non-economic damages are purely compensatory in nature, but often plaintiffs' lawyers attempt to use evidence regarding the extent of wrong-doing—which is relevant separately to punitive damages—in order to increase the size of the non-economic award. And such an increase in awarded non-economic damages can multiply any excess in awarded punitive damages. The bill maintains the important distinction between evidence relevant to punitive damages and evidence relevant to non-economic damages and enhances the opportunity for judicial review of awards.

***Caps on non-economic damages restore fairness while preserving the right of victims to be compensated.*** The Council's model does not attempt to deprive true victims of their right to be compensated fully for any monetary loss. Rather, it provides reasonable direction for damages that seek to place a monetary value on subjective non-economic loss, allowing for predictability and fairness for both plaintiffs and defendants.

***Excessive awards for damages affect more than just the parties to a lawsuit.*** Those who have never been involved in major litigation may struggle to sense the impact on the public interest of certain businesses and individuals paying large awards. But excess tort costs create economic inefficiencies that impact private investment and insurance costs, and in turn impact citizens at-large.

## Talking Points

***Damages reform delivers economic results.*** As citizens of states like Texas have witnessed, curbing rising damages and rising liability insurance costs can have a significant impact on the business climate in a state and the lives of its citizens. Whereas rural Texans once worried about the decreasing presence of adequate medical professionals, liability reform has returned them to the state in large numbers to fill a critical economic need.

Sticking Points  
and Questions  
from the  
Opposition

***“A cap is inherently arbitrary and may be unfair to some plaintiffs.”*** It is important to keep in mind that caps are not appropriate for economic damages. Any amount of definable and relevant economic loss should be recoverable. Caps on non-economic damages are merely providing guidance and normalization to awards that are inherently subjective. Such guidance may be needed to encourage fair and equitable recovery. Without this guidance, juries may award damages largely outside the norm for similar injuries. A 2012 poll found that 75 percent of voters believe that jury awards for these subjective “pain and suffering” damages should be reasonably limited.

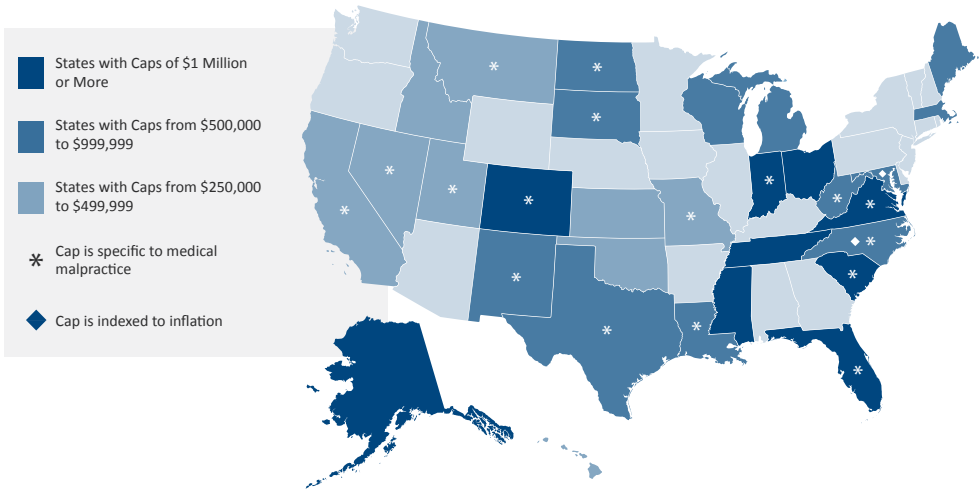
Steps in the  
Right Direction

Caps may not be viable option in all states. In lieu of this option, states may consider the *Full and Fair Non-Economic Damages Act* mentioned above.

Additionally, various aspects of punitive damages reform may be useful. The standards for awarding punitive damages in some states can be strengthened to properly apply to the most egregious conduct.

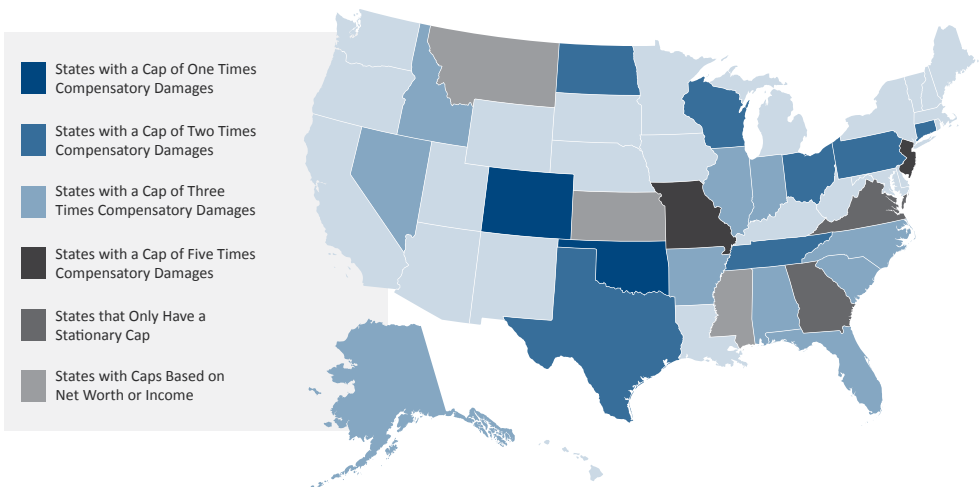
## Non-Economic Damages Caps Across the States

Where states have multiple caps that differ by the type of case, we have highlighted the highest cap.



## Punitive Damages Ratios Across the States

Most states have both a compensatory-to-punitive ratio cap and a stationary cap. In larger cases, the ratio will serve as the maximum cap. But in smaller cases, where the stationary cap is higher than what one could recover under the ratio cap, a somewhat higher punitive award is allowed. This map only reflects states' ratio caps.





## Eliminating Phantom Damages

### Accuracy in Medical Expense Awards

#### The Problem: Damages for Medical Expenses Often Exceed Actual Costs

**T**he invoiced prices on medical bills are rarely paid in full by patients or their insurers. When private insurance, Medicare or Medicaid covers the treatment, the healthcare provider will typically accept a negotiated rate that is significantly less than the “sticker price” originally listed on the bill. When a patient is uninsured, a hospital or other medical provider will often write off the expense or accept a discounted rate. It is not uncommon for the prices for medical services reflected on the original invoice to be three or four times the actual price paid.

But, in many states, when calculating a plaintiff’s losses, a jury learns only the billed rates for medical care. Jurors are blindfolded from knowing the amount actually accepted by the healthcare provider as full payment for the bill. As a result, juries award inflated amounts for medical expenses that include “phantom damages.” Phantom damages are portions of awards for medical expenses—the difference between the list price on a bill and amount accepted as full payment—that no one will ever pay or receive.

Inflated awards are troubling to defendants, just as abridged awards are problematic to plaintiffs. Either illustrates a poorly functioning legal system. When damages overcompensate a plaintiff, funds are shifted out of the business economy and can no longer go toward job creation. Excessive damages based on bills that do not reflect true expenses only serve to make an already costly litigation system more so.

#### The Solution: Cover the Actual Price Paid

The simple solution to these inflated verdicts is accurate disclosure. Where a plaintiff or his or her insurer has paid medical bills stemming from an injury that is the subject of a lawsuit, damages should reflect the actual amount paid rather than a rate initially listed on a bill. And where

bills are still outstanding, damages should be calculated as an amount that would reasonably cover the bills.

The Council has developed model legislation, the *Phantom Damages Elimination Act*, that takes care to bring awards in line with actual or expected medical costs rather than billed rates. The legislation ensures that plaintiffs are “made whole,” while avoiding inflated awards. This commonsense solution to inflated verdicts gives juries the information they need to calculate awards that reflect actual losses.

**Promotes accurate recoveries.** The model act restores fairness to personal injury litigation. By determining damages for medical expenses based on amounts actually paid, the model act ensures that these damages are compensatory in nature, as intended, and that the civil justice system does not require defendants to pay phantom costs that exist only on paper. Defendants must fully reimburse victims for their expenses, but they would no longer be held liable for costs that no party ever had to bear.

**Helps reduce the price of insurance for businesses and doctors.** Phantom damages significantly inflate liability in all personal injury litigation, from a slip-and-fall case to medical malpractice claim. Insurance rates for businesses and doctors reflect this higher-than-necessary liability. Such costs are passed on to consumers and patients in the form of higher prices for goods, services, and medical care. Eliminating phantom damages in no way impedes a victim’s access to justice, but it provides real benefits by reducing excessive liability that serves no compensatory purpose.

**“How does this reform affect subrogation?”** Subrogation is a legal principle that allows third parties to recover costs they expended. In this scenario, a plaintiff’s insurance company may be reimbursed out of the lawsuit award for money they spent covering medical bills. The *Phantom Damages Elimination Act* would have no effect on such subrogation. In-

Talking Points

Sticking Points  
and Questions  
from the  
Opposition

surers could still argue for subrogation in states allowing it, and just as the awards would be more accurate for plaintiffs so could they be just as accurate for insurers.

***“Would this negatively affect healthcare providers?”*** No. The idea behind this model act is to make sure that plaintiffs get reimbursed an amount that accurately reflects what a healthcare provider gets paid. The model act does not regulate the ability of healthcare providers and insurers to offer reduced rates.

***“How does this proposal intersect with the collateral source rule?”*** The collateral source rule generally keeps the jury from learning of payments made to the plaintiff by third parties, such as recovery from a life insurance policy. This is a much broader issue than permitting a jury to determine an accurate award for medical expenses based on actual costs. The Council’s model does not affect whether a state chooses to apply the collateral source rule.

