MAY / JUNE 2013

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Chairman Profile:

The Honorable Lance Kinzer - Kansas (HD-30)

Chairman of the Council Task Force on Civil Justice

The American Legislative Exchange Council is pleased to announce Kansas Representative Lance Kinzer (HD-30) as the incoming chair of the Council Task Force on Civil Justice. Rep. Kinzer, the current Chair of the Kansas House Judiciary Committee, will bring to the Task Force over nine years of experience in the Kansas Legislature. Rep. Kinzer served four years on active duty in the U.S. Army JAG Corps and is currently a partner in the law firm Schlagel, Gordon & Kinzer, LLC in Olathe, KS. The Task Force on Civil Justice will benefit greatly from Rep. Kinzer's many years of experience, expertise and commitment to free market principles.

Chairman Profile:

The Honorable Chris Shank - Maryland (SD-2)

Chairman of the Justice Performance Project

The American Legislative Exchange Council is pleased to announce Senator Chris Shank of Maryland as the incoming chair of the Exchange Council's Justice Performance Project. After serving in the Maryland House of Delegates for 12 years, Senator Shank was elected to the Maryland Senate in the 2010 elections. Among his many leadership roles, he will bring six years of experience on the Judiciary Committee as well as two years of experience on the Judicial Proceedings Committee to the Justice Performance Project. Senator Shank's leadership on criminal justice issues in Maryland will provide valuable insights and knowledge to members of the Justice Performance Project. Last session, he helped spearhead reforms that concentrate resources on higher-risk offenders through earned compliance credits. In 2011, Senator Shank sponsored legislation that would provide swift, certain and proportionate sanctions to individuals who violate the terms of their supervision. These reforms strengthen probation and parole and allow law enforcement to focus on individuals most likely to reoffend. The Exchange Council has already benefited from Senator Shank's role as a member of the Task Force on Civil Justice and his hands-on experience with criminal justice reform will be a great resource for Project members as they discuss limited government, free-market solutions for our states' criminal justice systems.

Chairman Profile:

The Honorable Judson Hill - Georgia (SD-32)

Chairman of the Council Task Force on Health and Human Services

The American Legislative Exchange Council is pleased to announce the appointment of Georgia Senator Judson Hill (SD-32) as chairman of the Council Task Force on Health and Human Services. A five-term State Senator, Hill has served as the chair of the Georgia Finance Committee and as a member of the Government Oversight and Judiciary Committees. As a member of the Georgia Health and Human Services Committee, he authored and successfully passed the nation's first patient-centered, prevention-focused, free market reform legislation, making health care and insurance more affordable for Georgia's working families. Having previously served as an Executive Committee member on the Task Force, Senator Hill's experience within the Council will complement his extensive policy and legal expertise to the continued benefit of the membership. Senator Hill served in the Reagan Administration as an Assistant United States Attorney for the Northern District of Georgia and also in Washington, D.C. as a White House appointee at the United States Department of State/Agency for International Development. He is a graduate of Emory University and the Walter F. George School of Law at Mercer University.

Let's All Get Along...With Lawsuit Reform

BY AMY KJOSE ANDERSON AND JOHN EICK

The current political climate has left many people tired of partisanship and gridlock. For those looking for sound policy with broad appeal, the Exchange Council Task Force on Civil Justice offers model policy for lawsuit abuse reforms.

A new national survey conducted by Luce Research and sponsored by the American Tort Reform Association and the Sick of Lawsuits campaign reveals there is wide-ranging appeal to curb lawsuit abuse.

The Luce poll suggests that 89 percent of Americans think lawsuit abuse is a problem and 83 percent believe the liability lawsuit system should be improved. The poll found this agreement spread across the political spectrum.

An overwhelming majority of American voters (90 percent) believe in the values and goals embodied by the Task Force on Civil Justice; namely, that lawsuits and legal settlements should seek to compensate people for their actual losses rather than provide unmerited financial gain.

The task force's lawsuit reform resolutions are purposed to diminish the negative impact of frivolous litigation, minimize the financial burden shouldered by the business economy to defend against such lawsuits, treat plaintiffs and defendants fairly, and encourage proper use of the legal system.

Is every lawsuit ridiculous? No. Are a majority of lawsuits unfounded? No. However, those unmerited or questionable lawsuits create problems in the system and impose crippling insurance and legal defense fees on small businesses. The Exchange Council takes particular care to craft model policy designed to target problematic areas of litigation while safeguarding the legal system as a deliverer of justice and a functioning check on the free market system.

> Most Americans agree that lawsuit abuse poses a serious threat to business productivity and competiveness.

Imagine your company could be sued not because of a defect in the product you sell but because the customer used your product for an unintended purpose, causing injury. Such lawsuits and damages awarded result in product warning labels such as: "do not use while sleeping" on a hair dryer, "remove child before folding" on a baby stroller, or "do not eat toner" on a printer cartridge.

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PLAYING WITH FIRE:

Manufacturer's Fate Shows Reforms are Needed to Save Industry and Jobs

BY AMANDA EMERSON, PORTABLE FUEL CONTAINER MANUFACTURERS ASSOCIATION

The American Dream does not mean everyone is guaranteed success. It means America provides vast opportunities for success to those who work hard.

Blitz U.S.A., a company in existence since WWII, was an example of the American dream. From its home base in the small town of Miami, Oklahoma, this company once commanded 75 percent of the U.S. market for a niche, commoditized product in constant demand.

Today, the once proud company is history – the latest American manufacturer to shut its doors.

Blitz was one of five companies in the U.S. and Canada that produced the familiar red plastic gas cans found in nearly every American household. First introduced in the early 1980s, the product was a significant safety breakthrough. For the first time, consumers had access to non-metallic containers designed exclusively for the transport and storage of gasoline that were both safe and affordable.

Over the years, safety standards and regulations developed by the American Society for Testing and Materials and the Environmental Protection Agency have furthered safety and environmental improvements, including child-resistant and spill-proof spouts. Gas can manufacturers have voluntarily embraced all proven means of safety and performance improvements. Unfortunately, the primary causes of accidents involving gas cans are individuals who choose to misuse gasoline to start or accelerate a fire.

Around the turn of the century, Blitz U.S.A. became the target of trial attorneys who theorized that when gasoline is exposed to flame, it's not the gasoline which causes injury, but the gas can. Plaintiffs allege consumer gas cans are defective because they do not contain a device called a metallic "flame arrestor," a device designed to prevent flame progression. Blitz took the brunt of the litigation, having the industry's largest market share.

What began as a trickle, averaging between three to seven lawsuits each year over 10 years, erupted into an avalanche of 26 lawsuits filed in the wake of one large settlement in 2011 made by Blitz's insurer. Shortly after the time of bankruptcy filing, Blitz had 42 open

cases. Other manufacturers experienced similar increases in litigation and continue to be at risk of a similar fate.

With 15-20 million cans sold in the U.S. annually, an estimated 600 million instances of gas can usage occur each year with very few resulting in accident or injury.

Data from the National Electronic Injury Surveillance System shows the number of accidents involving gas cans has steadily declined. It stands in stark contrast to the skyrocketing number of lawsuits and settlements by liability carriers that brought a once-viable industry to the brink of collapse.

While many businesses balk at regulation, the members of the Portable Fuel Container Manufacturers Association (PFCMA) actively seek regulatory mandates that will stabilize the industry and allow them to better defend themselves in cases involving product misuse.

It is impossible to completely remove all risk for those who choose to put themselves and others in danger. If the solution was as simple as plaintiffs allege, the manufacturers of consumer gas cans would have done so long ago. It would be irresponsible to adopt design changes to potentially reduce risks surrounding product misuse without first concluding that the proposed changes do not have unintended consequences for the majority of consumers who use the product responsibly. At the end of the day, there is no device that will make it safe to mix gasoline and fire.

The Consumer Product Safety Commission (CPSC) has twice rejected requests to mandate standards for consumer gas cans. In its original determination, CPSC stated that accident information did not indicate "that the design or performance of gas cans presents an unreasonable risk of injury," and it was the Commission's belief that "the majority of accidents occur because of the way gasoline and containers are used around ignition sources." Only the trial bar deems the product itself as unsafe. As a result, the manufacturers remain trapped in a vicious cycle of litigation.

At the Federal level, PFCMA is working with legislators to mandate relevant voluntary standards. A bill introduced by the Honorable Tom Cole of Oklahoma (CD-4) amending the 2008 Children's Gasoline Burn Prevention Act would mandate existing voluntary standards, in effect gaining CPSC oversight on product design. There is also opportunity for state statutes providing limited immunity related to product misuse.

In Oklahoma, PFCMA members have supported the Rational Product Use Act, an American Legislative Exchange Council model policy that would restrict the ability of consumers to recover in the event of misuse. Additionally, the act clarifies the law to assure that the reasonableness of the consumer's act is taken into account. The mere fact that a misuse might, in some way, be "foreseeable" is insufficient for imposing liability when the misuse was unreasonable and, in the case of gas cans, quite literally like pouring gasoline on a fire.

