The Defense Trial Counsel of West Virginia

CIVIL JUSTICE COMMITTEE REPORT ON THE STATE OF WEST VIRGINIA'S CIVIL JUSTICE SYSTEM

August 15, 2003

The observations, findings and conclusions contained within this Report represent the consensus reached by the DTCWV Civil Justice Committee and adopted by the Board of Governors. They do not necessarily represent the views and opinions of every member of the Civil Justice Committee, the Board of Governors or all of the members of the DTCWV.

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Preface

The Defense Trial Counsel of West Virginia is a professional organization and voluntary bar association consisting of trial lawyers whose practices primarily involve the representation of defendants in civil litigation in West Virginia. Its membership includes approximately 400 lawyers from virtually every corner of West Virginia. Members' clients include professionals and other individuals, small and large businesses and other organizations, some that are insured and some that are not. Its charge and mission include continuing efforts to improve the civil justice system for the benefit of our State and all its citizens.

At its annual meeting in May of 2002, the DTCWV celebrated its twentieth anniversary of service to the defense bar. As part of that celebration, numerous past-presidents of the organization spoke at the DTCWV banquet. A consistent theme throughout their remarks was the view that the civil justice system in West Virginia had, in the two decades of the organization's existence, become seriously unbalanced. As a consequence, those who found themselves defendants in civil suits in West Virginia, as well as their counsel, increasingly had little or no confidence in the ability of that system to fairly and impartially adjudicate claims being asserted against or among them.

These observations were not being voiced by insurers or large corporations whose views regarding the state's civil justice system are so often discounted as self-serving. Rather, they were being voiced by some of the foremost defense attorneys from throughout the State of West Virginia. None of them can be said to have any economic interest in seeing changes in the current system, which has, over the past two decades been quite good to all lawyers, civil defense attorneys included. As such, their views could not simply be dismissed. To the contrary, the very expression of those views by such prominent members of the bar, coupled with an increasing chorus of voices that have called into question the integrity of the litigation process within our state, made them impossible to ignore.

Accordingly, as the DTCWV entered into its third decade of service, its Board of Governors unanimously decided to form a select Civil Justice Committee to investigate the reasons behind the escalating criticisms of our civil justice system. This was not a decision that was undertaken lightly. The Board of Governors recognized that the members of the Association are themselves dependent upon that system for their very livelihoods. As with the Association's past presidents, there is little economic incentive for the individual members of the DTCWV to criticize that system and, in so doing, incur the disapproval of others who are also a part of that system.

Despite the disincentives, the DTCWV, as an organization, elected to set aside its own parochial concerns and proceed down this path because of a genuine concern for the integrity of the justice system in West Virginia, as well as the long-term future of the State itself. To the extent the civil justice system in West Virginia is out of balance, the legal profession itself is diminished in stature. Moreover, if there is imbalance, each and every citizen of the State pays an economic cost, whether in increased insurance rates, lost job opportunities, or an overall decline in our standard of living.

If there is no truth to the repeated assertion that our civil justice system is somehow biased or unfair, then the DTCWV, as an organization, has a duty to debunk the criticisms. Conversely, to the extent that those assertions are true, the Association has a similar responsibility to identify why

that is the case, and undertake every reasonable effort possible to see that corrections are made.

With that in mind, the charge of the Civil Justice Committee was to go beyond mere generalities and determine what specific deficiencies are alleged to exist in the system, whether those deficiencies are real or merely a matter of perception, and whether those deficiencies or perception do, indeed, serve to undermine the integrity of civil justice in West Virginia. The Committee was also charged with coming forward with suggested ways in which any actual or perceived deficiencies might be addressed in order to restore balance to the system.

Past presidents, current leaders, and other DTCWV members from around the State were invited to serve on a special Civil Justice Committee, which began its work in the Summer of 2002, and concluded it one year later with this Report. William E. Galeota, then DTCWV's Vice-President and a member with Steptoe & Johnson in Morgantown, and Thomas E. Scarr, then DTCWV's Treasurer and a member with Jenkins Fenstermaker, PLLC in Huntington, were selected to serve as co-chairs of this select committee. When Bill Galeota became DTCWV's President, Marc E. Williams, a partner with Huddleston, Bolen, Beatty, Porter & Copen, LLP in Huntington was appointed to fill his role as Co-Chairman of the Committee. An invitation was extended to each of the former presidents of the Association as well as its general membership for volunteers to serve as members of this committee. Collectively, the members of the committee brought to their study and discussions over two hundred years of combined legal experience, encompassing appearances as trial or as appellate counsel in virtually every state and federal court within the state. They also brought with them the perspectives of every geographic region of the state and the viewpoints of lawyers engaged in varied and diverse trial practices from a wide variety of backgrounds, including solo practitioners and members of some of the State's largest firms.

Over the course of this past year, the members of the Committee spent over fourteen hundred (1400) hours away from their law practices in order to complete the task assigned to them. As reflected in this Report, the Committee collected and reviewed a wide variety of material from various sources and organizations, discussing the civil justice system in West Virginia and elsewhere, some that criticized and others that praised various aspects of the civil justice system in West Virginia and throughout the nation. They held regional meetings at various locations throughout the state to solicit the views, perceptions and concerns of lawyers and non-lawyers alike, including business leaders and educators, over the manner in which civil justice is administered in West Virginia. In addition, the Committee interviewed members of both the state and federal Judiciary in order to gather insight into their views of the system and surveyed DTCWV members in an effort to get a broad cross section of opinions from among the defense bar. They studied what other states are doing to address some similar criticisms of their civil justice systems. Finally, they spent hours in conference discussing their findings and observations, in an effort to distill all of the gathered information into a single, cogent report.

The fruits of their labor are contained in the pages that follow. Their conclusions and observations are not scientifically based and do not purport to be. They are, however, an attempt to objectively consider and respond to the charge given the Committee. It does not take a clairvoyant to anticipate that the findings and conclusions contained in the report will be applauded by some and resoundingly criticized by others, including the Plaintiffs' bar and certain consumer advocacy groups, as well as certain tort reform advocates and some of its own members. That is to be expected. There are certainly grounds for reasoned discussion and fair disagreement over much contained in the Report. It is also to be anticipated that some may elect to take personal offense at

criticisms that are perceived as being aimed at them, even though no such offense is intended. That said, however, where actions on the part of certain participants in the civil justice system were viewed by the Committee as contributing to a perceived lack of confidence in that system, the Committee, to its credit, so stated.

Walter Lippmann, a well-known journalist in the middle of the last century, in a 1965 address to the International Press Institute Assembly, noted, "without criticism and reliable and intelligent reporting, the government cannot govern." Similarly, in the absence of critical analysis and candid assessments by those involved in any civil justice system, that system cannot function in the interests of those it is intended to serve. It is in that spirit that the Committee has come forward with its Report.

If this Report serves no other purpose, hopefully, it will serve to stimulate serious debate, both within and without the legal community, over the state of civil justice in West Virginia and how such justice is rendered. For that, the DTCWV owes the participation of members of the Civil Justice Committee both a sincere vote of gratitude and its unwavering support as this process moves forward.

In conclusion, we want to personally thank Tom Scarr and Marc Williams for chairing this Committee as well as each of the Committee members, and others who assisted from their respective law firms, for their unselfish efforts. I also wish to thank Jack Bowman, now retired from the West Virginia University School of Law, for taking to the time to review the Committee's work prior to its publication to ensure full compliance with ethical requirements of the West Virginia Rules of Professional Conduct.

Henry Jernigan, Immediate Past President
DTCWV, 2002-2003

Defense Trial Counsel of West Virginia Description

The Defense Trial Counsel of West Virginia was formed in 1981 to provide a cohesive network of West Virginia attorneys who defend individuals and corporations in civil litigation. It currently has a membership of approximately 400 attorneys, dedicated to the defense of these clients. Membership in the Association is restricted to attorneys licensed in the State of West Virginia who devote the majority of their practice to representing defendants in civil litigation of various types.

Mission Statement

To bring together attorneys who defend individuals and corporations in civil litigation for the purposes of elevating the standards of West Virginia trial practice; supporting and advocating for the improvement of the adversary system of jurisprudence; and increasing the quality of services rendered by the legal profession to the citizens of West Virginia.

The Defense Trial Counsel's goals are five-fold:

- To enhance the knowledge and improve the skills of civil defense attorneys;
- To elevate the standards of trial practice within West Virginia;
- To support and advocate improvement of the adversary system of jurisprudence;
- To work for elimination of court congestion and delays in civil litigation;
- And in general, to promote improvement of the administration of justice, and to increase the quality of legal services provided to the citizens of West Virginia.

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***Past DTCWV President**

Executive Summary

Driven by increasing criticism and scrutiny of West Virginia's civil justice system as a major component of the State's economic problems, and from its members' unique perspective on the daily operation of that system in the courtrooms, the Defense Trial Counsel of West Virginia, Inc. ("DTCWV") recognized the need for its own thoughtful study and discussion of the problems, real or perceived, and what may be done to address them.

The specific charge to the Civil Justice Committee was to study and report on the fairness and impartiality of West Virginia's civil justice system, and whether the criticisms of it have any valid basis, as well as offering conclusions and recommendations for possible changes and improvements to the system. The most prominent feature of the Committee's Report is the conclusion that there is indeed a problem with the civil justice system in West Virginia, with aspects both real and perceived, and that a major contributing factor to the problem (or a necessary element of any effective solution) is the Judiciary. More specifically, while much is made of legislative reform, the role of judges and justices in interpreting and applying the law has been a critical, but often overlooked element in how litigants, lawyers and the public perceive the law at work, good or bad.

The Judiciary is one of the three pillars of our government. Along with the other two co-equal branches of government, the executive and legislative, the Judiciary plays a critical role in preserving freedom and democracy in the Mountain State. It does so primarily as the forum for peacefully resolving thousands of disputes between and among this State's citizens as well as citizens from our sister states.

In recent decades, however, there has been a perception that political influences, normally confined to the other branches of government, are taking on an increasing prominence within the judicial system. That, in turn, has served to undermine confidence in the system and its ability to fairly and impartially dispense justice among all litigants, regardless of whether they are residents or non-residents of West Virginia and regardless of whether they are individuals, small businesses or large corporations. While the system, if it is to function as intended, must treat all as equals before the law regardless of prejudice or sympathy, as a result of political considerations, many believe that is no longer happening in West Virginia. As a consequence, public confidence in the system has been diminished to the point that West Virginia is now perceived as among the most hostile environments in the United States within which to adjudicate certain types of disputes.

The most significant findings of the study and analysis relate to the Judiciary. They begin with observations that some important cultural and socioeconomic factors are at work in West Virginia, which tend to prejudice the populace against business, institutional or professional interests. Insurance companies have been particularly popular targets, and their plight has resulted in restrictions of availability and skyrocketing premiums for all West Virginians. Most of the problems insurers would cite are in the form of "judge-made" law, from "third-party bad faith," to the collateral source rule and punitive damages, where rights and remedies are expanded and defenses or means of defense are nullified.

Additional findings acknowledge the Legislature's significant role, as the truly representative body, legitimately responsive to a constituency of the electorate, but increasingly frustrated or undone by the courts. The Report expresses misgivings about the pervasive influence of the plaintiffs' bar, in direct alignment with their own economic interests, but resolves that the Legislature remains the preferred venue for social and public policy decisions.

As to the courts, the findings start with the observation that their role has been too long ignored. Perceptions of judicial favoritism and partiality, result or party-oriented decisions, a "double standard" of rules or decisions, and popular political judicial elections are all noted with many specific instances cited, especially in the case decisions of the West Virginia Supreme Court of Appeals. Lax professional standards and inadequate enforcement of judicial ethical requirements also contribute to low confidence. The greater concern is clearly with the Supreme Court of Appeals, and much less with trial judges, though there can be no doubt trial judges are aware of the appellate justices' inclinations and predispositions, and often anticipate their influence. Mass litigation, with its tremendous discouraging impact on countless defendants who have little or no connection to the State or the thousands of plaintiffs involved, deserves special attention. Likewise, the "medical monitoring" cause of action, where a plaintiff without an injury or illness can recover money for future testing based on the possibility that a condition may develop, stands out as a prominent example. West Virginia's reputation as a thoroughly hospitable forum for mass litigation has made for a revolving door through which countless numbers of businesses and individuals are escaping, to be replaced only by an invasion of outside lawyers and their clients, all to the detriment of West Virginians.

Apart from the courts, but related directly to them, are the juries. Unfortunately a major problem with juries in West Virginia is that the jury pool is initially a product of the cultural and socioeconomic prejudices which have developed. No regard is given or allowed for the overall economic "cost" of unrestrained awards on unrestricted elements of damage. The jury selection process is influenced by the same judicial predispositions or agendas that impact other aspects of a civil action. As a result, the jurors sworn to impartially decide any civil case are still likely to be predisposed against defense interests. An approach, which systematically excludes educated, experienced and concerned citizens from jury service, cannot be objective or effective.

Lawyers certainly are a part of both the problem and the solution. As a result of increased rights and remedies making it easier to win big, and contingent fees to give some lawyers a personal stake, a virtual feeding frenzy has developed. Millions of dollars are spent to advertise for cases, and to support the judicial election campaigns of those candidates who are perceived as more favorable to plaintiffs. While the contingent fee system is not an evil unto itself, it appears to drive more than zealous advocacy for clients. When those contingent fees result in a conclusion that the deck should be stacked, and windfall recoveries provide the means, we cannot be surprised that so much money flows into judicial election campaigns.

Several conclusions in the Report overlap with its findings and observations, a result of the study and analysis confirming some perceptions and illuminating others. Again, the heavy

and often controlling influence of the courts is an underlying theme. Nowhere is this better illustrated than in the many instances where legislative reforms have been undone or long-standing precedent has been ignored or reversed by the Supreme Court of Appeals. The conclusion is unavoidable that a populist philosophy, and the practical desire to please those who would re-elect, appear to be unduly influencing judicial decisions. This is manifested in an attitude of presumed merit or entitlement, a disfavor for early or summary disposition of cases, and practical shifting of burdens of proof. Personal agendas, coupled with disregard for any end beyond incumbency and repayment of supporters, seem to be driving results. A wide range of examples, from mass tort rules to medical monitoring, are cited. Ultimately, the consequences of electing judges on popular vote, rather than selecting and appointing on merit, is a foundational problem.

After surveying tort reform initiatives in other states, the Report discusses the numerous remedies or solutions it observed and considered as potential improvements for our State. These range from the more comprehensive and long term, such as constitutional amendments and intermediate appellate courts, to the shorter term, more directed to DTCWV's active involvement. Not surprisingly, the wide array of commentators, interests and issues for a system so vital to everyone has resulted in a varied list of possibilities, some realistic and others not so.

When the Report considers specifically the role which DTCWV should play, it begins by reiterating the inherent measure of objectivity for defense lawyers trying to restrain the current system which arguably benefits them individually, especially when it is unrestrained, at times perhaps as well as it serves plaintiffs' lawyers. It also considers the varied views of its membership, which are never unanimous or entirely predictable, but surprisingly in harmony and consensus on the need for greater attention to the judicial role. Importantly, the Report resolves that DTCWV should continue to speak thoughtfully and objectively, without undue influence from any client, industry or public advocacy group.

The specific recommendations of the Report for DTCWV are quite pointed, all obviously focused on illuminating the important role of the Judiciary and increasing public awareness of notable judicial conduct, whether to praise the exemplary or discourage the inappropriate. These include an outspoken attitude and active voice through a Speakers Bureau, informational websites or newsletters, amicus briefing, press releases and editorial contributions.

DTCWV, by publishing this Report, has obviously rededicated itself to the cause of improving the civil justice system, as the voice of the defense bar with a uniquely informed and hopefully objective perspective. With confidence in the system at a low point, perhaps an all-time low, the timing could not be better. As DTCWV implements its own efforts, perhaps it can

hope to spur others to work toward the same improvements and help restore confidence in our system. It has taken decades to reach this point, and change will not come quickly or easily, but the imperative is clear.

William E. Galeota
President, 2003-04

Henry W. Jernigan, Jr.
Immediate Past President, 2002-03

Enduring Principles [1]

As discussed in the Report below, the Civil Justice Committee reviewed and considered the four main components in the civil justice system: the Legislature, the Courts, trial juries, and trial lawyers. Ultimately, the focus of the Committee's greatest discussion and concern became the courts, i.e., West Virginia's Judiciary. During the course of the ongoing discussions, the American Bar Association published a noteworthy report entitled "Justice in Jeopardy, Report of the American Bar Association Commission on the Twenty-First Century Judiciary." That Report identifies eight enduring principles "that should be central components to each state's understanding of the role of the Judiciary as a co-equal branch of government." Because of the importance of these principles, and in many ways their relationship to many of the specific problems identified in the observations and findings listed below, the Committee felt that it was important to set forth these enduring principles clearly and early in this Report.

Principle 1: Judges should uphold the rule of law.

Principle 2: Judges should be independent.

Principle 3: Judge should be impartial.

Principle 4: Judges should possess the appropriate temperament and character.

Principle 5: Judges should possess the appropriate capabilities and credentials.

Principle 6: Judges and the Judiciary should have the confidence of the public.

Principle 7: The judicial system should be racially diverse and reflective of the society it serves.

Principle 8: Judges should be constrained to perform their duties in a manner that justifies public faith and confidence in the courts.

[1] *Justice in Jeopardy*, Report of the American Bar Association Commission on the 21st Century Judiciary, May 2003.

I.

Committee Activities

The charge to this Committee from Defense Trial Counsel President Henry Jernigan was to evaluate the civil justice system in West Virginia and to objectively assess the State of West Virginia's civil justice system, particularly whether to identify any deficiencies in the System, determine whether they are real or simply perceived, and ultimately determine whether the System is fair and impartial. Additionally, the Committee would necessarily have to address what remedies, reforms or other changes to the System, if any, would be best suited to correct any deficiencies in the system, and to provide some guidance and direction for future consideration by the DTCWV Board and membership. The project would necessitate the most comprehensive evaluation of the civil justice system in the history of the State of West Virginia. Such an ambitious task by a group of admittedly amateur researchers forced the Committee to work as a group to identify the areas to be analyzed, the resources to be used for that analysis and to provide for a full and open discussion of the issues before reaching any conclusions and making any recommendations concerning potential reforms, if determined to be necessary and appropriate.

Commencing in the summer of 2002, the sixteen members of the Committee met regularly for the purpose of establishing a timeline and agenda for their evaluation. Over the course of the year that the Committee has engaged in this effort, tasks were assigned, meetings were held for the purpose of evaluating progress, and discussions were had regarding the direction of the analysis. The Committee as a whole met on a regular basis by teleconference or in person, through the summer of 2003, including a two-day meeting directed toward identifying its observations and findings and reaching final conclusions that would be formulated into this Report.

It is fair to say that the effort of the sixteen members of this Committee exceeded their expectations of the amount of time that would be necessary to perform this analysis and to complete this Report. The Committee was asked to keep track of the amount of time spent on this

endeavor. The sixteen members collectively committed over 1400 hours to this project. This report reflects the combined input of all members of the Committee. The observations, findings and ultimate conclusions reflect the virtual unanimity of the Committee on the issues and problems identified and potential reforms.

A. Research Studies and Reports

Whenever topics such as civil justice reform, tort reform or frivolous lawsuits are debated in the popular media, it frequently is an attempt to compare statistics regarding litigation to substantiate whether, in fact, there has been a "litigation explosion" in the United States over the last two decades. In reality, however, any attempt to quantify the effect of litigation requires a more structured and disciplined approach that examines such diverse issues as transaction costs, tax consequences of litigation, effects on insurance availability and cost, and impact on the value of equity markets. Various studies have attempted to address the economic impact of the civil justice system on a national scale and in West Virginia. In order to evaluate the extent to which the concerns expressed in the regional meetings and by the Committee members were born out by empirical analysis, approximately twenty-five research studies were analyzed.[2] All of these studies evaluated, to one extent or another, the economic impact of the civil justice system. Some dealt specifically with certain areas like workers' compensation or medical malpractice insurance affordability and/or availability, while many dealt more generally with the economic impact of litigation. From a national perspective, the studies demonstrate that litigation results in higher costs to consumers, restricts economic growth and opportunity, restricts access to healthcare, and restricts access to the courts by those with legitimate claims.

[2] A listing of the studies reviewed is included in the Appendix to this report.

Several of the studies specifically analyzed the impact that litigation has on West Virginia's economy. All support the conclusion that West Virginia's litigation landscape negatively impacts the state's economy. In the winter of 2002, Marshall University's Center for Business and Economic Research published an analysis of the costs of civil litigation in West Virginia. The study found that in 1978, only six states spent a lower proportion of their gross state product (GSP) than West Virginia on legal services, but by 1998, a total of thirty-eight states spent a lower proportion of GSP on legal services.[3] Ultimately, this increase in spending on legal services relative to GSP results in additional costs to West Virginians. The Marshall study concluded that legal expenditures constitute an assessment on each West Virginia citizen of between $425 and $990 per year.[4]

In 2001, the Beacon Hill Institute at Suffolk University released its State Competitiveness Report 2001.[5] The Beacon Hill Report attempted to evaluate each state for the purpose of gauging its competitiveness relative to other states. Two questions were considered for this evaluation. The first was an analysis of the comparative competitiveness of each state in which dozens of objectively measurable variables affecting nine sub-indices were analyzed.[6] West Virginia ranked 49th, second only to Mississippi, according to the overall index. West Virginia ranked last in the proportion of high school graduates, labor force participation rate and human resources sub-index.[7] It ranked 49th for attracting high-tech companies. West Virginia also ranked last in Workers' Compensation collection dollars at $833 per employee. Interestingly, the 49th ranked state in this category was Ohio at $698 per employee. By comparison, the first sixteen states to be ranked in

[3] *What Are The Costs of Civil Litigation in West Virginia?*, The Regional Economic Review (Winter 2002) p. 8.
[4] *Id.* at 9.
[5] *State Competitiveness Report 2001*, The Beacon Hill Institute for Public Policy Research (2001).
[6] The nine sub-indices are government and physical policy, institutions, infrastructure, human resources, technology, finance, openness, domestic competition, and environmental policy.
[7] *Id.* at 75.

this category had workers' compensation collections of less than one dollar per employee.[8]

The Beacon Hill study was not entirely negative in regard to West Virginia as it noted West Virginia's lowest crime rate in the country, low housing costs, and relatively low electricity rates.[9]

The United States Chamber of Commerce evaluated the liability systems in all fifty states and ranked them. The rankings were obtained after interviews of a national sample of in-house general counsel or other senior litigators at public corporations. These corporate officials play a vital role in decisions to expand and/or relocate business. The survey asked their opinions in the following areas:

- Tort and contract litigation;
- Treatment of class-action suits;
- Punitive damages;
- Timeliness of summary judgment/dismissal;
- Discovery;
- Scientific and technical evidence;
- Judges' impartiality and competence;
- Juries' predictability and fairness.

West Virginia was ranked 49th overall in the country and fared no better than 44th in any of the individual categories. Interestingly, respondents to the survey were asked to give a grade of A, B, C, D or F as to each of the subcategories listed above. West Virginia's only grade of "A" came from two percent of the respondents in the category of Jury predictability. The mean grade for this category, however, was 1.7, ranking West Virginia 47th among the fifty states. None of the mean grades in any category exceeded 1.8.[10]

[8] *Id*. at 81; Interestingly, the lack of competitiveness in Workers' Compensation rates is not the only aspect of West Virginia's Workers' Compensation System that arguably is in need of some reform. A recent survey of votes in the Supreme Court of Appeals on Workers' Compensation matters shows that since 1999, Justice McGraw voted in favor of claimants 100% of the time. Justice Starcher has voted in favor of claimants in Workers' Compensation matters almost 90% of the time. Other statistics show that the claimant files almost all of the appeals heard by the Supreme Court of Appeals on Workers' Compensation matters, with very few appeals by employers being heard. The full report of the analysis of the Court's review of Workers' Compensation matters is attached to the Appendix of this report.

[9] *Id.* at 75.

[10] U.S. Chamber of Commerce State Liability Systems Ranking Study (2002) p. 77.

At the direction of the Supreme Court of Appeals of West Virginia, a commission on the future of West Virginia's judicial system was formed in 1997 for the purpose of conducting a comprehensive review of the State's judicial system. While the scope of that commission's work was more broad than evaluating the civil justice system and the need for potential reforms, it is interesting to note that out of the seventy pages constituting its final report, exclusive of appendices, only six paragraphs were devoted to an evaluation of the need for civil justice reform, and then no consensus could be reached by the Committee on the need for tort reform in West Virginia. Interestingly, the only discussion regarding frivolous litigation concerned multiple habeas corpus filings by incarcerated individuals. As noted in the preface to this section, the commission's justification for ignoring the problems associated with excessive litigation in West Virginia relied on American Bar Association statistics showing that the volume of tort litigation has been declining since the early 1990's. No attempt was made to evaluate tort filings in West Virginia as those statistics were noted to be "not available" because these cases are not distinguished from other general civil case filings in the case load reporting system maintained by the administrative office of the courts.[11]

Perhaps the most comprehensive evaluation of the civil justice system's impact on economic activity in West Virginia was conducted on behalf of the West Virginia Chamber of Commerce by the Perryman Group, a research organization from Waco, TX. Their report, published in 2002, found that West Virginia has a judicial system that is widely believed to be imbalanced and considered to be one of the worst in the country. The Report concludes that the perceived imbalance is in fact a reality as the cost to the typical West Virginia household in terms of higher

[11] *Report of the Commission on the Future of West Virginia Judicial System*, p. 42. Ironically, the statistics maintained by the State of West Virginia account for the numbers of civil actions filed but do not account for the number of plaintiffs in each filing. It has become common practice in West Virginia for mass tort actions to be filed under one civil action, sometimes containing thousands of individual plaintiffs. This is particularly true in matters ultimately referred to West Virginia's Mass Litigation Panel, including litigation relating to asbestos, medical product liability, railroad occupational disease and flood damage claims.

prices and lower personal income as a result of the civil justice system is equivalent to a $997.96 annual tort tax for each West Virginia citizen.

The Perryman study also addressed the litigation growth issue that was avoided by the commission appointed by the West Virginia Supreme Court of Appeals. The Perryman study noted, "litigation activity increased approximately 53.6% more rapidly in West Virginia than in the nation as a whole over [the last ten years], while U.S. tort costs grew by less than the total output."[12]

One of the most interesting studies on the status of the nation's Judiciary was recently published by the American Bar Association. The study is important, not only because of its sponsorship by the nation's largest and most diverse bar association, but also because of the breadth of the analysis of the Judiciary and its recommended reforms.[13] The report, entitled "Justice in Jeopardy," argues that the judicial system in the United States suffers from a lack of confidence and public trust due to the impact of money on judicial elections, uncertain funding mechanisms, and increased politicization and partisanship in judicial selection processes. The report goes on to recommend a process for judicial selection that is based not on partisan elections but on merit selection. The report also identifies eight enduring principles "that should be central components to each state's understanding of the role of the Judiciary as a co-equal branch of government." [14] These principles are directed at the temperament, character, and independence that is required of our judges in order for the public to have faith in the ability of the Judiciary to perform its critical function in American democracy.

The problems associated with mass filings of tort actions were addressed by a recent study by the Center for Legal Policy at the Manhattan Institute. Entitled "One Small Step for a County

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[12] *The Negative Impact on the Current Civil Justice System on Economic Activity in West Virginia,* prepared for the West Virginia Chamber of Commerce, The Perryman Group (2002) at p. 3.
[13] *Justice in Jeopardy, Report of the American Bar Association Commission on the 21st Century Judiciary* (2003).
[14] These eight enduring principles are listed at the beginning of this Report.

Court…One Giant Calamity for the National Legal System," the report analyzes the inherent unfairness of massing large numbers of tort claims in certain jurisdictions.[15] This massing of claims causes such strain on judicial resources, both infrastructure and personnel, that the courts are left to craft "creative" mechanisms to resolve those claims that often result in a deprivation of the defendant's due process rights. Of particular interest to West Virginians is the reports' criticism of the Mass Litigation Panel (MLP) created by the Supreme Court of Appeals of West Virginia. The MLP allows for the mass aggregation of claims for the purpose of expediting the resolution of claims, while abandoning traditional concepts of individualized proof that is the foundation of our fault-based tort system.[16] As a result, West Virginia has become a "magnet court" for filings by plaintiffs from all over the nation, thus clogging the state's courts with out-of-state claims that have no relationship to West Virginia. The result is that the courts have to resort to even more "draconian efforts to resolve a flood of new cases."[17]

The empirical evidence is overwhelming that West Virginia's civil justice system results in significant negative impacts on the economic health of the state. While the studies reviewed acknowledged that civil justice is not the most significant factor affecting the continuous economic problems faced by West Virginia, it is clear that West Virginia's civil justice system is a consistent drag on economic growth and is a factor contributing to economic woes.

[15] Beisner, Miller and Shors, *One Small Step for a County Court…One Giant Calamity for the National Legal System*, Center for Legal Policy at the Manhattan Institute (No. 7 April 2003).
[16] *Id.* at 6.
[17] *Id.*

B. Press And Media Coverage

Over the past two years, media coverage of civil justice issues in West Virginia generally has become much more prevalent due to attention focused on the medical malpractice insurance crisis. The committee surveyed and sampled civil justice system coverage in the West Virginia media. Hundreds of articles, columns, and press reports relating to civil justice issues were collected and separated into categories for evaluation purposes.

Not surprisingly, no consistent theme can be concluded from the review of these press reports. The perspective of each report is dependent upon its source; additionally, advocacy groups seeking to influence public opinion on these issues place many in the media. For instance, in the extensive coverage of the medical malpractice insurance crisis, doctors and hospital groups and their insurers often competed on a daily basis for press coverage with plaintiffs' trial lawyers. Thus, those committed to one side of this debate would find numerous press reports supporting their position and likely an equal amount expressing the opposite position.