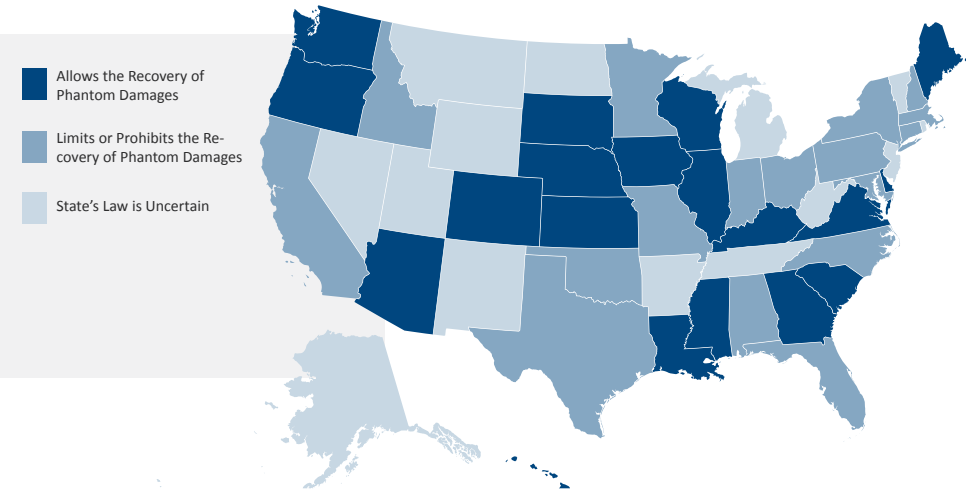
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Steps in the  
Right Direction

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Preventing admission in court of medical bills that do not reflect the price actually paid is the most effective way of eliminating phantom damages. If this is too large a step, then one policy option is to disclose to the jury both the amount billed and the amount paid for the medical care. The jury can then consider and reach a sound judgment on the reasonable value of the medical care.

Phantom Damages Throughout the States





# Liability Apportionment

## Only Pay Your Fair Share

### The Problem: Penalizing Deep Pockets

In a lawsuit with multiple defendants, fault is usually divided among them. One defendant may have contributed 20 percent to an injury, while another defendant contributed 50 percent, and a third defendant contributed 30 percent. Logic would tell us that Party 1 would owe 20 percent of whatever the jury awards to the plaintiff, Party 2 would owe 50 percent, and Party 3 would owe 30 percent. This, however, is often not the case.

In seven states, the rule of joint liability applies: a defendant one percent at fault could have to cover up to 100 percent of the damages if the other defendants lack the financial wherewithal. That's right, the defendant with a deep enough pocket may have to cover the entire bill, in large part because they can.

In 28 states, some form of modified joint and several liability is on the books. One form of joint and several liability creates a threshold of fault over which a defendant may be responsible for full damages. For example, in Illinois, defendants more than 25 percent at fault may have to cover 100 percent of damages. In Iowa, that threshold falls at 50 percent. Once again, defendants may have to cover the fault of other individuals and businesses in the market, an unfair shift of responsibility onto businesses with ample funds.

### The Solution: Pay Based on Your Responsibility

In 16 states, pure several liability law is in place. Under several liability, each defendant pays what his fault dictates. Here, a defendant will pay what the judge and jury rule he deserves to pay and no more. A defendant 20 percent at fault would be responsible for 20 percent of the damages awarded in a case.

The Council's *Fair Share Act* gives legislators interested in this issue



guidance on how to go about the change. It suggests several liability over joint liability and joint and several liability.

***Legislates fairness.*** Joint liability and joint and several liability fail to equitably distribute liability. They force defendants to pay more than their fair share.

## Talking Points

***Avoids stifling economic activity.*** States with liability rules that place undue burden on responsible businesses will feel the strain. Businesses choosing where to locate take liability systems into account (in a 2008 survey, 67 percent of corporate general counsel said a state's legal system is likely to impact important business decisions, including where to do business), and this particular issue is a top consideration among businesses small and large.

***Avoids heightened insurance rates.*** When setting rates, insurance companies most certainly consider the legal climate in which any potential future claims would be handled. If there is a risk of a business (and their insurance company) covering the legal awards associated with the fault of other companies and individuals, there is no doubt that rates will need to be higher to accommodate for the increased risk.

***“Joint liability and joint and several liability ensure that plaintiffs are fully compensated in case of a defendant without ample resources.”***

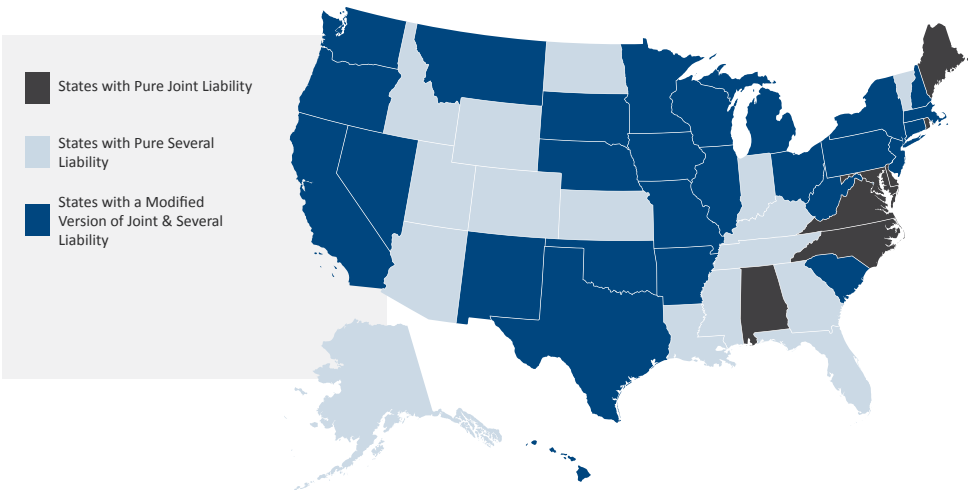
This focuses on the need to pay without caring who pays. And it fails to consider the hardship imposed by these laws on individual and business defendants that are forced to pay damages beyond their share. The tort system was created to make the injured whole at the expense of the injurer, and should avoid creating a new class of victims—those paying more than their fair share.

## Sticking Points and Questions from the Opposition

Steps in the  
Right Direction

The Council’s membership believes several liability to be the fairest approach to allotting liability, but there are many steps to take in the right direction. Instituting modified joint and several liability with a high threshold in a state currently upholding pure joint liability would be an improvement, as would be implementing a higher threshold for joint and several liability in a state with a low threshold.

Joint and Several Liability Across the States



# Judgment Interest



## Rationalizing the Interest Charged on Lawsuit Awards

**A**s litigation often takes years to come to conclusion and payments may yet still be delayed, damages usually accrue interest to ensure that plaintiffs are appropriately compensated. Historically, the common law did not allow for the charging of interest between the time the incident occurred and the time the case concluded. However, as cases take more time to be concluded than they did historically, most states have adopted rules or statutes that allow for this awarding of prejudgment interest. Many prejudgment and post-judgment interest laws, however, set interest rates well above standard interest rates. For this reason, defendants can be required to pay significantly more than the jury awarded, and arguably more than necessary to offset inflation. Set interest rates of 10 percent, for example, significantly over compensate the victim injured while the U.S. Treasury rates are 2 percent. Particularly with the multi-million dollar judgments that were much less common in the 1970's and 1980's when many of these statutes were put into law, defendants get saddled with inflated verdicts.

The Problem:  
Lawsuits  
Shouldn't Be  
Considered an  
Investment

The Council suggests common-sense reform that does allow for the recovery of interest on damages awarded, even prejudgment interest. Rather than fixing these rates to numbers that may under and over value awards depending on the economic cycle, the model *Prejudgment and Post-Judgment Interest Act* fixes the interest rate to that of the U.S. Treasury.

The Solution:  
Interest Rates  
Tied to the  
Economy

The model also allows for a 6-month grace period for interest accrual, acknowledging that litigation takes time to no fault of the plaintiff or defendant. Additionally, in part to counter any concern that lower interest rates would decrease incentives to settle, the model bill provides for

lower interest if the plaintiff refuses a defendant-suggested settlement that turns out to be fair and provides for higher interest if the defendant refuses a plaintiff-suggested settlement that proves fair on judgment.

Furthermore, the model legislation would limit prejudgment interest to accrual on interest for economic damages from the past, not for punitive and non-economic damages nor for damages to compensate the plaintiff for future economic loss. Interest should only accrue on those payments that should have technically been paid in the past.

Talking Points

***Ensures that plaintiffs are accurately compensated and avoids incentivizing prolonged litigation.*** By fixing the interest rate to that of the U.S. Treasury, the plaintiff will be fairly compensated for the difference in value of their loss had no injury occurred. Furthermore, by setting a fair interest rate and by incentivizing settlement, the plaintiff won't be tempted to prolong litigation to boost returns and the defendant won't unnecessarily prolong litigation on awards with interest accrual.

***Avoids punishing the defendant for mounting a defense.*** Defendants should have the right to follow cases through to trial they believe lack any merit and to appeal verdicts they believe are unfair and unjust without fear of additional retribution. Excessively high interest rates may punish defendants for exercising these rights to trial.

***Minimizes responsibility on defendant for delays in litigation they may not have caused.*** Defendants, plaintiffs, and standard court congestion may cause delays in the adjudication of a case. It is unfair to place this financial burden solely on the defendant. Minimizing interest rates will help to alleviate this burden.





## Product Liability Reform

### Encouraging Innovation While Protecting Consumers

#### The Problem: The Lawsuit Blame Game

**P**roduct liability litigation is just what it sounds like: lawsuits claiming physical injury as a result of a defective product. Product liability law has wide implications for both product safety and consumer choice. When a product is unreasonably dangerous, holding product manufacturers liable can protect consumers. However, when liability is applied erroneously, prices needlessly rise and valuable products may be removed from the market.