It is too late to save Blitz. Without policy intervention to stabilize the business environment, the remaining manufacturers are at risk to meet a similar fate.

AMANDA EMERSON is a Government Affairs Specialist at the Portable Fuel Container Manufactuers Association.

Losing Good Legislation to the Quagmire of Politics

BY MIKE SENEY, STATE CHAMBER OF OKLAHOMA

Senate Bill (SB) 754, based on the Exchange Council's model "Rational Use of a Product Act," passed the Oklahoma Senate by a vote of 33-9 and was sent to the House of Representatives as a "live round." In other words, if the House passed it with no amendments it would go straight to the Governor for her signature.

No problem, right? Wrong!

At the same time, the State Chamber of Oklahoma was pushing for a bill to regulate lawsuit lending, a bill to provide for personal injury bankruptcy trust transparency (which also included asbestos cases), and a complete restructuring of Oklahoma's workers' compensation court-based system (replacing it with an administrative system).

Due to time constraints and other political gamesmanship (i.e., strong pushback from the trial bar), the House decided not to hear SB 754. SB 754 will hopefully be the first piece of legislation heard next February in the House Judiciary Committee…and I believe it will pass.

Why? Because SB 754 makes good sense. The State Chamber of Oklahoma, in supporting SB 754, conducted a poll of likely voters in late February.

Here is the question and respondent results:

"Within the last year, an Oklahoma manufacturer of gas cans closed its business because it could not afford the lawsuits that had been filed by people who were injured when they poured gasoline on fires, even though the cans had a label on them warning against doing so. Do you think consumers who misuse products should or should not be able to sue the companies that make that product?"

SHOULD BE ABLE TO SUE - 7%
SHOULD NOT BE ABLE TO SUE - 88%
UNDECIDED (VOL.) - 5%

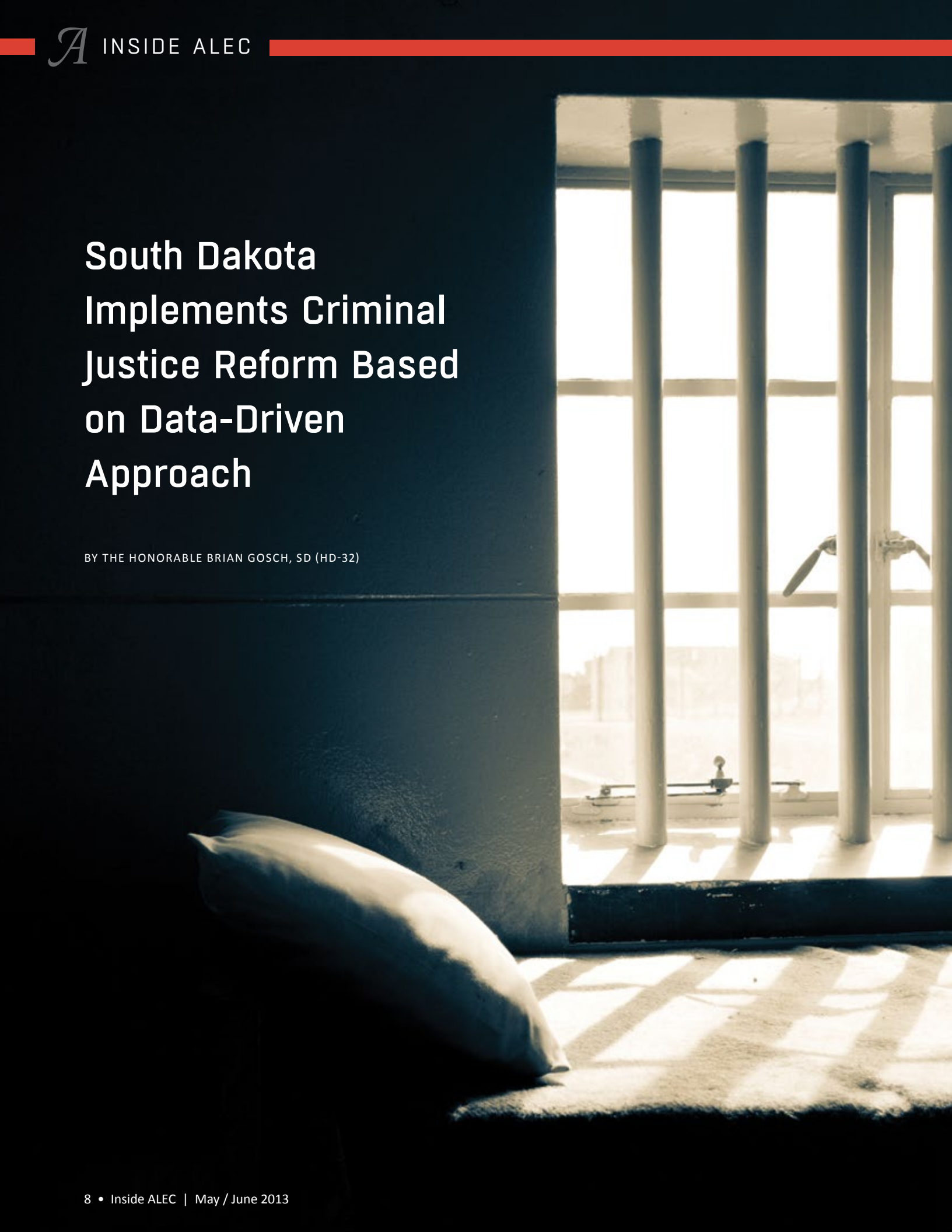
It's obvious that the common citizen has common sense. In this case, "common sense" was trumped by politics. Unfortunately, it sometimes also stands in the way of returning a sense of personal responsibility to our society.

We will be back next year…and we will pass SB 754.

Mike Seney is the Senior Vice President of Policy Analysis & Strategic Planning at the State Chamber of Oklahoma.

South Dakota Implements Criminal Justice Reform Based on Data-Driven Approach

BY THE HONORABLE BRIAN GOSCH, SD (HD-32)



Businesses are increasingly using data to better meet customer needs. State policymakers should do the same and leverage available data to help craft public policies that most efficiently allocate taxpayer dollars.

South Dakota provides an example of data-driven policy reforms that reduce recidivism—the rate at which offenders return to prison. The state's reforms are likely to be successful because decisions on what would work best for the criminal justice system were not based on emotion, instinct or whim. Rather, lawmakers based policy changes on data that revealed what was actually driving the prison population in the state.

Over the past 20 years, South Dakota's corrections spending tripled as its prison population has swelled from a few hundred inmates in the 1970s to over 3,600 today.[1] The increase in spending has not produced a commensurate return in public safety; nearly 45 percent of offenders in the state return to prison within three years of their release.[2] Most importantly, South Dakota's crime rate has not kept pace with the national crime rate decline.[3]

The state's reforms are likely to be successful because decisions on what would work best for the criminal justice system were not based on emotion, instinct or whim.

In early spring 2012, state leaders gathered input from a variety of stakeholders involved in all parts of the criminal justice system. Three dozen meetings with over 400 interested participants led to the formation of the South Dakota Criminal Justice Initiative Working Group. Throughout the remainder of 2012, the Working Group conducted an exhaustive review of probation, parole and incarceration data and produced a set of policy recommendations for the state.

One of the Working Group's major findings was that the number of prison beds used for parole violators returning to prison had nearly tripled between 2000 and 2012.[4] Additionally, 40 percent of probation violators were incarcerated due to a technical or minor violation of the terms of their supervision.

These findings allowed the Working Group to focus policy solutions on the specific groups of offenders who were driving up the prison population. The resulting reform package included several evidence-based solutions that have been proven to reduce recidivism in other states. South Dakota implemented earned compliance credits that allow low-risk offenders to earn their way off supervision by adhering to specific goals and guidelines. This provides powerful incentives for offenders to change their behavior and concentrates resources on higher-risk offenders by allowing law enforcement to focus on the individuals most likely to reoffend or to be a danger to the community.

In addition, South Dakota enabled probation and parole officers to employ swift, certain and proportionate responses to violations of the conditions of their supervision. The immediate and inevitable response helps prevent or erase the mentality that offenders can break the rules without consequences. Swift and certain sanctions can provide appropriate punishment and save taxpayer dollars by helping prevent long and costly prison stays for minor violations. Positive reinforcements such as good time credits or decreased reporting requirements can incentivize offenders to stay on track.

Combined with other aspects of reform, these responses can have an enormous effect on decreasing the rate of return to jail or prison. In South Dakota, reforms are estimated to save approximately $200 million through averted prison construction and operating expenses.[5]

A data-driven approach allowed South Dakota to go beyond rhetoric and examine what was really happening with South Dakota's correctional population. This will help the state better protect its communities, contain its corrections spending and hold both criminal offenders and reentry programs more accountable for results.