It was observed, however, that many press accounts now focus on concerns expressed by individuals who, in the past, rarely were involved in the debate regarding civil justice reform. Public attention directed at physicians leaving the state, restricting their practices or retiring early has resulted in individual citizens who had no previous interest in civil justice reform now finding the issue to be very personal, threatening, and wrought with uncertainty. Accordingly, these members of the general public found their concerns to be newsworthy.

The committee believes that discussions on both sides of these issues in the press with the resulting interest by previously uninterested parties is a favorable development in that civil justice issues, from all perspectives, are much more subject to open and free discussion. As with all controversial issues, however, the dissemination of accurate information reflecting the positions of

groups on all sides of and perspectives on the issue is critical for the development of informed opinions.

C. Membership Survey

In order to evaluate how the members of the civil defense Bar perceive the civil justice system in West Virginia, a survey was developed and transmitted to the 388 members of the Defense Trial Counsel of West Virginia. A total of 84 members submitted responses (21.6%). Demographically, of the respondents to the survey, 49% had been in practice more than sixteen years and 62% practiced law in firms of over 26 lawyers. A total of 74% of the respondents had their offices in Charleston, Huntington or Wheeling.

The survey consisted of objective and subjective questions. The objective section posed statements regarding the civil justice system and then asked the respondent to indicate the extent to which he/she agreed with the statement.[18] The subjective section asked for narrative responses to specific questions about the respondent's experience with the civil justice system.[19]

Overall, the results of the survey show that the defense Bar in the State of West Virginia perceives serious institutional and structural problems with the civil justice system. Significant findings regarding bias at both the trial and appellate court levels and an unwillingness of both levels of courts to treat defendants in civil actions in a fair and impartial manner highlight the results of the survey.

In response to those questions regarding the Supreme Court of Appeals of West Virginia, a

[18] The respondent was given five options from which to choose: strongly agree, somewhat agree, neither agree nor disagree, somewhat disagree and strongly disagree.

[19] A summary of the findings on the objective portion of the survey is attached in the Appendix to this report.

majority of respondents believe that the Court openly exhibits bias, is result-oriented, is not in the mainstream in its decisions and does not enforce procedural rules fairly:

- 89% believe appeals are not decided on an objective evaluation of the law;
- 90% believe the Supreme Court is result-oriented;
- 87% believe the Supreme Court exhibits partiality or bias toward some litigants;
- 94% believe the Supreme Court is not in the mainstream with its decisions;

According to the survey, many of the Circuit Courts in West Virginia are also perceived to be result-oriented, guilty of partiality and bias toward some litigants and unwilling to follow procedural rules evenly, although the percentages finding such problems were lower than those same findings for the Supreme Court of Appeals:

- 62% believe that judges are result-oriented;
- 69% believe that judges exhibit partiality or bias toward litigants;
- 54% believe that judges do not fairly apply the rules of procedure;
- 83% believe that judges do not dismiss cases or grant summary judgment in cases for fear of reversal;

When questioned as to the selection process for judges and justices, an overwhelming majority of respondents believed that the current practice of partisan election of judges, without limitations on lawyer contributions, taints the system of justice:

- 90% prefer a merit selection process;
- 80% believe lawyer judicial campaign contributions affect the outcome of cases;
- 89% believe lawyer judicial campaign contributions taint the justice system;

When queried as to their support for an intermediate appellate court, a majority, although not overwhelmingly, favored the adoption of such a court:

- 55% believe the lack of an intermediate appellate court is unfair to defendants;
- 62% believe that a system of only discretionary appeals is unfair to defendants;

When asked to identify jury venues that they believed were plaintiff-oriented, respondents identified the following counties (listed in descending order):

- McDowell
- Northern Panhandle (Brooke, Hancock, Ohio and Marshall)
- Mingo
- Wyoming
- Boone

From the results of this survey it is clear that practitioners in the defense of civil cases in West Virginia overwhelmingly believe that judges and justices have tilted the playing field in favor of plaintiffs. Most alarmingly, the results show that a significant number of the civil defense Bar believe an unbiased and impartial Judiciary does not exist for defendants in civil cases in West Virginia. The obvious conclusion from these findings is that the civil defense bar has lost faith in the judicial system in West Virginia, and the Supreme Court of Appeals in particular.

D. Regional Meetings

To further evaluate how the civil justice system was perceived in the communities of West Virginia, a series of regional meetings were held wherein lawyers, business people and citizens were invited for an open and frank discussion regarding their experiences and perceptions of the civil justice system, and to receive input regarding recommendations for reform. In essence, the regional meetings served as focus groups where the members of the Committee could obtain the perspective of non-lawyers on the operation of the civil justice system. Meetings were held in Charleston, Huntington, Wheeling, Princeton, Fairmont and Martinsburg.[20] A wide range of issues was discussed at these meetings with a particular focus on individuals' experiences with the civil justice system. While local and individualized issues often were the focus of comments from

[20] Copies of the reports of each Regional Meeting are included in the Appendix to this Report.

participants, the following issues were the most significant in regard to observations and recommendations for change:

1. The litigation climate in West Virginia and the high cost of doing business imperils existing businesses and their ability to continue in operation and deters new businesses from coming to West Virginia;

2. The West Virginia Supreme Court of Appeals does not provide a fair hearing for defendants in civil cases;

3. Lobbying efforts before the West Virginia Legislature only result in a minimum level of civil justice reform because of the dominance of plaintiffs' lawyers in the body;

4. Mass torts, especially claims filed by non-residents, are too frequently allowed to stay in West Virginia courts, despite the lack of any connection with West Virginia;

5. Jury service should be reformed to provide more opportunities for educated and employed individuals to serve on juries;

6. A merit selection process for judges and justices would be preferable to the current system of popular partisan election;

7. Meaningful tort reform, including reform of punitive damages, joint and several liability, and the collateral source rule, is needed in order to level the playing field in civil cases;

8. The workers' compensation system in West Virginia is broken and must be fixed.

E. Judicial Inquiries

The Committee asked sitting judges about their perception of the civil justice system and the need for potential reforms. Individual judges were contacted by members of the Committee and asked to participate in confidential interviews regarding these issues. In the report, no individual judge or Justice was identified by name, nor were sufficient facts given to allow a reader to identify the location or types of cases discussed by the judge or Justice. Eleven judges consented to the interview and provided information to the Committee.[21]

[21] The report of these interviews is included in the Appendix to this report.

The judges interviewed universally believed that legislative reform was not really necessary, they observed that frivolous lawsuits are not a problem for them and that significant procedural reforms are not required to deal with them. Some of the trial judges did observe that the West Virginia Supreme Court of Appeals appears to be plaintiff-oriented, and that their tendency to reverse rulings for defendants or undo decisions against plaintiffs in civil actions restricts the trial judges ability to issue rulings consistent with existing West Virginia law and expect them to stand.

Most of the judges identified lack of civility and cooperation among counsel as a significant problem in the civil cases pending before them. Additionally, most believed that any efforts at significant civil justice reform would have to originate in the West Virginia Legislature as the Supreme Court of Appeals of West Virginia was unlikely to adopt such measures.

F. Other States' Civil Justice Reform Efforts

West Virginia is not unique in its struggle with the perception that the civil justice system is in need of significant reform. The belief that the pendulum has swung too far in favor of plaintiffs has caused legislative bodies in 29 states to consider various packages of tort reform. West Virginia's legislature has also recently considered a myriad of proposals intended to reform the civil justice system. See Section Re Other States Civil Justice Reform Efforts, below. The most significant proposal adopted in West Virginia was directed at the medical malpractice crisis. Other significant changes were made to West Virginia's venue laws to prevent the dumping of thousands of out-of-state plaintiffs' claims in West Virginia's courts. While not adopted, West Virginia's legislature also considered measures to repeal the Supreme Court's adoption of a cause of action for medical monitoring, punitive damage reform, repeal of third-party insurance bad faith, repeal of joint and several liability, and collateral source reform.

G. Committee Conference

Following the completion of the regional meetings, research analysis, media analysis, membership survey, judicial inquiries, and analysis of other state's civil justice reform efforts, the Committee met in April 2003 for a two-day meeting to review the data and information obtained and to bring to the review and analysis process both the unique perspective of the defense bar and the differing experiences and opinions of the members of the Committee. Over the course of the two days, the Committee received reports from its members on the aforementioned activities with a resulting discussion as to its observations and findings and the conclusions that could be reached from the data and information presented. After discussing its observations, findings, and conclusions, the Committee turned its attention to the types of changes and possible reform that might address the findings and conclusions noted by the Committee.[22] The group endeavored to reach conclusions and identify possible recommendations that reflected the clear consensus of the Committee. The initial draft of this report resulted from the two days of discussions in April. Over the course of the following months, the report has been subjected to careful review and analysis by the members of the Committee and by the Board of Governors of the Defense Trial Counsel. Also, Professor Emeritus Forest J. Bowman of the West Virginia University College of Law reviewed the report for the purpose of compliance with the West Virginia Rules of Professional Conduct.

[22] It should be noted that the Committee received input and assistance in its work over the past year from other lawyers, members of the media, members of the West Virginia Legislature, and other concerned citizens and groups. Their assistance in developing a methodology for the Committee, in analyzing the data derived from the Committee's work, and in making recommendations for reform was invaluable.

II.

Observations and Findings Regarding Real and Perceived Problems with West Virginia Civil Justice System and Their Cause(s) and Contributing Factors

Introduction

Based on its year long review and analysis of all the documents and information available to it, the Civil Justice Committee of the Defense Trial Counsel of West Virginia has made the following observations and findings regarding the real and perceived problems with West Virginia's civil justice system, their cause(s) and contributing factors. The list is not in any particular order, other than after some general observations and findings, it is categorized by the four main participants in the civil justice system: the Legislature, the Courts, juries, and lawyers. Although there is not complete unanimity among the various members of the Committee on all of the observations and findings, their priority, significance or ultimate impact on the civil justice system, there is general consensus in support of the observations and findings listed below.

General:

1. There is a general perception in the business community, much of the general public, and the media, that West Virginia's civil justice system is out of balance and unfair to defendants in civil cases.

2. In the past twenty-five years, there appears to have been a decided and radical shift in terms of the proper role of the Judiciary and a perceived erosion of traditional notions of checks and balances between the co-equal branches of our state government, arguably to the detriment of the civil justice system.

3. The civil justice system has permitted socio-economic, historical and cultural prejudices common to West Virginians to permeate jury deliberations and take precedence over the law and facts peculiar to a given dispute. These same prejudices are, moreover, often reinforced and magnified by influential law professors and judges.

4. Most members of the civil defense bar and members of the business community believe that the plaintiffs' bar exerts far too much influence over the judicial and legislative processes in West Virginia through large political contributions to judges and influential Legislators.

5. Nationwide, the costs of litigation and liability claims exploded from 0.6% of Gross Domestic Product (GDP) in 1950 to 2% of GDP by 2001, approximately $200 billion per year.

6. Data and statistics indicate that since 1978, legal costs in West Virginia have risen more than 10 times faster than its economy as a whole.

7. Many insurance companies providing various different types of insurance coverage, including automobile, casualty, general liability and professional medical liability, have refused to issue new policies, have limited coverage, raised premiums astronomically, or left the State completely.

8. West Virginia is one of only six states which allow third party bad faith claims, i.e. claims against an insurance company by a third party for failure to act in good faith in responding to a claim against its insured. (A third party is someone other than the insured). In all of the other states, persons other than the insured with complaints against an insurance company must seek relief from state insurance regulatory agencies.

9. According to the U.S. Chamber of Commerce, West Virginia's litigation and judicial reputation among the business community has been and still is considered one of the worst in the nation. West Virginia's civil justice system has been ranked as one of the worst States in the country by the business community on such elements as overall treatment of tort and contract litigation, treatment of class actions, punitive damages, summary judgment, discovery, scientific and technical evidence, judges, competence and impartiality, jury predictability and fairness.

10. In particular, West Virginia is considered a very unfavorable legal climate for employers and product manufacturers and sellers.

11. Employers in particular, both large and small, complain about the bias and unfairness of West Virginia's civil justice system. Employers have been significantly and adversely effected by increasing, often duplicative, employment-related litigation, including discrimination and wrongful discharge claims. Not only must they respond to administrative claims by local, State and Federal agencies empowered to address certain issues (West Virginia Human Rights Commission, EEOC), they must also respond to private civil actions on the same issues. Similarly, in terms of employee personal injury or death cases, the no-fault Workers' Compensation system is no longer, practically speaking, the exclusive remedy of an employee against his employer as it was initially intended to be. Now an employee may assert and this employer must respond to and defend costly and loosely scrutinized deliberate intent claims and recently created medical monitoring claims in addition to related Workers' Compensation claims.

12. The legal system and litigation environment of a State can be a major barrier to corporate investment and economic development.

13. A study commissioned by the West Virginia Chamber of Commerce in 2001 found that a lack of legal reform has resulted in a loss of ten thousand (10,000) jobs that year and cost the typical West Virginia family nearly Six Hundred and no/100ths ($600.00) Dollars per year in higher prices and lower income. By 2006, job losses were predicted to rise to sixteen thousand (16,000) annually, costing families One Thousand and no/100ths ($1,000.00) Dollars per year.

14. The tort reforms most uniformly advocated by the defense bar involve reforms to the mass litigation system in West Virginia, restrictions on class action litigation, punitive damage limitations, collateral source, joint and several liability reform, and venue reform. (The 2003 Legislature enacted venue reform concerning out-of-state plaintiffs). Other areas of potential reform, such as caps on compensatory damages and Federal product liability law, have much less

support among the defense bar.

Legislature:

15. Although the Legislature does not include a significant number of plaintiffs' lawyers and the number of plaintiffs' lawyers who are Legislators has decreased recently, the plaintiffs' bar is well represented in positions of power and influence in and with the Legislature and certainly much better represented than defense trial lawyers.

16. Of equal or greater concern is the fact that West Virginia plaintiffs' lawyers have historically been very active in the political process, contributing significant time and money in supporting legislative candidates they believe will be favorable to them and their clients or potential clients, and thereby becoming part of their constituency of interests. Of equal concern is the significant influence that "organized" labor has upon the West Virginia Legislature, which historically takes positions consistent with the plaintiff bar.

17. There have been instances in the Legislature which appear to be examples of self-serving legislation, i.e. specific legislation passed for and at behest of one or more plaintiff lawyer Legislators.

18. Nevertheless, there is a general consensus that the West Virginia Legislature is not a significant problem. By its very nature, the Legislature makes changes slowly and deliberately with ample opportunity and provision for all voices to be heard. In addition, there are varying views in the Legislature concerning relevant civil justice issues, and at least recently there has been a significant change in the makeup of the Legislature.

Courts:

19. The defense bar and business community generally believe that the most significant problems with the civil justice system in West Virginia originate not with the Legislature, but with the Judiciary.

20. Despite the importance of the Judiciary in shaping West Virginia's civil justice system, and

the broad implications that the system has on the lives of every West Virginian, the impact of the Judiciary on the civil justice system and the State's economy have until recent years gone largely unnoticed and have been substantially ignored by the media and public.

21. The perception of judicial favoritism and partiality is based, in part, upon: (a) open, public prejudicial comments from members of the Judiciary; (b) what often appear to be result-oriented and/or party-based decisions; (c) what often appears to be a "double standard" resulting in inconsistent application of certain procedural and evidentiary rules depending upon the party and counsel involved; and (d) lawyer contributions to and lawyer involvement in judicial campaigns.

22. There is a general perception that certain members of the Judiciary turn a blind eye toward conflicts of interest, and engage in improper ex parte contacts and communications both with lawyers and other members of the Judiciary. There is also a widespread belief that there is too much "judicial infighting" and that this type of conduct erodes the confidence of the public in the overall civil justice system.

23. There is no provision in our system for an independent review of conflicts of interest decisions and rulings on judicial recusal/disqualification motions.

24. The defense bar believes that ex parte contact between judges and lawyers and judges and potential jurors is a significant problem in West Virginia.

25. Questions of judicial integrity have arisen as a result of a number of specific situations. Among one of the more striking examples was seen in a West Virginia Supreme Court opinion which was altered between the time it was handed down and the time it was published in the hard bound reporter, apparently at the direction of a member of the Court staff without any official action of record by the Supreme Court.

26. Only six states in the country, including West Virginia, hold partisan judicial elections.

27. Partisan election of judges and their corresponding regard for various "constituencies" conveys the impression that their decision making, like that of Legislators, is too much driven by

party allegiance or special interests, rather than the rule of law.

28. There is a general view among defense lawyers, business leaders and other organizations, that support and contributions to judicial election campaigns by lawyers and others actually affect and influence the outcome of cases. Just as important is the general view that lawyer contributions to judicial candidates taint the integrity of judicial systems generally.

29. Certainly at time, the increased politicization of the Judiciary may have also inured to the benefit of particular defendants, defense attorneys or their causes, but that is not what the Civil Justice Committee advocates or believes is in the best interest of the civil justice system and the citizens of West Virginia.

30. There is a general view that appointed judges, even those with less trial experience, have become more moderate and effective than those popularly elected when it comes to diligence, fairness, impartiality and respect for the process.

31. Federal judges, all of whom are appointed for life, are generally perceived as being more qualified and capable, and more impartial, evenhanded and independent than State Court judges. This perception appears to be based on the difference in the process for their selection, and related difference in politicization of the system, as well as a greater emphasis and concern in the Federal judicial system about actual and perceived impartiality and independence.

32. There is lack of effective judicial oversight. Lawyers are reluctant to report questionable or even clearly improper conduct out of concern regarding their subsequent treatment by the Judges and ineffective discipline should a complaint be sustained. Judges are reluctant to report questionable conduct or take action to discipline other judges, resulting in minimal, if any, discipline or sanctions for clear violations of the judicial code.

33. There is a general perception that the West Virginia Supreme Court of Appeals does not decide civil cases based on an objective, consistent evaluation of West Virginia law and with an analysis of legislative intent, but rather appears often to be result or party-oriented, with an eye

toward popular perception.

34. Often cited examples of result-oriented or party based decisions include the following: Farmers Mutual v. Tucker, 576 S.E.2d 261 (W.Va. 2002) (Starcher) (Dissent: Davis and Maynard) (finding "household" ambiguous and holding family member living in separate abode on insured's property member of insured's household; Richards v. Kees, 572 S.E.2d 898, (W.Va. 2002) (Per Curiam) (finding no accord and satisfaction despite statement on face of check because of plaintiff's "limited education and understanding"); Edwards vs. Bestway Trucking, 569 S.E.2d 443 (W.Va. 2002) (Per Curiam) ("conduct of your business" determined ambiguous so as to provide plaintiff insurance coverage for accident while transporting family to Church); Law v. Monongahela Power Company, 558 S.E.2d 349 (W.Va. 2001) (Per Curiam) (ignoring plaintiff's failure to file appeal within four month period); Doe v. Wal-Mart Stores, Inc., 558 S.E.2d 663 (W.Va. 2001) (Davis) (limited so called "empty chair" defense, i.e. the ability to argue fault of absent party); Stewart v. Monongahela Power Company, 558 S.E.2d 349 (W.Va. 2001) (Per Curiam) (Dissent: Davis and Maynard) (extension of time period required to appeal Summary Judgment ruling); Foster v. Sakhai, 559 S.E.2d 53 (W.Va. 2001) (McGraw) (Dissent: Davis and Maynard) (plaintiffs' lawyer permitted to violate a Limine order with impunity); Rowe v. Sisters of the Pallottine Missionary Society, 560 S.E.2d 491 (W.Va. 2001) (Starcher) (Dissent: Davis) (held defendant's objection waived since not properly communicated during closing argument despite evidence clearly showing objection made and in compliance with Court Rules); Feliciano v. 7-Eleven, Inc., 559 S.E.2d 713 (W.Va. 2001) (Davis) (Dissent: Maynard) (effectively created exception to at-will employment doctrine to permit employee to violate company policy by resisting armed robbery); Nestor v. Bruce Hardwood Floors, L.P., 558 S.E.2d 691 (W.Va. 2001) (Per Curiam) (Dissent: Maynard) (effectively created employee immunity from discharge subsequent to filing a Workers' compensation claim.); Bradshaw v. Soulsby, 558 S.E.2d 681 (W.Va 2001) (Starcher) (Dissent: Maynard) (applied discovery rule to permit wrongful death case,

overruling 50 years of precedent); Russell v. Bush & Burchett, Inc., 559 S.E.2d 36 (W.Va. 2001) (Starcher) (Dissent: Maynard) (application of comity rather than lex loci delicti to permit deliberate intent action for W.Va. resident worker injured in Kentucky); Allman v. Andrew MacQueen, 551 S.E.2d 369 (W.Va. 2001) (Per Curiam) (modifying mass litigation master plan implemented by circuit judge which provided for series of small group all-issues at trial instead of an en masse common-issues trial); Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC, 547 S.E.2d 256 (W.Va. 2001) (Starcher) (permitting recovery of both punitive damages and damages for emotional distress without any evidence of physical injury in wrongful termination case); Watson v. Inco, 545 S.E.2d 294 (W.Va. 2001) (Davis) (lowering standards for expert witness qualification, effectively diminishing the trial court's role as evidentiary gatekeeper); Roberts v. Consolidation Coal Company, 539 S.E.2d 478 (W.Va. 2000) (Davis) (eliminating employer's ability to assert defense of employee's deliberate contributory intent as cause of his occupational injury); Mitchell v. Broadnax, 537 S.E.2d 882 (W.Va. 2000) (Davis) (Concurring: Starcher and McGraw) (limiting legislative provisions permitting insurance exclusions to only those instances where premiums are adjusted accordingly); Crafton v. Burnside, 528 S.E.2d 768 (W.Va. 2000) (Starcher) (Dissent: Scott) (allowing plaintiff to withdraw consent to provision in case management order providing for reverse bifurcation damages); Gerver v. Benavides, 530 S.E.2d 701 (W.Va. 1999) (Per Curiam) (Dissent: Maynard) (overruling trial court's award of a new trial based on fraud where new evidence, including post-verdict surveillance tape, conclusively contradicted plaintiff's trial testimony); Bower vs. Westinghouse Electronic Corporation, 522 S.E.2d 424 (W.Va. 1999) (McGraw) (Dissent: Maynard) (adopting medical monitoring claims despite lack of any evidence of actual injury); Lacy v. CSX Transportation, Inc., 520 S.E.2d 418, (W.Va. 1999) (McGraw) (Dissent: Workman and Maynard) (invalidating process and result of Robert Kiss nomination); Gaither v. City Hospital, Inc., 487 S.E.2d 901 (W.Va. 1997) (Starcher) (Dissent: Maynard) (applying discovery rule to toll statute of limitations beyond the plain language of the Medical

Professional Liability Act of 1986 to permit plaintiff to bring action four years after injury); Blankenship v. Richardson, 474 S.E.2d 906(W.Va. 1996) (McHugh) (holding S.B. 250, which required 50% PTD threshold, and making other Workers' Compensation charges not effective until 90 days from passage, resulting in large influx of PTD filings); Abbot v. Owens, 444 S.E.2d 285 (W.Va. 1994) (McHugh) (reversing non-prejudicial dismissal based on forum non-conveniens to permit out-of-state plaintiffs to maintain action in W.Va. against defendant with minimal nexus to state); Dobson v. Eastern Associated Coal Corporation, 422 S.E.2d 494 (W.Va. 1992) (McHugh) (Dissent: Brotherton) (finding work force reduction based upon competency to be "age discriminatory" and holding that offer of reemployment conditioned only on passing standard physical exam was not an unconditional offer of reemployment).

35. There appear to be numerous instances of "judicial legislation," expansion of existing legal theories and/or creation of new legal theories, and judicial nullification of legislative intent or reforms, raising serious questions concerning separation of powers, the role of the Judiciary and judicial impartiality.

36. Cited examples of unjustified extensions of the law and/or judicial nullification of legislative intent or reforms include the following decisions: Findley v. State Farm Mutual Automobile Insurance Company, 576 S.E.2d 807 (W.Va. 2002) (Davis) (Dissent: McGraw) (refusing to apply statute retroactively, or contrary to legislative intent); Repass v. Workers' Compensation Division, 569 S.E.2d 162 (W.Va. 2002) (McGraw) (Dissent: Davis and Maynard) (disregarding Workers' Compensation legislative directives and holding DRE model of A.M.A. for diagnosis estimate invalid and unreliable); McKenzie v. Smith, 569 S.E.2d 809 (W.Va. 2002) (Starcher) (Dissent: Maynard and Davis) (holding employers cannot require workers to use a preferred provider list for Workers' Compensation rehabilitative services); Osborne v. United States, 567 S.E.2d 677 (W.Va. 2002) (Davis) (Dissent: Maynard) (interpreting Medical Professional Liability Act to permit non-patients to recover damages attributable to alleged medical

malpractice); Bradshaw v. Soulsby, 558 S.E.2d 681 (W.Va. 2001) (Starcher) (Dissent: Maynard) (applying discovery rule to extend wrongful death statute of limitations, overruling 50 years of precedent); Doe v. Wal-Mart Stores, Inc., 558 S.E.2d 663 (W.Va. 2001) (Davis) (limiting so-called "empty chair" defense, i.e. the ability to argue fault of absent party); Stewart v. Monongahela Power Company, 558 S.E.2d 349 (W.Va. 2001) (Per Curiam) (Dissent: Davis and Maynard) (extending time period for appeal of Summary Judgment ruling); Kiser v. Harper, 561 S.E.2d 368 (W.Va. 2001) (Per Curiam) (Dissent: Davis and Maynard) (effectively subjecting homeowner to "strict liability" for work on home involving dangerous activity which injures a third person); Erie Insurance Property and Casualty Company v. Stage Show Pizza JTS, Inc., 553 S.E.2d 257 (W.Va. 2001) (Starcher) (Dissent: Albright and Maynard) (invalidating insurance coverage exclusion for deliberate intent cause of action as outside the W.Va. Workers' Compensation Act); Roberts v. Consolidation Coal Company, 539 S.E.2d 478 (W.Va. 2000) (Davis) (eliminating employer's defenses of comparative fault and deliberate intent of employee in deliberate intent action); Mitchell v. Broadnax, 537 S.E.2d 882 (W.Va. 2000) (Davis) (Concurring: Starcher and McGraw) (limiting legislative action permitting insurance exclusions to instances where premiums are appropriately adjusted); Bailey v. Norfolk and Railway Company, 527 S.E. 516 (W.Va. 1999) (McGraw) (Dissent: Davis and Maynard) (applying statute not raised at trial to create new cause of action and decide merits); Bower v. Westinghouse, 522 S.E.2d 424 (W.Va. 1999) (McGraw) (Dissent: Maynard) (adopting medical monitoring claim despite lack of any injury manifestation); Gaither vs. City Hospital, 487 S.E.2d 901 (W.Va. 1997) (Starcher) (Dissent: Maynard) (applying discovery rule to toll statute of limitations contrary to legislative intent); Dobson v. Eastern Associated Coal Corporation, 422 S.E.2d 494 (W.Va. 1992) (McHugh) (Dissent: Brotherton) (finding work force reduction based on competency to be "age discriminatory" and offer of reemployment based on requirement of passage of a physical exam is not unconditional); Mayles v. Shoney's, Inc., 405 S.E.2d 15 (W.Va. 1991) (Workman) (Dissent: Neely and Brotherton) (ignoring

legislative intent to narrow deliberate intent standard and expanding it instead); Blankenship v. General Motors Corporation, 406 S.E.2d 781 (W.Va. 1991) (Neely) (adopting "crashworthiness" doctrine where design defect merely contributes to plaintiff's injuries and concluding that when split of authority exists, trial courts should presume West Virginia Supreme Court would adopt rule most favorable to plaintiff); Twigg v. Hercules Corporation, 185 W.Va. 155, 406 S.E.2d 52 (W.Va. 1990) (Workman) (Dissent: Brotherton) (holding employer's drug screening program contravenes public policy despite legislative silence on the issue); Mandolidis v. Elkins Industries, Inc., 246 S.E.2d 907 (W.Va. 1978) (McGraw) (Dissent: Neely) (reconsidering interpretation of "deliberate intent," and adopting a definition to include willful, wanton and reckless misconduct definition to circumvent employer immunity).

37. The 1999 decision of West Virginia Supreme Court in Bower v. Westinghouse recognized medical monitoring as a cause of action in West Virginia, allowing recovery for the cost of future medical testing, even though the person is in perfect health, even when diagnostic testing is not generally recommended, and even when no known treatment for the alleged potential problem exists.

38. The medical monitoring standard adopted by the West Virginia Supreme Court of Appeals in Bower v. Westinghouse is one of the most vague standards for medical monitoring claims in the country. Recovery is available despite a lack of any evidence of any physical injury or adverse health condition, even when no treatment available.

39. Certain Justices on the current Supreme Court appear to believe, and have affirmatively stated, that expansion of available claims and recoveries in West Virginia is somehow an acceptable (although many believe not ultimately successful) form of economic development.

40. The defense bar generally believes that the Supreme Court of Appeals does not fairly and consistently apply and enforce the requirements of the Rules of Civil Procedure, the Rules of Evidence, and the Rules of Appellate Procedure to the case.

41. There appears to be a double standard in the application of certain evidentiary and procedural rules and principles. For example, on one hand, plaintiffs' lawyers and judges talk about the importance of letting a jury decide the case and letting the jury hear all of the relevant evidence, while at the same time denying the jury relevant "reimbursement" evidence based on the collateral source rule, and preventing the jury from hearing evidence about the non-taxability of personal injury awards, personal consumption of a decedent in a wrongful death case, and remarriage of a decedent's spouse.

42. The civil defense bar perceives certain Supreme Court Justices as being so plaintiff-oriented in civil disputes as to be openly hostile and antagonistic toward defendants, their attorneys and their positions or interest, thereby calling into question the fairness with which the presented issues will be adjudicated.

43. The general view among the defense bar is that out of the sixty-five (65) Circuit Court judges in West Virginia, no more than 10 to 12 judges are regarded as exhibiting prejudice and bias toward litigants, which undermines the integrity of the process.