For example, gas can manufacturers have faced lawsuits in recent years for injuries sustained by individuals who used the product to pour gasoline on open flames. Despite signs on the gas cans warning that gasoline and fire don't mix and the expectation that this is common adult knowledge, the expense of defending against such lawsuits put the largest U.S. manufacturer of gas cans into bankruptcy. Product liability law should distinguish between products that are dangerous because they are defective and those that result in injuries because they are misused.

In other cases, products that benefit numerous consumers but may cause adverse side effects for a small percentage of people, may be removed from market because of litigation. This may occur even when such risks are considered and the product is approved by government experts. See the section on Regulatory Compliance for information about how this can be problematic.

A few courts have even misapplied product liability law to require drug manufacturers to pay for injuries caused by products they never manufactured. The Supreme Court of Alabama held in 2013 that brand-name drug manufacturers may be held liable for the injuries of people who used a generic version of the drug. A competitor manufactured and sold the drug, and yet the brand-name company, which invested millions to initially create the drug, is held liable. Such a transfer of liability is antithetical to the function of the free market. It discourages

innovation and could impede development of life-saving and -improving treatments.

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The Council has recently refreshed its *Product Liability Act* as an amalgamation of sound and meaningful state product liability laws. It sets forth generally accepted standards for determining whether a product is defective because of a flaw in its manufacturing, design, or warnings. These principals result in safer products and properly impose liability on those who are responsible for injuries. Among its sections is a provision that ensures that only the manufacturer of the actual product used by a plaintiff is subject to liability in order to avoid misdirected litigation like the scenario with brand-name and generic drug makers. The model act also provides protections for product sellers, such as small retailers, who have not had a hand in the development of the product. The *Product Liability Act* is a useful resource for state legislators looking to improve various aspects of their state product liability laws.

In early 2013, the Council approved the *Rational Use of a Product Act* to provide a legislative answer to those looking to protect responsible businesses, like the gas can manufacturers, from lawsuits for injuries due to the unreasonable misuse of their products. The model policy clarifies product liability law to ensure that the reasonableness of the consumer’s conduct is taken into account when determining a manufacturer’s liability. The *Rational Use of a Product Act*, as well as several other separate product-liability related acts, is incorporated by reference into the *Product Liability Act*.

.....

**Aligns liability with responsibility.** The Council’s model legislation ensures that those actually responsible for an injury are held accountable. It would not impose liability where the injury is not the fault of the manufacturer named in the lawsuit.

The Solution:  
Making Sure  
Responsibility  
Lies in Its Proper  
Place

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Talking Points

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*Creates an economic environment that allows product innovation to flourish.* Placing liability on a manufacturer whose product actually caused the plaintiff’s injury upholds the fairness and accountability needed for a well-structured marketplace to thrive.

*Keeps properly functioning products in the market.* Where lawsuits arise from a person’s unreasonable misuse of a product, the *Rational Use of a Product Act* would help keep essential items from being removed from the marketplace. It would not punish manufacturers who carefully design their products and provide appropriate warnings to consumers of potential hazards.

Sticking Points  
and Questions  
from the  
Opposition

*“Expansive product liability is important to protect consumers from unsafe products.”* A product liability system functions best when liability is appropriately linked to the party at fault. Blaming the wrong party does nothing to provide the right incentives to protect consumers. The Council’s model legislation will promote safer products while avoiding excessive, pointless liability.

Steps in the  
Right Direction

The *Product Liability Act* combines a number of important product liability reforms in one location so state legislators can have a nearly exhaustive resource of product liability law fixes. The product liability law of each state has its own nuances. Although some states have codified aspects of their product liability law, courts often develop a state’s product liability law through their rulings. For this reason, reviewing court rulings may be necessary to identify which reforms a state needs.



# Regulatory Compliance Defense Reform



## Balancing Liability with Regulation

**F**ederal and state agencies are charged by legislators with the responsibility of regulating, and in some cases pre-approving, certain products and services. When developing regulations or approving products, government agencies evaluate the risks and benefits of a product to its many and varied consumers and come to a reasoned decision. Some industries are subject to extensive government oversight. Lawsuits that conflict with the orders, standards, or approvals of government agencies result in unpredictability in the civil justice system and confusion among businesses as to their legal obligations.

For example, if a drug provides significant health benefits to many but may elicit an adverse response from a very small number of patients, should the drug be made available? The Food and Drug Administration (FDA) may decide that so long as a drug is accompanied by specified warnings informing doctors of the risks, doctors should be able to prescribe the drug to patients who, based on their particular condition, are likely to benefit from it. Nevertheless, the few patients who unfortunately suffer an adverse reaction may sue, claiming that the approved warnings were inadequate. Liability imposed in such cases may result in a product being removed from the market, making it unavailable to those who need it.

Furthermore, companies that provide products and services that are heavily regulated are often sued no matter what they do. If an aspect of a product does not comply with a government standard, then its deviation will most certainly be used as evidence of fault for an injury in a lawsuit. However, even when businesses carefully adhere to what may be a costly and complex regulation, they still face liability.

It is important for legislators to evaluate the interaction of regulation and liability and decide how best to make the two systems work in harmony.

The Problem:  
Sued If You Do,  
Sued If You Don't

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## The Solution: Congruity Between the Systems

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The Council has developed the *Regulatory Compliance Congruity with Liability Act* to provide state legislators with options for developing congruity between regulatory and legal systems. The model bill instructs courts on how to weigh a product's or service's compliance with regulatory standards when deciding liability in a civil lawsuit. The legislation would allow the legal system to work with the regulatory system, rather than undermine it, maximizing the efficient use of government enforcement resources.

The Council took the many laws already in existence in various states to give the courts guidance in deciding how much deference should be given to regulations when assessing liability.

### No Liability When Compliant

In Michigan, if a drug's design and label comply with the FDA's approval (a process that takes 10 years and over \$800 million on average), the product may not be considered defective in a lawsuit. The Council took a similar approach based on the understanding that when a company has committed significant resources to adhering to the law and when a regulatory agency has struck a balance in evaluating the benefits and risks to the public, the agencies' well-thought-out decision should not be second-guessed by litigation that considers only the individual before the court.

### Rebuttable Presumption

At least seven states have adopted a "rebuttable presumption" that a product is not defective when it is compliant with regulations. (A rebuttable presumption is basically an assumption that remains until proven otherwise.) This option operates under the idea that when a product or service conforms to government standards intended to protect the public, an individual would have to effectively claim those regulations were inadequate and overcome a higher standard than in ordinary cases. Under the model act, a plaintiff would be able to proceed with a claim by showing that the regulation at issue is wholly inadequate to protect the public from harm.

## No Punitive Damages

Six states have adopted laws that do not allow punitive damages when a product or service complies with regulations. Early adoptions of such laws focused exclusively on FDA-approved drugs, but more recent enactment apply to all products. Arizona enacted a rebuttable presumption in 2012 that also applies to conduct involving services that that are authorized by, or comply with, rules, regulations, or standards of a government agency. The underlying policy for these laws, and the model, is that, at minimum, a company should not be punished when it follows the law. Under such laws, plaintiffs may recover compensatory damages, such as medical expenses, lost wages or other economic loss, or pain and suffering if they establish that the company was at fault, but they may not seek punitive damages, subject to the exceptions noted below.

## Never Any Protection for Wrongdoing

All of the options provide exceptions that permit liability even when a product or service complies with government regulations. The limits on liability do not apply if a company misrepresented or intentionally withheld information from a regulatory agency during the approval process, secured approval of the product through bribery, or sold the product after a government-issued recall.

***Encourages the regulatory and legal systems to work in harmony.*** By tempering liability for companies whose products are in compliance with regulations, government agencies will be able to issue well-reasoned regulations that serve the public with minimal interference from lawsuits that may disturb such policy judgments.

## Talking Points

***Provides proper incentives for regulatory compliance.*** By refocusing liability on those businesses whose products and services do not comply with applicable regulations, business that comply in good faith will be appropriately rewarded for their efforts. This proposal better balances a liability system that treats compliance with regulations in a manner that is all sticks and no carrots.

***Upholds predictability for businesses.*** Lawsuits that conflict with the orders, regulations, or approvals of government agencies result in unpredictability in the civil justice system and confusion among manufacturers and service providers about their legal obligations. The Council’s model bill more clearly defines those obligations, allowing businesses to better plan and manage their risk of liability. A predictable legal climate, as supported by the model act, is a factor businesses consider when deciding where to locate or expand their operations.

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### Sticking Points and Questions from the Opposition

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***“Lawsuits are an essential way to regulate businesses.”*** The legal system is intended to compensate those who are injured for losses that are the result of another’s fault. Altering a product or service based on what happened to one of a few individuals is not necessarily in the public interest. This is especially true, as the model act recognizes, when a government agency, charged with protecting the public, has carefully considered and developed standards or approved a product or service. For example, a drug that may have harmful side effects for very few could save the lives of many. Were such a product to be removed from the market because of an individual lawsuit, the public would suffer.

***“These reforms give a free pass to manufacturers.”*** This is not the case, nor would that sort of reform be constructive. The limits on liability provided by the model act apply only where a government agency regulates and permits the particular aspect of the product or service that is challenged in litigation. Its provisions do not apply when a business has engaged in improper or illegal conduct during the approval process or sold a product after a recall. A plaintiff can overcome the “rebuttable presumption” against liability that applies when a product or service complies with government regulation by showing the regulation is wholly inadequate to protect consumers. The principle that a person or business should not be punished (through punitive damages) when it follows the law should not be controversial or viewed as a “free pass.”