Increasing Number Of Prison Beds Are Being Used For Offenders Entering Through Parole Revocations

Prison Population By Admission Type:		
JULY 2000 2558 total offenders	Parole Violators	18%
	New Commitments	79%
	Other	3%
JULY 2010 3611 offenders	Parole Violators	25%
	New Commitments	70%
	Other	5%

Source: http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/CJI_report_Nov_2012.pdf

Crime Rate Decline In SD Has Not Kept Pace With The Average Rate Of Decline

	Change in Overall Crime Rate	Change in Imprisonment Rate
Nationwide	-19%	1.6%
S. Dakota	-9%	18%

Source: Department of Justice, Bureau of Justice Statistics, Prisoner Series. Federal Bureau of Investigation, Uniform Crime Reports.

1 South Dakota Criminal Justice Initiative, Final Report. November 2012.
2 *Ibid.*
3 *Ibid.*
4 *Ibid.*
5 *Ibid.*

SPEAKER BRIAN GOSCH served on the South Dakota Criminal Justice Initiative Work Group and is a member of the Exchange Council's Task Force on Civil Justice. Rep. Gosch represents South Dakota's 32nd House district.

Five Solutions for Addressing Environmental Overcriminalization

BY VIKRANT P. REDDY AND MARC A. LEVIN

In recent years, advocates from across the political spectrum have increasingly criticized overcriminalization, the tendency of government to use criminal law to regulate behavior that is not traditionally criminal.

In January, we authored a report for the Texas Public Policy Foundation that described the U.S. Gulf Coast as Ground Zero for state-level overcriminalization. Indeed, between Texas, Louisiana, Mississippi, Alabama and Florida nearly 1,000 laws have passed to criminalize activities involving the environment. Criminal sanctions are of course appropriately applied to an individual who intentionally contaminates another person's property. Too often, however, the activity that is governed by these myriad laws is non-blameworthy, ordinary business activity.

In Louisiana alone, more than one hundred offenses that relate to hunting, fishing and wildlife could result in imprisonment—and virtually none of these offenses carry the *mens rea* (or culpable state of mind) requirement that has been a foundation of American criminal law for centuries. In Florida, it is a first-degree misdemeanor to "transport by vessel over water both wild and aquaculture products of the same species at the same time," but it is not clear why it is necessary to ban this practice in all circumstances. In Mississippi, individuals can face up to six months in prison for hunting deer from a boat. Texas has 11 felonies related to oyster harvesting.

Overcriminalization along the Gulf Coast is inevitably a significant burden to businesses. Ordinary business activity that is vital for the health of a state—fishing, drilling, hunting, building, etc.—is curtailed. Businesses do not have clear rules under which to operate, and when they do, the rules can be unduly harsh. Ultimately, it is the business' consumers who suffer. In our report, we offered five possible policy fixes.

First and foremost, policymakers should review whether certain offenses are properly characterized as "crimes" in the first place. If not, criminal penalties for these offenses should be removed. The remaining offenses, if they are attached to criminal penalties, ought to appear in the state's penal code.

Secondly, states should strengthen their *mens rea* protections. Civil and criminal law have always been distinguished by the requirement that a criminal must have a guilty state of mind, but an increasing number of regulatory offenses disregard the *mens rea* requirement because it is inconvenient for a speedy prosecution. Similarly, some statutes require mere criminal negligence rather than intentional, knowing, or reckless conduct for culpability. Negligence is a low standard, which is more appropriate in civil cases. In the criminal justice context, mere negligence or the lack of a culpable mental state requirement leads to the punishment of accidental conduct with potentially the same consequences as if it had been knowing or intentional. The American Legislative Exchange Council has developed model policies that would apply a strong *mens rea* element to all criminal laws that are silent on this issue.

Third, states should codify the rule of lenity to environmental offenses, and not simply trust the court will apply it. The rule of lenity is a canon of statutory interpretation instructing a court to resolve ambiguities about whether conduct is criminally prohibited in favor of the defendant. The U.S. Supreme Court has explained the rule using a sports analogy: "the tie must go to the defendant." This approach to statutory interpretation is almost universally unquestioned in criminal prosecutions—except when it comes to regulatory offenses. As Timothy Lynch of the Cato Institute has written, "[n]ot only has the rule of lenity been ignored in the context of regulatory offenses, it has also been turned on its head. When an ordinary criminal statute is ambiguous, the courts give the benefit of the doubt to the accused, but when a regulatory provision is ambiguous, the benefit of the doubt is given to the prosecutor." Just as the Exchange Council has approved model policy codifying a strong *mens rea* protection, it has also approved the rule of lenity as model policy.

In Mississippi, individuals can face up to six months in prison for hunting deer from a boat. Texas has 11 felonies related to oyster harvesting.

Fourth, states should eliminate provisions that delegate to agencies the power to create criminal offenses through rulemaking. Many provisions in state and federal statutes authorize regulatory agencies to designate any violation of their rules as a criminal offense. Such provisions transfer the power to take away an individual's liberty from duly elected officials to unelected administrators. Moreover, as each day brings new agency rules and revisions of existing rules, these broad delegation provisions make it virtually impossible for businesses and individuals to keep track of what constitutes criminal conduct, undermining the fair warning principle.

Continued on page 24

The Gulf Coast may be a known hotbed for the proliferation of environmental laws, but the phenomenon of overcriminalization is not limited to one area of the country. In Oregon, Gary Harrington was sentenced to 30 days in jail and fined $1,500 for collecting rain and snow runoff on his property.

Mr. Harrington was convicted of breaking a 1925 law by having "three illegal reservoirs on his property." Authorities based their charges on the claim that Harrington violated Oregon's water use law because he diverted state water.

All water is publically owned in Oregon. Before a person can store any type of water, they must first apply for a permit. Harrington applied for and received his permits, but they were withdrawn by the state when an Oregon court ruled the city of Medford holds exclusive rights to "core sources of water" in the Big Butte Creek watershed and its tributaries. Harrington argued that he was well within the confines of the law, as there was no mention of rainwater or snow run-off. After a prolonged legal battle, Mr. Harrington reported to jail for his 30-day sentence.

Regardless of whether Harrington violated the 1925 law, regulations such as collecting rainwater on one's property should be enforced through fines and market forces rather than criminal sanctions. Mr. Harrington will now carry the stigma of a prior incarceration and increased difficulty finding employment.

Civil remedies can serve as consequences for behavior deemed undesirable by the government and achieve the government's regulatory goals yet protect individuals and businesses from expensive prosecutions and lengthy prison stays. Civil sanctions for non-criminal violations also preserve prison space for dangerous, violent or habitual offenders who pose a threat to our communities.

Barriers to Entry: State Licensing Laws Restricting Charity

BY EDWARD WALTON

Improving medical access for the poor has remained a long-standing issue of concern for state governments. The 1986 Emergency Medical Treatment and Active Labor Act instituted a requirement on hospitals that accept Medicare and Medicaid to provide emergency services to anyone in need, regardless of ability to pay. A study by the Kaiser Family Foundation found that uncompensated care costs reached $57 billion nationwide in 2008, $42 billion of which was paid for by taxpayers through federal and state governments.[1,2] These costs are largely driven by people who, unable to afford health coverage, rely on hospitals and emergency rooms for care.

While many states are considering Medicaid expansion under the Affordable Care Act as a potential solution to these challenges, creating an environment where private charities and free clinics can thrive represents an immediate, cost-free alternative. Largely run by volunteers, free clinics can offer a wide range of services, including medical, dental, pharmaceutical and behavioral care. In 2005, free clinics provided charity care to an estimated 1.8 million people, valued at roughly $1 billion.[3]

Despite the success of and demand for free clinics, many charity care organizations face operational limitations due to existing state laws prohibiting professionals licensed in other states from providing free care.

One such charity care group is Remote Area Medical (RAM), a volunteer organization specializing in temporary free clinics. RAM travels around the country providing a variety of health services to those in need, regardless of ability to pay. RAM services include dentistry, eye care, general health checkups, mammograms, and more. In the United States, over 75,000 volunteers have aided RAM's efforts, delivering $61 million in care to over 300,000 patients.

As a mobile organization, however, RAM's volunteer health care professionals face state licensure restrictions, prohibiting them from providing free care to those in need in the vast majority of states.

RAM founder, Stan Brock, described the problem in a 2009 interview:

> The greatest impediment to what we do… is the fact that for some extraordinary reason in this country, a doctor or dentist or nurse or veterinarian licensed in one state, taking essentially the same exams and having the same qualifications, is not allowed to cross state lines to provide free care… There is a huge reservoir of thousands and thousands of willing medical people willing to cross the country at their expense to provide free care for the underserved.[4]

The majority of states—save Tennessee, Illinois and Connecticut—block out-of-state healthcare professionals from providing free care within their borders, which prevent organizations like RAM from reaching their full potential. While the merits of licensure for professional practice can be debated, restricting capable, licensed healthcare professionals from providing free services to the poor neither expands access nor reduces costs.