44. The general view of the defense bar is that certain jurisdictions in West Virginia have more plaintiff-oriented judges and juries, particularly areas in southern West Virginia (Mingo and McDowell Counties in particular) and the northern panhandle (Marshall, Brooke, Hancock and Ohio Counties).

45. The general view of the defense bar is that West Virginia Circuit Court judges often avoid rulings or otherwise allow cases that they would otherwise dismiss or in which they would grant summary judgment to proceed to trial because of the threat of reversal on the standard established by the West Virginia Supreme Court of Appeals.

46. Comments have been made by Circuit Court judges that they would grant summary judgment in given cases, except for the obvious disfavor to summary judgment by members of the West Virginia Supreme Court of Appeals. Members of the Supreme Court have on more than one

occasion indicated that they do not believe in summary judgment, and that “Rule 56 has been removed from their Rule Book”. They have expressed a lack of appreciation for the purpose and intent of summary judgment by asking counsel during oral argument "if your case is so good, why don't you simply go to trial? Why bother with summary judgment?"

47. Our judicial system as it currently operates has allowed for recovery of damages well beyond the intent of the "made whole" rule. Juries award damages in personal injury cases of amounts above that which the plaintiff actually lost because of the collateral source rule. Evidentiary rules or the application of evidentiary rules also prohibit admissibility of evidence concerning non-taxability of personal injury awards and personal consumption by a decedent in a wrongful death case.

48. An expectation has developed that most, if not all, cases will settle. While many cases do settle, that expectation has reached a point where certain judges view settlement as a "requirement.” Some judges proceed as if the plaintiff were automatically entitled to compensation and defendants must pay regardless of the case and facts. They make it abundantly clear that they resent parties, particularly defendants and their counsel, electing to exercise their right to a jury trial, sending a clear message that a defendant will pay a heavy price for failing to settle, when it comes time for rulings by the court during the course of the subsequent trial.

49. There appear to be certain areas in the State, including specific counties and circuits, where lawyers from outside West Virginia, or from other areas within West Virginia, are treated as outsiders, and not given the same courtesy and consideration as local lawyers, regardless of the lawyers’ plaintiff or defense orientation.

50. Considerable recent writings on class actions reflect a serious concern that West Virginia’s rules and processes for “mass torts” and class actions, when permitted incautiously, threaten the due process rights of both plaintiffs and defendants because they require courts to attempt to hold a large group of parties to the same result simultaneously, even when there are necessarily substantial

differences among the individual claims.

51. West Virginia's judicial response to mass tort litigation is an area of particular concern to the public, business, community and defense lawyers. Among other things, discovery is limited and claims are consolidated to such a degree that it is difficult to present any meaningful defense. Additionally, the burdens of proof and evidentiary standards for plaintiffs have been diminished to such a degree that they are virtually non-existent. Furthermore, the judges on the mass tort panel and the judges assigned to mass tort cases appear to be carefully selected by the West Virginia Supreme Court of Appeals to assure bias in favor of plaintiffs and prejudice against the defendants in those cases.

52. There is a widespread concern that aggregating claims through class action or mass tort devices creates exposure risks for defendants which have little relation to culpability or actual facts in the case and are so substantial that they necessitate settlement, even though plaintiffs have relatively weak underlying substantive claims.

53. Based on prior decisions of the West Virginia Supreme Court of Appeals, cases can be brought in any county in the State regardless that neither the plaintiff nor the facts and circumstances at issue in the case have any contact or connection with the county whatsoever, as long as a defendant in the case has had at least some contact, with the county, even if that contact is totally unrelated to matters at issue in the case.

54. As a result of its relaxation and less vigorous application of rules regarding joinder, consolidation, venue, choice of laws, and burden of proof, West Virginia courts are generally viewed as more favorable and advantageous to plaintiffs, and accordingly West Virginia has become a magnet for mass tort litigation.

55. West Virginia's Supreme Court created special mass litigation rules in 1999 when the Court adopted Trial Court Rule 26.01, which permits the mass aggregation of particular types of categories of cases with limited criteria, procedures, or standards. The Rule was adopted out of

necessity because the Court's willingness to permit mass tort actions had made West Virginia a magnet , thereby requiring even more draconian efforts to respond to the continuing flood of cases.

56. For over a decade, West Virginia Courts have permitted mass consolidation of asbestos cases for all purposes, including trial. In 1996, the West Virginia Supreme Court upheld consolidation for all purposes of approximately 1,000 cases filed against seventeen (17) defendants. The Court held that it had become necessary to "adopt diverse, innovative, and often non-traditional judicial management techniques to reduce the burden of asbestos litigation."

57. In a series of ad hoc decisions, Trial Court Rule 26.01 has been interpreted to approve the aggregation of the claims of as many as 8,000 plaintiffs alleging exposure to asbestos against over 250 defendants for resolution in a single mass trial. It has been interpreted to allow the aggregation of these cases for all purposes, and also to allow the denial to 250 defendants of the right to conduct discovery related to the 8,000 plaintiffs – the very discovery normally needed to file standard pre-trial motions (such as those challenging venue and those seeking summary judgment) in order to identify non-meritorious claims. Of the 8,000 plaintiffs involved "as many as five thousand" plaintiffs had "no connection" whatsoever with West Virginia. The rule has been interpreted to allow the application of West Virginia law to all claims.

58. Although there are many in the defense bar who believe that an intermediate level appellate court hearing civil appeals would improve our system, others believe that if they are elected and forced to follow the standards and precedent of the West Virginia Supreme Court of Appeals, they would offer little relief from current problems and would only add more layers of delay with an expanded bureaucracy.

Juries:

59. There is a general view that juries are not composed of any of defendant's peers. Juries are often substantially composed of unemployed, uneducated and unsophisticated citizens. This problem is in part due to the unwillingness of certain educated and employed people to serve and

their inclination to avoid jury duty, as well as jury selection processes weighted in favor of excusing any prospect who may have an opinion or the ability and inclination to form one.

60. Because of the way juries are chosen in West Virginia, and the limitations placed on the number of jurors hearing civil cases, juries are rarely perceived as representing a true cross section of the population. In addition, because of the limited number of jurors and the manner in which they are chosen, there is a perception that the natural prejudices and sympathies that some jurors bring to the process can be more easily manipulated, all of which serves to undermine confidence in the impartiality of the system.

61. There is a general concern among defense counsel over lack of uniformity in the voir dire process. Some judges allow unfettered questioning by counsel and even allow what amounts to predisposing argument, and other judges prohibit any real, effective voir dire. Several judges have indicated that you are only allowed to voir dire concerning information necessary to determine if there is actual prejudice or bias in order to request a challenge for cause, and prohibit inquiry to obtain information necessary to effectively exercise preemptory challenges.

Lawyers:

62. One perceived problem with the civil justice system is that no one is objectively evaluating or screening cases.

63. The number of lawyers in West Virginia has doubled since 1980, increasing by a net of approximately 100 lawyers per year. Not counting the many lawyers from outside the state who appear in our courts, there are now 4200 lawyers licensed in West Virginia. There is a concern that the number of lawyers may affect the decrease in the nature and scope of screening of cases by lawyers since there are necessarily fewer cases to go around and cases with less merit, which otherwise might have been declined, are pursued with hope for a compromise recovery.

64. There is a general view that there is a new brand of consumer advocacy, one in which lawyers stand first, if not alone, in the benefits line at the time of settlement. Many class actions

are now being settled on the basis of what the lawyers get, not what the client/consumers in the class may get. (See National Association of Consumer Advocates, Senate Judiciary Sub-Committee Hearing, May 4, 1999.)

65. There is a general view that the contingent fee system often results in windfall fees being obtained by some contingent fee lawyers, regardless of the work, skill, diligence, talent or value of service provided, and thereby diminishing the net award to deserving victims.

66. Large sums of the money received by lawyers in contingency fees cases has been put back into judicial campaigns to assure that the Judiciary is supportive of the current system, high verdicts, and the interest of Plaintiffs in civil litigation.

67. The contingency fee system is generally defended as providing a necessary resource and avenue to people who may not otherwise be able to afford legal services. However, some believe that the contingent fee system has been exploited by lawyers who take excessively large percentages of verdicts/settlements, in part because many plaintiffs are uninformed about their ability to negotiate fair and case-appropriate contingent fee arrangements.

68. Lawyer solicitation and unfettered personal injury advertising hurt the image of lawyers and the civil justice system, but it exists everywhere throughout the country and is not a unique major problem or contributing factor to the existing problems with West Virginia's civil justice system.

69. Certain lawyers, both plaintiff and defense, at times are unnecessarily confrontational, abrasive and obstructive, and fail to adhere to the Standards of Professional Conduct, which among other things require lawyers to be civil and courteous, and not be abrasive or indulge in offensive conduct, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.

III.

Conclusions

Introduction

Based on its review and analysis of a substantial amount of documents and information, and its observations and findings regarding the real and perceived problems with West Virginia's civil justice system, as well as their causes and contributing factors, the Civil Justice Committee has made and reached the following conclusions. This list is not in any particular order, and although there is not complete unanimity among the various members of the Committee on all of these conclusions and their priority, the conclusions do represent the general consensus of the Civil Justice Committee.

General:

1. An effective, independent and impartial judicial system requires public trust and confidence.

2. Laws established in the State Constitution, and legislatively enacted statutes, are intended to protect everyone equally: the rich, the poor, the majority, the minority, the powerful and the powerless, unaffected by prejudice or sympathy.

3. In the past twenty-five years, there has been a decided and radical shift in terms of the proper role of the Judiciary and a perceived erosion of traditional notions of checks and balances between the co-equal branches of our state government, all to the detriment of the civil justice system.

4. There is a general perception by the business community, and much of the general public, the media and lawyers (at least defense attorneys) that West Virginia's civil justice system is unbalanced and unfair to defendants in civil cases.

5. West Virginia's civil justice system has been ranked as one of the worst in the country by the business community on such elements as overall treatment of tort and contract litigation,

treatment of class actions, punitive damages, summary judgment, discovery, scientific and technical evidence, judges' competence and impartiality, jury predictability and fairness.

6. In particular, West Virginia is considered a very unfavorable legal climate for employers and product manufacturers and sellers.

7. The civil justice system has permitted socio-economic, historical and cultural prejudices common to West Virginians to permeate jury deliberations and take precedence over the law and facts peculiar to a given dispute. These same prejudices are, moreover, often reinforced and magnified by influential judges.

8. The plaintiffs' bar exerts far too much influence over the judicial and legislative processes in West Virginia through large political contributions to judges and influential Legislators.

9. The legal system and litigation environment in West Virginia have been a major barrier to corporate investment and economic development.

10. West Virginia's negative litigation and judicial reputation have been established over time, and its reputation will not be easily or quickly reversed.

Legislature:

11. There is a general consensus that the West Virginia Legislature is not a significant problem. By its very nature, the Legislature makes changes more slowly and deliberately with ample opportunity and provision for all voices to be heard. In addition, there are varying views in the Legislature concerning relevant civil justice issues, and at least recently there has been a significant change in the makeup of the Legislature.

12. The recent increase in attention on and concern over West Virginia's civil justice system and its problems, and the resulting discussion and debate by individuals and groups involved in the system, are positive developments.

Courts:

13. The most significant problems with the civil justice system in West Virginia originate not with the Legislature, but with the Judiciary.

14. Despite the importance of the Judiciary in shaping West Virginia's civil justice system, and the broad implications that the system has for the lives of every West Virginian, the impact of the Judiciary on the civil justice system and the State's economy has until recent years gone largely unnoticed and have been substantially ignored by the media and public.

15. Judges should uphold the rule of law, be impartial and independent, and possess appropriate temperment and character (integrity, humility, evenhandedness and be unyielding to personal bias) as well as superior qualifications and capabilities (intelligence, legal training and experience).

16. It is fundamental to the integrity of the Court system that it be free from bias. The special role of the Judiciary in our system of government demands not only that justice be dispensed impartially, but also that the perception of impartiality be maintained.

17. Litigants will only accept adverse rulings if they believe that they have had a full and fair opportunity to present their case or defense and have been heard, and that the Court's decision is unbiased and based on the legal merits of the case, not personal favor, whim or other prejudicial influences.

18. There is a general perception that the West Virginia Supreme Court of Appeals does not decide civil cases based on an objective, consistent evaluation of West Virginia law and legislative intent, but rather appears often to be result or party-oriented.

19. Some of the Justices of the Supreme Court of Appeals regularly exhibit partiality or bias toward litigants who appear before the Court.

20. Employers in particular, both large and small, complain about the bias and unfairness of West Virginia's civil justice system. Employers have been significantly and adversely affected by increasing, often duplicative, employment related litigation, both civil and administrative, and the

fact that, practically speaking, the no-fault Workers' Compensation system is no longer the exclusive remedy of an employee against his employer as it was intended to be.

21. The general perception of the public, media and defense counsel that the Judiciary is unfair and unbalanced, results from a number of factors, including but not limited to:

- Apparent judicial conflicts of interest;
- Inconsistent application of certain procedural and evidentiary rules;
- Result-oriented and party-based decisions;
- Permitting recovery without injury and/or without satisfying any meaningful burden of proof;
- Unprofessional judicial conduct, including ex parte contact and communications between judges and lawyers, and inappropriate conduct and comments raising questions regarding impartiality.

22. There is a general view that West Virginia's Judiciary is biased against out-of-state residents and entities. Retired West Virginia Supreme Court Judge Richard Neely wrote candidly in his book, "*The Product Liability Mess*": "As long as I am allowed to redistribute wealth from out-of-state companies to injured, in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security because the in-state plaintiffs, their families and their friends will reelect me." (Page 4) He continued: "It should be obvious that the in-state local plaintiff, his witnesses, and his friends, can all vote for the judge, while the out-of-state defendant can't even be relied upon to send a campaign donation." (Page 62) With a few notable exceptions, some of the current Judiciary in West Virginia appear to have the same bias and philosophy described by former Justice Neely.

23. The defense bar perceives that the West Virginia Supreme Court of Appeals is not in the judicial mainstream when compared to other jurisdictions in its interpretation and application of law in civil cases.

24. There are numerous cited instances of "judicial legislation", expansion of existing legal theories and/or proliferation of new legal theories, and/or judicial nullification of legislative intent

or reforms.

25. Much of the Supreme Court's proliferation of new legal theories and/or judicial nullification of legislative intent or reforms evidences a preoccupation with the expansion of so-called individual and personal rights at the expense of established legal principles, raising serious questions concerning separation of powers and judicial impartiality.

26. The Civil Justice Committee does not believe that this is an issue of so-called conservative views and opinions vs. so-called liberal views and opinions, which is a natural and healthy tension in any system. It is not judicial philosophy that is problematic. The problem instead is where judicial officers, regardless of personal or political opinions and philosophy, exhibit bias or prejudice, apply a double standard to procedural, evidentiary, or substantive issues as they arise, make result-oriented or party-based decisions, or conduct themselves inappropriately.

27. In many instances the West Virginia Supreme Court has usurped the authority of the Legislature to consider public policy issues, and to enact carefully drafted legislation which not only addresses public policy issues, but also considers the short term and long term effects of the legislation and attempts to integrate it into and with other existing laws.

28. West Virginia's judicial branch has become an impediment to governmental policy implementation. Rather than a partner and coequal branch of government, the Judiciary has adopted and applied the social and public policy agenda of individual judges, or even special interests with which they are identified, with substantial negative effects on allocation of resources and true representative government.

29. Justices of the West Virginia Supreme Court of Appeals, and in certain cases Circuit Court judges, inconsistently apply evidentiary and procedural rules and principles in order to assist or "relieve" plaintiffs of their burden of proof.

30. There appears to be a double standard in the application of certain evidentiary and procedural rules and principles. For example, on one hand, plaintiffs' lawyers and judges talk about

the importance of letting a jury decide the case and letting the jury hear all of the relevant evidence, while at the same time denying the jury relevant "reimbursement" evidence based on the collateral source rule, and preventing the jury from hearing evidence about the non-taxability of personal injury awards, personal consumption of a decedent in a wrongful death case, or remarriage of a decedent's spouse.

31. There has been a lessening of the admissibility standards for expert witness qualifications and the reliability and bases of their opinions, which has created a situation where almost anyone has been found qualified to testify concerning almost any issue, even when there is no meaningful scientific or factual support or recognition for their opinions.

32. There has been a general rejection of the concept of summary judgment, and an increased burden on movant, shifting sharply away from the moderate position established by the West Virginia Supreme Court of Appeals when Justice Cleckley was on the Court.

33. There is a general view that burden of proof standards have been eroded to the point that the burden of proof has been shifted from the plaintiff to the defendant, creating a "presumption of liability" which must be rebutted by the defendant.

34. West Virginia's judicial system, as it currently operates, has allowed for recovery of damages well beyond the intent of the "made whole" rule.

35. Certain Justices on the current West Virginia Supreme Court appear to have firmly established personal agendas, which they are either unable or unwilling to separate from their role and conduct in the Judiciary.

36. There is a general impression that the egos or attitudes of certain individual members of the West Virginia Supreme Court have resulted in a conclusion by them that rules of procedure, judicial conduct, and appropriate separation of powers simply do not apply to them.

37. A small number of judges who do not reliably and consistently enforce civil procedure and evidentiary rules, or who make novel and/or dubious interpretations, make it difficult for State

policy makers (Legislators) to respond and correct such abuses without upsetting the proper balance in the system.

38. If the Judiciary were balanced, and provided a level playing field, without double standards, there would be little need for so-called tort reform. In fact, many people believe that what is needed is "Court reform", not tort reform.

39. The defense bar believes that ex parte contact between judges and lawyers and judges and potential jurors are a significant problem in West Virginia.

40. There is lack of effective judicial oversight. Lawyers are reluctant to report questionable or even clearly improper conduct out of concern regarding their subsequent treatment by the Judges and ineffective discipline should a complaint be sustained. Judges are reluctant to report questionable conduct or take action to discipline other judges, resulting in minimal, if any, discipline or sanctions for clear violations of the judicial code.

41. Although there is a belief that Supreme Court Justices frequently do not decide cases based on an objective evaluation of West Virginia law, and are often result-oriented in their decisions, there are a relatively small number of Circuit Court judges with whom this is a problem, and that may be in part attributable to the practical need to anticipate how their decisions will be treated on appeal and their understandable reluctance to take positions contrary to a tone set by the Supreme Court.

42. There is a general feeling that, other than a few specific Circuit Court judges, most Circuit Court judges attempt to be fair and balanced, and the problems in the West Virginia Judiciary cannot be solved at the Circuit Court level.

43. Certain jurisdictions in West Virginia have more plaintiff-oriented judges and juries, particularly areas in southern West Virginia (Mingo and McDowell Counties in particular) and the northern panhandle (Marshall, Brooke, Hancock and Ohio Counties).

44. A particular area of concern to the public, business, community and defense lawyers is the

Judiciary's response to mass tort litigation. The mass tort litigation panel does not take adequate steps to protect the defendants' due process and other rights in mass tort cases.

45. Mass tort actions, where claims of large numbers of plaintiffs are joined and consolidated indiscriminately for simultaneous trial under lenient aggregation standards are proliferating in West Virginia, and in many instances depriving defendants (and sometimes plaintiffs) of basic due process and fairness.

46. Mass tort actions are an effort to litigate highly individualized claims in an aggregate, class action type approach, albeit they often would not satisfy the prerequisites for class action treatment. The problems with this approach are further magnified when the claims involve multiple defendants.

47. Mass tort actions have flooded West Virginia Courts, precisely because the Courts have been so amenable to such actions. The Civil Justice Committee concludes that, as indicated by Francis McGovern in *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997), "judges who move large numbers of highly elastic torts through their litigation process at bw transaction costs create the opportunity for new filings. They increase demand for new cases by their resolution rates and low transaction costs. If you build a superhighway, there will be a traffic 'jam'."

48. An expectation has developed that most, if not all, cases will settle. While many cases do settle, that expectation has reached a point that certain judges view and act as if settlement is a "requirement".

49. In many areas of the State, our courts are overcrowded and have insufficient time and resources to adequately manage and handle the cases filed and pending in that Circuit. This situation has resulted from the liberal to non-existent rules on jurisdiction and venue for out-of-state plaintiffs, virtually unrestricted access to any Circuit Courts within the State, and the filing and continuation of some cases of questionable merit, all resulting in overcrowding and delays.

50. Although not an absolute, appointed judges, even those with less trial experience, tend to become more effective and moderate judges than those elected, when it comes to diligence, fairness, impartiality and respect for the process.

51. The preferred system of State Court judicial selection is a commission-based appointive process, so-called “merit selection”, system.

52. To the extent laws are not impartially interpreted and enforced, regardless of the parties affected, and regardless of the popularity of the issues involved, West Virginia’s judicial system is a risk.

53. The perceived unfairness, bias and plaintiff oriented judges has resulted in serious distrust and lack of confidence in the impartiality of West Virginia’s Judiciary, and has prompted a significant backlash which has the potential for a dramatic escalation and further politicization and increase in the cost and partisan nature of West Virginia’s judicial election campaigns, further eroding the public’s trust and confidence in West Virginia’s civil justice system.

Juries:

54. West Virginia juries are composed of individuals who are substantially affected by social, economic and cultural factors, resulting in prejudice against out-of-state interests, and any defendants perceived or characterized as prosperous or socioeconomically privileged.

55. A general attitude has developed that West Virginians have been slighted and exploited over the years so they are justified in "sticking it" to insurance companies, corporations, or any "out-of-state" entity.

56. A historical culture has developed in West Virginia of "haves vs. have-nots", often described as an "entitlement" mentality, Robin Hood mentality and/or lottery mentality.

Lawyers:

57. Although many believe that the contingent fee system, as it currently operates, is problematic, most recognize that it is a matter of contractual freedom and that it would be a mistake

to attempt to regulate fee arrangements. A preferable approach is to assure that the public is adequately educated so that individuals are able to make informed decisions concerning their attorney fee options.

58. Lawyer solicitation and unfettered personal injury advertising hurt the image of lawyers and the civil justice system, but it exists everywhere throughout the country and is not a unique major problem or contributing factor to the distinctly unfavorable impressions of West Virginia's civil justice system.

59. One perceived problem with the civil justice system is that no one is objectively evaluating or screening cases. Although lawyers who take and prosecute civil cases and judges who hear the cases have a responsibility to screen and evaluate cases and only prosecute or permit the prosecution of cases which are supported by the law and the evidence, many plaintiffs' lawyers do not evaluate and conduct any meaningful screening of the cases they file. Some lawyers do not view that as their role; others are eager for legal work and will take almost any case. The way the civil justice system has evolved, even a case of questionable merit may get to a jury since judges are reluctant to grant summary judgment, particularly with the makeup and philosophy of the current West Virginia Supreme Court of Appeals. Consequently, many defendants, particularly businesses, pay substantial amounts to settle claims to avoid the significant costs of ongoing litigation and the ever present risk of a significant adverse verdict.

60. Although certain lawyers, both plaintiff and defense, are at times unnecessarily confrontational, abrasive and obstructive, such conduct, although clearly adversely affecting the efficiency and effective operation of West Virginia’s civil justice system, involves limited and isolated attorneys and is not a significant problem in the civil justice system.

IV.

Other States' Civil Justice Reform Efforts

Well over half of our 50 states, including West Virginia, have been or are currently involved in comprehensive or specific civil justice reform efforts. Below is a brief summary of some current civil justice reform legislation enacted or proposed during the 2002-2003 legislative sessions in various states other than West Virginia. Unless signed into law as indicated, the legislation was proposed and may be at varying stages of the legislative process. Some of the proposed legislation is, for all intents and purposes "dead", while other efforts are proceeding and have some realistic chance of passage. This brief summary is not intended to be complete and does not include certain legislation proposed by plaintiff's trial bar in various states that would make filings and prosecution of plaintiff's civil actions and the recovery of damages easier. Most of this legislation has little chance of passage under the current nationwide concerns re: the state of our civil justice system. The list and brief summary below is simply provided in order to highlight the nature of some of the civil justice reforms enacted or being considered in various other states, and it may provide some useful ideas for West Virginia Legislators and citizenry.

Alabama

S.B. 266 - Limits damages against hospitals to $250,000. Also provides a statute of limitations of 2 years from the date of injury, damage, or death; or six (6) months after the date of discovery or after the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier

H.B. 399 - Clarifies and changes Alabama's product liability law. Provides wholesaler/retailer liability protection and makes a substantial modification to Alabama's wrongful death statute. Limits punitive damages to the greater of three times compensatory damages or $1.5 million

S.B. 268 - Governs civil actions against nursing homes. Creates a "Patient's Recovery Fund" for payment of claims against nursing homes. Also provides for administrative and Court procedures to resolve disputes between nursing homes and their patients

S.B. 269 - Provides for medical pre-trial screening panel to review claims against State medical providers. Prior to filing a claim in Court, the claim must be submitted to a pre-trial medical review panel. No action may be commenced against a state healthcare provider before the findings of the panel have been issued. The use of the panel may be waived if both parties provide written

consent. Juries are to be notified during instructions of the findings of the medical review panel; those findings are not dispositive but may be considered by the jury in reaching its verdict

Arizona

H.B. 2520 - Jury Service Reform Legislation creates a "lengthy trial" fund and establishes stricter criteria for prospective jurors to be excused from service

H.B. 2188 - Attorney Sunshine Legislation specifies guidelines to hire private attorneys who provide representation or services on behalf of the state

H.B. 2313 - Bars joint and several liability

H.B. 2620 – Construction Liability Reform (2002) – requires purchaser to wait to file suit for construction defect until Seller has had an opportunity to cure

S.B. 1099 - Constitutional amendment to cap general damages

Arkansas

H.B. 1038 - Signed into law on 3/26/03

- Joint and several liability reform - eliminates joint liability, but also provides some limited several liability (10%-20% increase in defendant's liability) if Court determines a portion of verdict not collectable from another defendant
- Punitive damages - sets specific standards, requires clear and convincing evidence and limits punitive damages to greater of $250,000 or 3 times compensatory damages not to exceed $1 million, and provides for bifurcated proceedings
- Venue - provides for venue in county where substantial part of events or omissions giving rise to claim occurred, or in county where defendant or plaintiff reside or maintain their principal place of business
- Appeal bonds - limits maximum required appeal bond to $25 million
- Medical malpractice liability reform - provides specific evidentiary requirements for expert witness testimony, damages, and peer review evidence, and certain procedural requirements, including production of medical records and penalties for filing false or unreasonable proceedings

California

A.B. 2723 – Barring Admission of Defendants Expression of Sympathy (2002)

Colorado

H.B. 03-1027 - Signed into law on 4/7/03. Law permits the interlocutory appeal of class certification in class action lawsuits

S.B. 03-086 - Signed into law on 4/9/03 - Attorney Retention Sunshine Legislation that requires government officials signing contracts with attorneys on a contingent fee basis to competitively bid

such contracts, and obtain legislative review of the terms of the contract

H.B. 03-1007 - In non-medical malpractice actions, the total amount of non-economic damages shall not exceed $250,000 unless Court determines amount justified by clear and convincing evidence, and in no such case shall such damages exceed $500,000. Non-economic damages in medical malpractice actions shall not exceed limit set forth in Section 13-64-302 and non-economic damage cap applies to damages for physical impairment for disfigurement, responding to and reversing Colorado Supreme Court decision

H.B. 03-1012 – Medical Liability Reform – vicarious liability responding to and reversing a Colorado Supreme Court decision

H.B. 03-1121 - Early offer proposal that assesses attorneys fees and costs for plaintiffs who decline an offer of settlement, proceed to litigation, and receive a smaller judgment than would have been received if a settlement offer had been accepted

H.B. 03-1232 – Medical Liability Reform - inadmissibility of expressions of sympathy

H.B. 03-1366 – Limits amount of bond required to appeal to $25 million

S.B. 03-231 - Signed into law on 4/9/03 - Prohibits a product liability action from being brought against a seller or manufacturer of a product under certain circumstances. An innocent seller provision is included, which prohibits product liability actions against parties who are not the manufacturer of the product. Also provides that a product liability action may not be brought if the product was improperly used or if the product provided warning or instruction that, if heeded, would have prevented the injury, death, or property damage, and modifies joint and several liability

S.B. 03-253 – Parental Waivers – reversing Colorado Supreme Court decision invalidating parental liability waivers signed on behalf of minors

Connecticut

Bill No. 6574 - Limits non-economic damages against healthcare providers in wrongful death or personal injury to $250,000

Florida

S.B. 1832 – Dangerous Instrumentalities Reform – related to powered shopping carts

S.B. 1946 – Premises Liability Reforms – reversing Florida Supreme Court decision that shifted burden to defendants in premises liability actions

S.B. 2826 – Appeal Bond Reform

H.B. 1713 - Medical Malpractice Reform - caps non-economic damages at $250,000

H.B. 489 - Provides for no fault auto insurance and modifies joint and several liability

Georgia

S.B. 133 - The Senate passed committee substitute for Medical Malpractice Liability Reform

S.B. 133 - Provides joint and several liability only under certain specific circumstances and provides exceptions to vicarious liability. Substitute bill does not incorporate many of the meaningful provisions in the introduced version, including a $250,000 limit on non-economic damages, complete elimination of joint and several liability, and collateral source benefit disclosure

S.B. 217 - Limits certification of class action

Idaho

H.B. 92 - Signed into law on 4/2/03 -Comprehensive Civil Justice Reform

- Limits non-economic damages in personal injury cases to $250,000
- No judgment for punitive damages shall exceed the greater of $250,000 or three times compensatory damages
- Raises the standard to "clear and convincing evidence" of punitive damages
- Limits appeal bonds on punitive damages to only first $1 million of any judgment

H.B. 627 – Small Lawsuit Resolution – requires nonbinding arbitration or mediation at request of either party for claims of less than $25,000

Illinois

S.B. 102 - Appeal Bonds Reform - Legislation that would limit appeal bonds in tobacco cases to $25 million regardless of the size of the judgment

S.B. 102 - Jury Service Reform - provides for lengthy trial fund and increased compensation for jury service, jury service employee protections, and clarifies and limits reasons for being excused from service