## Trespasser Responsibility

### Protect Property Owners from Trespasser Lawsuits

#### The Problem: Paying Trespassers under New Legal Theory

In most states, the common law has upheld that landowners owe no duty of care to trespassers and thus are not liable to them for civil damages except in certain specific situations. One wouldn't expect landowners to owe anything to those on their property without authorization.

However, there's an effort afoot to subject landowners to unprecedented liability for trespassers injured on their property. The American Law Institute, a council of legal academics, professionals and scholars that sporadically releases bodies of work called Restatements to guide judges in interpreting and applying the law, has released such a Restatement that veers significantly from the norm on this issue. If judges choose to follow the Restatement, which they often do, landowners may now be subjected to civil liability for injuries to trespassers that occur on their land. The only exception given in the Restatement is one ill-defined and with potential to be quite weak in practice.

Landowners nationwide should be concerned about the potential shift in the common law, particularly those with unwatched properties. Vacation home owners, railroad companies, utility companies, factories, and farmers may all be at risk of liability for activities inherently out of their control.

If judges aren't guided by state statute to prevent them from deferring to the Restatement, an already expensive legal system would likely become more so.

#### The Solution: Codify the Status Quo

To effectively freeze the law and preempt the use of the Restatement to subject landowners to newfangled liability, the Council developed its *Trespasser Responsibility Act*. The model bill codifies what is generally

accepted in common law: a property owner, occupier, or lessee owes no duty of care to a trespasser except in few, traditional exceptions. Legislators considering work on this issue should take care to tailor the bill to their state. The intent is to codify the common law in a particular state and to maintain the status quo as a preventive measure.

***Keeps property insurance rates from skyrocketing under the proposed law change.*** Imposing unwarranted liability on landowners for trespassers could unleash unpredictable and undue cost that would result in higher insurance premiums.

## Talking Points

***Preserves fundamental fairness in dealing with trespassers.*** No property owner should be subject to liability for unintentional injuries of uninvited guests. As a matter of common-sense fairness, the model legislation would safeguard against such uncalled for liability.

***Keeps frivolous trespasser lawsuits from punishing law-abiding property owners.*** Lawsuits alleging property-owner responsibility for trespasser injury that would not pass muster in state courts prior to the influence of the Restatement would be maintained as meritless were legislation to codify common law rules as intended.

***“Would this legislation hinder judicial flexibility?”*** The Council’s model legislation is intended to codify the rules judges currently consider when ruling on a trespasser case, so little change would be expected from the status quo.

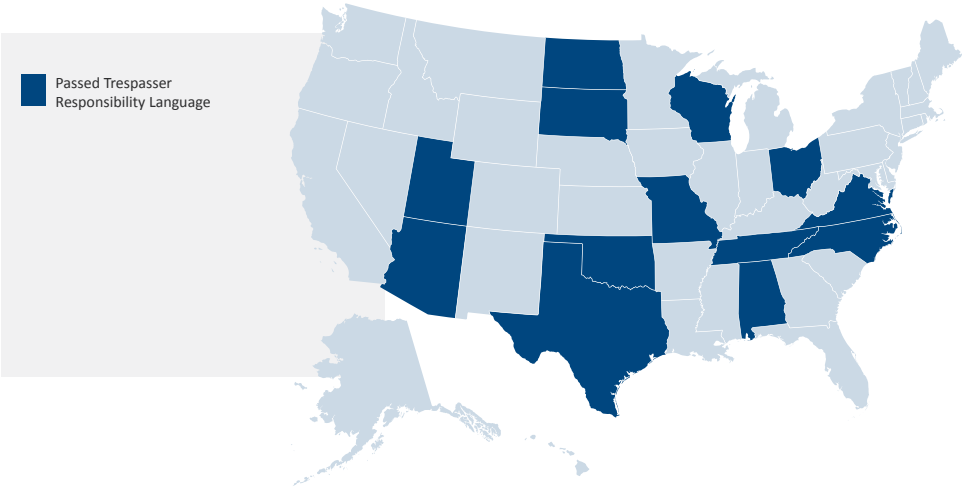
## Sticking Points and Questions from the Opposition

***“Would this legislation overlook existing exceptions to the no-duty-owed-to-trespassers rule?”*** The Council’s model was drafted to include sections on many of the most widely recognized exceptions to the rule. Any legislation drafted based on the model bill should take care to consider and include all of a state’s relevant exceptions.

Steps in the  
Right Direction

Some states may already have laws on the books that in part address the duty owed to a trespasser. These laws may be specific to categories of property owners, like farmers or businesses. Thus, in some cases, a law with wide enough applicability to preempt judicial use of the Restatement may be achieved with tweaks of existing statutes.

States that have Passed Legislation Similar to the *Trespasser Responsibility Act*





# Asbestos Bankruptcy Trusts



## Instituting Transparency in Recovery

**F**or many years, asbestos was widely used as insulation and for other purposes due to its resistance to fire. In the 1970s, as the dangers of asbestos were better understood, and the federal government began regulating its use, companies that had used the substance for years began to face lawsuits for sicknesses related to exposure to the fiber. Due to the long latency period for asbestos-related conditions, individuals are still becoming sick today from exposures that occurred decades ago. To date, asbestos litigation has put over 100 companies into bankruptcy.

During the bankruptcy process, companies establish trusts to compensate those who were exposed to asbestos and might develop a disease in the future. To recover from these trusts, individuals file a short, simple claim form with documentation showing that they were exposed to asbestos-containing products of the bankrupt entity and developed an asbestos-related disease. Anyone who meets the criteria for payment gets paid. As the number of bankrupt companies has risen, the number of trusts, and the resources they make available to claimants, has exponentially increased. According to a 2011 report by the U.S. Government Accountability Office, “the number of asbestos personal injury trusts increased from 16 trusts with combined total of \$4.2 billion in assets in 2000 to 60 with a combined total of over \$36.8 billion in assets in 2011.”

Because these bankruptcy trusts operate outside of the traditional tort system, there is little, if any, coordination between lawsuits filed in court and claims made with the trusts of the bankrupt entities. A lawyer can therefore recover for his or her client from one or more trust funds of bankrupt companies and then sue other companies in court for the same injury. Some plaintiffs’ lawyers may make claims in documents filed with trust funds that are inconsistent with what they argue in litigation. For example, a jury would not know that a plaintiff claimed in materials submitted to a trust fund that a different company’s

The Problem:  
Double Dipping  
in the Asbestos  
Lawsuit Industry

products solely caused her injury. The lack of transparency results in “double dipping,” the potential for fraud, and diminished funds for those who develop asbestos-related injuries in the future.

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**The Solution:**  
**Transparency**

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Plaintiffs’ attorneys are paid to advocate for their clients and to get them the highest recovery. When multiple companies are responsible for an injury, or more than one method exists to obtain compensation, plaintiffs’ lawyers can be expected to use all such avenues. When lawyers seek recovery without disclosing the whole story, the situation can needlessly deplete resources for those who might develop injuries in the future, impose excessive and unwarranted liability on businesses, and damage the integrity of the judicial system.

The Council’s model *Asbestos Bankruptcy Trust Act* requires plaintiffs to disclose any claims made with the trusts when filing lawsuits. The model legislation does not keep plaintiffs from both pursuing recovery through lawsuits and trust claims. Rather, transparency between the trust and judicial system would ensure that courts decide liability and evaluate appropriate compensation based on all of the facts. The model act would avoid double dipping and reduce the potential for fraud.

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**Talking Points**

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**Minimizes fraud.** The *Asbestos Claims Transparency Act* would promote honesty in civil litigation by reducing the potential for lawyers to tell one story of their client’s exposures to asbestos in submitting a claim to the trusts and a different story to a jury. Transparency helps ensure that each company that contributed to a person’s injury is responsible for its fair share of liability whether through proper allocation of fault at trial or being able to show that a now-bankrupt entity was wholly responsible for the harm.

**Prevents “double dipping.”** This can occur where a company in litigation pays what the jury believes is needed to make the plaintiff whole, but then the plaintiff files trust claims after trial and obtains

additional money. This gaming of the system is unfair because it facilitates duplicative recovery. The *Asbestos Claims Transparency Act* would reduce the potential for overpayment and preserve resources for those who may develop an asbestos-related illness in the future.

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***“The more funds, the better. These people have been seriously injured.”***

We agree that there are serious injuries out of asbestos exposure. For this very reason, it is particularly important that claims are evaluated based on all of the information available and plaintiffs are not, in some instances, overpaid. Juries or trusts should decide, based on complete and accurate information, what is owed and who is responsible, and not merely write an open check. The model act helps ensure that compensation is available in the future.

***“Does fraudulent activity actually exist here?”*** Yes, unfortunately, it does. A March 2013 *Wall Street Journal* analysis comparing claims made in lawsuits and trust fund submissions on behalf of the same individuals found “numerous apparent anomalies.” For example, the study found that hundreds of claims to the largest asbestos bankruptcy trust stated that the claimant suffered from mesothelioma (which gets the largest payout), but, in court cases or claims filed with other trusts, claimed less severe diseases.

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The simplest, fairest solution for addressing the problems caused by two separate and untethered systems for compensating asbestos claimants is transparency. The model act places a minimal duty on claimants to disclose their past and intended trust claims when also pursuing litigation against others.