Several states are considering measures that would remove roadblocks for volunteer health professionals and charitable organizations, potentially expanding access to quality care for those in need while reducing the burden on state budgets and taxpayers. With so many states considering the impacts of uncompensated care and access in the Medicaid expansion context, there is real opportunity to reevaluate existing policies that restrict care for those in need.

1 Kaiser Commission on Key Facts, "Covering the Uninsured in 2008: Key Facts about Current Costs, Sources of Payment, and Incremental Costs," Kaiser Family Foundation, August 2008, http://www.kff.org/uninsured/upload/7810.pdf.
2 Jack Hadley, John Holahan, Teresa Coughlin and Dawn Miller, "Covering The Uninsured In 2008: Current Costs, Sources Of Payment, And Incremental Costs," *Health Affairs*, August 2008, http://content.healthaffairs.org/content/27/5/w399.full.pdf.
3 Julie Darnell, "Free Clinics in the United States," Arch Intern Med Vol. 170 No. 11, June 14, 2010, http://www.wafreeclinics.org/admin/mod-cms/viewattachment.php?id=498.
4 "Uninsured Travel from Across US for Free Healthcare from Relief Group Remote Area Medical," Democracy Now, July 22, 2009, http://www.democracynow.org/2009/7/22/uninsured_travel_from_across_us_for.

EDWARD WALTON is the Legislative Analyst for the Task Forces on Health and Human Services and Education.

HEALTH EXCHANGES: COMING SOON TO A STATE NEAR YOU, PROBABLY

BY SEAN RILEY AND EDWARD WALTON

The Affordable Care Act (ACA) requires fully operational health insurance exchanges in every state by January 1, 2014, with open enrollment beginning in October of this year. The ACA also provides that the federal government will step in for states that decide against voluntary implementation. Currently, only 16 states plan to operate an individual market health insurance exchange for plan year 2014. Utah will split the duties and default to a federal exchange in the individual market but use its existing exchange to offer plans to small businesses through what are known as small business health option program (SHOP) exchanges. Recent guidance from the Department of Health and Human Services (HHS), however, has delayed that SHOP program until 2015.

Two-thirds of the states will default to a federal exchange in various capacities, including several serving as "partners" or "silent partners." For purposes of the ACA, partnership and silent partnership exchanges are still federally-facilitated, rather than state, exchanges. The consequence, logistically, is that the federal government will shoulder a much larger burden than originally anticipated—the White House's most recent budget request asks Congress for an additional $1.5 billion to run these federal exchanges.

Health insurance exchanges, often billed as websites for consumers to shop for health insurance plans, are integral to several provisions of the health law. These exchanges are essentially the vehicle through which much of the health law is carried out, from the imposition of federal insurance regulations, to the distribution of tax subsidies exceeding $1 trillion, which then triggers the individual and employer mandates to buy insurance. Many states, therefore, question why they would support such exchanges.

Resistance to state exchanges comes in various forms, chief among them are unanswered questions as to how exchanges will operate, whether they will be financially viable, whether the federal government will be able to handle the task of establishing them in states that refuse to do so, and whether they will actually foster competition and reduce healthcare related costs.

Like Medicaid expansion, the establishment of a state exchange is voluntary, and states can default to a federal exchange in the absence of taking affirmative steps. Also similar to Medicaid expansion, states can choose to implement exchange provisions at a later time. Specifically, provisions in the law allow states defaulting to a federal exchange in the short term to take control of federal exchanges moving forward.

While the actual text of the law provides only that states either implement or default to the federal government, HHS has since released guidance creating partnership exchanges in an attempt to move states toward state exchanges. In February, HHS began contacting state insurance departments urging states that did not seek partnership arrangements to continue to conduct certain administrative functions in federal exchanges as silent partners through "marketplace plan management."

For the 33 states defaulting (not including Utah), seven will be "partners" and an additional seven will be "silent partners." While these arrangements do not exempt states from federal regulations or offer states control beyond administrative functions, they will lighten the task before HHS and, to that extent, support implementation of the law.

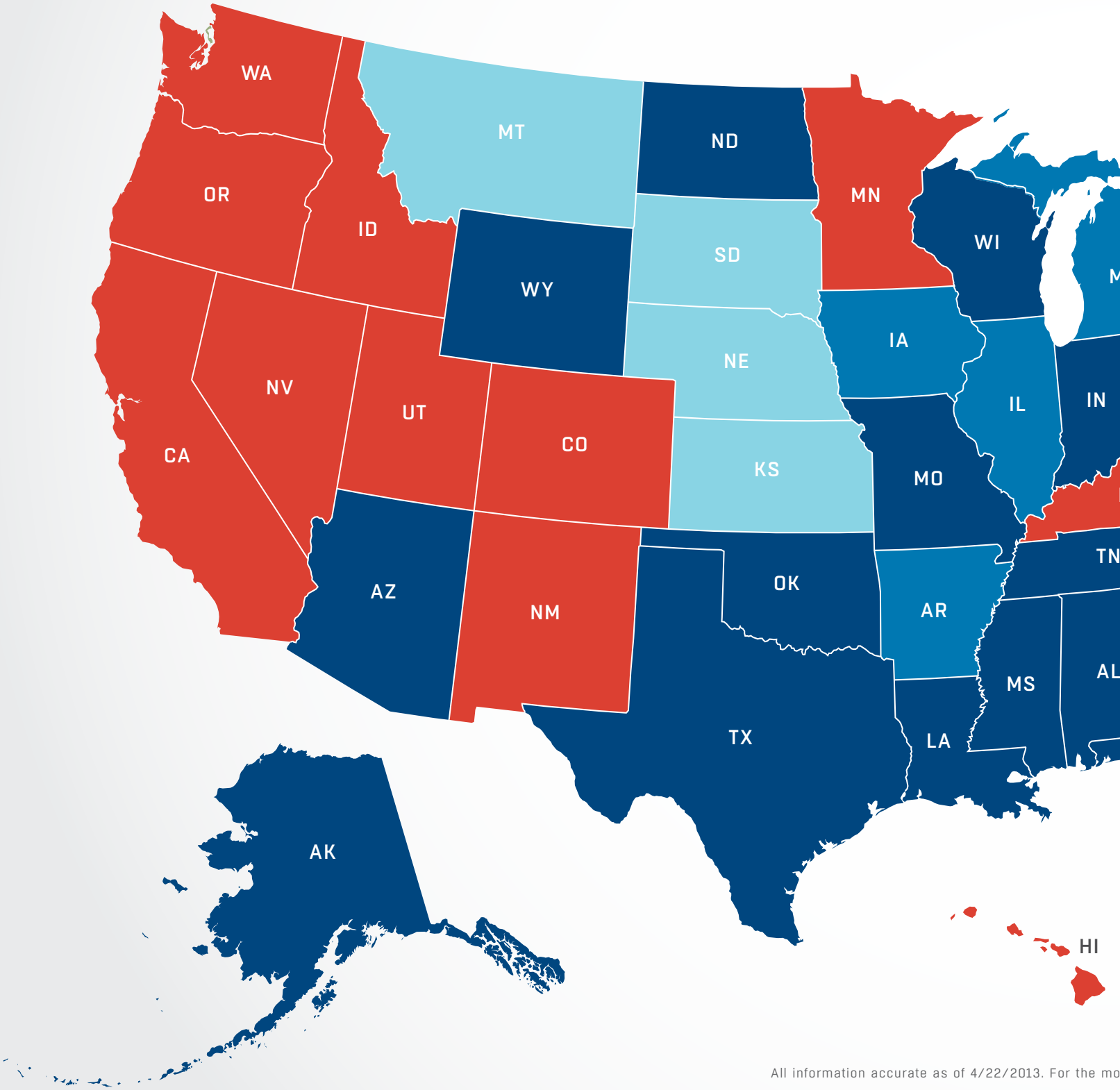
Continuing uncertainty as to how exchanges will function will turn an intense focus to state implementation as open enrollment approaches in October of this year. HHS stressed that exchanges will be up and running on time, though the recent delay of SHOP exchanges and remarks from federal officials tasked with implementing the law have raised concerns. "[T]he time for debating about the size of text on the screen, or the color, or is it a world-class user experience—that's what we used to talk about two years ago," said Henry Chao, who oversees exchange technology, "[now the philosophy is]: let's just make sure it's not a Third World experience."

SEAN RILEY is Director of the Task Force on Health and Human Services.

EDWARD WALTON is the Legislative Analyst for the Task Forces on Health and Human Services and Education.