S.B. 1158 - Class Action Reform - limits venue of class actions to defendant's principal place of business, where majority of class members reside, or where cause of action arose. Also, defines and refines requirements for class actions, class certification, and class determinations, and provides for mandatory Court review and approval of class action attorney's fees

Iowa

S.F.344 - Onmibus Regulatory Reform Legislation - includes extensive civil justice reform

- Punitive Damages Reform - requires punitive damages be requested in the Complaint. Plaintiffs must present sufficient prima facie evidence to the Court at least 30 days prior to trial to sustain an award of punitive damages. In addition, actual malice must be demonstrated by clear and convincing evidence
- Non-Economic Damages - non-economic damages are not to exceed the greater of $250,000 or the amount awarded in economic damages

- Joint and Several Liability - eliminates joint liability
- Product Liability - manufacturers are not liable if the product alleged to cause the plaintiff's harm complied with all relevant federal and state regulations. In addition, plaintiff's in defective design cases are required to prove that a feasible alternative design was available to the manufacturer at the time the product left the manufacturer's control
- Also includes reforms for appeal bonds and adopts an "innocent" seller provision. Other provisions of legislation cover workers' compensation, unemployment insurance, financial services and consumer protection, occupational safety, and environmental protection

H.F. 587 - Product Liability Reform - provides an assembler, designer, supplier of specifications, distributor, manufacturer, or seller is not liable for failure to warn regarding risk when the product risks and risk avoidance measures are generally known by foreseeable product users. Furthermore, parties specified above are not liable in a product liability action arising from an alleged defect in packaging, warning, or labeling if the product would be deemed reasonably safe if the warning or instructions are followed correctly. In addition, inactions arising from a defective design which allegedly enhanced injuries, or any action alleging the crashworthiness of a product, evidence of the injured person's conduct is admissible in court and the injured person's comparative fault should be assessed if such fault was a substantial factor in causing the underlying event producing the injury

Kansas

S.B. 48 and others - lower appeal bond requirements and modifies joint and several liability

Louisiana

H.B. 427 - Collateral Source Reform Legislation - legislation that prohibits double recovery of damages, for example, provides defendant a credit for Workers' Compensation benefits paid

H.B. 1819 – Appeal Bond Reform **–** limits required appeal bond to $50 million

H.B. 2008 – Jury Service Reform – limits reasons for exemption from jury service, protects jurors from adverse employment action due to jury service, and establishes a special lengthy trial fund

Minnesota

H.F. 75 - provides defendants only severally responsible for their share of fault if fault less than 50%

S.F. 872 – provides joint and several liability does not apply to defendants less than 50% at fault

Mississippi

H.B. 2 – Medical Liability Reform

- Requires certificate of consultation prior to filing suit
- Provides immunity to prescribing physicians for damages allegedly caused by medications absent their active negligence

- Provides good samaritan immunity to physicians who render medical services under special circumstances
- Joint and Several Liability Reform – adopts rule of proportionate liability for non-economic damages, and economic damages if less than 30% of fault
- Non-economic Damage Reform – capping such damages at $500,000 until July 2011
- Limits venue to county where medical treatment rendered

H.B. 1084 - Signed into law on 3/18/03 - provides civil immunity for parties that clean up EPA Superfund sites

H.B. 1312 – Provides civil immunity for sponsors and advertisers of community events

Missouri

S.B. 280, S.B. 242, S.B. 213 and/or H.B. 273 - Comprehensive Civil Justice Reform
(SB 280 – General Tort Reform bill vetoed by Governor on July 9, 2003)

- Joint and several liability reform eliminates joint liability except when principal/agent relationship exists
- Costs - defines "costs" recoverable by prevailing party to include expert witness and court reporter fees, travel expenses, record retrieval, photocopying, long distance telephone toll charges, deposition costs, and exhibit preparation
- Class actions - class certification decision is a final, appealable Order
- Appeal bond - limits maximum appeal bond required
- Compensatory damages - provides failure to wear seat belt can reduce damage award by up to 10%
- Damages - adopts clear and convincing standard, and prohibits discovery of defendant's assets before court determination of viable claim
- Venue - venue in all tort actions against corporations in county where cause of action occurred or where corporation resides
- Professional liability claims - requires affidavit from similarly licensed professional supporting claim for all non-medical professional negligence claims
- Attorney fees - limits attorney contingency fees in all tort actions to 33% of first $500,000, 28% of next $500,000, and 15% of all damages in excess of $1 million. Also limits attorney fees in class actions to 10% of value of judgment or settlement actually collected by members of class
- Medical malpractice - limits civil damages to $150,000 for care necessitated by traumatic injury and rendered in designated trauma centers
- Long Term Care facilities - adds them to definitions of "health care provider" subject to requirements and protection afforded "health care providers" in civil actions
- Evidence - prohibits statements, writings, or benevolent gestures expressing sympathy by defendant from being admissible evidence regarding liability
- Selt belt violations - failure to wear seat belt admissible evidence of comparative fault and also admissible re: failure to mitigate damages
- Interest on judgment - reduces and ties pre and post judgment interest in tort actions to Treasury bill rates

Montana

S.B. 363 - limits punitive damage awards and modifies joint and several liability

Nevada

A.B. 1 – Medical Liability Reform (2002)

- Limits damages against emergency room physicians to $50,000
- Bars application of joint and several liability regarding non-economic damages
- Limits non-economic damages to $350,000, except upon showing of "gross malpractice"

A.B. 9 /H.B. 187- strengthens non-economic damage limit in Nevada to $250,000 hard cap. Also contains an offset for collateral sources of compensation received by the plaintiff, and allows for the periodic payment of judgments. Also contains a sliding scale limit on attorneys' fees, and a product liability section barring litigation 10 years after a product's date of manufacture, and 6 years after a product's sale date

New Jersey

S.2174 - Medical Malpractice Reform - provides caps on non-economic damages and additional modest reforms

New Mexico

S.B. 6 -Modifies New Mexico's punitive damages law to: (1) require "clear and convincing evidence" of actual malice before an award of punitive damages may be made; (2) bar awards of punitive damages when there is no award of compensatory damages; (3) allow a claim for punitive damages in an amended complaint, and upon the submission of supporting affidavits or after a hearing; (4) require bifurcation of proceedings to impose punitive damages; (5) limit the scope of punitive damages in breach of contract actions; (6) and limits punitive damages awards to the greater of $250,000 or three times the amount of a compensatory award

S.725 - Jury Service Reform Legislation - declares obligations of all citizenry to serve on juries, creates lengthy trial fund, increases compensation and eliminates service excuses

New York

S.B. 2944 - Comprehensive Civil Justice Reform Legislation - "Civil Justice Reform Act"

- Expands New York's certificate of merit requirement to all licensed professionals
- Imposes a 10-year statute of repose for architects and engineers, and in product liability actions
- Sets New York's postjudgment interest rate at 4% per year
- Limits non-economic damages to $250,000
- Bars recovery in instances where a plaintiff is more than 50% at fault for a cause of action
- Abolishes joint and several liability
- Provides job reference immunity;

- Bars recovery in instances where the plaintiff is engaged in criminal activity, is under the influence of drugs, or is intoxicated
- Abolishes liability in product liability actions against blameless wholesalers and retailers
- Imposes a sliding scale limit on attorneys' fees in product liability actions

North Carolina

S.B. 9 - Medical Malpractice Reform

- Limits non-economic damages to $250,000
- Provides for periodic payments of judgment of $50,000
- Provides a sliding scale for attorneys' fees

Ohio

S.B. 80 - Signed into law on 4/28/03 - provides for changes related to award of certain damages, replaces joint and several liability with "proportionate liability" where default only jointly liable if at least 50% at fault, admissibility of collateral benefits evidence, and contributory fault in tort actions; establishes a statute of repose for certain product liability claims and claims based on unsafe conditions of real property improvements; makes other changes related to product liability claims; provides that product liability statutes are intended to abrogate common law product liability causes of action; enacts a conflicts of law provision for statutes of limitation in civil actions; and modifies provisions on frivolous conduct in filing civil actions

H.B. 412 – Nursing Home Liability Reform (2002)

Oklahoma

H.B. 1148, H.B. 1282 - Bills pending - establish no fault auto insurance - set standards for experts, limits joint liability for defendants with fault less than 10%, reduces prejudgment interest and limits venue to county in which incident occurred

S.B. 629 – Medical Liability Reform (2003)

- Limits non-economic damages to $350,000 in cases involving pregnancy and delivery and emergency care
- Certificate of merit requirement
- Collateral source rule – evidence of collateral source payments admissible
- Prejudgment interest reform – rate tied to average Treasury bill rates

Pennsylvania

H.B. 1278 - Amends the Medical Care Availability and Reduction of Error Act, further providing for medical professional liability insurance for the medical care availability and reduction of error

H.B. 1802 – Medical Liability Reform (2002)

- Periodic Payment of Future Medical Damages - provides for periodic payments of future medical costs exceeding $100,000
- Collateral Source Rule – prohibits patient from suing for medical expenses paid for by a health insurer
- Statute of Limitations - establishes a seven-year statute of limitations on medical liability actions

S.B. 725 - Amends Judiciary and Judicial Procedure of Pennsylvania Consolidated Statutes and provides specific requirements that must be satisfied in order to establish liability against a product seller, effectively eliminating vicarious liability and limiting a product seller's liability to situations where it was negligent, breached an express warranty, or was actually involved in the product's manufacture

S.B. 1089 – Joint and Several Liability (2002) – Bar application of joint and several liability except when defendant is liable for intentional fraud or tort, more than 60% at fault, liable for environmental hazards, or liable as result of drunk driving

Rhode Island

S.B. 239 - Legislation pending providing substantial changes to joint and several liability

South Carolina

S. 446, H.B. 3744, H.B. 3139, and H.B. 3055

- Limits non-economic damages to the greater of $250,000 or economic damages
- Limits punitive damages to the greater of $250,000 or three times compensatory damages
- Provides an "opportunity to cure" in construction defect litigation
- Provides for introduction of collateral source payments into evidence
- Provides sanctions for filing frivolous lawsuits
- Reforms South Carolina venue law to limit forum shopping
- Abolishes joint and several liability
- Lowers the post-judgment interest rate to 5 % per year.

South Dakota

H.B. 1164 – Loss of Chance Rule (2002) – responding to act reversing South Dakota Supreme Court decision adopting unrestricted loss change rule

Tennessee

S.B. 1687 – Appeal Bond Reform – limits required appeal bond to $75 million

Texas

Comprehensive Civil Justice Reform, H.B. 4

- Class action reform - establishes standard for attorneys' fees and appealabililty of certain interlocutory orders
- Early offer of settlement - provides recovery of litigation costs, including attorneys' fees and expert witness fees, incurred after rejection of offer of settlement if rejecting party's ultimate recovery is less favorable
- Multi-district litigation reforms - revises procedure and standards concerning venue and forum non-convenience reform authority and standards, and requires each plaintiff to independently establish proper venue
- Joint and several liability reform - eliminates joint liability except when defendant's responsibility greater than 50%
- Product liability reform - adopts statute of respose, limits liability of nonmanufacturer sellers, adopts special rules for pharmaceutical claims and provides that compliance with governmental standards creates rebuttable presumption of non-liability
- Appeal bonds reform - limits required security to 50% of judgment debtors' net worth or $25 million, whichever is less
- Medical malpractice liability reform - adopts numerous definitions to clarify scope and application of act, provides protection for nursing homes same as other health care providers, establishes presuit notice, medical record discovery requirements, specific informed consent claim requirements, standards of proof and liability limitations in emergency care situations, revised statute of limitations provision, liability limits on non-economic damages of $250,000 for each health care provider, $500,000 for each health care institution, total claim for non-economic damages of $750,000, and wrongful death claim non-economic damages of $500,000
- Interest - postjudgment interest, rate revised to Federal prime rate

H.J.R. 3 - Constitutional amendment assures caps in HB 4 are constitutional by reinforcing that legislature, not the Judiciary, has authority to enact and/or modify caps on damages.

S.B. 496 and H.B. 1240 - Asbestos Litigation Reform - restricts asbestos claims and limits successor liability, and establishes an inactive docket and specifies criteria by which an individual may file a claim to be removed to the active docket

Utah

S.B. 138 – Medical Liability Reform - arbitration allows physicians to withhold services (except in emergencies) if patient does not consent to arbitration

Jury Service Reform - Signed into law on March 17, 2003 - stricter criteria for excuses from jury duty; increase penalties for failure to appear; and provides protection of employment and benefits

Washington

S.B. 5728 - Comprehensive Civil Justice Reform Legislation that: (1) reforms joint and several liability by tying money awards to actual fault; (2) protects employers who disclose information, such as job performance, from lawsuits; (3) sets tort judgment interest rates to equal two percentage

points above the 26 week Treasury Bill rate; (4) provides for medical malpractice reform including a cap on non-economic damages of $250,000; a sliding scale on attorney contingency fees; advance notice of a claim; statute of limitations of 3 years from the time of the injury or 1 year from when the injury was discovered; collateral source payments can be introduced into evidence by defendants; elimination of health care joint and several liability; changing the burden of proof from preponderance to clear, cogent, and convincing; biding arbitration of disputes; and allows periodic payments of damages over $50,000; (5) provides for six new affirmative defenses in construction liability cases in regard to actions arising from the construction, alteration, repair, design, planning, survey, or administration of any improvement to real property; (6) allows defendant to introduce into evidence whether the plaintiff was wearing a seatbelt; and (7) provides for greater limits on governmental liability.

S.B. 6429 – Provides inadmissibility of defendant's apology

V.

Long Term Potential Remedies/Solutions
&
Short Term Potential Remedies/Solutions

Based on careful review and consideration of all of the real and perceived problems with West Virginia's civil justice system, the causes and contributing factors thereto, and the fundamental and significant impact of the civil justice system on life in West Virginia, the Civil Justice Committee has identified various potential remedies and/or solutions to the problems identified and their contributing factors and causes. The remedies and solutions have been loosely categorized as long term or short term based solely on a general impression of the time, effort and other obstacles that would need to be overcome in order to implement the particular remedy or solution and potential role of DTCWV.

It is also important to note that many of the remedies and solutions identified and listed below are not, for one reason or another, supported or at least uniformly supported by members of the Civil Justice Committee. For example, the Civil Justice Committee does not uniformly support caps on damages, other than caps on punitive damages, since the members of the Committee realize that there are and will be situations and cases where caps would not be fair or reasonable. The Committee generally believes that such caps on certain type of compensatory damages are being considered because of the failure of our Judiciary to adequately monitor and control various factors, including but not limited to fair application of summary judgment standards, admissibility of certain evidence, including expert witness testimony, and jury instructions which have resulted in damage awards viewed by many as excessive. Despite the fact that not all of the potential remedies and solutions discussed were or are supported by members of the Civil Justice Committee, the Committee felt it was important to identify all potential remedies and solutions which were considered and discussed to allow for further discussion and consideration and debate

by others. A review of these potential remedies and solutions may prompt further discussions and ideas by DTCWV and other groups and individuals.

A. <u>Long Term Potential Remedies/Solutions</u>

- Constitutional amendment to provide for an appropriate system of appointment of Judges
- Legislation to provide for non-partisan judicial elections
- Restrictions on lawyer contributions to judicial campaigns
- Establish an intermediate Appellate Court
- Establish a credible, neutral, non-partisan body to assess the qualifications of all judicial candidates, whether for election or appointment
- Establish a uniform and balanced system for mass tort case judicial assignments
- Establish a balanced system for, and/or restrict and monitor, the appointment of lawyers as guardians ad litem, mediators, etc., to avoid the appearance of impropriety and the suggestion that appointment reward for political support
- Increase judicial training concerning standards of required conduct (decorum, civility, integrity, impartiality and impropriety of ex-parte contacts)
- Increase judicial oversight by existing investigative/disciplinary body, i.e. Judicial Investigation Commission, or other appropriate body, to hold the Judiciary accountable for their conduct, including changes to the judicial disciplinary code to encourage and facilitate the reporting of judicial violations where warranted to initiate the investigation, and creation of an independent body, not appointed by the West Virginia Supreme Court.
- Develop a judicial evaluation program to periodically assess the performance of all sitting judges, both on trial and appellate courts.
- Establish procedures to protect the anonymity of people who file complaints of or report judicial misconduct in order to protect them from potential retribution and encourage appropriate reporting
- Strengthen the standards and application of judicial recusal procedures and establish a procedure for independent review of recusal decisions to ensure recusal when a judge has a personal bias or prejudice and also when a judge's impartiality might reasonably be questioned.

- Mass tort litigation changes (Pursuant to Trial Court Rule 26(a))

    - Limit claim consolidation against defendants
    - Strict standards for and application of class action prerequisites
    - Eliminate or reduce the number and size of mass trials
    - Venue restrictions to insure only claims with substantial connection/nexus with West Virginia may be pursued in West Virginia (Senate Bill 231 passed by Legislature in 2003)
    - Establish damage caps on certain types of damages, such as punitive damages and certain other non-economic damages

- Strengthen and strictly apply requirements for class action suits, including specific class action venue requirement and requirements to limit lawyer driven class actions and class actions involving relatively minor or trivial damages; provide for early and appealable class certification determinations, and establish standards for attorney fees and require their review and court approval

- Limit venue of actions in West Virginia to the county or counties with meaningful connection/nexus to the litigation to prevent forums and Judge shopping

- Limit liability of nonmanufacturing product sellers

- Establish evidentiary rule and rebuttable presumption of non-liability if product manufactured in compliance with federal safety standards or regulations applicable at time of product's manufacture and sale

- Provide that nursing home facilities and long term care facility medical directors receive the same type of protection as other "health care providers"

- Eliminate or restrict third party bad faith claims

- Legislation strengthening attorney/client and work product privileges

- Legislation establishing self-critical analysis, evidentiary protections to encourage efforts to improve health and safety without increasing potential liability

- Eliminate or restrict application of the collateral source rule

- Eliminate joint liability, limiting liability to direct proportion to a defendant's degree or percentage of actual fault, or restrict joint and several liability to situations when a minimum percentage of fault has been established

- Establish meaningful standards for the qualification of experts and the reliability, basis and admissibility of their opinions

- Prohibit admissibility at trial of statements, writings or benevolent gestures and expressions of sympathy by defendants

- Legislation re: evidentiary rules providing for admissibility and evidentiary consideration of non-taxability of personal injury awards and deductions for personal consumption of decedent in wrongful death case to prevent windfalls

- Legislation re: evidentiary rules providing for admissibility of evidence of the remarriage of the a decedent's spouse

- Legislation re: evidentiary rules providing for admissibility of evidence of non-seat belt use in automobile accident cases

- Limit damages for medical expenses to medical expenses actually paid by or on behalf of plaintiff or which are legally due

- Limit damages for lost wages to actual lost wages, sick or personal leave

- Revise prejudgment and postjudgment interest so that it is tied to Treasury bill rate rather than a set rate, like West Virginia's current statutory 10% per annum rate

- Limit punitive damages by requiring specific standards of proof, including a clear and convincing standard and limitations and caps on amount of punitive damages to specific amount and/or percentage of compensatory damages awarded and bifurcating compensatory and punitive damage determination (A recent decision from the United States Supreme Court, State Farm Mutual Automobile Insurance Company v. Campbell, 123 Sup. Ct. 1513 (2003) may have addressed some of our concerns re: punitive damages)

- Increase size of jury panels to unanimous decision by 12 jurors

- Explore methods to enhance the representativeness of jury pools, including use of additional source lists to increase inclusion of currently underrepresented individuals and groups

- Efforts to increase educational background of jurors, increase compensation and standards for being excused from jury service and increase flexibility in requirements for jury service to encourage employed and educated members of the public to serve as jurors

- Adopt and enforce reasonable restrictions on lawyers' solicitation and "personal injury" advertising, limiting such to West Virginia licensed attorneys, and providing for asserting uninvestigated and unsupported claims moratorium on post accident lawyer solicitation

- Limitation on lawyer fees

    - Limitation on lawyer fees - graduated, sliding scale and/or caps
    - Required Court approval of fees beyond a certain percentage of award/settlement

- Enforce sanctions for filing frivolous lawsuits

- Consider the increase and clarification of opportunities for the shifting burden of litigation costs and attorney fees

- Consider further definition and clarification of "costs" recoverable by a prevailing party

- Strengthen offer of judgment/offer settlement provisions by shifting certain costs to party rejecting offer if that party fails to obtain a verdict/judgment equal to or greater than the offer

B. <u>Short Term Potential Remedies/Solutions</u>

- Decision of DTCWV Board and membership in favor of DTCWV active involvement in civil justice issues

- Articulate clear and unequivocal public message, "if you get sued don't you want to be treated fairly?" A civil justice system should be fair and balanced, on a level playing field, not result-oriented or party-based. Plaintiffs must be required to prove their claim, under the law, before they are entitled to recover, and when liability is established, a plaintiff should be made whole, but not receive a windfall or double recovery

- Emphasize unique perspective of DTCWV and its members: directly involved in judicial systems, broad scope of members' practices, reform generally contrary to own economic self interest

- Raise public awareness concerning the causal connection between the civil justice system and the State's negative business image and its affect on the State's economy, wages and job opportunities

- Raise public awareness concerning the various causes and factors of the real and perceived problems with West Virginia's civil justice system by:

    - Broad and public dissemination of DTCWV Civil Justice Committee's Report;
    - Creation of a DTCWV speaker's bureau to make presentations to local groups (civic, educational, religious, etc.)
    - Establish contacts and relationships with reporters and other media
    - Liaison/membership in other civic and professional organizations to insure a meaningful voice;
    - Continued involvement of DTCWV at West Virginia University Law School and increase interaction with faculty and students;

- Join and form coalitions with other organizations within the State to assist in increasing public awareness and sensitivity to issues related to the civil justice system and to propose and support certain legislative and judicial reforms, where appropriate

- Encourage active involvement of members of DTCWV in legislative campaigns to insure that elected officials are knowledgeable and sensitive to issues related to the West Virginia's civil justice system, its problems and the fundamental impact on various aspects of life in West Virginia, including the financial burdens of income tax, Workers' Compensation premiums and insurance premiums; reduced availability of various basic services; diminished business and economic development and reduction in employment opportunities

- Active participation in the legislative process, principally as an information and opinion resource for members of the Legislature

- Meet with legislative leadership in private meetings, small group meetings and social events to establish relationships and insure that the DTCWV's views are known and considered

- Elimination of so called "medical monitoring" claims by requiring injury manifestation and medical necessity for monitoring as a precondition for recovery

- Identify potential good judicial candidates and encourage them to consider running for judicial office

- Encourage the active involvement of members of DTCWV in judicial campaigns to insure that moderate, unbiased, fair minded candidates who exhibit respect for the integrity of the civil justice system are elected to the Supreme Court

- Remind membership of the obligation to report judicial misconduct

VI.

Role Of Defense Trial Counsel

The Defense Trial Counsel of West Virginia is in a unique position to identify problems and address potential remedies or solutions for the civil justice system. Defense trial attorneys are regular and active participants in the administration of civil justice. The interpretation and application of legislative principles, whether traditional or reformed, is a daily routine for the defense trial attorney. The significant, but often overlooked, role of the Judiciary is particularly apparent.

Unlike other interested organizations and groups, the defense bar must be objective. Changes in a civil justice system, which reduce the number, complexity, duration or significance of civil actions, are necessarily contrary to the economic interests of defense lawyers. This may be part of the explanation for the longstanding complacency or acquiescence of DTC, which could maintain its professional service to the defense bar by focusing on improving the quality of defense lawyering. With the ever-worsening business climate in West Virginia, the recognition that the civil justice system has contributed greatly to the tarnished image, and the near unanimous calls for reform, the organization has realized that it cannot remain silent. Over its more than 20 years, DTC has generally been regarded as "apolitical". This Committee's expansive investigation, careful study, and eventual conclusions take shape in the context of a call to action.

There are certainly constraints and limitations on what DTC can do, and some indications of what it can do best. The Rules of Professional Conduct and their interpreting decisions are balanced against First Amendment rights. In particular, Rule 8.2 requires that lawyers not make statements they know to be false, or with reckless disregard for truth or falsity "concerning the qualifications or integrity of a judge". Interpretations have made it clear that this principle prohibits personal insults, insolence and unjustifiable attacks on the judicial office, based upon the need to maintain public confidence, as well as regulation of lawyers as a profession. Accordingly, while the First Amendment applies, it does not protect absolutely. As a guiding premise, it appears that we can certainly be candid, especially with the clear purpose of highlighting the Judiciary as a significant part of the problem and the solution, but we cannot be reckless.

DTC has a broad base of membership and interests, although there are some principles on which the surveys indicate near consensus agreement. The membership includes many who have a "mixed" practice, or work in the private sector among our various clients and insurers. Some have grown comfortable with an organization limited to collegiality and professional improvement focus, and may not wish to see it expanded into a more proactive and conspicuous body. There is also an abiding concern that a focus on the Judiciary could offend or aggrieve a judge or justice, resulting in anxiety about retribution or other insidious negative impact on firms, individual lawyers, or even clients. These professional and practical considerations should be more than sufficient to temper the expanding role and activity of DTC in this important area.

A final point, which has run through most of the Committee's activities, is the desire to avoid the duplication of others' efforts and voices. While there are many organizations of "like-minded" individuals concerned about the civil justice system in West Virginia, DTC's unique position and particular duties and obligations give it both a distinctly effective potential and a necessarily defined standing to contribute to improvement. While we can and should communicate and cooperate whenever possible, DTC's independence should be maintained in all activity.

Conclusions and Recommendations

A. General

Even after the extensive investigation and study undertaken by the members of the DTC Civil Justice Committee, the resultant conclusions and recommendations are necessarily somewhat fluid and abstract. This invites the immediate recommendation that our conclusions be refined, distilled and rendered more specific. Conclusions and Recommendations of a less remedial nature are as follows:

A recurrent concern, evidenced throughout the Committee's discussions of the matters constituting its charge, was that there is insufficient public awareness of the relationship between West Virginia's economy, public image and the civil justice system. Specifically, it has been observed that the general public does not recognize and/or appreciate the economic and sociological impact created by the activities of the Judiciary. It is concluded that raising public awareness is a critical objective. This objective could be pursued by the formulation of a speakers' bureau composed of DTC members who would make themselves available for presentations at meetings of civic, educational and governmental organizations. This might include making presentations in such forums as public schools, the legislature, or public television.

This goal can also be brought within reach by accessing statistics that show the relationship between our State's economy and a respected, even-handed civil justice system. For example, members of the general public would most likely be interested in a statistical comparison between West Virginia and neighboring states in the context of costs associated with the workers' compensation system. It is felt that the elderly population would be impressed by evidence of direct "pocket book" impact.

Liaison with other organizations may also be considered as a means of achieving the goal of public awareness. As noted above, caution should be observed to avoid random or expedient associations made in the interest of adhering to the maxim "misery loves company." On the other hand, common interests forge increased strength. The DTC should explore associations, to some degree, with blocs of senior citizens, teachers or labor. The motivation for encouraging such associations is the hope of compromise between "the common folk" of West Virginia and the hated "big business" as well as the despised "insurance industry." A compromise is necessary to keep business and insurance industries in this state to provide employment and other economic benefits for the working people.

It has been observed during our investigation and study that when members of the Judiciary are subjected to public scrutiny, the conduct of the specific judge or justice who invited the scrutiny is tempered. In addition, there seems to be no obvious backlash against the source of this scrutiny. Accordingly, we should encourage attention by the media for public scrutiny of inappropriate judicial conduct. We believe that exposure will encourage increased civility, decorum and manifestations of integrity.

The contingent fee lawyers have traditionally maintained a high profile within the West Virginia legislature. The DTC needs to be a more conspicuous presence in the legislature. It has been pointed out to us that input from the defense bar is valuable to the legislature in its consideration of issues that are ultimately of great significance to us and to the state in general (for example, the recent medical malpractice reforms and proposed medical monitoring legislation).

We should organize a body of lawyers (this group, from a practical standpoint, would have to be located in the Charleston area or its environs) who can be available upon short notice to go before legislative committees and give informed, helpful testimony.

Talk is cheap. In other words, the time and energy invested in our study of the civil justice system will be for naught if the individual members of DTC cannot commit the organization and themselves to effectively speak out on the issues which must be addressed in the interest of achieving balance within the system. This does not mean that we have to cut our professional and economic throats in the interest of reform. However, we have a responsibility to communicate the information that we may uniquely possess to the general public. We can do this, as noted above, through making ourselves available and affirmatively offering to speak, not by invitation alone. Our individual members can and should become more active in county and state judicial campaigns. The results in judicial elections in several counties around the state in the year 2000, showed that the commitment of relatively small numbers of attorneys willing to work in favor of candidates who will be fair and impartial can make a significant impression on the voting public. Likewise, we can and should become more actively involved in legislative campaigns.

B. Specific

1. DTC can and should play an active and prominent role in highlighting the effects and impact of the Judiciary on our civil justice system, make positive contributions to the debate, and encourage meaningful solutions to many problems, real and perceived, with West Virginia's civil justice system.

2. DTC should use its members' unique perspective as participants in the system to identify judicial decisions and conduct which negatively impacts upon the civil justice system, and bring that to the public's attention.

3. DTC should establish and maintain a "Speakers Bureau" of its members willing to speak at public functions, before groups, before the Legislature and in other settings including the media, to offer an enlightened voice and the DTC perspective on important issues concerning the civil justice system.

4. DTC should consider publishing a newsletter, website, periodic report or other media to identify and explain the role of the Judiciary with regard to problems and potential solutions to problems in our civil justice system.

5. DTC should distinguish itself from various tort reform, political, lobbying, and other special interest groups which may have common ground and assert mutual interests in order to maintain its independence and objectivity and to take special care not to become, or be perceived as, motivated by any particular client, industry or other group's agenda or interests.

6. DTC should, while observing its professional and ethical obligations, speak out as an organization in favor of judicial integrity, consistency and impartiality, and against judicial misconduct, inconsistency, bias and prejudice.