Sticking Points  
and Questions  
from the  
Opposition

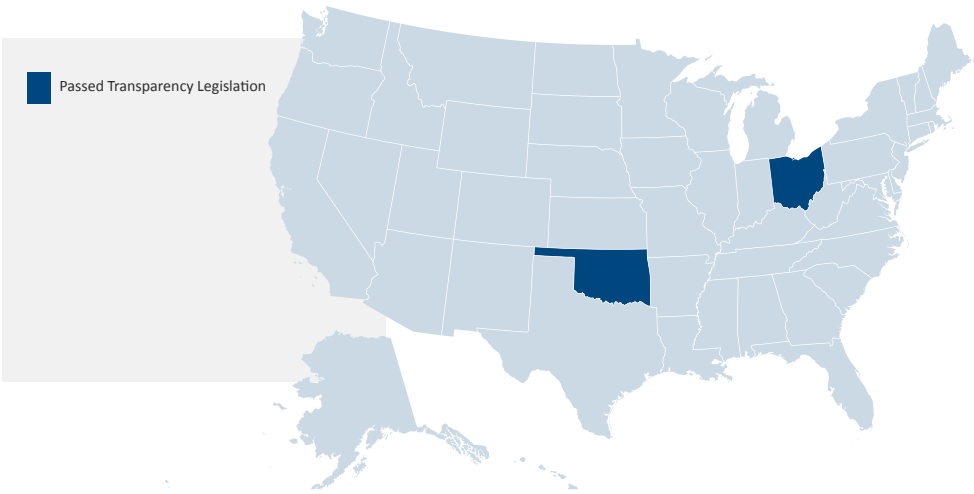
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Steps in the  
Right Direction

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Asbestos Claims Transparency Across the States

Several individual courts have adopted case management orders requiring the disclosure of trust information.



# Transparency in Lawsuits



## No New Unintended Lawsuits

When legislation is silent or ambiguous on its enforcement, plaintiffs' attorneys may occasionally bring cases encouraging judges to find what are called implied causes of action. These causes of action are rights for the individual to bring a lawsuit and they are not articulated in legislation but rather decided upon based in large part on the perceived intent of the legislature at the time of enactment. To illustrate, a piece of legislation requires restaurants to post nutritional information for menu items in dining areas within 50 feet of all patrons and lacks clear enforcement policies. One restaurant posts this information 55 feet away from some diners. Should an individual seated 55 feet away from the posting be able to bring a lawsuit against the restaurant for failure to comply with the regulation whether or not they experienced injury as a result of the violation? Or should this regulation be enforced through an overseeing agency (perhaps aided by consumer violation reports) and with appropriate fines? That is a policy-making question that should be up to the legislature. Courts considering single cases in a vacuum without consideration of the wider policy implications should not be the ones making these public-policy decisions.

As with many other aspects of the tort system and law-making, in this case ambiguity can beget abuse. Plaintiffs' attorneys may take advantage of ambiguity in the law to argue over the intent of the legislature and push for a new right for the private individual to sue. Litigators spend valuable resources and time playing trial and error with the legal system in this manner.

The Problem:  
Lawsuits out  
of Unclear  
Legislation

The Council developed the *Transparency in Lawsuits Protection Act* to keep litigators from toying with regulatory enforcement

The Solution:  
Legislate Clarity

provisions, to safeguard legislative authority and government enforcement authority, and to protect consumers of the legal system from unintended and unexpected liability. The model bill simply states that without explicit language, the court cannot hold that the legislature intended to create a new right to sue. This bars courts from finding new rights to sue without clear legislative authorization, which the legislature is required to provide expressly. Effectively, it creates a standard to preserve legislative policy-making authority.

Talking Points

***Facilitates predictability and transparency in the legal system.*** With the enactment of the *Transparency in Lawsuits Protection Act*, plaintiffs know where a lawsuit exists and defendants know for what they can and cannot be held liable.

***Allows for the efficient use of resources.*** The legislation helps to preserve the resources of courts no longer needing to consider cases alleging implied causes of action, thus helping to cut down the costs of state legal systems.

***Minimizes judicial and private speculation about legislative intent.*** Under the model bill, legislators provide their intent and judges must take their intent at face value. The question that most judges consider before deciding on the creation of a new private cause of action is “What did the legislature intend to do?” Instead of requiring judges to interpret the legislature’s considerations, the *Transparency in Lawsuits Protection Act* would require legislators to answer the question themselves.

***Creates fairness in the court system and curtails inconsistent results.*** This legislation would help ensure the fair and consistent application of the law. Removing judicial speculation would decrease the likelihood that differing interpretations of the law would be applied in courts.

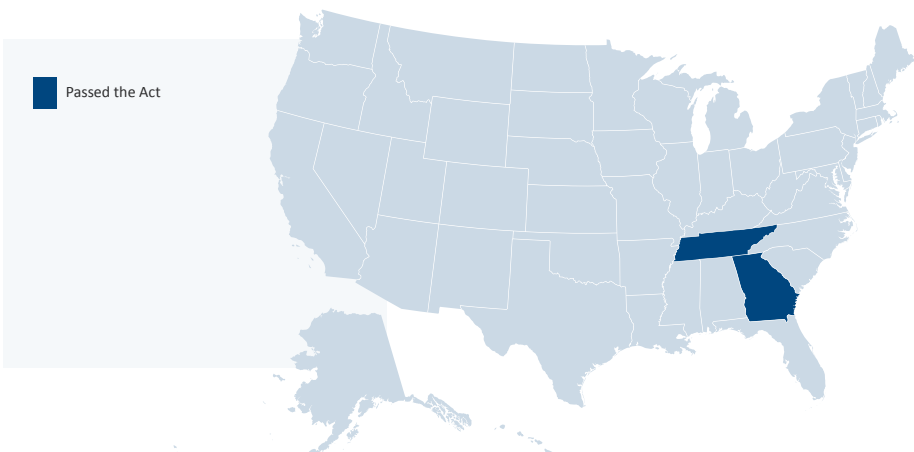
***“Does the Transparency in Lawsuits Protection Act affect negligence per se claims?”*** The model language would have no effect on existing causes of action that rely on statutes to show negligence or wrongful conduct. In fact, the model bill was amended to make this point explicitly clear. Rather, the model legislation fixes the possibility of loopholes that would allow claims to move forward without tangible injury.

## Sticking Points and Questions from the Opposition

Where the *Transparency in Lawsuits Protection Act* is not law, legislators can focus on legislating and enforcing with clarity. They can be specific in enforcement provisions and go so far as to insert language explicitly stating their legislative intent on enforcement and the creation of new causes of action. The Council’s Civil Justice Task Force developed the *Transparency in Lawsuits Protection Act* when legislative members realized how often they had to include the same clarifying language in legislation: “nothing in this Act is intended to create a claim or remedy for a violation of a state law where the legislature did not establish a private right of action.” The *Transparency in Lawsuits Protection Act* simplifies this requirement and sets a default standard, but just being precise in legislation could go a long way toward preserving clarity in enforcement and keeping unintended lawsuits from being filed.

## Steps in the Right Direction

### States that Have Passed Legislation Similar to the *Transparency in Lawsuits Protection Act*





## Venue Reform

### Filing Lawsuits in the Proper County

#### The Problem: Shopping for the Magic Court Jurisdiction

**T**hose unfamiliar with the procedures of filing lawsuits will likely be equally unfamiliar with the venue options plaintiffs have. In filing a case, a plaintiff can choose the court to host his case based on guidelines that are sometimes vague. At times the choice is dependant upon convenience variables like the location of the plaintiff or the location of the tortious incident. Sometimes, however, plaintiffs' attorneys may have experiential knowledge of the tendencies, rules, and judges in particular counties and will use this knowledge to choose the venue most likely to return them a favorable outcome. Plaintiffs' attorneys themselves have called these magic jurisdictions, a phrase coined by tort baron Dickie Scruggs. He elaborated, "It's almost impossible to get a fair trial if you're a defendant in some of these places... These cases are not won in the courtroom. They're won on the back roads long before the case goes to trial."

Bill Wagner, a super lawyer in Tampa, Florida adds, "I used to be able to sue the Seaboard Airline Railroad any place I wanted to where they had a railroad station, and therefore I would go to the place where the jury would likely give me the most money." Some counties are more likely to have less favorable views of the defendant in a case; some counties may be more lenient with evidence rules. A variety of factors go into creating these "magic jurisdictions."

Particularly troubling in these situations is that cases flock to areas supposedly more lenient to the plaintiff, clogging the court systems in these regions and burdening the local economy with the paycheck for the court costs and legal services of nonresidents. This has been most aptly described by Victor Schwartz, tort reform scholar and the Council's Civil Justice Task Force Co-Chair, as Litigation Tourism.



The Council developed its *Intrastate Forum Shopping Abuse Reform Act* to ensure that lawsuits are brought in jurisdictions with which they have a tangible connection. The legislation allows cases to be brought in either the residence county of the plaintiff, the place in which the incident occurred, or the county in which the defendant or its principal in-state office is located. For cases with multiple plaintiffs, each plaintiff would have to show a relationship with the venue county or that bringing the case in the particular venue is a matter of convenience for the case and does not impede justice.

## The Solution: Find the Rational Venue for Each Case

### ***Prevents forum shopping and instills logic and fairness in the system.***

Plaintiffs will no longer be able to cherry pick their venues and favor those districts that have been termed “magic jurisdictions.” The model bill creates a system based on logic in that it requires a standard relationship between the parties of a lawsuit and the jurisdiction in which their case is heard.

## Talking Points

***Encourages delivery of speedier justice and more fairly spreads court caseloads.*** With fewer excess cases brought in “jackpot jurisdictions,” these jurisdictions will have more time to spend on residents’ legal matters. Encouraging a spatial relationship between cases and the counties in which they are brought will serve to normalize case loads in relation to residents.

***Preserves tax-dollar-funded court expenses for the benefit of local taxpayers.*** With proper venue reform rules in place, taxpayers in “jackpot jurisdictions” won’t be saddled with the court expenses associated with supporting the legal claims of nonresidents.