TEAR-OFF SECTION

HEALTH INSURANCE EXCHANGES BY



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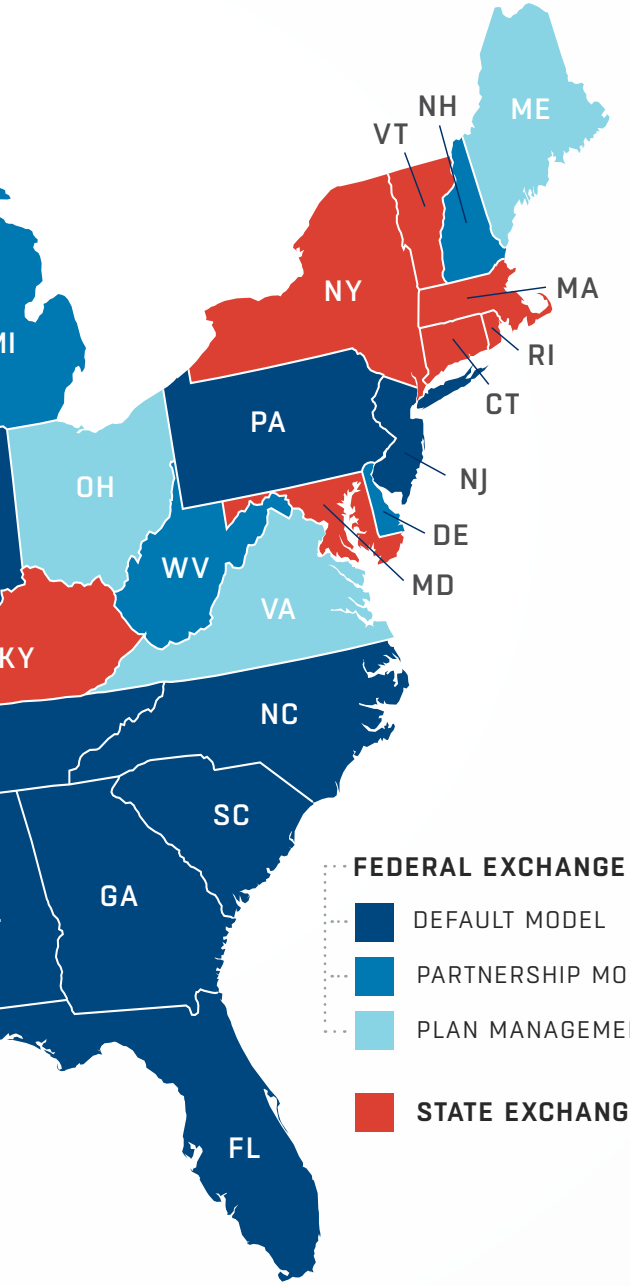

st up-to-date information, please contact Edward Walton at ewalton@alec.org.

MEDICAID EXPANSION

STATE	STATUS
ALABAMA	NO
ALASKA	LEANS NO
ARIZONA	GOV/LEG SPLIT
ARKANSAS	NEGOTIATING W/ HHS
CALIFORNIA	YES
COLORADO	YES
CONNECTICUT	YES
DELAWARE	YES
FLORIDA	GOV/LEG SPLIT
GEORGIA	NO
HAWAII	YES
IDAHO	NO
ILLINOIS	YES
INDIANA	LEANS NO
IOWA	LEANS NO
KANSAS	LEANS NO
KENTUCKY	UNDECIDED
LOUISIANA	NO
MAINE	LEANS NO
MARYLAND	YES
MASSACHUSETTS	YES
MICHIGAN	GOV/LEG SPLIT
MINNESOTA	YES
MISSISSIPPI	NO
MISSOURI	GOV/LEG SPLIT
MONTANA	GOV/LEG SPLIT
NEBRASKA	GOV/LEG SPLIT
NEVADA	YES
NEW HAMPSHIRE	LEANS YES
NEW JERSEY	YES
NEW MEXICO	YES
NEW YORK	YES
NORTH CAROLINA	NO
NORTH DAKOTA	YES
OHIO	GOV/LEG SPLIT
OKLAHOMA	NO
OREGON	LEANS YES
PENNSYLVANIA	LEANS NO
RHODE ISLAND	YES
SOUTH CAROLINA	NO
SOUTH DAKOTA	NO
TENNESSEE	NEGOTIATING W/ HHS
TEXAS	NO
UTAH	UNDECIDED
VERMONT	YES
VIRGINIA	UNDECIDED
WASHINGTON	YES
WEST VIRGINIA	LEANS YES
WISCONSIN	NO
WYOMING	NO

THE MEDICAID EXPANSION LANDSCAPE

BY SEAN RILEY AND EDWARD WALTON

The Affordable Care Act's Medicaid expansion provisions would extend Medicaid benefits to nearly all Americans below 138 percent of the federal poverty level—$15,856 for an individual in 2013.[1] Reactions from states have been decidedly mixed, spanning the range between support and opposition, including splits between state legislatures and their governors. Several states embracing Medicaid expansion take the position that it will reduce uncompensated care while serving as another round of stimulus. Other states are concerned, however, that because Medicaid is already the largest component of total state spending, expanding the program will only further encourage dependence on the federal government while straining state budgets.

In roughly half of the states, it is clear which path policymakers will take: 14 are currently poised to expand the Medicaid programs while 11 states seem ready to oppose. The remainder of states are either split, delaying the decision or continuing to study the law's impact. Questions surrounding proposals from states like Arkansas to move the expansion population into private plans via health exchanges fuel uncertainty as to where remaining states will ultimately land. Nonetheless, with no statutory deadline to pursue expansion, much of the debate is focused on the federal government's temporary 100 percent funding for expansion through 2016. That rate falls gradually to 90 percent in 2020 and subsequent years, assuming the law remains unchanged.

The broader uncertainty facing states, however, stems from the Supreme Court's June 2012 ruling making expansion optional. Twenty-six states joined the multistate lawsuit against the federal government challenging the Medicaid expansion provisions as unconstitutionally coercive—that is, because the law as written allowed the federal government to withhold existing Medicaid funding in states that did not expand, and since states were already largely dependent on federal funds, they were left without a choice.

The Supreme Court agreed, but, rather than upholding or rejecting the provisions in total, it essentially rewrote the law by leaving all Medicaid expansion provisions intact, except for the ability of the federal government to withhold existing funds.[2] States then found themselves in a position of determining whether expansion made sense absent coercion. While states like Arkansas have since pursued premium assistance for the expansion population using new federal funds,[3] states such as Wisconsin have sought to extend Medicaid without relying on the health law.[4] The majority of states, however, have taken a binary view of either outright support or opposition.

The Arkansas model has received the most attention of the Medicaid expansion alternatives. Some previous supporters of the concept have taken pause, however, as details regarding the premium assistance strategy have yet to be fully articulated.[5] Meanwhile, further guidance from the Department of Health and Human Services (HHS) has made clear that any proposals from states regarding Medicaid expansion must provide the same services at the same cost as they otherwise would, dampening the prospect of state flexibility.[6]

While details regarding some state plans and the latitude HHS will provide is unclear, the Medicaid debate will continue with an increased focus on flexibility and closer attention paid to federal budget talks.

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A Premium on Premiums

BY SEAN RILEY

Health insurers and actuaries have recently predicted an increase of insurance rates for small business and certain consumers of between 29 and 116 percent due to implementation of the Affordable Care Act and its effect on medical inflation. Effects on premiums vary by age, but the brunt of premium increases will fall on younger, healthier adults who will be required, like most Americans, to purchase health insurance.

mandate penalties—amounting to $95 in 2014—will convince healthier people to purchase plans. Faced with expensive premiums and a relatively inexpensive fine, some individuals may forego insurance until they become sick, since the law requires plans to cover people at the same price, regardless of their condition. If healthy people simply pay the fine, insurance premiums will increase for everyone, as the insurance pool will be relatively less healthy.

Compounding the issue is a looming tax, structured as a fee, on health insurers beginning in 2014. The health law aims to raise

> The nonpartisan Congressional Budget Office pointed out costs "would be largely passed through to consumers in the form of higher premiums for private coverage."

These public predictions and anticipation of health insurers' release of 2014 plan rates prompted Department of Health and Human Services (HHS) Secretary Kathleen Sebelius to explain that some "folks will be moving into a really fully insured product for the first time, and so there may be a higher cost associated with getting into that market."[1] These costs, Sebelius said, would be largely offset by "subsidies available to a lot of that population," so "they are really going to see much better benefit for the money that they're spending."