7. DTC should encourage its members to share their individual views, opinions and perspectives, with any interested persons or groups concerning qualifications of candidates for judicial office in West Virginia, and support those candidates who have demonstrated the required

integrity, consistency and impartiality.

8. DTC should announce and publicize its evolving role, position and perspective, as the voice of the West Virginia defense bar in the civil justice system, through press releases, increased participation in public functions, amicus briefing, guest editorials and other conspicuous appearances where DTC is specifically identified.

9. DTC should continue to explore and develop means or methods by which it can be widely identified and effectively serve as a "watchdog" organization for the civil justice system. DTC must maintain its vigilance and foster its image as an informed and credible group advocating for the fairness and integrity of the entire civil justice system, even where the pursuit of that cause may be directly contrary to the economic interests of any of its individual members or their firms.

APPENDIXES/ATTACHMENTS

West Virginia's Workers' Compensation Crisis: Does the Supreme Court of Appeals Contribute to the Problem?

In recent issues of the Charleston Daily Mail, there has been an editorial debate over whether the West Virginia Supreme Court of Appeals played a significant role in the development and/or exacerbation of the well known fiscal crisis in which the State Workers' Compensation Fund finds itself. *See* "Court didn't ruin Workers' Comp," Larry V. Starcher, Charleston Daily Mail, May 9, 2003; "Court's activists do add to comp crisis," Steve Roberts, Charleston Daily Mail, May 13, 2003. In his editorial, Justice Starcher opines that the Court did not cause or worsen the crisis, but blames it upon the "culture" of disability that exists in Southern West Virginia. In rebuttal, Mr. Roberts, president of the State Chamber of Commerce, claims that Starcher's own statistics verify the problem, and blames the Court for contributing to the "culture of disability" in West Virginia through its decisions.

To lend objective data to the debate, 33 "memorandum orders" issued by the Court over the period 1999 to 2003 disposing of 923 Workers' Compensation appeals were reviewed.[23] At the outset, two clarifications must be made about this study. First, and most obviously, if the Court's decisions have contributed to the financial crisis of the Workers' Compensation Fund, they would obviously have been doing so since long before 1999. However, the data prior to 1999 would be of limited value regarding the present Court, since two of the current Justices were not seated until that time[24], and since the Court has seen exploding numbers of Workers' Compensation appeals since the late 1990's. Second, the Court has issued far more than 33 memorandum orders, deciding many more than 923 Workers' Compensation appeals since 1999.

The data indicate that a surprising number of Workers' Compensation appeals are heard by the Court. According to the "West Virginia Court System 2001 Annual Report," available on the Court's web site, Workers' Compensation filings have increased dramatically. Workers' Compensation filings went from 116 petitions in 1983 to 481 in 1990. In 1991, Workers' Compensation filings soared to 1,947. Presumably, this was due to significant statutory reforms enacted in 1990. This number slowly decreased to 966 by 1994, but once again, in 1995 the Legislature enacted significant legislative reforms, and the number of petitions filed swelled to 1,534 in 1996. Rather than steadily declining thereafter as in the early 1990's, Workers' Compensation filings again *increased* to 2,306 by 1999. It is surmised that this may have followed the seating of certain Justices on the Court who may have been viewed as potentially claimant-friendly. It is encouraging to note that the number of petitions filed in 2001 was back down to 1,380.

The study was limited to the 33 memorandum orders reviewed for several reasons. First, it is reasonable to assume that 923 cases represent a fair depiction of the Court's voting tendencies in all Workers' Compensation appeals. The study's goal was to ascertain the Court's general voting tendencies and trends in Workers' Compensation litigation, and it is believed that the cases reviewed were sufficient to permit an accurate sampling. In 2001, according to its Annual Report,

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[23] The Court has discretion whether to hear Workers' Compensation appeals, and over the period 1999-2001 heard about 55% of the appeals filed. Information is given below about the number of petitions accepted from claimants and employers, but there is no way to know how many petitions refused by the Court were filed by one party or the other.

[24] Justice Warren McGraw was elected in November 1998 and first began participating in decisions in the Court's Spring 1999 term. Justice Joseph Albright was elected in November 2000 and first began participating in the Court's decisions in the Spring 2001 term. The remaining Justices, Larry Starcher, Robin Davis, and Elliott Maynard, were all elected in November 1996 and began participating in the Court's decisions in the Spring 1997 term.

the Court disposed of 1,323 Workers' Compensation cases by memorandum order. The study includes 395 of these decisions, or 29.86% of the total. The sampling from the other years is probably not this high, but overall is sufficient for the intended purpose. Second, the data were compiled from all memorandum orders received by a single law firm. When the Court renders Workers' Compensation decisions, it forwards copies of the memorandum orders to all firms representing any party in any one of the cases decided, of which there may be several dozen in a single order. Accordingly, expansion of the study would not only require review of additional orders with questionable changes in the overall results, but would require obtaining the orders from multiple sources, which was beyond the scope of the study's intent.

The data summarized in the attached study indicate that the Court hears appeals filed by claimants almost exclusively. Of 923 decisions reviewed, 908 were petitions filed by claimants, with only 14 petitions from employers and one from the Workers' Compensation Division granted. This leads one to conclude that the present Court does not hear appeals filed by employers. The general response offered by the claimants' bar is that the Workers' Compensation Appeal Board during Governor Cecil Underwood's administration was inordinately conservative and issued employer-friendly decisions. The data studied indicates that the Court *does* continue to review and reverse pro-employer decisions by Governor Wise's Appeal Board, which is generally viewed as more claimant-oriented. However, there were not enough decisions available to review in which the Court disposed of pro-employer decisions by the current Appeal Board to form a meaningful statistical database.

Of the 923 decisions reviewed, 693 were decided in favor of the claimants, a rate of 75.08%. However, Justice Margaret Workman retired from the Court in 1999, and her seat was temporarily filled by Justice George Scott. The study includes 276 decisions by the Court during Justice Scott's tenure, and claimants prevailed in 145 of those cases, a rate of 52.54%. After Justice Scott was replaced by Justice Joseph Albright, the study encompasses 455 of the Court's decisions, and claimants prevailed in 387 of those cases, a rate of 85.05%.

Each of the current Justices' individual voting records was reviewed over the entire period. Justice Warren McGraw's voting record was the most notable, with 902 of 922 votes going for claimants, and 14 being compromise or indeterminable verdicts. Justice McGraw was disqualified from one decision, so he voted in favor of employers in only six of 922 decisions. Perhaps most noteworthy is that ***none*** of these six votes for employers occurred after 1999. Since 1999, Justice McGraw voted for claimants in 100% of the cases reviewed.

Justice Larry Starcher voted for claimants in 825 of 923 decisions, a rate of 89.38%. Employers got his vote 74 times, a rate of 8.02%, and he offered 24 split verdicts and/or indeterminable decisions.

Justice Joseph Albright, the newest member of the Court, appears to give the claimants' bar a significant statistical majority. In 455 decisions reviewed, Justice Albright ruled in favor of the claimant 379 times, a rate of 83.30%, and just 64 times in favor of employers, a rate of 14.07%. Twelve of Justice Albright's verdicts would be considered either compromise or indeterminable in nature.

Justice Elliott Maynard's record stands in stark contrast to those of Justices McGraw, Starcher, and Albright. Justice Maynard voted in favor of claimants in 246 claims, a rate of 26.65%, and sided with employers in 657 of 923 decisions, a rate of 71.18%. Justice Maynard

offered 20 decisions that would be characterized as neither pro-claimant nor pro-employer, or were unidentifiable from the limited information available on memorandum orders. While these statistics may seem to indicate a pro-employer bias, it is to be remembered that almost all of the cases reviewed were appeals by claimants, and the Court is supposed to adhere to a rigorous and strict standard of review, reversing the Appeal Board only in cases where the Board acted with plain, obvious error.

Justice Robin Davis was disqualified from nine of the decisions reviewed. Of the 914 cases in which she participated, she ruled in favor of the claimant 558 times, or a rate of 61.05%. Her decisions were in employers' favor 335 times, or a rate of 36.65%. Justice Davis reached a compromise or indeterminable verdict 21 times. Justice Davis' voting pattern seems to vary the most from memorandum order to memorandum order, and she is definitely the most unpredictable Justice on the Court from case to case.

One other significant statistic related to the Court's voting record involves permanent total disability and "dependent's benefits" or "widow's benefits." These are historically the most costly Workers' Compensation claims, with individual awards running into the hundreds of thousands of dollars. From 1999 to 2003, the Court granted or upheld these benefits 99 times, and upheld the rejection of these benefits 39 times. The Court *never* reversed a permanent total disability or dependent's benefits award. This means that of 923 claims decided, entitlement to dependent's benefits or permanent total disability benefits was the issue under review 138 times, or a rate of 14.95% of appeals heard. Claimants prevailed in 71.74% of the cases involving these issues, a similar success rate to the overall success rate for claimants in all Workers' Compensation issues.

These statistics, along with the Court's published Workers' Compensation decisions during the same time period, certainly indicate that employers face a very difficult fight before the Court in Workers' Compensation issues. It is impossible to know the exact dollar impact that these decisions have upon the Workers' Compensation Fund, but it is reasonable to conclude that the Court is very pro-claimant in its decisions, and the dollar value of the individual case does not seem to influence the potential outcome.

According to the Court's 2001 Annual Report, it accepted approximately 3,550 petitions for appeal out of 6,400 filed between 1999 and 2001 in Workers' Compensation claims. If one assumes that claimants will prevail in 85% of those claims, claimants will receive favorable decisions in over 3,000 claims, and if 15% of those claims are permanent total disability and dependent's benefits claims, the Court will award or uphold benefits in at least 450 claims. This number should be further coordinated with the statistic offered by the State Chamber of Commerce in Mr. Roberts' May 13, 2003 Charleston Daily Mail editorial, in which he cites a statistic stating that West Virginia has awarded 1,008 permanent total disability awards per year since 1992. It is unknown whether that statistic encompasses only awards granted by the Division or whether it includes awards garnered through the litigation process. It is possible that the Court's statistical proclivity to grant these awards would add to this already high number.

Permanent total disability and dependent's benefits awards average hundreds of thousands of dollars per individual award. If each award averages only $300,000, which is a very conservative number, 450 such awards granted or upheld by the Court, also thought to be a very conservative estimate, over just the 1999-2001 period, would represent a total liability to the Fund and West Virginia employers of $135,000,000. Moreover, during that same period, the numbers suggest that claimants will also prevail in approximately 2,500 other issues litigated before the

Court, and each of these claims will obviously bear some measure of expense, often significant expense. It is therefore difficult to imagine that the Court's rulings are not having a significant impact upon both employers and the Workers' Compensation Fund of West Virginia. Certainly it can be speculated that the Court, by giving claimants such a large percentage chance of prevailing, creates or contributes to the "culture of disability."

Voting Record Of West Virginia Supreme Court Of Appeals
Workers' Compensation Claims
Select Orders Covering 1999-2003

Spring 1999 Term
1999-1
61 decisions reviewed

- Petitions accepted from claimants: 61
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 53
- Decisions in favor of employers: 4
- Impossible to determine or divided outcome: 4
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	56	1	4
Starcher	56	1	4
Davis	53	4	4
Maynard	24	33	4

Spring 1999 Term
1999-2
62 decisions reviewed

- Petitions accepted from claimants: 58
- Petitions accepted from employers: 3
- Petitions accepted from Division: 1
- Decisions in favor of claimants: 51
- Decisions in favor of employers: 9
- Impossible to determine or divided outcome: 2
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	60	0	2
Starcher	56	4	2
Davis	39	21	2
Maynard	18	42	2

Spring 1999 Term
1999-3
67 decisions reviewed

- Petitions accepted from claimants: 62
- Petitions accepted from employers: 5
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 57
- Decisions in favor of employers: 9
- Impossible to determine or divided outcome: 1
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	63	3	1
Starcher	57	9	1
Davis	42*	23*	1*
Maynard	20	46	1

*Justice Davis also disqualified from one decision

Fall 1999 Term
1999-4
19 decisions reviewed
Justice Workman off Court; Justice Scott on

- Petitions accepted from claimants: 19
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 8
- Decisions in favor of employers: 10
- Impossible to determine or divided outcome: 1
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	18	0	1
Starcher	16	2	1
Davis	8	10	1
Maynard	3	15	1

Fall 1999 Term
1999-5
39 decisions reviewed

- Petitions accepted from claimants: 39
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 30
- Decisions in favor of employers: 7
- Impossible to determine or divided outcome: 2
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	36	2	1
Starcher	33	4	2
Davis	33	4	2
Maynard	13	24	2

Fall 1999 Term
1999-6
18 decisions reviewed

- Petitions accepted from claimants: 18
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 9
- Decisions in favor of employers: 8
- Impossible to determine or divided outcome: 0
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	18	0	0
Starcher	14	4	0
Davis	12	6	0
Maynard	6	12	0

Fall 1999 Term
1999-7
23 decisions reviewed

- Petitions accepted from claimants: 23
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 19
- Decisions in favor of employers: 3
- Impossible to determine or divided outcome: 1
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	22	0	1
Starcher	19	3	1
Davis	20	2	1
Maynard	7	15	1

Spring 2000 Term
2000-1
28 decisions reviewed

- Petitions accepted from claimants: 28
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 12
- Decisions in favor of employers: 16
- Impossible to determine or divided outcome: 0
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	28	0	0
Starcher	21	7	0
Davis	12	16	0
Maynard	12	16	0

Spring 2000 Term
2000-2
19 decisions reviewed

- Petitions accepted from claimants: 19
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 9
- Decisions in favor of employers: 10
- Impossible to determine or divided outcome: 0
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	19	0	0
Starcher	19	0	0
Davis	7	12	0
Maynard	4	15	0

Spring 2000 Term
2000-3
34 decisions reviewed

- Petitions accepted from claimants: 34
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 18
- Decisions in favor of employers: 14
- Impossible to determine or divided outcome: 2
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	33	0	1
Starcher	28	4	2
Davis	19	13	2
Maynard	4	28	2

Spring 2000 Term
2000-4
26 decisions reviewed

- Petitions accepted from claimants: 26
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 11
- Decisions in favor of employers: 15
- Impossible to determine or divided outcome: 0
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	26	0	0
Starcher	25	1	0
Davis	11	15	0
Maynard	6	20	0

Fall 2000 Term
2000-5
56 decisions reviewed

- Petitions accepted from claimants: 54
- Petitions accepted from employers: 2
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 22
- Decisions in favor of employers: 31
- Impossible to determine or divided outcome: 1
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	55	0	1
Starcher	53	2	1
Davis	22	33	1
Maynard	6	49	1

Fall 2000 Term
2000-6
16 decisions reviewed

- Petitions accepted from claimants: 16
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 7
- Decisions in favor of employers: 9
- Impossible to determine or divided outcome: 0
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	16	0	0
Starcher	15	1	0
Davis	7	9	0
Maynard	0	16	0

Spring 2001 Term
2001-1
38 decisions reviewed
Justice Scott off Court; Justice Albright on

- Petitions accepted from claimants: 38
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 27
- Decisions in favor of employers: 11
- Impossible to determine or divided outcome: 0
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	38	0	0
Starcher	37	1	0
Davis	9*	28*	0*
Maynard	8	30	0
Albright	25	13	0

*Justice Davis also disqualified from one decision

Spring 2001 Term
2001-2
26 decisions reviewed

- Petitions accepted from claimants: 26
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 22
- Decisions in favor of employers: 2
- Impossible to determine or divided outcome: 2
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	26	0	0
Starcher	22	2	2
Davis	14	10	2
Maynard	4	22	0
Albright	22	2	2

Spring 2001 Term
2001-3
33 decisions reviewed

- Petitions accepted from claimants: 32
- Petitions accepted from employers: 1
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 32
- Decisions in favor of employers: 1
- Impossible to determine or divided outcome: 0
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	33	0	0
Starcher	32	1	0
Davis	27	6	0
Maynard	9	24	0
Albright	32	1	0

Spring 2001 Term
2001-4
39 decisions reviewed

- Petitions accepted from claimants: 39
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 39
- Decisions in favor of employers: 0
- Impossible to determine or divided outcome: 0
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	39	0	0
Starcher	39	0	0
Davis	38*	0*	0*
Maynard	11	28	0
Albright	33	3	3

*Justice Davis also disqualified from one decision

Spring 2001 Term
2001-5
16 decisions reviewed

- Petitions accepted from claimants: 15
- Petitions accepted from employers: 1
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 15
- Decisions in favor of employers: 0
- Impossible to determine or divided outcome: 1
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	15	0	1
Starcher	15	0	1
Davis	15	0	1
Maynard	3	12	1
Albright	15	0	1

Spring 2001 Term
2001-6
20 decisions reviewed

- Petitions accepted from claimants: 20
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 20
- Decisions in favor of employers: 0
- Impossible to determine or divided outcome: 0
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	20	0	0
Starcher	20	0	0
Davis	14	6	0
Maynard	6	14	0
Albright	20	0	0

Spring 2001 Term
2001-7
12 decisions reviewed

- Petitions accepted from claimants: 12
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 11
- Decisions in favor of employers: 1
- Impossible to determine or divided outcome: 0
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	12	0	0
Starcher	11	1	0
Davis	5	7	0
Maynard	3	9	0
Albright	11	1	0

Spring 2001 Term
2001-8
34 decisions reviewed

- Petitions accepted from claimants: 34
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 32
- Decisions in favor of employers: 0
- Impossible to determine or divided outcome: 2
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	34	0	0
Starcher	32	0	2
Davis	29	3	2
Maynard	20	12	2
Albright	30	2	2

Fall 2001 Term
2001-9
25 decisions reviewed

- Petitions accepted from claimants: 25
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 22
- Decisions in favor of employers: 3
- Impossible to determine or divided outcome: 0
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	25	0	0
Starcher	22	3	0
Davis	15*	9*	0*
Maynard	8	17	0
Albright	22	3	0

*Justice Davis also disqualified from one decision

Fall 2001 Term
2001-10
24 decisions reviewed

- Petitions accepted from claimants: 24
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 24
- Decisions in favor of employers: 0
- Impossible to determine or divided outcome: 0
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	24	0	0
Starcher	24	0	0
Davis	12	12	0
Maynard	4	20	0
Albright	23	1	0

Fall 2001 Term
2001-11
19 decisions reviewed

- Petitions accepted from claimants: 19
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 17
- Decisions in favor of employers: 2
- Impossible to determine or divided outcome: 0
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	19	0	0
Starcher	17	2	0
Davis	15	4	0
Maynard	7	12	0
Albright	17	2	0

Fall 2001 Term
2001-12
34 decisions reviewed

- Petitions accepted from claimants: 34
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 27
- Decisions in favor of employers: 7
- Impossible to determine or divided outcome: 0
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	33	0**	1**
Starcher	27	7	0
Davis	27	7	0
Maynard	0**	33	1**
Albright	27	7	0

**This Order disposed mainly of statutory 5% awards for occupational pneumoconiosis. Justice McGraw's one vote for an employer came in such a case, as did Justice Maynard's one vote for a claimant. Because these are both highly inconsistent with each Justice's vote in all other such cases, it is strongly suspected that this was a typographical error, and that Justice Maynard was actually the dissenting Justice, not Justice McGraw. Accordingly, each Justice receives a single vote in the Split/Undetermined column for this particular claim.

Fall 2001 Term
2001-13
26 decisions reviewed

- Petitions accepted from claimants: 25
- Petitions accepted from employers: 1
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 20
- Decisions in favor of employers: 5
- Impossible to determine or divided outcome: 1
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	25*	0*	0*
Starcher	22	3	1
Davis	6*	15*	1*
Maynard	7	18	1
Albright	19	6	1

*Justice Davis also disqualified from four decisions; Justice McGraw also disqualified from one decision.

Fall 2001 Term
2001-14
24 decisions reviewed

- Petitions accepted from claimants: 24
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 19
- Decisions in favor of employers: 5
- Impossible to determine or divided outcome: 0
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	24	0	0
Starcher	22	1	1
Davis	9	15	0
Maynard	2	22	0
Albright	18	5	1

Fall 2001 Term
2001-15
25 decisions reviewed

- Petitions accepted from claimants: 24
- Petitions accepted from employers: 1
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 20
- Decisions in favor of employers: 5
- Impossible to determine or divided outcome: 0
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	25	0	0
Starcher	20	4	1
Davis	12	13	0
Maynard	10	15	0
Albright	21	4	0

Spring 2002 Term
2002-1
9 decisions reviewed

- Petitions accepted from claimants: 9
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 5
- Decisions in favor of employers: 4
- Impossible to determine or divided outcome: 0
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	9	0	0
Starcher	8	1	0
Davis	1	8	0
Maynard	0	9	0
Albright	6	3	0

Spring 2002 Term
2002-2
9 decisions reviewed

- Petitions accepted from claimants: 9
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 8
- Decisions in favor of employers: 1
- Impossible to determine or divided outcome: 0
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	9	0	0
Starcher	9	0	0
Davis	6	3	0
Maynard	2	7	0
Albright	8	1	0

Spring 2002 Term
2002-3
10 decisions reviewed

- Petitions accepted from claimants: 10
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 8
- Decisions in favor of employers: 1
- Impossible to determine or divided outcome: 1
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	10	0	0
Starcher	8	1	1
Davis	5	4	1
Maynard	5	4	1
Albright	8	1	1

Fall 2002 Term
2002-4
23 decisions reviewed

- Petitions accepted from claimants: 23
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 15
- Decisions in favor of employers: 7
- Impossible to determine or divided outcome: 1
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	23	0	0
Starcher	18	4	1
Davis	12*	10*	0*
Maynard	12	11	0
Albright	18	4	1

* Justice Davis also disqualified from one decision

Spring 2003 Term
2003-1
9 decisions reviewed

- Petitions accepted from claimants: 9
- Petitions accepted from employers: 0
- Petitions accepted from Division: 0
- Decisions in favor of claimants: 4
- Decisions in favor of employers: 5
- Impossible to determine or divided outcome: 0
- Votes of individual justices

	Claimant	Employer	Split/Impossible to determine
McGraw	9	0	0
Starcher	8	1	0
Davis	2	7	0
Maynard	2	7	0
Albright	4	5	0

SUMMARY:

Petitions Accepted from Claimants:	908
Petitions Accepted from Employers:	14
Petitions Accepted from Division:	1
Total Decisions Reviewed:	923

Total Decisions in Favor of Claimants:	693 (75.08%)
Total Decisions in Favor of Employers:	205 (22.21%)
Total Split, Compromise, or Indeterminable Decisions:	25 (2.71%)

Total Decisions Reviewed During Justice Scott's Tenure:	276
Total Decisions Reviewed During Justices Workman & Albright's Tenures:	647
Total Decisions Reviewed Since Justice Albright on Court:	455

Total Decisions in Favor of Claimants, Excluding Justice Scott's Tenure	548 (84.70%)
Total Decisions in Favor of Employers, Excluding Justice Scott's Tenure	82 (12.67%)
Total Split, Compromise, or Indeterminable Decisions, Excluding Justice Scott's Tenure	17 (2.63%)

Total Decisions in Favor of Claimants, During Justice Scott's Tenure	145 (52.54%)
Total Decisions in Favor of Employers, During Justice Scott's Tenure	123 (44.57%)
Total Split, Compromise, or Indeterminable Decisions, During Justice Scott's Tenure	8 (2.90%)

Total Decisions in Favor of Claimants, Since Justice Albright on Court	387 (85.05%)
Total Decisions in Favor of Employers, Since Justice Albright on Court	60 (13.19%)
Total Split, Compromise, or Indeterminable Decisions, Since Justice Albright on Court	8 (1.76%)

Voting Records of Individual Justices:

	In Favor of Claimants	In Favor of Employers	Split, Compromise, or Indeterminable
McGraw	902 (97.83%)*	6 (0.65%)**	14 (1.63%)
Starcher	825 (89.38%)	74 (8.02%)	24 (2.60%)
Davis	558 (61.05%)*	335 (36.65%)	21 (2.30%)
Maynard	246 (26.65%)	657 (71.18%)	20 (2.17%)
Albright	379 (83.30%)	64 (14.07%)	12 (2.64%)

* Justice McGraw was disqualified from one of the 923 decisions reviewed; Justice Davis was disqualified from nine of the 923 decisions reviewed.

** There were no votes recorded by Justice McGraw, other than the one virtually certain typographical error in the 12th Memorandum Order of the Fall 2001 term with 34 petitions decided, that were in favor of employers after the Fall 1999 term. As explained in the table above, the decision in question recorded Justice McGraw dissenting from an Order of the Court granting a claimant a 5% permanent partial disability award in an occupational pneumoconiosis claim. The decision also recorded Justice Maynard as voting for the claimant in the decision. This is entirely inconsistent with both Justices' voting records in hundreds of such claims, so an "indeterminable" decision was recorded for each.

Awards of Permanent Total Disability or Dependent's Benefits Granted/Upheld:	99
Awards of Permanent Total Disability or Dependent's Benefits Reversed:	0
Denial of Permanent Total Disability or Dependent's Benefits Upheld:	39

Index Of Studies, Reports and Articles Reviewed

1. *Asbestos Litigation Costs and Compensation: An Interim Report* – RAND Institute for Civil Justice, 2002

2. *Bringing Justice to Judicial Hellholes* – American Tort Reform Assoc., 2002

3. *Civil Justice Report, One Small Step for a County Court . . . One Giant Calamity for the National Legal System,* Center for Legal Policy of the Manhattan Institute, April 2003

4. *Class Action Litigation Abuse in America* – Considered Opinion; James Wooten, U.S. Chamber Institute of Legal Reform, 2002

5. *Commission on the Future of the West Virginia Judicial System*, 1998

6. *Court Watch: The Impact of the West Virginia Supreme Court On Our State's Economy* – A Report Prepared for the Members of the WV Chamber of Commerce

    a. Spring 1999
    b. Fall 1999
    c. Spring 2000
    d. Fall 2000
    e. Spring 2001
    f. Fall 2001 – Spring 2002
    g. Statistical Information – 1999-2002

7. *Does a State's Legal Framework Affect Its Economy?* (Reliance on January 11, 2002 Harris Interactive Report, *State Liability Ranking Study*, Todd G. Buchholz and Robert W. Hahn)

8. *The Institute of Legal Reform Malpractice Liability in West Virginia* – The U.S. Chamber Institute for Legal Reform, Harris Interactive, Nov. 2002

9. *Justice in Jeopardy,* Report of the American Bar Association Commission on the 21st Century Judiciary, May 2003

10. Litigation Fairness Campaign (All are Internet Articles)
    a. *Internet Links* – www.litigationfairness.org
    b. *Studies and Surveys*
    c. *Facts and Figures – America's Class Action Crisis*
    d. *Updates*

11. *Medical Monitoring: Are Some States Walking into a Legal Thicket?* – American Legislative Exchange Council, Spring 2001

12. *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize?* – William Mitchell Law Review, 2000

13. *Medical Monitoring: Should Tort Law Say Yes?* – Wake Forest Law Review, Winter 1999

14. Miscellaneous Articles & Commentary from American Trial Lawyers Association Citizens for Sound Economy, Manhattan Institute and American Tort Reform Foundation

15. *Nation's Obstetrical Care Endangered by Growing Liability Insurance Crisis; ACOG Announces "Red Alert" States Where Care is Most at Risk* – Internet Article and *ACOG (American College of Obstetricians and Gynecologists) Fact Sheet - Red Alert: The Hot States*, 2002

16. *The Negative Impact of the Current Civil Justice System on Economic Activity in West Virginia* – Prepared for The West Virginia Chamber of Commerce by The Perryman Group, 2002

17. *Public Attitudes Toward The American Legal System and Proposed Class Action Reform Legislation* – Fall 2001 Research Study – Prepared by Penn, Schoen & Berland Associates and Public Opinion Strategies, Sept. 2001

18. *The Secondary Impacts of Asbestos Liabilities*– United States Chamber of Commerce, NERA Economic Consulting, Jan. 2003

19. *Small Business Survival Committees Seventh Annual Small Business Survival Index 2002: Ranking the Policy Environment for Entrepreneurship Across the Nation*, Raymond J. Keating, Chief Economist, July 2002.

20. *State by State Polling on The Class Action System – National Results from National Survey* – Institute of Legal Reform, U.S. Chamber of Commerce - May 2002

21. *State Competitiveness Report 2001* – Beacon Hill Institute at Suffolk University, 2001

22. *U.S. Chamber of Commerce State Liability Systems Ranking Study* - Final Report – U.S. Chamber of Commerce Report Card on State Liability Systems, Harris Interactive, Jan. 2002

23. *U.S. Chamber of Commerce State Liability Systems Ranking Study* – Final Report– U.S. Chamber Institute of Legal Reform, April 2003

24. *U.S. Tort Costs: 2002 Update* – Tillinghast-Towers Perrin, 2002.

25. *West Virginia Court System 2001 Annual Report* – Supreme Court, 2002

26. *What are the Costs of Civil Litigation in West Virginia?* – The Regional Economic Review, Marshall University, Winter 2002

27. *Who Pays for Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System* – Council of Economic Advisers, April 2002

Summary Of Survey Regarding Civil Justice System Reform In West Virginia

Civil Justice Committee Of The Defense Trial Counsel Of West Virginia

GENERAL INFORMATION

1. How many lawyers practice in your firm?

   __1____ Solo practitioner

   __18___ 1-10 lawyers

   __13___ 11-25 lawyers

   __24___ 26-50 lawyers

   __28___ More than 50 lawyers

2. How long have you been admitted to practice law?

   __14___ 0-5 years

   __15___ 6-10 years

   __14___ 11-15 years

   __15___ 16-20 years

   __26___ more than 20 years

3. In what city is your office located?

   Bluefield (3)
   Charleston (27)
   Clarksburg (1)
   Elkins (1)
   Fairmont (2)
   Huntington (20)
   Martinsburg (5)
   Morgantown (6)
   Various (1)
   Wheeling (15)

STATE THE EXTENT TO WHICH YOU AGREE OR DISAGREE WITH THE FOLLOWING STATEMENTS:

SUPREME COURT OF APPEALS OF WEST VIRGINIA

4. The Supreme Court of Appeals fairly decides civil appeals based on an objective evaluation of the state of the law in West Virginia.