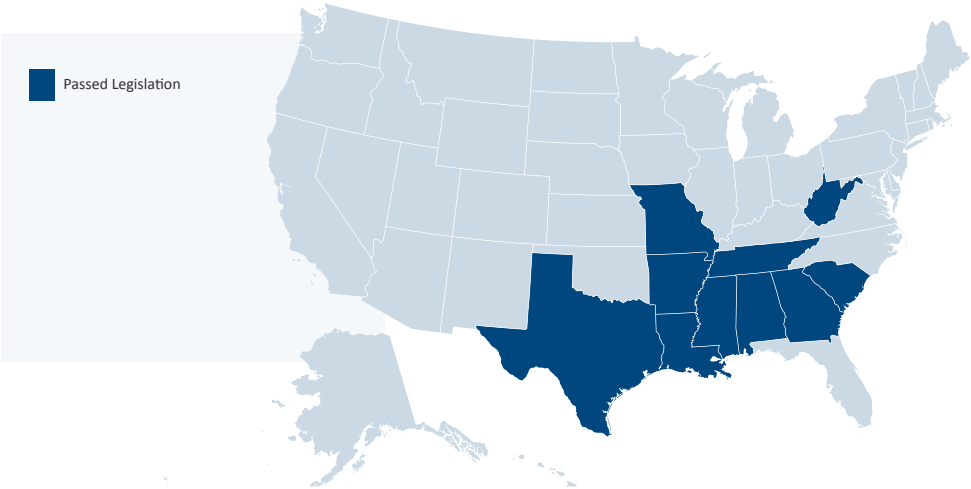
Sticking Points  
and Questions  
from the  
Opposition

***“The plaintiff brings the lawsuit, so the plaintiff should decide the venue.”*** The Council’s model policy still allows plaintiffs a relative choice in where to bring suit, but the choice is limited to reasonably related venues. Some plaintiffs’ attorneys have admitted the unfairness of overly flexible venue laws. Bill Wagner, the major plaintiffs’ attorney mentioned previously, notes that “the law was changed. Everybody recognized that was unfair. I now have to sue them where the accident happened or at their home place of business. Those are my two choices.”

Steps in the  
Right Direction

Any step toward tightening the venue requirements in states will be beneficial. The model bill should be adapted to a state’s particular needs with the intent of minimizing the ability of case filers to cherry pick favorable jurisdictions.

States that Have Passed Legislation Reflecting the *Intrastate Forum Shopping Abuse Reform Act*



# Expert Evidence Reform



## Keeping Junk Science out of State Courts

**M**ost civil trials involve the hearing of witness and expert witness testimony. Expert witnesses are brought in to explain complex scientific issues that can have strong bearing on the outcome of a case. They are often asked to provide professional opinion as well as fact. Expert witness testimony has powerful sway in front of a jury. If courts don't take ample opportunity to thoroughly vet expert witnesses prior to their sitting on the stand, witnesses unqualified to offer professional insight and opinions may be allowed to do so to the detriment of the case. Uncertain and unproven science could parade as fact, experts may attempt to advise outside their areas of expertise, and juries may be led by weakly science-based opinions to unsubstantiated decisions. When unreliable expert testimony is admitted, the fair delivery of justice is at stake. Juries may impose liability on innocent defendants, and the side effects of undue liability may follow: spiked insurance rates, stalled innovation, and more dollars moving from research and development to legal costs.

### The Problem: Science by Jury

The U.S. Supreme Court recognized the importance of evaluating expert witnesses prior to their arrival in front of the jury. In 1993, they came out with a decision charging judges with gate-keeping responsibility (*Daubert v. Merrell Dow Pharmaceuticals*). Judges on the federal level have since held pretrial hearings, termed *Daubert* hearings, to ensure that expert testimony is based on accepted methodology and that the experts providing the testimony are truly experts in their fields. Some states have embraced this standard, but others have yet to do so.

The Council developed the *Reliability in Expert Testimony Standards Act* to help states align themselves with the fairer federal standard and to keep junk science from bringing about poor verdicts in state courts.

### The Solution: Reliable Expert Witness Evaluation

The legislation requires courts to hold the pretrial hearings used on the federal level to ascertain the reliability of an expert, and it provides courts with a nonexclusive list of factors to consider in determining reliability. Experts must show sufficient qualifications and those qualifications must directly relate to the subject matter to be covered. For example, a doctor may not testify on any area of medicine; testimony should relate to the area of expertise. Further, any opinions provided by the expert must be supported by accepted scientific methodologies, and the testimony must uphold a logical relationship between the data, the events of the case, and the conclusion given by the expert.

The legislation also allows for thorough review of a court's decision to admit expert testimony. Such a precaution is necessary to ensure experts are adequately vetted prior to appearance in front of the jury, the point after which testimony may already begin to have an impact on the outcome of a case.

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## Talking Points

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***Keeps junk science cases from being brought in state courts.*** With pre-trial hearings for the admission of expert witnesses, judges will be able to screen out those witnesses that may encourage decisions unsupported by accepted science.

***Reduces excessive litigation.*** Attorneys encouraged by relaxed expert witness standards may bring unmerited cases, but those faced with the stronger standards enclosed in the model legislation will be encouraged to bring only those cases with unequivocal viability.

***Discourages forum shopping.*** If state rules for the admission of expert testimony are at least as strong as those on the federal level, attorneys will be unable to move cases based on weak evidence to state courts with more lax standards.

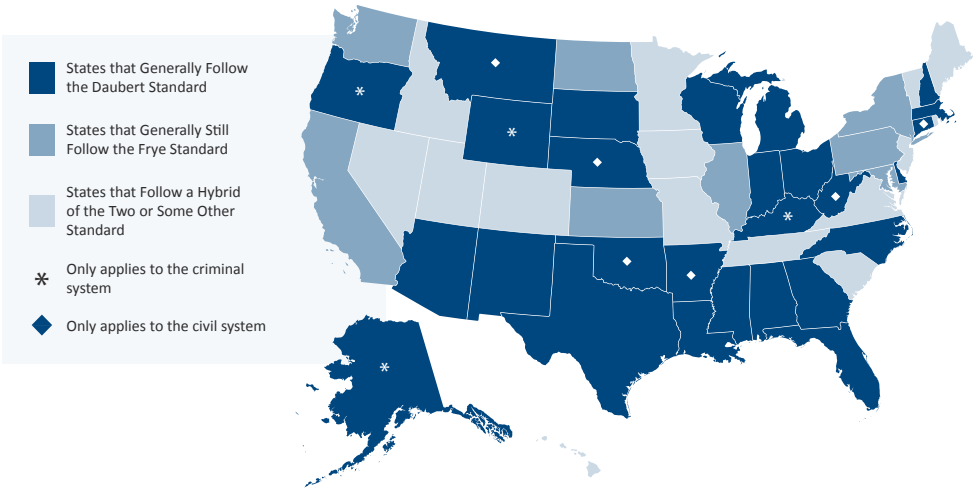
***“Expert witness standards shouldn’t be so strong as to keep out innovative science.”*** The Council’s research finds that the court room is not the appropriate place to test novel science, and judges and jurors aren’t the scientific experts able to do so. As legal decisions can have lasting and serious impacts on industry-wide regulation, it is imperative that they are supported by sound and proven scientific findings.

Sticking Points  
and Questions  
from the  
Opposition

Some states may currently rely on the *Frye* standard, the predecessor to the *Daubert* standard. These states may benefit by moving to the *Daubert* standard and embracing a portion of the Council’s model bill. For those states adhering to the *Daubert* standard, the Council’s model has additional reforms to improve state expert testimony laws.

Steps in the  
Right Direction

Expert Witness Review Standards by State





## Class Action Reform

### Keeping the Class Action Mechanism on Point

#### The Problem: Class Actions for the Sake of Influence

Class action lawsuits were originally created to group together claimants whose cases have clear similarities—perhaps with injuries caused by the same defendant, from the same event, or using the same evidence—in an effort to streamline justice and allow particularly those with small claims to share litigation costs. However, in recent years, class actions have been used to do much more.

Most adults at some point in their lives have been party to—whether knowingly or unknowingly—a class action lawsuit. Attorneys will find one plaintiff with a case against a deep-pocketed defendant and will pull together a class action lawsuit with an often not-present class of hundreds, thousands, or hundreds of thousands of victims. These victims may never have asked to bring a lawsuit but are party to one, and they may stand to recover a minimal award, perhaps merely coupons, while the attorneys stand to recover millions in legal fees.

Class action cases have also been a tool for “regulation through litigation,” the use of the legal system to coerce industries to regulate themselves for fear of litigation. Class actions, as mass conglomerates of cases and their liability risks, have the potency of the many cases they represent combined. Any verdict coming down on a class action will have more overarching affect on liability for a company than a single case. And the class action will be much more expensive to litigate, providing a powerful incentive for companies to settle sometimes despite facts to their advantage. Thus, class actions should be carefully considered before certification. Such strength needs to be checked.

#### The Solution: Legislate Against Abuse

The Council developed the *Class Actions Improvements Act* to reign in the abuse of the class action mechanism and to encourage class actions to serve their proper function. The model focuses on five reforms that

will go a long way toward keeping class actions from being overused and abused.

Prior to a class action being debated and decided in court, the judges must first agree to certify a class action. Under the Council's model, the conditions under which a class can be certified are strengthened. In a class action suit a jury simultaneously provides a single answer to respond to the many claims of the combined cases. The rules governing certification should reflect the difficulty this requirement imposes on juries. Rather than allow classes of cases with mere similarities to move forward as class actions, the model would ensure that only appropriate cases be decided en masse where there isn't a need to hear hundreds of varying facts and circumstances.

Additionally, the legislation would allow for the review of a class certification prior to moving to the next stage of litigation. The certification of a class action represents more than just access to the courts; it empowers the plaintiffs' attorneys and can move defendants to settle as the risk of losing hundreds or thousands of lawsuits is much more concerning than the risk of losing a single case. The certification of a class action, therefore, is a meaningful stepping stone and should only be done when appropriate.