Insurance companies are skeptical, however, that the individual roughly $90 billion in revenue through 2020 by collecting fees from plans sold in the fully insured market. The nonpartisan Congressional Budget Office pointed out costs "would be largely passed through to consumers in the form of higher premiums for private coverage."[2]

The majority of small businesses will be directly impacted by the tax because they purchase health insurance in the fully insured market. The National Federation of Independent Business predicts the tax will reduce private sector employment from 146,000 to 262,000 jobs by 2022; the majority of those coming from small businesses.[3]

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Provisional Occupational Licenses Provide a Path to Employment for Ex-Offenders

BY CARA SULLIVAN

In the classic movie scene of an individual's discharge from prison, the released offender emerges from a single door to cross a dusty courtyard and pass through a vast, chain-link fence. On the other side of that fence, a friend or loved one is waiting to pick up the prisoner and drive off into the future.

In reality, the reentry process is much different. Ninety-five percent of all state prisoners will eventually be released into our communities, so it is in the interest of public safety to provide ex-offenders with the tools and resources they need to successfully reintegrate into society.[1] Provisional occupational licenses can help reduce recidivism, protect our communities and contain corrections budgets by providing a path to employment for certain ex-offenders.

Obtaining and maintaining a job is an integral part of an effective reentry process because released offenders often lack financial resources and must rely on friends or family for support. Beyond providing an ex-offender with an income, a job provides a sense of stability, responsibility and structure. However, a criminal background, no matter how minor, can make it tremendously difficult to find employment.

Beyond providing an ex-offender with an income, a job provides a sense of **stability, responsibility and structure.**

A provisional, or probationary, occupational license is given to an otherwise qualified ex-offender with the understanding that the licensing authority will revoke the license if the provisional license holder commits a new crime, has their community supervision or parole revoked or violates the rules governing the practice of the occupation for which the provisional license was issued. The possibility of having the license revoked provides incentives for ex-offenders to follow the law and maintain employment.

Provisional licenses will help protect our communities and reduce recidivism because gainful employment can reduce the likelihood of criminal behavior. In January 2012, the Center for Employment Opportunities conducted an analysis of their transitional jobs program. The survey found that among the subgroup who were enrolled in the program, within three months of release, individuals were less likely to be arrested, convicted of a new crime and reincarcerated.[2] In Indiana, among offenders with a high school diploma or equivalent, the recidivism rate was 23.3 percent for those with a job after release and 38.4 percent for those without a job after release.[3] Lowering the rate at which offenders return to prison will reduce the number of necessary prison beds and, more importantly, protect our communities by decreasing the incidents of crime.

Provisional occupational licenses do not remove an offender's criminal history or prevent an employer from accessing that information. Understandably, employers want to know of a potential employee's criminal past, and they would often rather hire an individual without a criminal record due to the fear that the ex-offender may reoffend. However, after approximately seven years without another offense, an ex-offender is no more likely to commit a crime than an individual without a criminal record.[4]

Protections can be put in place when giving an ex-offender a provisionary occupational license. The occupation should not be directly related to the crime for which the individual was convicted. Clearly a sex offender should not be licensed to operate a daycare and an individual convicted of residential burglary should not be installing residential HVAC systems. However, nonviolent offenders should have the opportunity to obtain a provisional license for an occupation unrelated to their crime. For example, individuals convicted of insurance fraud should be able to obtain a provisional license to be a barber if they are otherwise qualified.

Employment allows ex-offenders to make their victim restitution payments, pay court fees and support themselves. Offering provisional licenses to ex-offenders will not solve the various problems prisoners have trying to find employment after they are released, but it is a step in the right direction to providing resources to help released offenders get back on their feet.

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Legislators Address the Growing Use of Contingent Fee Attorneys by State Officials

BY CHRISTOPHER E. APPEL

As the practice of states hiring private lawyers has expanded to virtually every area of government enforcement, concerns have mounted as to whether such arrangements serve the public interest or are driven by private profit. Legislators have responded by adopting safeguards on the hiring, oversight, and payment of private attorneys by state officials. Following Florida's lead,[1] six additional states have adopted reform over the past three years.

These reforms have their genesis in the American Legislative Exchange Council's Private Attorney Retention Sunshine Act (PARSA) adopted in 1998. Soon thereafter, Colorado, Connecticut (via executive order), Kansas, Minnesota, North Dakota, Texas and Virginia adopted legislation based on the model policy. The most recent wave of states taking action includes Arizona, Indiana and Missouri in 2011,[2] and Iowa, Mississippi and Georgia (via administrative order) in 2012.[3]

Momentum continues to grow. Recently, West Virginia voters replaced long-serving West Virginia Attorney General Warren McGraw, Jr., who faced significant controversy due to his routine no-bid hiring of private lawyers, with Patrick Morrisey, who was elected on an ethics platform. Among the new Attorney General's first acts was to propose new procedures and guidelines outlining when and how the Office of the Attorney General should hire outside counsel to represent the State and its agencies in legal proceedings.[4]

THE EXPANDING USE OF THE PRACTICE

Use of private contingency fee agreements first rose to prominence during the landmark state attorney general tobacco litigation of the 1990s. The Manhattan Institute has estimated that approximately 300 lawyers from 86 firms are projected to earn up to $30 billion from the settlement of this litigation.[5] In most cases, the selection of outside counsel to pursue this litigation was not the product of an open or competitive bidding process, but rather occurred behind the scenes and went to political allies and large campaign contributors of the state attorney general.[6] The effective rates for the work performed on behalf of the state by some plaintiffs' attorneys has been calculated at tens of thousands of dollar per hour.

Although observers once viewed such arrangements as unique to tobacco litigation, plaintiffs' lawyers and some state attorneys general are now applying this model to virtually every area of litigation against numerous industries. Pharmaceutical manufacturers, financial institutions and insurers are among the most frequent targets.[7] Government officials in at least 21 states have hired plaintiffs' lawyers on a contingent fee basis to enforce state laws in recent years.

A NEED FOR SAFEGUARDS

The history of contingent fee contracts between state attorneys general and private attorneys is replete with examples of unfavorable deals from the public's perspective and "pay-to-play" antics. Although state laws typically require use of an open and competitive process when contracting for goods and services, such good government procedures are not typically used when the state hires outside counsel. Experience has shown that plaintiffs' law firms often develop the theory for the litigation, then shop it around to state attorneys general to find an interested client, not the other way around. State officials have frequently hired law firms that contribute or are expected to contribute to their campaigns or have other political or personal connections to the hiring official. There is no assurance that the state is hiring the most qualified counsel and getting the best deal. In some instances, government lawyers may be perfectly capable of handling the litigation without outside assistance, which would avoid siphoning off a significant portion of the recovery, potentially millions of dollars that could reduce the tax burden or fund projects or programs, by a contingent fee.

The effective rates for the work performed on behalf of the state by some plaintiffs' attorneys has been calculated at **tens of thousands of dollars per hour.**

Enforcement of state law through a contingent fee also raises serious ethical and constitutional concerns.[8] There is an inherent conflict of interest between the profit maximizing objective of a private attorney, whose compensation is based on the amount of damages or fines imposed on a company, and the state's most fundamental role of ensuring that the law is enforced in a fair and reasonable manner.

In some cases, the public interest may be best served through a remedy that is not financial in nature or the evidence may suggest that the government should discontinue litigation. Unlike cases brought for private plaintiffs, public enforcement actions "involve a balancing of interests" and a "delicate weighing of values" that "demands the representative of the government to be absolutely neutral."[9] This is simply not the case where a private lawyer's compensation depends upon the dollar amount of a judgment or settlement.

In examining this practice, the state supreme courts of Rhode Island and California have found that contingent fee agreements between government officials and private attorneys may be permissible in some circumstances but only where the government's attorneys maintain full and complete control over the litigation.[10] A state may not abrogate its law enforcement powers to private lawyers.

In addition, by shifting litigation risks to outside counsel, states may be enticed to bring novel or speculative lawsuits (often at the invitation of the retained private counsel) that seek to expand the liability as opposed to enforce existing law.[11] The practice invites "regulation through litigation."