   __0___ Strongly agree

   __8___ Somewhat agree

   __1___ Neither agree nor disagree

   __26__ Somewhat disagree

   __49__ Strongly disagree

5. The Supreme Court of Appeals is not result-oriented in its decisions on civil appeals.

   __1___ Strongly agree

   __3___ Somewhat agree

   __4___ Neither agree nor disagree

   __19__ Somewhat disagree

   __57__ Strongly disagree

6. The justices of the Supreme Court of Appeals have always treated the lawyers that appear before them with respect during oral argument.

   __9___ Strongly agree

   __19__ Somewhat agree

   __15__ Neither agree nor disagree

   __29__ Somewhat disagree

   __10__ Strongly disagree

7. The justices of the Supreme Court of Appeals do not exhibit partiality or bias toward any litigants that appear before the court.

   __1___ Strongly agree

   __1___ Somewhat agree

   __9___ Neither agree nor disagree

   __34__ Somewhat disagree

   __40__ Strongly disagree

8. The Supreme Court of Appeals is in the mainstream when compared to other jurisdictions in its application of law in civil cases.

   __0___ Strongly agree

   __2___ Somewhat agree

   __3___ Neither agree nor disagree

   __38__ Somewhat disagree

   __41__ Strongly disagree

9. The Supreme Court of Appeals fairly applies and/or enforces the requirements of the Rules of Civil Procedure, the Rules of Evidence and the Rules of Appellate Procedure.

   ___0___ Strongly agree

   __11__ Somewhat agree

   __12__ Neither agree nor disagree

   __32__ Somewhat disagree

   __29__ Strongly disagree

WEST VIRGINIA CIRCUIT COURTS

10. West Virginia circuit court judges fairly decide issues in civil cases based on an objective evaluation of the state of the law in West Virginia.

    __2___ Strongly agree

    __26__ Somewhat agree

    __10__ Neither agree nor disagree

    __33__ Somewhat disagree

    __12__ Strongly disagree

11. West Virginia circuit court judges are not result-oriented in their decisions on civil cases.

    __2___ Strongly agree

    __18__ Somewhat agree

    __11__ Neither agree nor disagree

    __40__ Somewhat disagree

    __12__ Strongly disagree

12. West Virginia circuit court judges have always treated the lawyers that appear before them with respect during oral argument.

    __6___ Strongly agree

    __47__ Somewhat agree

    __11__ Neither agree nor disagree

    __18__ Somewhat disagree

    __1___ Strongly disagree

13. West Virginia circuit court judges do not exhibit partiality or bias toward any litigants that appear before them.

___0___ Strongly agree

__18__ Somewhat agree

__8___ Neither agree nor disagree

__44__ Somewhat disagree

__13__ Strongly disagree

14. West Virginia circuit court judges fairly apply and/or enforce the requirements of the Rules of Civil Procedure, the Rules of Evidence and the Rules of Appellate Procedure.

__1___ Strongly agree

__24__ Somewhat agree

__14__ Neither agree nor disagree

__30__ Somewhat disagree

__15__ Strongly disagree

15. West Virginia's circuit court judges often have to allow a case to continue to trial that they would otherwise dismiss or grant summary judgment because of the threat of reversal by the Supreme of Court of Appeals.

__48__ Strongly agree

__21__ Somewhat agree

__6___ Neither agree nor disagree

__2___ Somewhat disagree

__6___ Strongly disagree

SELECTION OF JUDGES

16. A merit selection process for judges and justices would be preferable to West Virginia's current system of partisan elections.
17.

__58___ Strongly agree

__18___ Somewhat agree

__4____ Neither agree nor disagree

__1____ Somewhat disagree

__3____ Strongly disagree

18. Lawyer contributions to judicial election candidates affect the outcome of cases.

__36___ Strongly agree

__31___ Somewhat agree

__13___ Neither agree nor disagree

__1____ Somewhat disagree

__3____ Strongly disagree

19. Lawyer contributions to judicial election candidates taint the system of justice.

__53___ Strongly agree

__21___ Somewhat agree

__4____ Neither agree nor disagree

__4____ Somewhat disagree

__1____ Strongly disagree

MASS TORTS

20. The Mass Litigation Panel rules guarantee that defendants' rights are protected in mass tort cases.

__1____ Strongly agree

__3____ Somewhat agree

__13___ Neither agree nor disagree

__24___ Somewhat disagree

__40___ Strongly disagree

OTHER AREAS OF CONCERN

21. The plaintiffs' bar exerts too much influence over the judicial and legislative processes in West Virginia.

__43___ Strongly agree

__24___ Somewhat agree

__9____ Neither agree nor disagree

__4____ Somewhat disagree

__2____ Strongly disagree

22. The most significant problems with the civil justice system in West Virginia originate not with the legislature, but with the Judiciary.

__44___ Strongly agree

__24___ Somewhat agree

__9____ Neither agree nor disagree

__5____ Somewhat disagree

__2____ Strongly disagree

23. West Virginia justices and judges make inconsistent applications of evidentiary and procedural principles in order to assist plaintiffs in civil cases.

__23___ Strongly agree

__46___ Somewhat agree

__12___ Neither agree nor disagree

__2____ Somewhat disagree

__1____ Strongly disagree

24. The Defense Trial Counsel of West Virginia should be more active in promoting civil justice reform in West Virginia.

__50___ Strongly agree

__23___ Somewhat agree

__4____ Neither agree nor disagree

__3____ Somewhat disagree

__4____ Strongly disagree

25. Judges having *ex parte* contacts with plaintiff's counsel is a significant problem in West Virginia.

__11___ Strongly agree

__33___ Somewhat agree

__25___ Neither agree nor disagree

__11___ Somewhat disagree

__4____ Strongly disagree

TORT REFORM

26. I am in favor of adoption of the following reforms to the civil justice system (check all that apply):

__62___ Punitive damage limitations

__28___ Caps on compensatory damages

__65___ Class action/Mass Litigation reform

__55___ Collateral source reform

__67___ Joint and several liability reform

__51___ Medical malpractice reform

__35___ Federal product liability law (preempting all state product liability laws)

__64___ Venue/Forum non-conveniens reform

APPELLATE COURTS

27. The lack of an intermediate level appellate court hearing civil appeals is unfair to defendants.

__19___ Strongly agree

__27___ Somewhat agree

__24___ Neither agree nor disagree

__11___ Somewhat disagree

__2____ Strongly disagree

28. An appellate system that only allows for only discretionary appeals of civil cases is unfair to defendants.

__26___ Strongly agree

__26___ Somewhat agree

__18___ Neither agree nor disagree

__12___ Somewhat disagree

__1____ Strongly disagree

JURIES

29. Juries in West Virginia are usually fair in deciding civil cases.

__8____ Strongly agree

__38___ Somewhat agree

__13___ Neither agree nor disagree

__21___ Somewhat disagree

__3____ Strongly disagree

Report Of Huntington Regional Meeting;
Defense Trial Counsel Civil Justice Committee

The Huntington Regional meeting was convened at the offices of the Chamber of Commerce in Huntington, West Virginia at 3:30 p.m. on March 19, 2003. The meeting lasted about two (2) hours, and was attended by employee representatives for small and large business concerns in the Huntington area.

Those business representatives attending and participating in the meeting spoke at length about their concerns and the perils and high cost of doing business in West Virginia because of the Workers' Compensation system (rates, standards, rules of liability, etc.) and the litigation climate here. One representative who had significant experience outside the state indicated that he had seen "nothing like" what he sees in West Virginia and other jurisdictions. He described West Virginia as being ten (10) years behind the times, particularly in the employment law area, particularly because every potential discrimination claim turns into a civil action in addition to a State or Federal administration matter. According to this individual, nowhere else he does business do employees have the resort to the civil courts, over and above administrative remedies, that they do here.

All representatives indicated concern about the nature and degree of lawyers' solicitation and the lack of any type of meaningful sanctions, including actual sanctions or awards of costs and attorney fees, against lawyers and/or parties who bring questionable civil actions. Overall though, there is a belief that there are too many lawyers in West Virginia and that they are forced to "scrap" for work and do not screen the cases that they bring and file.

With respect to the West Virginia legislature, the representatives indicated that they do not believe the West Virginia legislature was a major problem, noting that over the years, although they have some significant positions of influence, there are a limited number of so called

“plaintiffs’ lawyers” in the legislature, and as a result of recent elections, the numbers have been further reduced. The representatives noted that plaintiffs’ lawyers have more impact on the legislative process through their substantial monetary campaign contributions than anything else, and the problem with the legislature relates more to the significant number of education and labor oriented members of the legislature. The representatives also noted that as it currently stands, the West Virginia Supreme Court of Appeals writes more law than does the West Virginia legislature.

All representatives present were uniform in their feelings that they generally receive fairer treatment in Federal Court than in State Court, and that about the West Virginia Supreme Court Appeals is a real problem. They are mad as hell at them. All expressed the belief that the public does not realize the impact of the Supreme Court on our day to day lives, business, jobs, etc. They indicated that in order to achieve a fairer and more "balanced" civil justice system in the state, significant efforts must be made to defeat Justice McGraw's re-election bid in two (2) years. Harshest criticism was reserved for Justice McGraw, but there was also the general belief that four (4) of the five (5) justices, save Justice Maynard, have a plaintiff's-result orientation. No one really believes that cases are decided predicated on what the law requires. They appear to be result-oriented and antibusiness.

There was less criticism of the circuit courts, primarily because of the perception that the circuit judges in Cabell County are generally conservative. However, for those representatives who do business in the northern part of the state particularly, it was the definite expressed opinion that businesses do not get a fair shake there. Similar concerns were expressed as to the southern jurisdictions.

There was a general awareness that recent lobbying efforts in the legislature produced few results, with the notable exception of the medical malpractice reform act and the new venue statute. It was generally acknowledged that there was no real reform for the insurance industry because "nobody gives a sh.." about insurance companies.

There was a definite belief that overall West Virginia has an entitlement mentality that effects voting for Legislators and judges and results in a Robin Hood mentality in the jury box, particularly as it relates to big business government and out-of-state entities. There was a general belief that many unfair settlements are reached because the potential exposure is simply too great. One representative expressed the opinion, however, that if one settles on this basis, a company deserves what it gets, and that all cases should be defended as a matter of principle. This representative believed that in doing so, he could prevent frivolous claims from being filed.

Employee representatives present expressed a firm belief that defense lawyers need to get more involved in speaking out against what they perceive to be the civil abuses heaped upon them in the courts of West Virginia. One representative noted that in his lobbying efforts at the legislature he sees the plaintiff lawyers there all the time, that they are very well organized and funded, but that he never sees defense lawyers represented there. There seemed to be a sense from these representatives that more defense lawyers need to be willing to participate in the judicial process by running for judgeships and providing reasonable alternatives to the judges who are in office now and are generally perceived to be plaintiff result-oriented.

One representative expressed disdain for the fact that West Virginia had become a "mass tort" haven. The fact that so many claims that have no real relationship to West Virginia are filed here is clear evidence it is believed that this state is a good place for plaintiffs to bring cases. There was a general belief that if judges were appointed, instead of elected, that this would improve somewhat. Even though judicial appointments may result in some liberal and some conservative judges being appointed as the changes occur in the party in control of the governorship, at least there would be some meaningful change in the judicial perspective, which appears to rarely occur through the normal elector process. Nevertheless, no one believed that such a dramatic change in our constitution so as to allow for the appointment of judges could occur.

Following the discussion, there is a general consensus that West Virginia’s civil justice

system problems relate to West Virginia's culture and attitude of entitlement, which effects the public, legislature, judges, and jurors. The greatest single problem at the present time was unanimously viewed as the makeup of our current Supreme Court.

Consequently, it would appear clearly that business will set their sights on trying to find a moderate candidate to oppose Justice McGraw in the next election, and then they will turn their attention to Justice Starcher in the following election. It was believed by those participating at the meeting that, as Justice Maynard expressed in a recent speech, that irrespective of what the legislature does the real power is in the supreme court and that the supreme court has been elected "under the radar screen" for too long.

Defense Trial Counsel of West Virginia - Civil Justice Committee
Charleston/Kanawha Regional Meeting -

March 26, 2003

21 attendees - representatives of banks, hospitals, real estate investors, manufacturers, business community leaders, insurance companies, lobbyists

Identification of problems in West Virginia's civil justice system and possible causes thereof, as well as the identification of potential solutions

1. Problems and Causes

    1. Mass Torts

        1. ease of prosecution
        2. fee generation

    2. Workers' Compensation

        1. viewed as an entitlement

    3. Third-Party Bad Faith

        1. Only 1 of 6 states

    4. Claim Settlement - settling cases to avoided exposure and expense

        1. cause or effect?

    5. Plaintiffs' lawyers

        1. contingent fee
        2. increase in legal cost
        3. fee shifting rules - loser pays?

    6. Defense lawyers

        1. avoid trial?
        2. last minute settlements

    7. Juries

        1. makeup of juries
        2. fear of juries

8. Judges
    1. do not rule
    2. control of trial
    3. forced mediation
    4. partisan elections - political positions
    5. lack of voter education

9. West Virginia Supreme Court

    1. inconsistent
    2. abandonment of *stare decisis*
    3. the Justices have a social agenda
    4. lack of checks and balances
    5. 12-year terms are too long
    6. lack of voter education on importance of Supreme Court

2. Potential Solutions

    1. Participation in the process

        1. grass roots process to educate the electorate on function and importance of the court system
        2. be willing to support jury duty - for themselves and their employees

    2. Different process to select judges and justices

    3. Locate and support Supreme Court candidate who will address these issues

        1. be willing to contribute time and money to support such a candidate

    4. Company laws

        1. utility PACs
        2. corporate PACs

    5. Broader tort reform than medical malpractice

    6. Workers' compensation reform

Defense Trial Counsel Civil Justice Committee
Eastern Panhandle Regional Meeting

A regional meeting was held April 28, 2003. Those in attendance included lawyers, physicians, contractors and managers of local plants as well as human resources representatives.

The Committee heard primarily from the business leaders in attendance concerning their concerns and priorities with respect to the civil justice system in West Virginia.

All in attendance agreed that meaningful tort reform is key to the continued vitality and expansion of business in West Virginia. Problems unique to the locale concerning competition with facilities in neighboring states were discussed. Neighboring states are perceived to have a more business-friendly climate.

For example, one physician explained that the local hospital competes with facilities in neighboring states that are nearby. Neither of the hospitals, located in Virginia and Maryland, respectively, pay sales tax which places West Virginia hospitals at a disadvantage from the beginning of its fiscal year. In addition, a recent increase in the pay scale at one facility has put an additional burden on the ever-present nursing shortage.

Several others present spoke generally about the lack of uniformity concerning the interpretation of statutes particularly between state agencies and municipalities. Key to this discussion was an issue concerning bid irregularities for construction projects. This was identified as a key lobbying point by the West Virginia Contractors' Association.

Without exception, all in attendance agreed that the key to solving issues presently facing West Virginia is meaningful tort reform and a change to the present composition of the West Virginia Supreme Court of Appeals. Meaningful tort reform is a term that takes on various meanings depending upon the agenda of the advocate, however, most agreed that defense trial counsel are in a unique position to bring about change since in many instances it will be defense trial counsel who will lose by a significant overhaul of the tort system. General discussions centered upon potential fee shifting, the perceived change in the true burden of proof in workers' compensation cases, the continued increase of insurance premiums across all lines of business, potential cancellation of policies, the moratoriums imposed by certain insurance carriers and the recent pull out of insurance carriers in West Virginia coupled with the drastic difference in premiums in West Virginia as opposed to the five states which border it.

With respect to the upcoming Supreme Court election, all agreed that the primary in May is most likely the most important election in West Virginia for the next 10 years. In that regard all in attendance pledged to support a pro-business candidate, to encourage local Legislators to continue with the pro-business platform many ran on and to engage in concerted efforts with respect to the election. A local contractor reported that the Contractors' Association has devoted its resources to the Supreme Court election. Those in attendance agreed that campaign contributions alone will not suffice but that funds must be utilized for worker/voter education. The Contractors' Association, for example, plans to embark upon a public relations campaign to educate workers how the election could personally impact them.

The group identified three key issues of tort reform: repeal of the collateral source rule,

repeal of joint and several liability, reversing the private cause of action for third party "bad faith" claims. The group was primarily concerned about the level of favorable response that can be expected from its legislative delegation.

Given the obvious support of the issues which the Civil Justice Committee is facing, those in attendance determined that they would like to continue to meet to bring about tort reform and to have an influence upon the upcoming Supreme Court election. Those in attendance will also solicit other business leaders in the area for further involvement.

Report Of Princeton, WV Regional Meeting

A meeting was held in Princeton, West Virginia, on April 4, 2003. At that time, approximately 14 people from the business community appeared for a general discussion on a variety of matters including our Judiciary.

As a general consensus, the participants acknowledge that we have a problem with at least a perception of an anti-business climate in West Virginia. Interestingly, however, no one seemed to be in favor of appointment of judges and, in fact, my attempt to initiate a discussion on that issue was rejected. They acknowledge the need for continued tort reform and was very supportive of the medical malpractice reform measures that have been taken during the past legislative session.

General speaking, the biggest concern on the minds of people in attendance at our meeting was workers' compensation. We have already experienced a number of businesses going across the state line solely because the workers' compensation insurance laws in the Commonwealth of Virginia are much more business oriented in West Virginia.

Report Of Wheeling Regional Meeting
Defense Trial Counsel Civil Justice Committee

On March 13, 2003, business leaders from various segments of the community met to discuss their perception of West Virginia Civil Legal System. These eight individuals represented a nonprofit organization, the Chamber of Commerce, the health care industry and education. In addition, three lawyers from the City were in attendance.

The following issues were discussed:

(1) Juries:

(a) Jury service - none of the individuals had ever served on a jury in a civil case, although several had served on grand juries. At least one individual noted that her employer actively encouraged employees to serve on juries if selected. Concern was expressed with regard to the makeup of the juror pool and the intellectual ability of jurors selected to serve in complicated civil cases. Several questioned whether there was any way to improve the pool of jurors so that the likelihood of obtaining a better-educated jury would be increased.

(b) Number of jurors - there was a consensus that the number of jurors should be increased from a number greater than six (6) but less than twelve (12). A concern was expressed that there may be difficulty finding twelve (12) qualified jurors. Concern was also expressed that with a smaller panel, one or two dominate persons can effectively sway the entire panel

(2) Judges

There was a definite sentiment that there are some judges who are so plaintiff oriented that the individuals felt that they, if defendants, would not get a fair trial. There is a perception that there was an "old boy" network and that judges do know which lawyers have supported them in their elections and that other lawyers or the litigants represented by those lawyers would not be treated fairly by that judge. The consensus was that election of judges should be eliminated in favor of appointment. Efforts should be made so that there is a diversity of individuals who would be involved in any appointment process to avoid partisan politics and/or control by any one interest group. There is a feeling that not just judges but that the law in general favored employees and plaintiffs rather than defendants.

(3) Frivolous lawsuits:

There was a consensus that there are too many lawyers which results in too many frivolous lawsuits being filed. There is a perception that there are a lot of frivolous lawsuits filed and that judges permit these lawsuits to go forward, thus wasting time and money on the part of the businesses who are sued. There was also the feeling that some lawyers file lawsuits just to obtain nominal compensation, even though they know that the case is not "winnable". Some individuals felt that these lawyers file suit on the expectation that the defendants will settle rather than litigate the case.

There was also the perception that many people in the community felt that insurance was there not just to compensate you for your loss, but just to give you money.

Interestingly, there seems to be the feeling that most of the litigants in plaintiff's cases are poor and/or uneducated.

Some express the concern that with the medical malpractice bill having been adopted, plaintiffs' lawyers will now shift to some other "victim".

One individual suggested that perhaps the British concept of "loser pays" should be adopted into our civil justice system.

(4) Jury Awards:

(a) Amount: Some felt that plaintiff's attorneys build up medical expenses in order to recover a larger award. The sentiment was also expressed that plaintiffs simply have an unrealistic expectation with regard to what to expect as an award and that jurors have no real understanding of the large sums of money that they award. Again, there is a feeling that the jurors were not educated well enough to understand the effect of huge awards.

(b) Punitive Damages: The consensus was that punitive damages should not go just to the plaintiff who brought the lawsuit, but should somehow be given back to the community.

(5) Collateral Source Rule:

The consensus was to eliminate the collateral source rule.

(6) Joint and Several Liability:

Everyone seemed to agree that the percentage of an award that a defendant should have to pay should be equivalent to his or her percentage of fault.

(7) Venue:

Everyone agreed that the statute should be changed so that venue would be more narrowly construed.

(8) Lawyers:

(a) Fees: While there was no consensus as to what a cap on lawyer's fees should be, It was agreed that there should be some limit on contingency fee contracts. Lawyer greed was noted several times as being behind the contingency fee contract and the filing of frivolous lawsuits.

(b) Lawyer Advertising: Most felt that lawyers should be permitted to advertise, although some objected to the nature of some specific commercials.

Report On Morgantown/Fairmont/Clarksburg Regional Meeting

A regional meeting was sponsored in the Morgantown/Fairmont/Clarksburg area on Monday, March 24, 2003. The meeting was held at the Fairmont Holiday Inn. A social session began at 5:00 p.m. The meeting took place from 5:30 p.m. to approximately 7:30 p.m. Bill Galeota and Lisa Rose hosted the meeting.

Approximately 50 invitations were sent out to business, government and community leaders in the Morgantown/Fairmont/Clarksburg area. Approximately 20 individuals attended.

An interesting and lively discussion took place during the meeting. The following is a summary of the topics discussed and raised during the meeting.

1. West Virginia's system of electing judges should be eliminated/revised. Appointment of judges is considered more appropriate.

2. The current West Virginia Supreme Court of Appeals is a deterrent to economic development in this state.

3. The lack of an intermediate appellate court in West Virginia contributes to the litigation crisis in this state.

4. There should be a method/vehicle through or by which the members of our Supreme Court are held accountable for their professional conduct and their rulings.

5. The fact that our legislature recently enacted tort reform in medical malpractice cases is evidence of the failure of the judicial system.

6. As a realistic and practical matter, summary judgment practice does not exist in West Virginia.

7. Lawyers should not contribute to judicial campaigns.

8. Insurance companies settle out of court as a regular practice; because of fear of the system, some claims are settled even before suit is filed.

9. A "lottery mentality" exists in West Virginia.

10. We should enact a penalty for frivolous lawsuits. Consideration should be given to adopting the procedure followed in Great Britain pursuant to which the losing party pays costs.

11. "Shot gun lawsuits" are a concern. There is no standard that needs to be met before a party can be sued.

12. In some cases, all defendants in a case are insured by the same carrier. The interests of all defendants may not be aligned, and this creates at least a perception of conflict on the part of the defendants.

13. The high cost of lawsuits is reflected in future insurance premiums.

14. The relationship between worker's compensation awards and costs incurred by the public must be brought home to the public.

15. In all lawsuits, there appears to be a "presumption of perfection." Regardless of the applicable standard of care, defendants are held to a standard of perfection.

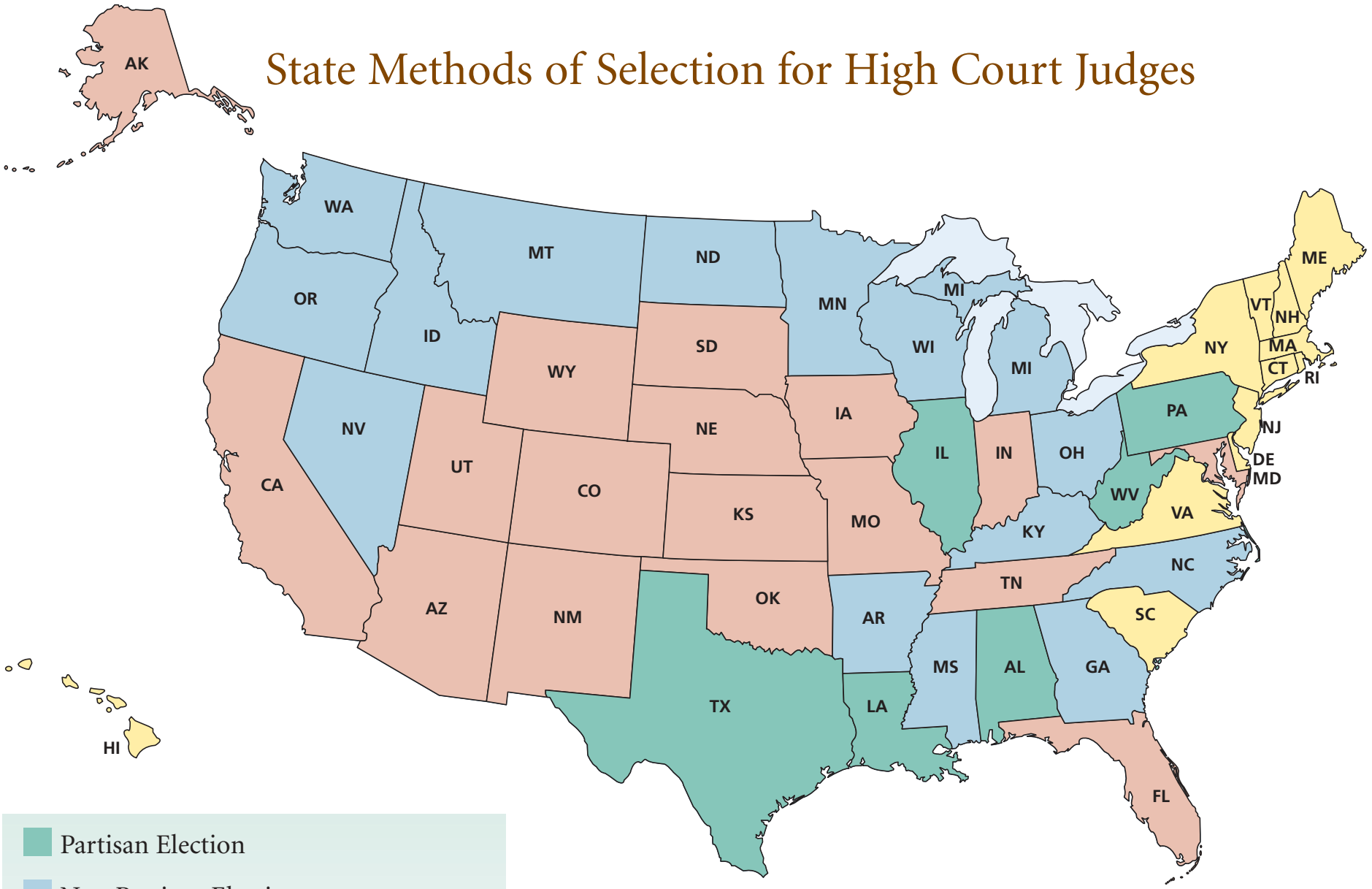
16. A patient compensation fund should be established for medical malpractice cases.

17. The concepts of joint and several liability and the collateral source rule are problematic and should be abolished.

18. Most citizens who are not involved in the legal system or directly affected by it have no idea of the causal connection between the judicial system (i.e. the Supreme Court) and West Virginia's poor business and economic image; somehow, information needs to be disseminated to the public to enlighten the public. Suggestions for dissemination were through web sites, schools, and newspapers.

19. The Defense Trial Counsel should form a coalition with other blocs within the state. Suggestions were teachers and the elderly.

State Methods of Selection for High Court Judges



Partisan Election

Non Partisan Election

Appointment with Retention Election

Appointment with no Re-Election

Please see fact sheet for more information

Source: American Bar Association

JUSTICE IN JEOPARDY

INFORMATION

FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES

State High Courts:
For state high courts (which are called supreme courts in 48 states) a total of 38 states have some type of judicial elections. The breakdown of selection systems for state high courts is as follows:

- **Six (6) states have partisan elections** (AL, IL, LA, PA, TX, WV; All judges in both Illinois and Pennsylvania run in uncontested retention elections for additional terms after winning a first term through a contested partisan election)
- **Fifteen (15) states have nonpartisan elections** (AR, GA, ID, KY, MI, MN, MS, MT, NV, NC, ND, OH, OR, WA, WI; Ohio and Michigan have nonpartisan general elections, but political parties are involved with the nomination of candidates, who frequently run with party endorsements)
- **Seventeen (17) states have uncontested retention elections after initial appointment** (AK, AZ, CA, CO, FL, IN, IA, KS, MD, MO, NE, NM, OK, SD, TN, UT, WY; All judges in New Mexico are initially appointed, face a contested partisan election for a full term, and then run in uncontested retention elections for additional terms)
- **The remaining 12 states grant life tenure or use reappointment of some type for their highest courts** (CT, DE, HI, MA, ME, NH, NJ, NY, RI, VT, VA, SC)

Intermediate Appellate Courts:
Thirty-nine (39) states have intermediate appellate courts. The breakdown of selection systems for intermediate appellate courts is as follows:

- **Five (5) states have partisan elections** (AL, IL, LA, PA, TX; see note above on IL and PA)
- **Twelve (12) states have nonpartisan elections** (AR, GA, ID, KY, MI, MN, MS, NC, OH, OR, WA, WI)
- **Fourteen (14) states have uncontested retention elections after initial appointment** (AK, AZ, CA, CO, FL, IN, IA, KS, MO, NE, NM, OK, TN, UT; see note above on NM)
- **Eight (8) states grant life tenure or use reappointment of some type for their intermediate appellate courts** (CT, HI, MD, MA, NJ, NY, SC, VA)
- **Eleven (11) states do not have intermediate appellate courts** (DE, ME, MT, NV, NH, ND, RI, SD, VT, WV, WY)

Trial Courts:
A total of 39 states hold elections-whether partisan, nonpartisan, or uncontested retention elections-

for trial courts of general jurisdiction. The breakdown of selection systems for trial courts of general jurisdiction is as follows:

- **Eight (8) states have partisan elections for all general jurisdiction trial court judges** (AL, IL, LA, NY, PA, TN, TX, WV; see note above on IL and PA)
- **Twenty (20) states have nonpartisan elections for all general jurisdiction trial court judges** (AR, CA, FL, GA, ID, KY, MD, MI, MN, MS, MT, NV, NC, ND, OH, OK, OR, SD, WA, WI)
- **Seven (7) states have uncontested retention elections for all general jurisdiction trial courts** (AK, CO, IA, NE, NM, UT, WY; see note above on NM)
- **Four (4) states use different types of elections-partisan, nonpartisan, or retention-for general jurisdiction trial courts in different counties or judicial districts** (AZ, IN, KS, MO)
- **Eleven (11) states grant life tenure or use reappointment of some type for all general jurisdiction trial courts** (CT, DE, HI, ME, MA, NH, NJ, RI, SC, VT, VA)

Tort Reform Record

June 30, 2003

The Tort Reform Record is published each June and December to record the accomplishments of the latest legislative year. It includes a two-page, state-by-state summary of the ATRA-supported reforms enacted by the states since 1986.