The Council's model also limits class participants to residents of the state in order to both discourage attorneys from cherry picking the state with the friendliest laws for the class action filing and to ensure that state legal systems are serving state taxpayers. See the section on Venue Reform for more information on this.

Furthermore, the model bill creates "maturity" requirements for the filing of class actions. This reflects the need for there to be a legitimate class of injured individuals for a class action to be merited. Under the bill, classes would not be certifiable until enough individual claims have come forward to justify a class lawsuit. The last major provision of the model would encourage courts to consider whether administrative remedies are already in place to render justice for potential class members before certifying a possibly unnecessary class action.

Talking Points

***Reigns in the abuse of the class action mechanism.*** By codifying prerequisites for bringing a class action claim and allowing for screening in the form of appellate review of class certification, fewer abusive class action cases and settlements will be allowed to move forward.

***Encourages class actions to serve their proper function.*** By providing requirements for the certification of class actions and adding additional screening mechanisms like the maturity requirement, class actions will be less likely to be abused as instigators of regulatory change and more likely to be used for the original purpose of expediting justice for similar claims.

***Deters the use of class actions where individual claims are appropriate.*** Class actions hold more force against defendants than do individual lawsuits, so it shouldn't be surprising that attorneys looking for the highest possible recovery may seek class action certification where individual claims may suffice. The model codifies rules with the awareness that the class action mechanism was developed to foster speedy and less costly justice, not to boost bargaining power in settlement discussions.

Sticking Points  
and Questions  
from the  
Opposition

***“Class actions give voice and legal assistance to the masses who might not otherwise be able to participate in the legal system.”*** Under the Council's model, legitimate class action cases still move forward and serve cost-sharing purposes. What is less likely under the bill is the allowance of class action cases with few recorded injuries that may be more appropriate as individual cases.







## Consumer Protection Statute Reform

### Promoting Fairness in Consumer Protection and Business Practices

#### The Problem: Crippling Fair Businesses Under Bloated Consumer Protection Acts

**S**tate consumer protection acts (sometimes called Deceptive Trade Practices Acts or Consumer Fraud statutes) are intended to, as their name implies, protect consumers from businesses taking advantage of them. Such a goal is fair and important. However, many state consumer protection acts go beyond their intended use. With few proof requirements and lenient standards for claims, consumer protection acts are being used to punish law-abiding businesses. The problem with some state consumer protection acts can be most closely likened to a metal detector with too strong a signal that picks up not just weapons and dangerous items but earrings and metal buttons. In the case of the well known \$54 million lawsuit against Washington, D.C. dry-cleaners Jin and Soo Chung, they faced severe financial strain because of an aberrant consumer, a standard satisfaction guaranteed sign, and a faulty consumer protection act.

The problems with state consumer protection acts arise out of the history of their development. The Federal Trade Commission was established in 1914 to handle consumer protection claims on the federal level. And states soon followed with their own versions. Over the years, however, states have enabled private rights of action (individual lawsuits) under state consumer protection acts, something the FTC has repeatedly opted not to do. When the states created these new rights for the individual to sue, they often failed to include the proof requirements necessary to avoid abusive claims. Tort claims lacking the proof and reliance standards required in the tort system could be tried under the guise of consumer protection claims. What is more, many of these statutes provide for automatic attorneys fees. Kansas' consumer protection act has even seen medical malpractice cases brought under its code.

Reforming state consumer protection acts is perhaps one of the more

important things state legislators can do to protect small businesses from the feared frivolous lawsuit.

The Council developed the *Private Enforcement of Consumer Protection Statutes Act* to help state legislators tailor their consumer protection acts to reflect sound public policy and protect them from abusive use. In order to keep weak tort claims from being repurposed into consumer protection claims and to keep businesses from becoming victims of unwarranted consumer protection claims, the model legislation institutes requirements of proof and reliance. It uses the same requirements that would be needed to prove fraud under the tort system: proof of a false statement, an intent to deceive, reliance on the false statement, and, of course, actual harm.

The Council model also limits recovery to out-of-pocket losses to avoid awards that far outstretch the consumer protection act violation. The model bill would, however, allow for additional defined damages against willful, egregious, or repeat violations to serve as a deterrent to problematic behavior. The model bill specifically does not offer automatic attorneys fees as this can strongly encourage tort claims to be renamed consumer protection claims and weak claims to be brought by ambitious attorneys, but it does allow the discretion of the judge to award attorneys fees to either the plaintiff or the defendant. And lastly, the bill has language to avoid overlap in regulation and liability.

## The Solution: Proper Proof in Consumer Protection Claims

***Ensures that consumer protection claims protect consumers without hurting businesses.*** By requiring under consumer protection claims the widely accepted standards of proof and reliance adhered to in fraud claims under the tort system, the Council model bill safeguards against the abuse of the consumer protection act that can drag on the local economy. Consumers with legitimate claims are still able to recover appropriately under the model language.

## Talking Points

***Keeps merit-light tort claims from being repurposed as consumer protection claims.*** By instituting those same standards required to bring tort

claims, attorneys will be less likely to repackage a tort claim as a consumer protection claim. And without automatic attorneys’ fees, there will be even less incentive to move lawsuits from their appropriate venues.

***Avoids excessive consumer protection awards for small infractions.***  
Awards for consumer protection claimants under the language in the model bill will give full compensation for injuries but will stop short of over-penalizing businesses for minor offenses.

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Sticking Points  
and Questions  
from the  
Opposition

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***“Consumer protection acts are intentionally vague to ensure all viable claims can be rendered justice.”*** Recall the example of a metal detector turned up too high. There is a fine line between legislation that would provide justice to injured consumers and legislation that can wreak havoc on state economies and local businesses. The Council model bill codifies that fine line.

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Steps in the  
Right Direction

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Efforts to improve consumer protection acts are largely state-specific. The nuances of each state statute are different and so require different fixes. State legislators will want to keep in mind the goal of a consumer protection act that punishes wrongdoers and protects fair business practices. For more information on the best policy to reform your state consumer protection statute, contact the Council.

## Jury Reform



### Protecting the Representative Jury

**S**erving jury duty should be considered an important civic duty. However, the difficulties associated with serving this duty too often render it an annoyance. Individuals may lose salary, hourly wages and productivity. Businesses, particularly small businesses, may feel the loss in productivity when employees are out to serve jury duty.

These difficulties have discouraged potential jurors from serving and have made jury pools less representative of the whole. For example, if small business owners are allowed to opt out of jury service, the perspective of small business owners will be underrepresented. If teachers are allowed to opt out of jury service, the same could be said for the perspective of teachers.

**The Problem:**  
Insufficiently  
Diversified and  
Overly Peeved

The Council has created the *Jury Patriotism Act* to remove some of the barriers to jury service and to promote diversity in jury pools. Included in the model bill are multiple reforms with these goals. The bill removes exceptions for jury service. Over the years, multiple professions and groups of individuals have been exempted from service in various states. For example, teachers, nurses, doctors, and state legislators are all groups that have been exempted from jury service in some states. The bill would restore jury service requirements for these individuals. The legislation also instills a one-day, one-trial system. Rather than require prospective jurors to spend numerous days in court waiting to be assigned a trial, this system would give jurors one day at the courthouse to be assigned to a trial. If at the end of that one day, no trial has been assigned, the juror may go home having fulfilled jury duty. The bill also creates a lengthy trial fund for jurors chosen to serve on long cases to reimburse the individual for lost wages. This fund adds a minimal fee to existing filing fees and enables jurors who may have had financial

**The Solution:**  
Lessen the  
Burdens of Jury  
Service

difficulty serving 10- and 20-day trials to do so. Under the model bill, jurors are also allowed to reschedule service once for any reason, and small businesses can avoid productivity strain by keeping more than one employee from serving jury duty at any one time.

Talking Points

***Provides more flexibility in jury service.*** By allowing individuals one postponement of jury service and instituting a one-day, one-trial system to minimize unused juror time, the model bill would alleviate inconvenience and boost flexibility in a system often perceived as rigid and wasteful.

***Protects rights of employment.*** The model bill would keep jurors from being penalized by their employers for serving jury duty, removing the barrier of fear of retribution for work absence.

***Reduces the burden of jury service on small businesses.*** In that the model bill allows small businesses additional postponements in the case of more than one employee being called for jury service at one time, the legislation lessens the burden on businesses with few employees. It would maximize jury service while minimizing any obstacles to productivity.

***Minimizes risk of serving on a lengthy trial.*** By instituting the lengthy trial fund to reimburse jurors for lost wages, the model bill would temper the financial burdens associated with jury service.

***Increases the representativeness of the jury pool.*** By removing exceptions to jury service and minimizing the financial burdens associated with jury service, more citizens with diverse backgrounds will be required to serve their civic duty. And by strengthening the penalties for avoiding jury service, fewer potential jurors will be able to avoid the court room. Juries will better reflect the communities around them and the role of the jury as a means for the citizenry to place a check on the judiciary will be preserved. Litigators frequently observe that if juries included a fair

share of business owners, professionals, and working Americans, they would be more likely to reach well-reasoned decisions and there might be fewer excessive and bizarre verdicts.

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***“The additional cost of the lengthy trial fund is an unnecessary barrier to filing a case.”*** In practice, the additional cost of removing financial barriers to service is minimal. In Arizona upon enactment, the lengthy trial fund, which is very similar to if not more generous than the Council’s model, added a mere \$15 to the filing fee. This is a reasonable jury-usage fee. Moreover, the fund has actually raised excess funds so that reimbursement rates have been raised three times since the legislation took effect.

Because the model bill removes superfluous exceptions to serving jury duty, there may be discussion over the maintenance of specific exceptions. This is a conversation that will vary by state, but minimizing these exceptions is key to encouraging diverse jury pools.