ADOPTION OF REFORM

Although the legislation adopted varies significantly from state-to-state, the recent wave of state laws generally includes the following elements:

- The attorney general must analyze certain factors and make a written determination that contingent fee representation will be both cost-effective and in the public interest, prior to entering into a contract;
- The attorney general is required to request proposals from private attorneys, or make a written determination that such a request is not feasible under the circumstances;
- Contingent fees are subject to tiered limits and an aggregate cap of $50 million, exclusive of reasonable costs and expenses;
- Contingent fees may not be based on imposition of fines;
- Certain requirements must be met throughout the contract to ensure government attorneys retain complete control over the litigation;
- Contingent fee contracts must include certain standard provisions reflecting what is expected of the government attorneys and contingent fee counsel;
- The contingent fee contract, payments made under the contract, and the attorney general's written determination about the need for contingent fee representation are to be posted on the attorney general's website. Other records relating to the contract are to be subject to the state's open records laws. The private attorneys and paralegals are to maintain detailed contemporaneous time records for presentation to the attorney general on request; and

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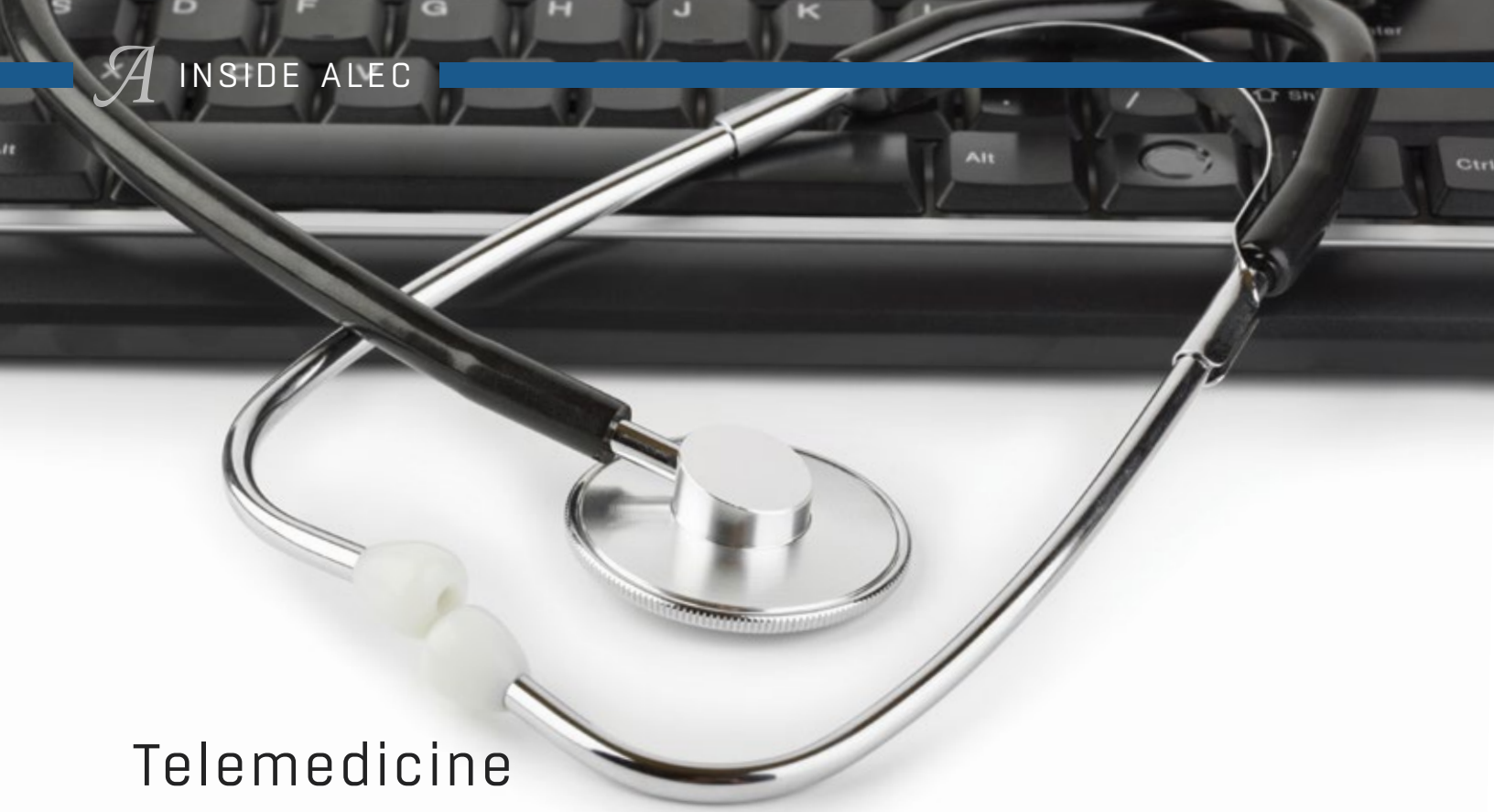

Telemedicine

BY ALEX RUED

Health Information Technology (IT) has dramatically improved since S. Eric Wachtel of MedPhone Company first diagnosed patients needing defibrillation over telephone lines, which the 1989 *House Chronicle* article described as a "[h]eart attack victim revived via telephone."[1] Today, patients are able to seamlessly communicate with physicians using remote health monitoring tools, including laptops, smartphones and tablets. These technologies exploit America's tech-focused society and result in quality, patient-centered care for more Americans at a lower cost. In order to cope with future regulatory and demographic challenges, policymakers must embrace technological advancements as a catalyst for reworking the healthcare system.

Health IT is a broad term that refers to a variety of technology-related healthcare functions, including Electronic Healthcare Records (EHRs), Mobile Health or mHealth and telemedicine. These health-related technologies allow physicians to access digitized healthcare records, diagnose patients, or prescribe medicine—all via the Internet. Patients also benefit from mobile applications as they monitor their own health and provide physicians with real-time feedback on their progress.

The changing healthcare landscape requires both policymakers and industry representatives to think critically about innovation and identify creative solutions to challenges. Under the Affordable Care Act (ACA), the federal-state health insurance program for low-income individuals known as Medicaid will expand eligibility to an estimated 16 million Americans. This regulatory change, coupled with America's shift towards an older and less healthy population, will likely cause a physician shortage. The Association of American Medical Colleges estimates the U.S. will face a shortage of over 90,000 physicians by 2020.[2]

Telemedicine enables healthcare providers to reach patients across distances and has effectively connected patients in underserved, rural areas with physicians. Telemedicine could be similarly effective in helping the U.S. cope with the predicted lack of physicians. Other nations experimenting with telemedicine have experienced progress in this arena. One such example is Dr. Sunita Maheshwari's company *Teleradiology Solutions*, which addressed India's physician shortage by receiving patients' scans and connecting them with medical experts from around the world.[3]

A great benefit to implementing mHealth and telemedicine is that the technology is already in the hands of most patients and physicians. The Pew Research Center recently announced that 87 percent of Americans own cell phones[4] and more than half of people with mobile phones are smartphone users.[5] Fortunately, adoption of these devices is on the rise, for smartphone adoption has increased 38 percent in the past three years[6] and Gartner, a leading IT research and advisory company, estimates 2013 will bring the sale of nearly 1.2 billion smartphones and tablets.[7] Not only do people own the devices that make mHealth possible, but they are also actively engaging them for health purposes; 80 percent of physicians have an iPhone and 30 percent of physicians use an iPad for clinical activities.[8] As for patients, the U.S. House Energy Subcommittee on Communications and Technology recently reported that 500 million people will use the 97,000 available mobile health applications by 2015.[9,10]

As states look to decrease the overall burden on the U.S. healthcare system, mHealth is a means to streamline healthcare processes around common diseases, such as diabetes, and decrease readmission rates. For example, the American Diabetes Association calculated the cost of treating diabetes in 2012 reached $245 billion.[11] The introduction of DiabetesManager and similar mobile apps empowers patients to manage their health and allows physicians to ensure adherence and identify problems before patients are re-hospitalized.

Since $100 billion is spent annually to hospitalize patients who did not adhere to medication requirements, Diabetes Manager or a simple app like MediSafe, which alerts emergency contacts if patients forget to take their medicine, has huge potential to cut unnecessary costs.

Although Health IT solutions lower costs and improve patient care, these technology-related devices are often subject to regulatory oversight well before there are signs regulation is needed. Currently, in both Medicaid and Medicare, physicians, hospitals and various healthcare providers are effectively using mHealth technologies certified by accredited private entities. Meanwhile—years after the invention of these mobile health devices—the Federal Drug Administration is still determining how best to regulate them.[12] As the federal government generates regulatory uncertainty, there is opportunity for the states to take the lead in fostering an environment that encourages innovation in and the utilization of medical-related technologies.

As the federal government generates regulatory uncertainty, there is opportunity for the states to take the lead in **fostering an environment that encourages innovation in and the utilization of medical-related technologies**.

One major impediment to telemedicine are state practice-licensing issues that arise when healthcare providers attempt interstate care. Prior to the advent of the Internet and accompanying technologies like smartphones, Facetime and Skype, seeing a physician across state lines was an impossibility. Patients seeking healthcare outside their state confuses medical licensing laws written for a bygone era. In order to practice telemedicine, a quarter of doctors have obtained licenses in more than one state, which adds up to $300 million in licensing costs from doctors alone. While the state barrier is important to the state medical association, it is meaningless to patients. In the future, establishing standards that make sense to patients, healthcare providers and regulators will be important to reducing uncertainty with regards to telemedicine.