Please note: The Record lists tort reforms enacted since 1986; it does not list legislative reforms enacted prior to 1986, the year of ATRA's founding.

For each issue included in the Record, ATRA provides issue papers and model legislation.

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Tort Reform Record

At-A-Glance

	Punitive Damages	*Joint & Several Liability*	*Prejudgment Interest*	*Collateral Source Rule*	*Noneconomic Damages*	*Product Liability*	*Class Action Reform*	*Attorney Retention Sunshine*	*Appeal Bond Reform*	*Jury Service Reform*
Alabama	X	X		X	X		X			
Alaska	X	X	X	X	X					
Arizona	X	X		X						X
Arkansas	X	X							X	
California	X	X				X				
Colorado	X	X	X	X	X	X	X	X	X	
Connecticut		X		X						
Delaware										
District of Columbia										
Florida	X	X		X	X	X			X	
Georgia	X	X	X	X		X	X		X	
Hawaii		X		X	X					
Idaho	X	X		X	X				X	
Illinois	X	X		X	X	X				
Indiana	X			X		X			X	
Iowa	X	X	X	X		X				
Kansas	X			X	X			X	X	
Kentucky	X	X		X					X	
Louisiana	X	X	X			X	X		X	X
Maine			X	X		X				
Maryland					X					
Massachusetts		X								
Michigan		X	X	X	X	X			X	
Minnesota	X	X	X	X	X					
Mississippi	X	X			X	X			X	
Missouri	X	X	X	X						
Montana	X	X		X	X	X				

Tort Reform Record

At-A-Glance

	Punitive Damage	Joint & Several Liability	Prejudgment Interest	Collateral Source Rule	Noneconomic Damage	Product Liability	Class Action Reform	Attorney Retention Sunshine	Appeal Bond Reform	Jury Service Reform
Nebraska		X	X							
Nevada	X	X			X				X	
New Hampshire	X	X	X		X	X				
New Jersey	X	X		X		X				
New Mexico		X								
New York	X	X		X						
North Carolina	X					X			X	
North Dakota	X	X		X	X	X		X		
Ohio	X	X		X	X	X	X		X	
Oklahoma	X		X	X	X				X	
Oregon	X	X		X	X					
Pennsylvania		X								
Rhode Island			X							
South Carolina	X									
South Dakota	X	X								
Tennessee*									X	
Texas	X	X	X		X		X	X	X	
Utah	X	X								X
Vermont		X								
Virginia	X							X		
Washington		X			X					
West Virginia		X			X				X	
Wisconsin	X	X			X					
Wyoming		X								

*Tennessee abolished joint and several liability by judicial decision

THE RULE OF JOINT AND SEVERAL LIABILITY

Joint and several liability is a theory of recovery that permits the plaintiff to recover damages from multiple defendants collectively, or from each defendant individually. In a state that follows the rule of joint and several liability, if a plaintiff sues three defendants, two of whom are 95 percent responsible for the defendant's injuries, but are also bankrupt, the plaintiff may recover 100 percent of her damages from the solvent defendant that is 5 percent responsible for her injuries.

The rule of joint and several liability is neither fair, nor rational, because it fails to equitably distribute liability. The rule allows a defendant only minimally liable for a given harm to be forced to pay the entire judgment, where the co-defendants are unable to pay their share. The personal injury bar's argument in support of joint and several liability—that the rule protects the right of their clients to be fully compensated—fails to address the hardship imposed by the rule on co-defendants that are required to pay damages beyond their proportion of fault.

ATRA supports replacing the rule of joint and several liability with the rule of proportionate liability. In a proportionate liability system, each co-defendant is proportionally liable for the plaintiff's harm. For example, a co-defendant that is found by a jury to be 20% responsible for a plaintiff's injury would be required to pay no more than 20% of the entire settlement. More moderate reforms that ATRA supports include: (1) barring the application of joint and several liability to recover non-economic damages; and (2) barring the application of joint and several liability to recover from co-defendants found to be responsible for less than a certain percentage (such as 25%) of the plaintiff's harm.

Thirty-eight states have modified the rule of joint and several liability.

ALASKA

1988—Proposition Two

Barred application of the rule of joint and several liability in the recovery of all damages through a ballot initiative on November 8, 1988.

ARIZONA

1987—SB 1036

Barred application of the rule of joint and several liability in the recovery of all damages, except in cases of intentional torts and hazardous waste.

The Arizona Court of Appeals upheld the constitutionality of this statute in Church v. Rawson Drug & Sundry Co., No. 1 CA-CV 90-0357, October 1, 1992.

ARKANSAS

2003—HB 1038

Modified repeal of joint and several liability instead of complete repeal, whereby defendants who are found to be 1 percent to 10 percent at fault will only be responsible for the percentage of damage caused, defendants who are 11 percent to 50 percent at fault could have their share of a judgment increased up to an additional 10% if a co-defendant is unable to pay its share of a judgment, and defendants who are 51% to 99% at fault could have their share of a judgment increased up to an additional 20% if a co-defendant is unable to pay its share of the judgment. The reform applies to all

damages except punitive damages. Reform provisions also do not apply to cases involving long-term care facility medical directors

CALIFORNIA

1986—Proposition 51

Barred application of the rule of joint and several liability in the recovery of noneconomic damages.

COLORADO

1986—SB 70

Barred application of the rule of joint and several liability in the recovery of all damages. (An amendment approved in 1987 allowed joint liability when tortfeasors consciously acted in a concerted effort to commit a tortious act.)

CONNECTICUT

1986—HB 6134

Barred application of the rule of joint and several liability in the recovery of all damages, except where the liable party's share of the judgment is uncollectible. (1987 legislation limited application of this reform to noneconomic damages.)

FLORIDA

1999—HB 775

Provided for a multi-tiered approach for applying limits on the rule of joint and several liability.

1) **Where a plaintiff is at fault:** Any defendant 10% or less at fault shall not be subject to joint liability; for any defendant more than 10% but less than 25% at fault, joint liability is limited to $200,000; for any defendant at least 25% but not more than 50% at fault, joint liability is limited to $500,000; and for any defendant more than 50% at fault, joint liability is limited to $1 million.

2) **Where a plaintiff is without fault:** Any defendant less than 10% at fault shall not be subject to joint liability; for any defendant at least 10% but less than 25% at fault, joint liability is limited to $500,000; for any defendant at least 25% but not more than 50% at fault, joint liability is limited to $1 million; and for any defendant more than 50% at fault, joint liability is limited to $2 million.

1986—SB 465

Barred application of the rule of joint and several liability in the recovery of noneconomic damages in negligence actions, and for economic damages, where a defendant is less at fault than the plaintiff. The reform does not apply to the recovery of economic damages for pollution, intentional torts, actions governed by a specific statute providing for joint and several liability, or actions involving damages no greater than $25,000.

The Florida Supreme Court upheld the statute as constitutional in Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987). The Florida Supreme Court further interpreted the Joint and Several Liability patron of the statute in Allied Signal v. Fox, case No. 80818, Florida Supreme Court, Aug. 26, 1993 and Fabre v. Marin, case No. 76869, Florida Supreme Court, Aug. 26, 1993.

GEORGIA

1987—HB 1

Barred application of the rule of joint and several liability in the recovery of all damages when a plaintiff is assessed a portion of the fault.

HAWAII

1994—HB 1088

Barred application of the rule of joint and several liability in the recovery of all damages from all governmental entities.

1986—SB S1

Barred application of the rule of joint and several liability in the recovery of noneconomic damages from defendants found to be 25% or less at fault. The reform does not apply to auto, product, or environmental cases.

IDAHO

1990—HB 744

Defined the term "acting in concert," as used in SB 1223 (below), as pursuing a common plan or design that results in the commission of an intentional or reckless tortious act.

1987—SB 1223

Barred application of the rule of joint and several liability in the recovery of all damages, except in cases of intentional torts, hazardous waste, and medical and pharmaceutical products.

ILLINOIS

1995—HB 20

Barred application of the rule of joint and several liability in the recovery of all damages.

Held unconstitutional by the Illinois Supreme Court in Best v. Taylor Machine Works, Inc., December 1997.

1986—SB 1200

Barred application of the rule of joint and several liability in the recovery of noneconomic damages from defendants found to be 25% or less at fault. The reform does not apply to auto, product, or environmental cases.

IOWA

1997—HF 693

Provided that defendants found to be 50% or more at fault are jointly liable for economic damages only.

1985

Barred application of the rule of joint and several liability in the recovery of all damages from defendants who are found to be less than 50% at fault.

KENTUCKY

1996—HB 21

Barred application of the rule of joint and several liability in the recovery of all damages.

1988—HB 551

Codified the common law rule that when a jury apportions fault, a defendant is only liable for that share of the fault.

LOUISIANA

1996—HB 21

Barred application of the rule of joint and several liability in the recovery of all damages.

MASSACHUSETTS

2001—HB 574

Barred application of the rule of joint and several liability in the recovery of all damages against public accountants so that an individual or firm is only liable for damages in proportion to the assigned degree of fault.

MICHIGAN

1995—HB 4508

Barred application of the rule of joint and several liability in the recovery of all damages, except in cases of employers' vicarious liability and in medical liability cases, where the plaintiff is determined not to have a percentage of fault.

1986—HB 5154

Barred application of the rule of joint and several liability in the recovery of all damages from municipalities. Barred application of the rule of joint and several liability in the recovery of all damages from all other defendants, except in products liability actions and actions involving a blame-free plaintiff. Provided that defendants are severally liable, except when uncollectible shares of a judgment are reallocated between solvent co-defendants according to their degree of negligence.

MINNESOTA

2003—SF 872

Provided that joint and several liability does not apply to defendants found to be less than 50% at fault.

1988—HF 1493

Provided that defendants found to be 15% or less at fault shall pay no more than *four times* their share of damages.

MISSISSIPPI

2002—HB 2

In determining non-economic damages in medical malpractice cases, replaced the rule of joint and several liability with the rule of proportionate liability.

1989—HB 1171

Provided that the rule of joint and several liability only applies to the extent necessary for the injured party to receive 50% of his or her recoverable damages.

MISSOURI

1987—HB 700

Barred application of the rule of joint and several liability in the recovery of all damages when a plaintiff is assessed a portion of the fault.

MONTANA

1997—HB 571

Retained the current system of modified joint and several liability, where joint liability does not apply to defendants found to be less than 50% at fault. Revised the comparative negligence statute to permit the allocation of a percentage of liability to defendants who settle or are released from liability by the plaintiff. Allowed those defendants to intervene in the action to defend against claims affirmatively asserted.

1997—HB 572

Barred application of the rule of joint and several liability in the recovery of all damages.

Takes effect only if HB 571 is held unconstitutional.

1995—SB 212

Restored the joint and several liability reforms of 1987, which had been weakened by the Montana Supreme Court. Provided procedural safeguards to allow joint liability to apply only when a defendant is found to be more than 50% at fault.

1987—SB 51

Barred application of the rule of joint and several liability in the recovery of all damages from defendants found to be 50% or less at fault.

NEBRASKA

1991—LB 88

Modified the rule of joint and several liability by replacing the slight-gross negligence rule with a 50/50 rule, in which the plaintiff wins if the plaintiff's responsibility is less than the responsibility of all the defendants; Barred application of the rule of joint and several liability in the recovery of noneconomic damages.

NEVADA

2002—AB 1

Barred application of the rule of joint and several liability in the recovery of noneconomic damages for medical liability claims.

1987—SB 511

Barred application of the rule of joint and several liability in the recovery of all damages, except in product liability cases, cases involving toxic waste, cases involving intentional torts, and cases where defendants acted in concert.

NEW HAMPSHIRE

1989—SB 110

Barred application of the rule of joint and several liability in the recovery of all damages from defendants found to be less than 50% at fault.

NEW JERSEY

1995—SB 1494

Barred application of the rule of joint and several liability in the recovery of all damages from defendants found to be less than 60% at fault. (The law formerly extended the 60% threshold for noneconomic damages only.) The reform does not apply to toxic torts.

1987—SB 2703, SB 2708

Barred application of the rule of joint and several liability in the recovery of all damages from defendants found to be less than 20% at fault. Barred application of the rule of joint and several liability in the recovery of noneconomic damages from defendants found to be between 20% and 60% at fault.

NEW MEXICO

1987—SB 164

Barred application of the rule of joint and several liability in the recovery of all damages, except in cases involving toxic torts, cases in which the relationship of defendants could make one defendant vicariously liable for the acts of others, cases involving the manufacture or sale of a defective product (in these cases the manufacturer and retailer can be held liable for their collective percentage of fault but not the fault of other defendants), and in situations "having a sound basis in public policy."

NEW YORK

1986—SB 9391

Barred application of the rule of joint and several liability in the recovery of noneconomic damages from defendants found to be 50% or less at fault. The reform does not apply to actions where the defendant is found to have acted with reckless disregard of the rights of others, and in actions involving motor vehicle cases, actions involving the release of toxic substances into the environment, intentional torts, contract cases, product liability cases where the manufacturer could not be joined, construction cases, and other specific actions.

NORTH DAKOTA

1987—HB 1571

Barred application of the rule of joint and several liability in the recovery of all damages, except for intentional torts, cases in which defendants acted in concert, and products liability cases.

OHIO

1996—HB 350

Barred application of the rule of joint and several liability in the recovery of all damages from defendants found to be less than 50% at fault. Barred application of the rule of joint and several liability in the recovery of noneconomic damages from defendants found to be more than 50% at fault.

Held unconstitutional in *Ohio Academy of Trial Lawyers v. Sheward*, August 1999.

1987—HB 1

Barred application of the rule of joint and several liability in the recovery of noneconomic damages when the plaintiff is also assessed a portion of the fault.

OREGON

1995—SB 601

Barred application of the rule of joint and several liability in the recovery of all damages, except where the defendants is determined to be insolvent within one year of the final judgment. In those cases, a defendant less than 20% at fault would be liable for no more than two times her original exposure and a defendant more than 20% liable would be liable for the full amount of damages.

1987—SB 323

Barred application of the rule of joint and several liability in the recovery of noneconomic damages. Barred application of the rule of joint and several liability in the recovery of all damages, where the defendant is found to be less than 15% at fault.

PENNSYLVANIA

2002—SB 1089

Barred application of the rule of joint and several liability in the recovery of all damages, except when a defendant has not: (1) been found liable for intentional fraud or tort; (2) been held more than 60% liable; (3) been held liable for environmental hazards, or; (4) been held civilly liable as a result of drunk driving.

SOUTH DAKOTA

1987—SB 263

Provided that "any party who is allocated less than 50% of the total fault allocated to all parties may not be jointly liable for more than twice the percentage of fault allocated to that party."

TEXAS

2003—HB 4

In toxic tort cases, the threshold for joint and several liability raised from 15% to 50%.

Defendant pays only assessed percentage of fault unless defendant is 50% or more responsible.

Defendants can designate (as opposed to join) other responsible third parties whose fault contributed to causing plaintiff's harm

1995—SB 28

Barred application of the rule of joint and several liability in the recovery of all damages from defendants found to be less than 51% at fault.

1987—SB 5

Barred application of the rule of joint and several liability in the recovery of all damages from defendants found to be less than 20% at fault, except when a plaintiff is found to be fault free and a defendant's share exceeds 10%, and when damages result from environmental pollution or hazardous waste.

UTAH

1999—HB 74

Clarified the 1986 statute that totally abolished joint liability to address the Utah Supreme Court decision in *Field v. The Boyer Company*.

1986—SB 64

Barred application of the rule of joint and several liability in the recovery of all damages.

VERMONT

1985

Barred application of the rule of joint and several liability in the recovery of all damages.

WASHINGTON

1986—SB 4630

Barred application of the rule of joint and several liability in the recovery of all damages, except incases in which defendants acted in concert or the plaintiff is found to be fault free, or in cases involving hazardous or solid waste disposal sites, business torts and manufacturing of generic products.

WEST VIRGINIA

2003—HB 2122

Modified joint and several liability in medical malpractice cases so that liability is several among defendants who go to trial, but does not take into account settling defendant's liability.

WISCONSIN

1995—SB 11

Barred application of the rule of joint and several liability in the recovery of all damages from defendants found to be less than 51% at fault. Provided that a plaintiff's negligence will be measured separately against each defendant.

WYOMING

1994—SF 35

Amended the joint and several liability reform passed in 1986. Defined when an individual is at fault. Specified the amount of damages recoverable in cases where more than one party is at fault. Clarified the relationship between fault and negligence.

1986—SB 17

Barred application of the rule of joint and several liability in the recovery of all damages.

□□□

THE COLLATERAL SOURCE RULE

The collateral source rule of the common law says that evidence may not be admitted at trial to show that plaintiffs' losses have been compensated from other sources, such as plaintiffs' insurance, or worker compensation. As a result, for example, 35% of total payments to medical malpractice claimants are for expenses already paid from other sources.

Twenty-five states have modified or abolished the collateral source rule.

ALABAMA

1987

Permitted the admissibility of evidence of collateral source payments.

ALASKA

1986—SB 337

Permitted the admissibility of evidence of collateral source payments. Provided for awards to be offset with broad exclusions.

ARIZONA

1993—SB 1055

Extended the existing collateral source legislation from medical malpractice issues to other forms of liability litigation. Under this legislative approach, a jury would not be bound to deduct the amounts paid under a collateral source provision, but would be free to consider it in determining fair compensation for the injured party.

COLORADO

1986—SB 67

Permitted the admissibility of evidence of collateral source payments. Provided for awards to be offset with broad exclusions.

CONNECTICUT

1986—HB 6134

Permitted the admissibility of evidence of collateral source payments. Provided for awards to be offset with broad exclusions.

FLORIDA

1986—SB 465

Provided for awards to be offset with broad exclusions.

The Florida Supreme Court upheld the collateral source provision as constitutional in Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987).

GEORGIA

1987—HB 1

Permitted the admissibility of evidence of collateral source payments.

The Georgia Supreme Court held the collateral source provision unconstitutional in Georgia Power v. Falagan, No. S90A1245, April 1991.

HAWAII

1986—SB S1

Provided for payment of valid liens (arising out of claims for payments made from collateral sources for costs and expenses arising from an injury) from special damages recovered.

Prevented double recoveries by allowing subrogation liens by insurance companies or other sources; third parties are allowed to file a lien and collect the benefits paid to the plaintiff from the plaintiff's award. The reform does not affect the amount of damages paid by the defendant to the plaintiff.

IDAHO

1990—HB 745

Permitted the admissibility of evidence of collateral source payments. Provided for awards to be offset to the extent that they include double recoveries from sources other than federal benefits, life insurance, or contractual subrogation rights.

ILLINOIS

1986—SB 1200

Provided for awards to be offset for benefits over $25,000, as long as the offset does not reduce the judgment by more than 50%.

INDIANA

1986—SB 394

Permitted the admissibility of evidence of collateral source payments, with exceptions. Provided for awards to be offset at the court's discretion. Permitted a court to instruct a jury to disregard tax consequences of its verdict.

IOWA

1987—SF 482

Permitted the admissibility of evidence of collateral source payments.

KANSAS

1988—HB 2693

Permitted the admissibility of evidence of collateral source payments, where damages exceed $150,000. Provided for awards to be offset when the court assigns comparative fault.

The $150,000 threshold for the admissibility of collateral sources into evidence was held unconstitutional by the Kansas Supreme Court in Thompson v. KFB Insurance Company, Case No. 68452 (1993).

KENTUCKY

1988—HB 551

Mandated that juries be advised of collateral source payments and subrogation of rights of collateral payers.

MAINE

1990

Provided for awards to be offset by collateral source payments, where the collateral sources have not exercised subrogation rights within 10 days after a verdict for the plaintiff.

MICHIGAN

1986—HB 5154

Permitted the admissibility of evidence of collateral source payments after the verdict and before judgment is entered. Permitted courts to offset awards, as long as a plaintiff's damages are not reduced by more than the amount awarded for economic damages.

MINNESOTA

1986—SB 2078

Permitted the admissibility of evidence of collateral source payments only for the court's review. Provided for awards to be offset by collateral source payments, unless the source of reimbursement has a subrogation right.

MISSOURI

1987—HB 700

Permitted the admissibility of evidence of collateral source payments, but provided that a defendant who presents collateral source payments as evidence waives his right to a credit against the judgment for that amount.

MONTANA

1987—HB 567

Permitted the admissibility of evidence of collateral source payments, unless the source of reimbursement has a subrogation right under state or federal law. Required a court to offset damages over $50,000.

NEW JERSEY

1987—SB 2703, SB 2708

Provided for awards to be offset by collateral source payments other than workers' compensation and life insurance benefits.

NEW YORK

1986—SB 9351

Provided for awards to be offset by collateral source payments.

NORTH DAKOTA

1987—HB 1571

Provided for awards to be offset by collateral source payments other than life insurance or insurance purchased by the recovering party.

OHIO

2003—S.B. 281

Provided for awards in medical malpractice cases to be offset by collateral source payments, unless the source of reimbursement has a mandatory self-effectuating federal right of subrogation or a contractual or statutory right of subrogation.

1996—HB 350

Permitted the admissibility of evidence of collateral source payments, including workers' compensation benefits, but only if there is no right of subrogation attached or the plaintiff has not paid a premium for the insurance.

Held unconstitutional by the Ohio Supreme Court in Ohio Academy of Trial Lawyers v. Sheward, August 1999

1987—HB 1

Provided for awards to be offset by payments of collateral source benefits that have been paid or are likely to be paid within 60 months of judgment, unless the source of reimbursement has a subrogation right.

OKLAHOMA

2003—SB 629

Permitted the admissibility of evidence of collateral source payments.

OREGON

1987—SB 323

Permitted a judge to reduce awards for collateral source payments, excluding life insurance and other death benefits, benefits for which plaintiff have paid premiums, retirement benefits, disability benefits, pension plan benefits, and federal social security benefits.

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PUNITIVE DAMAGES

Punitive damages are awarded not to compensate a plaintiff, but to punish a defendant for intentional or malicious misconduct and to deter similar future misconduct. While punitive damages awards are infrequent, their frequency and size have grown greatly in recent years. More importantly, they are routinely asked for today in civil lawsuits. The difficulty of predicting whether punitive damages will be awarded by a jury in any particular case, and the marked trend toward astronomically large amounts when they are awarded, have seriously distorted settlement and litigation processes and have led to wildly inconsistent outcomes in similar cases. ATRA recommends four reforms:

- Establishing a liability "trigger" that reflects the intentional tort origins and quasi-criminal nature of punitive damages awards - "actual malice."
- Requiring "clear and convincing evidence" to establish punitive damages liability.
- Requiring proportionality in punitive damages so that the punishment fits the offense.
- Enacting federal legislation to address the special problem of multiple punitive damages awards; This would protect against unfair overkill, guard against possible due process violations, and help preserve the ability of future claimants to recover basic out-of-pocket expenses and damages for their pain and suffering.

Thirty-four states have reformed punitive damages laws.

ALABAMA

1999—SB 137

In non-physical injury cases:

1) General rule: Limited the award of punitive damages to the greater of three times the award of compensatory damages or $500,000.

2) For businesses with a net worth of less than $2 million: Limited the award of punitive damages to $50,000 or 10% of net worth up to $200,000, whichever is greater.

In physical injury cases: Limited the award of punitive damages to the greater of three times the award of compensatory damages or $1.5 million.

Prohibited application of the rule of joint and several liability in actions for punitive damages, except for wrongful death actions, actions for intentional infliction of physical injury, and class actions.

Provided that the limit on punitive damages will be adjusted on January 1, 2003 and increased at three-year intervals in accordance with the Consumer Price Index.

1987

Required a plaintiff to show by "clear and convincing" evidence that a defendant acted with "wanton" conduct.

Limited the award of punitive damages to $250,000.

The Alabama Supreme Court held the $250,000 limit on punitive damages unconstitutional in Craig Henderson v. Alabama Power Co., case No. 1901875, June 25, 1993.

Required trial and appellate judges to review all punitive damages awards and reduce those that are excessive based on the facts of the case—Chapter 87-185.

The Alabama Supreme Court held the judicial review of all awards unconstitutional in Armstrong v. Roger's Outdoor Sports, Inc., May 10, 1991.

ALASKA

1997—HB 58

Limited the award of punitive damages to the greater of three times the award of compensatory damages or $500,000.

Exceptions include:

1) When the defendant's action is motivated by financial gain, punitive damages are limited to the greater of four times compensatory damages, four times the aggregate amount of financial gain, or $7,000,000.

2) In an unlawful employment practices suit, punitive damages are limited to $200,000, if the employer has less than 100 employees in the state; $300,000, if the employer has more than 100, but less than 200 employees in the state; $400,000, if the employer has more than 200, but less than 500 employees in the state; and $500,000, if the e employer has more than 500 employees in the state.

Required a plaintiff to show by "clear and convincing" evidence that a defendant acted with "reckless indifference" or was engaged in "outrageous" conduct.

Required the determination of awards for punitive damages to be made in a separate proceeding.

1986—SB 337

Required a plaintiff to prove punitive damages by "clear and convincing" evidence.

ARIZONA

1989—SB 1453

Provided a government standards defense for FDA-approved drugs and devices.

ARKANSAS

2003—HB 1038

Raised the standard for the imposition of punitive damages to "clear and convincing" evidence of actual fraud, malice, or willful or wanton conduct and changes.

Limited punitive damages to the greater of $250,000 or three times compensatory damages, not to exceed $1,000,000.

Provided for bifurcated proceedings for punitive damages.

CALIFORNIA

1987—SB 241

Required a plaintiff to show by "clear and convincing" evidence that a defendant acted with oppression, fraud, or malice.

Required the determination of awards for punitive damages to be made in a separate proceeding, allowing evidence of defendants' financial conditions only after a finding of liability.

COLORADO

1991—HB 1093

Expanded the 1990's prohibition against seeking punitive damages in cases in which FDA-approved drugs are administered by a physician to include medically prescribed drugs or products used on an experimental basis (when such experimental use has not received specific FDA approval) and when the patient has given informed consent.

1990—HB 1069

Provided that punitive damages may not be alleged in a professional negligence suit until discovery is substantially completed.

Provided that discovery cannot be reopened without an amended pleading.

Provided that physicians cannot be liable for punitive damages because of the bad outcome of a prescription medication, as long as it was administered in compliance with current FDA protocols.

Prohibited punitive damages from being assessed against a physician because of the act of another unless she directed the act or ratified it.

1986—HB 1197

Provided that an award for punitive damages may not exceed an award for compensatory damages. Permitted a court to reduce a punitive damages award if deterrence can be achieved without the award. Permitted a court to increase a punitive damages award to three times an award for compensatory damages if misbehavior continues during trial.

Required one-third of punitive damages awards to be paid to the state fund.

The Colorado Supreme Court held the state fund portion of this statute unconstitutional in Kirk v. The Denver Publishing Company, 15 Brief Times Reporter, No. 88SA405, September 23, 1991.

FLORIDA

1999—HB 775

Limited the award of punitive damages to the greater of three times the award of compensatory damages or $500,000.

Limited the award of punitive damages to the greater of four times the award of compensatory damages or $2,000,000, where the defendant's wrongful conduct was motivated by unreasonable financial gain or the likelihood of injury was known.

Prohibited multiple punitive damages awards based on the same act or course of conduct, absent a specific finding by the court that earlier punitive damages awards were insufficient.

Required a plaintiff to show by "clear and convincing" evidence that a defendant engaged in intentional misconduct or gross negligence.

Outlined circumstances when an employer is liable for punitive damages arising from an employee's conduct.

The reform does not apply to abuses to the elderly, child abuse cases, or cases where the defendant is intoxicated.

1986—SB 465

Limited the award of punitive damages to three times the award of compensatory damages, unless a plaintiff can demonstrate by "clear and convincing" evidence that a higher award would not be excessive.

Required 60% of all punitive damages awards to be paid to the state's General Fund or Medical Assistance Trust Fund. (Amended in 1992 so that 35% of any punitive damages award goes to the state's General Fund or Medical Assistance Trust Fund.)

The Florida Supreme Court upheld the constitutionality of the punitive damages limit and "clear and convincing" evidence requirement in Smith v. Department of Insurance, 507 So. 2d 1080 Fla. 1987. The Florida Appellate Court upheld the constitutionality of the state fund provision in Harvey Gordon v. State of Florida, K-Mart Corp. et al., No 90-2497, August 27, 1991.

GEORGIA

1987—HB 1

Limited the award of punitive damages to $250,000, except in product liability cases, where only one award of punitive damages can be assessed against any given defendant.

The Georgia Supreme Court upheld the constitutionality of the $250,000 limit on punitive damages in Bagley, et al. V. Shortt, et al. and vice versa, Nos. S91X0662, S91X0663, September 5, 1991.

Required 75% of all punitive damages awards to be paid to the State Treasury.

The Federal District Court for Georgia held the state fund provision for punitive damages unconstitutional in McBride v. General Motors Corp., M.D. Ga., No. 89-110-COL, April 10, 1990.