Some court administrators may be wary of implementing this sort of reform. The Arizona court administration has applauded the reform and has considered the benefits of the reform to grossly outweigh any implementation difficulties.

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## Sticking Points and Questions from the Opposition

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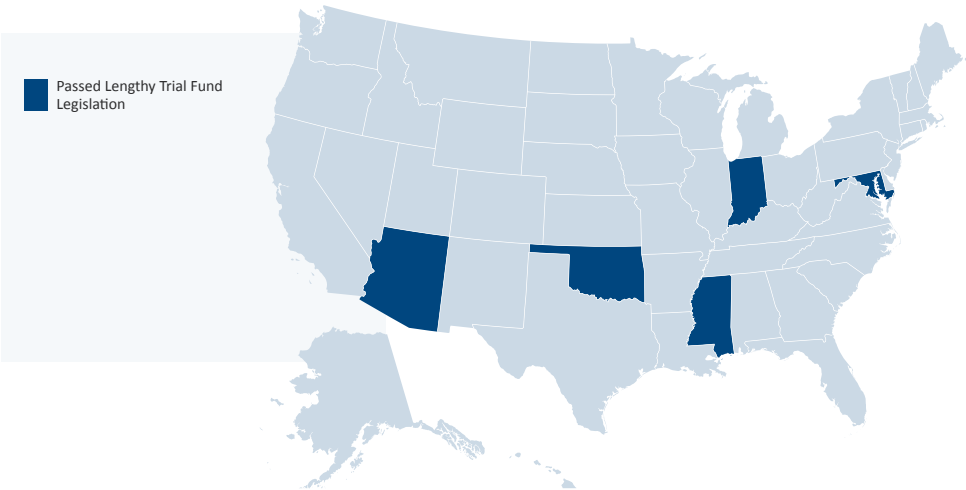
As the Council’s model bill is comprised of numerous reforms, one aspect of the model bill can be tackled without addressing some of the others. For example, removing excessive exemptions to jury service will go a long way toward boosting jury diversity. And the one-day, one-trial system will temper the burdens felt by potential jurors. The small business allowance is another way to ease burdens while encouraging participation.

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## Steps in the Right Direction

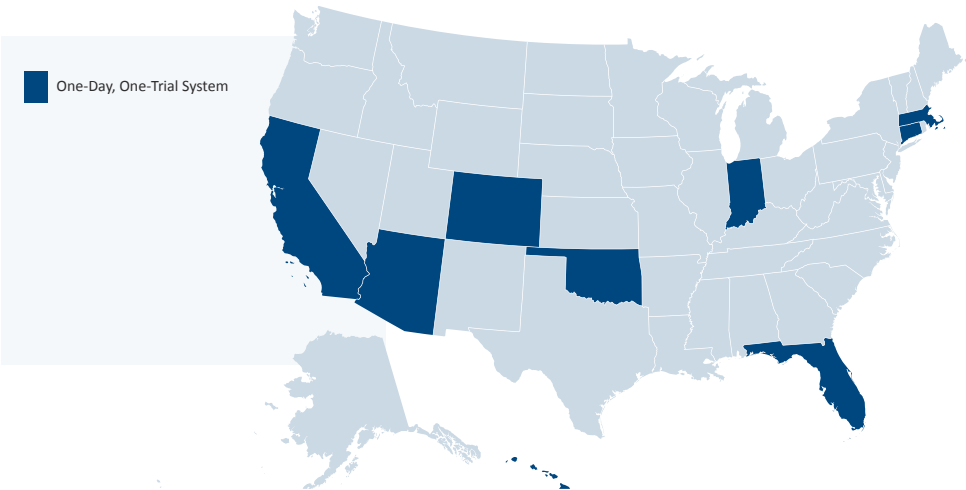
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States that Have Passed the Lengthy Trial Fund



States that Have a One-Day, One-Trial System

Over half the states give local courts the discretion on this issue. The below states are those that have implemented the One-Day, One-Trial System on a state-wide basis.





## Private Attorney Contract Sunshine



### Transparency in the State's Hiring of Private Attorneys

**T**he last 15 years or so have seen a significant increase in the role of the attorney general and in the use of outside attorneys hired on contingency fee by state attorneys general. In 1999, settlements were reached by private attorneys who had contracted with many state attorney general offices in litigation on behalf of the state against tobacco companies. This became the textbook example of “regulation through litigation,” a term often used to describe the practice of using litigation to bypass the legislative process to regulate industries. In bringing litigation on behalf of the state, the far-reaching prosecutorial power of the AG office is combined with the profit-motivated rather than taxpayer-motivated incentives of a private attorney to create the perfect storm of litigation.

Of particular concern is the lack of transparency in the hiring of these outside attorneys, leading citizens to question whether these deals are made in the best interest of the state or in the best interest of the politician and private-attorney pocket. In early 2010, the *Wall Street Journal* printed an article investigating the potential for quid pro quo between the AGs who often hire the private attorneys to bring state litigation and the private attorneys who often contribute significantly to AG campaigns. This is a troubling connection indeed, whether or not the quid pro quo confirmedly exists. An appearance of impropriety risks confidence in the office of the attorney general and in the legal system. The possibility of quid pro quo in state litigation exists in large part because of the lack of hiring practices instilling transparency and accountability in such situations.

The Problem:  
Profits or  
Taxpayer  
Interests?

The Solution:  
Shed Light on the  
Practice

Some states have ruled the hiring of outside counsel on contingency fee to be either unconstitutional or have placed restrictions on its use. When the government hires outside counsel on contingency fee, there is a recognized risk of impropriety rising out of the blurred incentives of the contracted private litigators who are motivated by fees earned by a win but are charged with bringing litigation in the best interest of the citizenry, win or lose.

The Council has a model bill that would shed light on the hiring of outside counsel on contingency fee in an effort to keep these contracts above ground and open to the legislature and the taxpayer. The model *Private Attorney Retention Sunshine Act (PARSA)* would require transparent competitive bidding and legislative oversight when outside counsel are to be hired on contingency fee. The model legislation also dictates a maximum calculated hourly fee to keep the state budget from being too heftily stripped of funds. In essence, following litigation the contracted attorney will calculate an “hourly rate” by dividing the awarded contingency fee by the hours spent on the case. The contingency fee would be reduced to reflect no more than \$1000 an hour.

Recently, many states have implemented reforms based on legislation that passed in Florida in 2010. With the same goals in mind, this legislation creates a sliding scale to cap the recoverable attorneys’ fees for these state-brought cases, requires the attorney general to make a written justification of the need to hire outside counsel, and makes sure that all contracts between private attorneys and the state are disclosed and made available to the public. This legislation can be just as effective as the *Private Attorney Retention Sunshine Act*.

Talking Points

***Removes at least the appearance of impropriety.*** If the hiring of contracted attorneys continues to occur behind closed doors away from the public’s eye, there will be at the very least an appearance of impropriety. Sunshine legislation would boost citizen confidence in the Attorney General office by ensuring that contract deals occur in the open where media and citizens can serve a watchdog role.

***Applies similar standards to the hiring of contract attorneys as applied to hiring other contract services.*** Most states require a public bidding process if contract services are to be hired by the state. The hiring of attorneys, however, has eluded this precaution in many states. *PARSA* merely asks contracts with attorneys to go through the same scrutiny required of other government contracts to encourage the best deal for the state.

***Minimizes excessive payments to outside counsel.*** By creating a ceiling for the deduced “hourly rate,” the government will pay those hired on contingency fee ample payment for legal services while maximizing funds returned to the state for the benefit of taxpayers rather than individual attorneys.

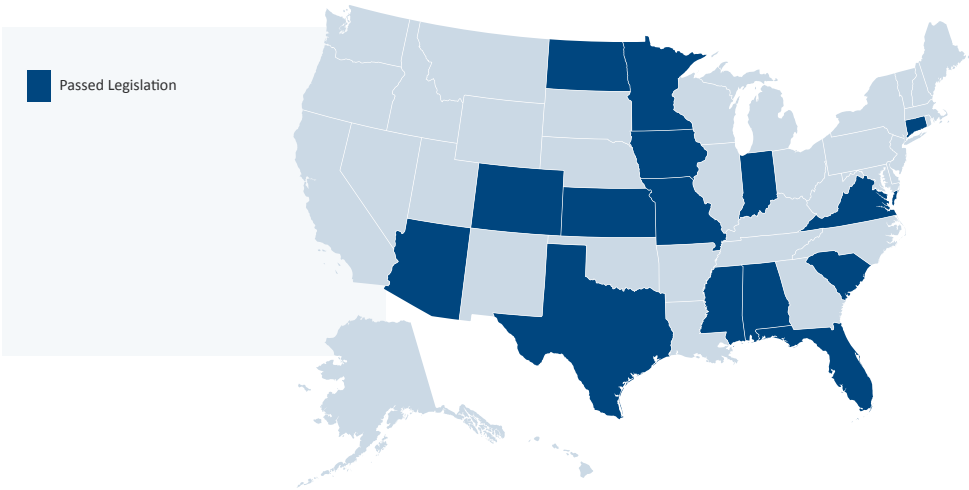
***“Attorneys general offices need flexibility to hire the right contract attorneys.”*** Rather than removing any ability to hire the best attorney, such sunshine legislation merely brings the hiring process under public light. With these provisions in place, attorneys general would be further encouraged to use the most qualified attorney.

Sticking Points  
and Questions  
from the  
Opposition

The most important aspect of this legislation is the transparency it installs in the process of hiring outside attorneys. Thus, legislation that uses alternative methods to boost transparency and accountability may also serve a beneficial purpose. Florida’s 2010 *Transparency in Private Attorney Contracts Act* is an effective alternative.

Steps in the  
Right Direction

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