As Bret Swanson points out in *The App-lification of Medicine*, given that healthcare is one-sixth of the Gross Domestic Product, reducing barriers to technologies that improve our healthcare system will raise the productivity of the sector and have positive implications for the overall U.S. economy.[13] Although states do not always have primary jurisdiction over policies related to Health IT, their role as regulators in terms of pharmacies, hospitals and clinics, insurance, and physicians and nurses grant them the authority to encourage a patient-centered, market-driven approach to healthcare. Given the looming doctor shortage and general economic malaise, the U.S. healthcare system—and patients nationwide—cannot risk missing out on the benefits of Health IT.

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Lawsuit Reform, continued from page 5

While many people may find such labels humorous, these seemingly unnecessary warning labels are an unfortunate side effect of excessive litigation.

A company out of Massachusetts was sued for millions of dollars for exercise equipment that was used incorrectly and resulted in injury. Gas can manufacturers have been sued after customers poured gasoline onto a live fire and were surprised when the gas can exploded.

The Council develops model policy to inject common sense and accountability into the legal system and monetary awards. Sixty percent of those polled believe lawsuits filed against businesses hurt the U.S. economy. The Council's common sense lawsuit reform policies reduce the harm unmerited lawsuits can have on the U.S. economy.

According to the survey, most Americans agree that lawsuit abuse poses a serious threat to business productivity and competiveness. Seventy-two percent agree that the existing liability lawsuit system makes it harder for employees to do business and 88 percent support creating safeguards to protect small businesses from groundless lawsuits that could put them out of business. The Council's "Private Enforcement of Consumer Protection Statutes Act" would protect small businesses against lawsuit abuse brought under the guise of consumer protection while still allowing injured consumers to recover their due.

Seventy-eight percent of the poll's respondents believe there are too many lawsuits, while a mere eight percent believe there are too few. The Council developed a "Resolution on the Lawsuit Abuse Reduction Act" to temper the incentive to file frivolous lawsuits. The model policy is designed to dissuade complaints groundless in fact or legal standing. Specifically, the model resolution would encourage courts to levy sanctions and award attorneys' fees to any attorney or party who brings a lawsuit deemed frivolous by a judge. Such a safeguard would provide reasonable protection for defendants who may not have done anything wrong, yet are still forced to pay the often significant costs of litigation under the current tort system.

The polling data finds that 78 percent of people agree to the posed statement that "enacting lawsuit reform is an important part of improving the U.S. business environment and attracting and keeping jobs." Lawsuit reform is widely-appreciated policy that can improve the business environment for companies large and small. The Council's Task Force on Civil Justice works to develop fair reforms that help the free enterprise system function more fairly and effectively.

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Five Solutions, continued from page 10

Finally, states should implement safe harbor provisions. A safe harbor provision is an element in a statute or regulation that affords protection from liability or penalty if certain conditions are met. Often these conditions require that no harm has occurred as a result of the violation and that the offender take prompt steps to come into compliance with the statute or regulation that has been violated. In the byzantine world of environmental regulation in which it is nearly impossible to be in total compliance at all times, safe harbor provisions are particularly sensible.

For a business owner along the Gulf Coast of Texas, Louisiana, Mississippi, Alabama and Florida, dozens—and in some cases, hundreds—of activities that one could not possibly know to be criminal put business owners at significant risk. The risk is not just of monetary loss, but of actual prison time. The five Gulf Coast states mentioned in this report can seize a significant opportunity for leadership by reforming their laws to conform better to traditional legal norms. They may also set an example that can be followed by the federal government, which has made notorious overcriminalization headlines such as imprisoning a lobster fisherman for six years for improperly harvesting lobster tails.

Fundamentally, governments are instituted to secure liberty, and, although our report focused primarily on the economic ramifications of overcriminalization, the most important reason for reform is simply that overcriminalization is a dereliction of the government's responsibility to secure individual liberty. A few modest reforms would do a great deal to address this problem.

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Premiums, continued from page 17

Small businesses will not be the only ones effected, however. A 2012 report from actuarial consulting firm Milliman, Inc. estimated that state governments would pay over $13 billion over ten years in new taxes as a result of the health insurance tax.[4] Ironically, this will affect states with larger Medicaid programs that utilize managed care: that is, Medicaid programs that contract with private plans in the fully insured market.

The general consensus that premiums will rise is consistent with what many predicted based on examples in several states; essentially, guaranteed issue and community rating come at a cost.

The mechanism of the law that claims these higher premiums will be affordable comes in the form of tax subsidies paid for by raising taxes elsewhere. These taxes, however, will be passed down to consumers and, ironically, the federal government will indirectly tax itself and the states for the honor. On the other hand, Secretary Sebelius stated that the mechanism the law relies on to make insurance affordable comes from the market when insurers "compete for customers."[5]

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Legislators, continued from page 20

- The attorney general must submit an annual report to the legislature that describes the state's use of outside counsel in the preceding calendar year.

Each of these laws, and earlier legislation adopted based on PARSA, shares the common goals of promoting transparency, curbing unseemly liaisons between public enforcement officials and private, profit-motivated lawyers, and protecting the public funds. Such reforms provide legislators with an effective means of safeguarding the public interest when the state enforces the law through use of private attorneys.

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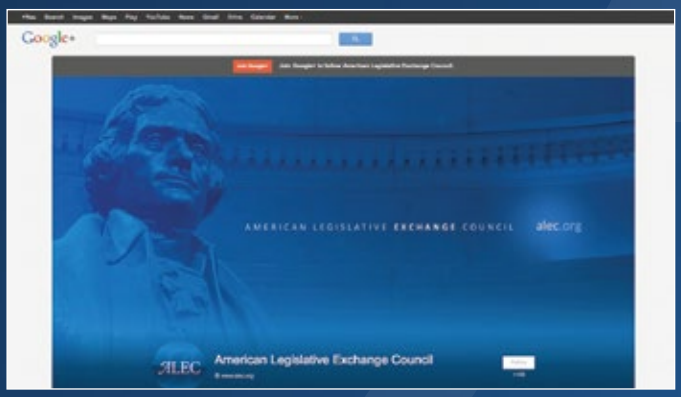
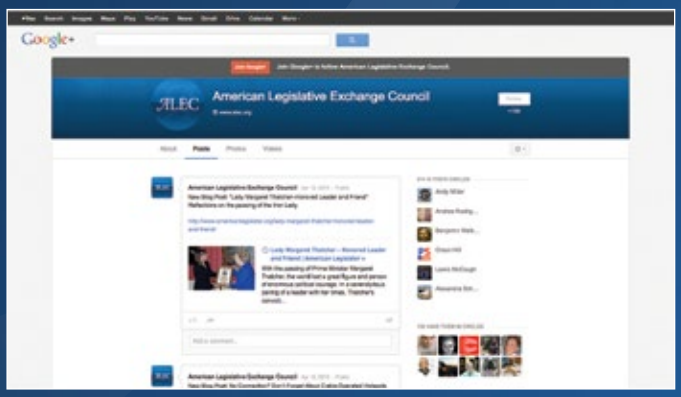
3 Iowa Code § 13.7, 23B.1 et seq.; Miss. Code Ann. §§ 7-5-1 to -8, 7-5-21, 7-5-39; Admin. Order, Attorney General Samuel L. Olens, May 29, 2012.
4 See Office of West Virginia Attorney General Patrick Morrisey, Outside Counsel, at http://www.wvago.gov/outsidecounsel.cfm.
5 See Manhattan Inst., Center for Legal Pol'y, Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America 2003 6 (2003), available at http://www.manhattan-institute.org/pdf/triallawyersinc.pdf; see also Leah Godesky, State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?, 42 Colum. J.L. & Soc. Probs. 587, 588-89 (2009) (estimating that approximately $14 billion of the settlement has gone to private attorneys).
6 See, e.g., Stuart Taylor, How a Few Rich Lawyers Tax the Rest of Us, Nat'l J., June 26, 1999; Robert A. Levy, The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza, Legal Times, Feb. 1, 1999, at 27.
7 See, e.g., Manhattan Inst., Trial Lawyers Inc.: Attorneys General: A Report on the Alliance Between State AGs and the Plaintiffs' Bar 2011 (2011), available at http://www.triallawyersinc.com/TLI-ag.pdf; Pay-to-Play Examples, U.S. Chamber Institute for Legal Reform, at http://www.instituteforlegalreform.com/featured-tool/pay-to-play-examples-0.
8 See Martin H. Redish, Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications, 18 Sup. Ct. Econ. Rev. 77 (2010).
9 People ex rel. Clancy v. Superior Ct., 705 P.2d 347, 352 (Cal. 1985).
10 See Rhode Island v. Lead Indus. Ass'n, 951 A.2d 428 (R.I. 2008); County of Santa Clara v. Atlantic Richfield Co., 235 P.3d 21 (Cal. 2010).
11 See, e.g., Adam Liptak, A Deal for the Public: If You Win, You Lose, N.Y. Times, July 9, 2007, at A10; Editorial, The Pay-to-Sue Business, Wall St. J., Apr. 16, 2009, at A15.





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