IDAHO

2003—HB 92

Limited the award of punitive damages to the greater of three times the award of compensatory damages or $250,000.

Raised the standard for the imposition of punitive damages to "clear and convincing evidence."

1987—SB 1223

Required a plaintiff to show by a preponderance of evidence that a defendant's conduct was "oppressive, fraudulent, wanton, malicious or outrageous."

ILLINOIS

1995—HB 20

Limited the award of punitive damages to three times the award of economic damages.

Prohibited the award of punitive damages absent a showing that conduct was engaged in "with an evil motive or with a reckless indifference to the rights of others."

Required the determination of awards for punitive damages to be made in a separate proceeding.

Held unconstitutional by the Illinois Supreme Court in Best v. Taylor Machine Works, Inc., December 1997.

1986—SB 1200

Prohibited plaintiffs from pleading punitive damages in an original complaint.

Required a subsequent motion for punitive damages to show at a hearing a reasonable chance that the plaintiff will recover an award for punitive damages at trial.

Required a plaintiff to show that the defendant acted "willfully and wantonly."

Provided discretion to the court to award punitive damages among the plaintiff, the plaintiff's attorney, and the State Department of Rehabilitation Services.

INDIANA

1995—HB 1741

Limited the award of punitive damages to the greater of three times the award of compensatory damages or $50,000.

Required 75% of punitive damage awards to be paid to the state fund.

IOWA

1987—SF 482

Required a plaintiff to show by a "preponderance of clear, convincing, and satisfactory evidence that the conduct of the defendant from which the claim constituted willful and wanton disregard for the rights or safety of another."

1986—SB 2265

Required a plaintiff to show that a defendant acted with "willful and wanton disregard for the rights and safety of another." (In 1987 the evidence standard was elevated to "clear, convincing, and satisfactory" evidence.)

Required 75% or more of all punitive damages awards to be paid to the State Civil Reparations Trust Fund.

KANSAS

1988—HB 2731

Limited the award of punitive damages awards to the lesser of a defendant's annual gross income or $5 million. (The 1992 legislature amended this statute to allow a judge who felt a defendant's annual gross income was not a sufficient deterrent to look at 50% of the defendant's net assets and award the lesser of that amount or $5 million.)

(1987 legislation had required the court, not the jury, to determine the amount of the punitive damages award and required "clear and convincing" evidence.)

Required a plaintiff to show that a defendant acted with willful or wanton conduct, fraud, or malice.

Required the determination of awards for punitive damages to be made in a separate proceeding.

1987—HB 2025

Limited the award of punitive damages awards to the lesser of defendant's highest annual gross income during the preceding five years or $5 million. Provided that if the defendant earned more profit from the objectionable conduct than either of these limits, the court could award 1.5 times the amount of that profit.

Required the determination of awards for punitive damages to be made in a separate proceeding.

Required a plaintiff to prove punitive damages by "clear and convincing" evidence.

Provided seven criteria for the judge to consider in punitive damages cases, including whether this is the first award against a given defendant.

KENTUCKY

1988—HB 551

Required a plaintiff to show by "clear and convincing" evidence that a defendant acted with oppression, fraud or malice.

The Kentucky Supreme Court held the "clear and convincing" evidence standard that conduct constituted oppression, fraud or malice unconstitutional in Terri C. Williams v. Patricia Lynn Herald Wilson, No. 96-SC-1122-DG, April 16, 1998.

LOUISIANA

1996—HB 20

Repealed the statute that authorized punitive damages to be awarded for the wrongful handling of hazardous substances. (The Louisiana courts had established precedents substantially expanding liability based upon the repealed statute.)

MINNESOTA

1990—Minn. Stat. Sec. 549.20

Required a plaintiff to show that a defendant acted with "deliberate disregard." (The former standard required only a showing of "willful indifference.")

Required the determination of awards for punitive damages to be made in a separate proceeding at the request of the defendant.

Granted trial and appellate judges the power to review all punitive damages awards.

1986—SB 2078

Prohibited plaintiffs from pleading punitive damages in an original complaint. Required a plaintiff to make a *prima facie* showing of liability before an amendment of pleadings is permitted by the court.

MISSISSIPPI

1993—HB 1270

Required a plaintiff to prove punitive damages by "clear and convincing" evidence.

Required the determination of awards for punitive damages to be made in a separate proceeding.

Prohibited the award of punitive damages in the absence of compensatory awards.

Prohibited the award of punitive damages against an innocent seller.

Established factors for the jury to consider when determining the amount of a punitive damages award.

MISSOURI

1987—HB 700

Required the determination of awards for punitive damages to be made in a separate proceeding. Permitted the jury to set the amount for punitive damages if, in the first stage, the jury finds a defendant liable for punitive damages. Permitted the admissibility of evidence of a defendant's net worth only during the proceeding for the determination of punitive damages.

Required 50% of all punitive damages awards to be paid to the state fund.

Prohibited multiple punitive damages awards under certain conditions.

MONTANA

2003—SB 263

Limited punitive damages, unless otherwise expressed by statute, to $10 million or 3 percent of a defendant's net worth, whichever is less. It does not limit the amount of punitive damages that may be awarded in class action lawsuits.

2003—HB 212

Brought Montana statute into conformity with Supreme Court decision that punitive damages may be awarded by a two-thirds majority verdict rather than the previous requirement that punitive damage awards must be unanimous.

1997—SB 212

Required a unanimous jury to determine the amount of punitive damages awards.

1987—HB 442

Required a plaintiff to show by "clear and convincing" evidence that a defendant acted with "actual fraud" or "actual malice."

Required the determination of awards for punitive damages to be made in a separate proceeding. Permitted the admissibility of evidence of a defendant's net worth only during the proceeding for the determination of punitive damages.

Required a judge to review all punitive damages awards and to issue an opinion on his decision to increase or decrease an award, or to let it stand.

NEVADA

1989 — AB 307

Limited punitive damages awards to $300,000, where the award for compensatory damages is less than $100,000, and to three times the award for compensatory damages, where the award for compensatory damages is $100,000 or more.

The reform does not apply to cases against a manufacturer, distributor, or seller of a defective product; an insurer who acts in bad faith; a person violating housing discrimination laws; a person involved in a case for damages caused by toxic, radioactive, or hazardous waste; or a person for defamation.

Required a plaintiff to show by "clear and convincing evidence" that a defendant acted with "oppression, fraud, or malice."

Required the determination of awards for punitive damages to be made in a separate proceeding. Permitted the admissibility of evidence of a defendant's finances only during the proceeding for the determination of punitive damages.

NEW HAMPSHIRE

1986—HB 513

Prohibited the award of punitive damages.

NEW JERSEY

1995—SB 1496

Limited the award of punitive damages to the greater of five times the award of compensatory damages or $350,000.

The reform does not apply to cases involving bias crimes, discrimination, AIDS testing disclosure, sexual abuse, and injuries caused by drunk drivers.

1987—SB 2805

Required a plaintiff to show that a defendant acted with "actual malice" or "wanton and willful disregard" for the rights of others.

Required the determination of awards for punitive damages to be made in a separate proceeding.

Provided for an FDA government standards defense to punitive damages.

The reform does not apply to cases involving environmental torts.

NEW YORK

1992—SB 7589

Required that 20% of all punitive damages awards be paid to the New York State General Fund.

NORTH CAROLINA

1995—HB 729

Limited the award of punitive damages to the greater of three times the award of compensatory damages or $250,000. The reform does not apply to cases where the defendant caused the injury by driving while impaired.

Required a plaintiff to show by "clear and convincing" evidence that a defendant was liable for compensatory damages and acted with fraud, malice, willful or wanton conduct.

Required the determination of awards for punitive damages to be made in a separate proceeding at the request of the defendant.

NORTH DAKOTA

1997—HB 1297

Required a plaintiff to show by a preponderance of the evidence that a defendant acted with oppression, fraud, or actual malice before a moving party may amend pleadings and claim punitive damages.

1995 — HB 1369

Required a plaintiff to show by "clear and convincing" evidence that a defendant acted with oppression, fraud, or actual malice.

Provided for an FDA government standards defense to punitive damages.

1993—SB 2351

Limited the award of punitive damages to the greater of $250,000 or two times the award of compensatory damages.

Required the determination of awards for punitive damages to be made in a separate proceeding. Permitted the admissibility of evidence of a defendant's financial worth only during the proceeding for the determination of punitive damages.

1987—HB 1571

Barred the pleading of punitive damages in an original complaint.

Required a plaintiff to show *prima facie* evidence for claims for punitive damages.

Required a plaintiff to show that a defendant acted with "oppression, fraud, or malice."

OHIO

1996—HB 350

Limited the amount of punitive damages recoverable from all parties except large employers to the lesser of three times the award of compensatory damages or $100,000.

Limited the amount of punitive damages recoverable from large employers (more than 25 employees on a full time permanent basis) to the greater of three times the award of compensatory damages or $250,000.

Required the determination of awards for punitive damages to be made in a separate proceeding at the request of either party.

Limited multiple punitive damages awards based on the same act or course of conduct.

Expanded governmental defense standards to include non-drug manufacturers and manufacturers of over-the-counter drugs and medical devices.

The Ohio Supreme Court held HB 350 unconstitutional in Ohio Academy of Trial Lawyers v. Sheward, N.E. 2d Ohio August 16, 1999.

1987—HB 1

Required a plaintiff to show by "clear and convincing" evidence that she suffered "actual damages" because a defendant acted with "malice, aggravated or egregious fraud, oppression or insult."

Provided a government standard defense for FDA approved drugs.

OKLAHOMA

1995—SB 263

Codified factors that the jury must consider in awarding punitive damages.

Provided that when a jury finds by "clear and convincing" evidence that the defendant:

1) Acted in "reckless disregard for the rights of others," the award is limited to the greater of $100,000 or actual damages awarded; or

2) Acted intentionally and with malice, the award is limited to $500,000; two times the award of actual damages; or the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing injury.

The limit does not apply if the court finds evidence *beyond a reasonable doubt* that the defendant acted intentionally and with malice in conduct life-threatening to humans.

1986—SB 488

Limited the award of punitive damages to the award of compensatory damages, unless a plaintiff establishes her case by "clear and convincing" evidence, in which case no limit applies.

OREGON

1995—SB 482

Required 40% of punitive damages awards to be paid to the prevailing party, 60% to the state fund, and no more than 20% to the attorney of the prevailing party.

Required a plaintiff to show by "clear and convincing" evidence that a defendant "acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others."

Provided for court review of jury-awarded punitive damages.

Barred the claiming of punitive damages in an original complaint. Required a plaintiff to show a *prima facie* case for liability before amending a complaint to include a punitive damages claim.

1987—SB 323

Required a plaintiff to prove punitive damages by "clear and convincing" evidence.

Provided an FDA standards defense to punitive damages.

SOUTH CAROLINA

1988

Required a plaintiff to prove punitive damages by "clear and convincing" evidence.

SOUTH DAKOTA

1986—SB 280

Required a plaintiff to prove by "clear and convincing" evidence that a defendant acted with "willful, wanton, or malicious" conduct.

TEXAS

2003—HB 4

Required a unanimous jury verdict to award of punitive damages. Specified that jury must be so instructed.

1995—SB 25

Limited the award of punitive damages to the greater of $200,000 or two times the award of economic damages plus non-economic damages up to $750,000.

Required a plaintiff to show by "clear and convincing" evidence that a defendant acted with malice, defined as the "conscious indifference to the rights, safety, or welfare of others."

Required the determination of awards for punitive damages to be made in a separate proceeding at the request of the defendant.

1987—SB 5

Required a plaintiff to show that a defendant's actions were fraudulent, malicious, or grossly negligent.

Limited the award of punitive damages to the greater of four times the amount of actual damages or $200,000.

UTAH

1989—SB 24

Required a plaintiff to show by "clear and convincing" evidence that a defendant's actions were "knowing and reckless." (The law previously required only a showing that a defendant's actions were "reckless.")

Provided a government standard defense for FDA approved drugs.

Required the determination of awards for punitive damages to be made in a separate proceeding on a defendant's motion.

Required 50% of all punitive damage awards over $20,000 to be paid to the state fund.

VIRGINIA

1987—SB 402

Limited the award of punitive damages to $350,000.

The Virginia Court of Appeals upheld the constitutionality of this statute in Wackenhut Applied Technologies Center Inc. v. Syngetron Protection Systems, No. 91-1655, November 1992.

WISCONSIN

1995—SB 11

Required a plaintiff to show that a defendant acted "maliciously or in intentional disregard of the rights of the plaintiff."

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NONECONOMIC DAMAGES

Damages for noneconomic losses are damages for pain and suffering, emotional distress, loss of consortium or companionship, and other intangible injuries. These damages involve no direct economic loss and have no precise value. It is very difficult for juries to assign a dollar value to these losses, given the minimal guidance they customarily receive from the court. As a result, these awards tend to be erratic and, because of the highly charged environment of personal injury trials, excessive.

ATRA believes that the broad and basically unguided discretion given juries in awarding damages for noneconomic loss is the single greatest contributor to the inequities and inefficiencies of the tort liability system. It is a difficult issue to address objectively because of the emotions involved in cases of serious injury and because of the financial interests of plaintiffs' lawyers.

Twenty-two states have modified the rules for awarding noneconomic damages.

ALABAMA

1987

Limited the award of noneconomic damages to $250,000 in medical liability cases.

The Supreme Court of Alabama found the limit on noneconomic damages unconstitutional in Moore v. Mobile Infirmary Association, 592 So. 2d 156 (1991).

ALASKA

1997—HB 58

Limited the award of noneconomic damages to the greater of $400,000 or the injured person's life expectancy in years multiplied by $8,000, unless the plaintiff "suffers severe permanent physical impairment or severe disfigurement," in which case noneconomic damages are limited to the greater of $1,000,000 or the injured person's life expectancy multiplied by $25,000.

1986—SB 337

Limited the award of noneconomic damages for injuries other than physical impairment or disfigurement to $500,000.

COLORADO

1988— SB 143

Limited the total award of damages to $1,000,000, of which no more than $250,000 can be for noneconomic damages.

The $250,000 limit on noneconomic damages in medical liability actions was held constitutional by the Colorado Supreme Court in Scholz v. Metropolitan Pathologists, P.C., No. 92-8A277, Co. Sup. Ct., April 26, 1993.

1986—SB 67

Limited the award of noneconomic damages to $250,000, unless the court finds justification by "clear and convincing" evidence for a larger award, which cannot exceed $500,000.

The $250,000 limit on noneconomic damages in medical liability actions was held constitutional by the Colorado Supreme Court in Scholz v. Metropolitan Pathologists, P.C., No. 92-8A277, Co. Sup. Ct., April 26, 1993.

FLORIDA

1988—CS/SB 6-E

Limited the award of noneconomic damages in medical liability cases to $250,000 if the parties agree to arbitration.

Limited the award of noneconomic damages in medical liability cases to $350,000 if the plaintiff rejects the defendant's offer to arbitrate.

1986—SB 465

Limited the award of noneconomic damages to $450,000.

The Florida Supreme Court held the limit on noneconomic damages unconstitutional in Smith v. Department of Insurance, Inc., 507 So. 2d 1080 Florida, 1987.

HAWAII

1986—SB S1

Limited the award of damages for physical pain and suffering to $375,000.

The reform does not limit the award of other noneconomic damages.

IDAHO

2003—HB 92

Limited the award of noneconomic damages to $250,000 in personal injury cases.

1990—HB 574

Removed the 1992 sunset to the $400,000 limit on noneconomic damages enacted in 1987.

1987—SB 1223

Limited the award of noneconomic damages to $400,000; provided a sunset in June 1992.

ILLINOIS

1995—HB 20

Limited the award of noneconomic damages in all civil actions to $500,000 per plaintiff, indexed for inflation.

Held unconstitutional by the Illinois Supreme Court in Best v. Taylor Machine Works, Inc., December 1997.

KANSAS

1988—HB 2692

Limited the award of noneconomic damages to $250,000.

1987

Limited the award of damages for pain and suffering to $250,000. The reform does not limit the award of other noneconomic damages.

MARYLAND

2001—HB 714

Provided that an individual driving a motor vehicle that is not covered by insurance is considered to have waived the right to recover noneconomic damages under specified circumstances.

1994—SB 283

Limited the award of noneconomic damages in wrongful death actions to $500,000, where there is one beneficiary, and $700,000, where there are two or more beneficiaries. (The legislation somewhat countered the effect of the *Streidel* decision, which held that Maryland's $350,000 limit on noneconomic damages did not apply in wrongful death actions.)

1987—SB 237

Limited the award of noneconomic damages in public entity lawsuits to $200,000 per person and $500,000 per incident.

1986—SB 558

Limited the award of noneconomic damages to $500,000.

The Court of Special Appeals of Maryland upheld the constitutionality of the noneconomic damages limit in Potomac Electric Co. v. Smith, 79 Md. App. 591, 558 A.2d 768 1989.

MICHIGAN

1993—SB 270 (H-2)

Limited the award of noneconomic damages in medical liability cases to $280,000 for ordinary occurrences, and $500,000 for incidents falling within certain exceptions.

MINNESOTA

1986—SB 2078

Limited the award of damages for loss of consortium, emotional distress, or embarrassment to $400,000. The reform does not limit the award of other noneconomic damages, such as pain and suffering.

MISSISSIPPI

2002—HB 2

In medical malpractice cases, limited noneconomic damages to $500,000 from Jan. 1, 2003 until July 1, 2011, $750,000 from July 1, 2011 until July 1, 2017, and $1 million after July 1, 2017, unless a judge were to determine that a jury could impose punitive damages.

MONTANA

1995—HB 309

Limited the award of noneconomic damages in medical malpractice cases to $250,000.

Provided for the periodic payment of future damages over $50,000.

NEVADA

2002—AB 1

Limited the award of noneconomic damages in medical malpractice cases to $350,000, except in cases involving "gross malpractice" or upon a judicial determination that there is "clear and convincing evidence" that the noneconomic award should exceed the cap.

NEW HAMPSHIRE

1986—HB 513

Limited the award of noneconomic damages to $875,000.

The New Hampshire Supreme Court held this statute unconstitutional in Brannigan v. Usitalo, No. 90-377, March 13, 1991.

NORTH DAKOTA

1995—HB 1050

Limited the award of noneconomic damages in medical liability cases to $500,000. The reform included a provision for alternative dispute resolution.

OHIO

2003—SB 281

Limited the award of noneconomic damages in medical malpractice cases to $350,000, with a provision to allow the cap to rise to $1 million, depending on the severity of the injuries and the number of plaintiffs involved in the suit.

1997—HB 350

Limited the award of noneconomic damages to the greater of $250,000 or three times economic damages to a maximum of $500,000, unless there is a finding that a plaintiff suffered:

1) a permanent and severe physical deformity; or

2) a permanent physical functional injury that permanently prevents her from being able to independently care for herself and perform life sustaining activities.

If a plaintiff establishes the criteria set forth above, noneconomic damages are limited to the greater of $1 million or $35,000 times the number of years remaining in the plaintiff's expected life.

Held unconstitutional by the Ohio Supreme Court in Ohio Academy of Trial Lawyers v. Sheward, August 1999.

OKLAHOMA

2003—SB 629

Limited the award of noneconomic damages to $350,000 in cases involving pregnancy (labor, delivery, and post partum period) as well as emergency care.

OREGON

1987—SB 323

Limited the award of noneconomic damages to $500,000.

The Oregon Supreme Court declared the $500,000 limit on noneconomic damages unconstitutional in the case of Larkin v. Senco Products, Inc. — P.2d. — , 1999 WL 498088 Or. July 15, 1999.

TEXAS

2003—HB 4

Limited the award of noneconomic damages in medical malpractice cases to $250,000 against all doctors and health care practitioners and a $250,000 per-facility cap against health care facilities such as hospitals and nursing homes, with an overall cap of $500,000 against health care facilites, creating in effect an overall limit of noneconomic damages in medical malpractice cases of $750,000.

WASHINGTON

1986—SB 4630

Limited the award of noneconomic damages for bodily injury to .43% times the average annual wage times the plaintiff's life expectancy (no less than 15 years).

The Washington Supreme Court held the limit on noneconomic damages unconstitutional in Sofie v. Fibreboard Corp., 112 Wash. 2d 636, 771 P. 2d 1989).

WEST VIRGINIA

2003—HB 2122

Limited the award of noneconomic damages in medical malpractice cases to $250,000 to $500,000 depending on the severity of the injuries.

WISCONSIN

1995—AB 36

Limited the award of noneconomic damages in medical liability cases to $350,000, indexed for inflation.

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PREJUDGMENT INTEREST

In the absence of an applicable statute or rule, the courts generally applied the traditional common law rule that prejudgment interest was not available in tort actions since the claim for damages was unliquidated. In an effort to compensate tort plaintiffs for the often-considerable lag between the event giving rise to the cause of action, or filing of the lawsuit, and the actual payment of the damages, many state legislatures have enacted laws that provide for or allow prejudgment interest in particular tort actions or under particular circumstances. In addition to seeking to compensate the plaintiff fully for losses incurred, the goal of such statutes is to encourage early settlements and to reduce delay in the disposition of cases, thereby lessening congestion in the courts. Although well-intended, the practical effects of prejudgment interest statutes can be inequitable and counter-productive. Prejudgment interest laws can, for example, result in over-compensation, hold a defendant financially responsible for delay it may not have caused, and impede settlement.

At a time when policymakers are attempting to lower the cost of the liability system in an equitable and just manner, prejudgment interest laws that currently exist and new proposals should be reviewed to ensure that they are structured fairly and in a way designed to foster settlement. At a minimum, the interest rate should reflect prevailing interest rates by being indexed to the treasury bill rate at the time the claim was filed and an offer of judgment provision should be included.

Fourteen states have enacted prejudgment interest reforms.

ALASKA

1997—HB 58

Set prejudgment interest rates at the Twelfth Federal Reserve District's discount rate plus 3%.

Prohibited the assessment of prejudgment interest for future damages and punitive damages.

COLORADO

1995—SB 165

Limited the amount of prejudgment interest that can be assessed between accrual of the action and filing of the claim to below the $1,000,000 limit on the total amount recoverable in medical liability claims.

GEORGIA

2003—HB 792

Set prejudgment interest rates at the Federal Reserve's prime interest rate plus 3%.

IOWA

1997—HF 693

Set prejudgment interest rates at the U.S. Treasury Rate plus 2%.

1987—SF 482

Prohibited the assessment of prejudgment interest for future damages. (Other interest accrues from the date of commencement of the actions at a rate based on the U.S. Treasury Bill.)

LOUISIANA

1997

Set prejudgment interest rates at the average Treasury Bill rate for 52 weeks plus 2%. Provided varying rates of prejudgment interest for actions pending or filed during the last 10 years.

1987—HB 1690

Set prejudgment interest rates at the prime rate plus 1% with a floor of 7% and a cap of 14%.

MAINE

1988—LD 2520

Set prejudgment interest rates and postjudgment interest rates at the U.S. Treasury Bill rate.

MICHIGAN

1986—HB 5154

Prohibited the assessment of prejudgment interest on awards for future damages.

MINNESOTA

1986—SB 2078

Prohibited the assessment of prejudgment interest on awards for future damages.

MISSOURI

1987— HB 700

Permitted the assessment of prejudgment interest only in cases where the judgment exceeds a settlement offer.

NEBRASKA

1986—LB 298

Set the prejudgment interest rate at 1% above the rate of the U.S. Treasury Bill.

The reform included an offer of judgment provision that permitted the award of prejudgment interest for unreasonable failure to settle.

NEW HAMPSHIRE

2001—HB 140

Set the prejudgment interest rate at the 26-week discount U.S. Treasury Bill rate.

OKLAHOMA

2003—SB 629

Set the prejudgment interest rate in medical malpractice cases to the average U.S. Treasury Rate of the preceding calendar year.

1986—SB 488

Prohibited the assessment of prejudgment interest on punitive damages awards.

Set the prejudgment interest rate at 4% above the rate on the U.S. Treasury Bill.

RHODE ISLAND

1987—HB 5885

Set the prejudgment interest rate at the U.S. Treasury Bill rate. Provided that interest accrues from the date the lawsuit is filed.

TEXAS

2003—HB 4

Set the prejudgment interest rate to the New York Federal Reserve prime rate, with a floor of 5% and a ceiling of 15%.

1987—SB 6

Limited the period during which prejudgment interest may accrue if the defendant has made an offer to settle.

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PRODUCT LIABILITY

Product liability law is meant to compensate persons injured by defective products and to deter manufacturers from marketing such products. It fails, however, when it does not send clear signals to manufacturers about how to avoid liability or holds manufacturers liable for failure to adopt a certain design or warning even if the manufacturers neither know, nor could have anticipated, the risk.

Eighteen states have enacted laws specifically to address product liability.

CALIFORNIA

1986—SB 241

Confirmed that under California law, products like foods high in cholesterol, alcohol, and cigarettes, which are inherently unsafe and which ordinary consumers know to be unsafe, should not be the basis for product liability lawsuits.

COLORADO

2003—SB 03-231

Provided that a product liability action could not be taken against a manufacturer or seller of a product if the product was used in a manner other than which the product was intended and which could not reasonably have been expected.

Provided for an innocent seller provision which prohibits product liability action against parties who were not the manufacturer of the product.

FLORIDA

1999—HB 775

Provided a 12-year statute of repose for products with a useful life of 10 years or less, unless the product is specifically warranted a useful life longer than 12 years.

Provided a 20-year statute of repose for airplanes or vessels in commercial activity, unless the manufacturer specifically warranted a useful life longer than 20 years.

The reform does not apply to cases involving improvements to real property, including elevators and escalators; latent injury cases; and cases where the manufacturer, acting through its officers, directors or managing agents, took affirmative steps to conceal a known defect in the product.

GEORGIA

1987—HB 1

Permitted only one award of punitive damages to be assessed against any given defendant in product liability cases.

ILLINOIS

1995—HB 20

Provided for product liability affidavit requirements.

Created a presumption of safety, where manufacturers meet state and federal standards, and where no practical or feasible alternative design existed at the time the product was manufactured.

Applied statutes of repose on all product liability cases to bar an action after 12 years from the first sale or 10 years from the first sale to a user or consumer, whichever occurs first.

Held unconstitutional by the Illinois Supreme Court in Best v. Taylor Machine Works, Inc., December 1997.

INDIANA

1995—HB 1741

Barred application of the rule of joint and several liability in product liability cases.

Provided a rebuttable presumption that a product is not defective if:

1) the manufacturer of the product conformed with recognized "state of the art" safety guidelines; or

2) the manufacturer of the product complied with government standards (*i.e.* approved by FDA, FAA etc...).

Restricted strict liability actions to the manufacturer of the product.

IOWA

1997—HF 693 Statute of Repose

Established a 15-year statute of repose for product liability lawsuits not involving fraud, concealment, latent diseases caused by harmful materials, or specified products.

LOUISIANA

1988—SB 684

Provided that a product may be unreasonably dangerous only because of one or more of the following characteristics:

1) defective construction or composition;

2) defective design;

3) failure to warn or inadequate warning; or

4) nonconformity with an express warranty.

Provided that a manufacturer of a product shall not be liable for damages proximately caused by a characteristic of the product's design, if the manufacturer proves that at the time the product left his control:

1) he did not know and, in light of then-existing reasonably available scientific and technological knowledge, could not have known of the design characteristic that caused the damage;

2) he did not know and, in light of then-existing reasonable available scientific and technological knowledge, could not have known of the alternative design identified by the plaintiff; or

3) the alternative design identified by the plaintiff was not feasible, in light of then-existing reasonably available scientific and technological knowledge or existing economic practicality.

MAINE

1996—LD 346

Provided that "subsequent remedial measures" or steps taken after an accident to repair or improve the site of injury are not admissible as evidence of negligence.

MICHIGAN

1995—SB 344

Barred application of the rule of joint and several liability in product liability cases.

Provided statutory defenses to product liability claims, including adherence to government standards, FDA standards, and sellers' defenses. Provided an absolute defense, where the plaintiff was found to be at least 50% at fault due to intoxication or a controlled substance.

Limited the award of noneconomic damages in product liability cases not involving death or loss of vital bodily function to $280,000; Limited the award of noneconomic damages in such cases to $500,000.

1995—HB 4508

Provided venue control in product liability cases.

MISSISSIPPI

1993—HB 1270

Required product liability cases to be based on a design, manufacturing or warning defect, or breach of an express warranty, which caused the product to be unreasonably dangerous.

Provided that a product that contains an inherently dangerous characteristic is not defective if the dangerous characteristic cannot be eliminated without substantially reducing the product's usefulness or desirability and the inherent characteristic is recognized by the ordinary person with ordinary knowledge common to the community.

Provided that a manufacturer or seller cannot be held liable for failure to warn of a product's dangerous condition if it was not known at the time the product left the manufacturer's or seller's control.

Completely barred from recovery a plaintiff who knowingly and voluntarily exposes himself or herself to a dangerous product condition if he or she is injured as a result of that condition.

Relieved a manufacturer or seller from the duty to warn of a product that poses an open and obvious risk.

Provided that a properly functioning product is not defective unless there was a practical and economically feasible design alternative available at the time of manufacture.

Provided for indemnification of innocent retailers and wholesalers.

MONTANA

1987—SB 380

Provided statutory defenses to product liability claims, including assumption of the risk and misuse of product.

NEW HAMPSHIRE

1993—SB 76

Established a right of indemnification for New Hampshire manufacturers from a claim for damages by the original purchaser of a product, where the product was significantly altered after it left the New Hampshire manufacturer's control.

1992—SB 339

Established a committee to study the impact of product liability on New Hampshire businesses.

NEW JERSEY

1995 —SB 1495

Excluded product sellers from strict liability in product liability actions.

1987—SB 2805

Provided that a manufacturer or seller of a product is liable only if the plaintiff proves by a preponderance of the evidence that the product was not suitable or safe because it:

1) deviated from the design specifications or performance standards;

2) failed to contain adequate warnings; or

3) was designed in a defective manner.

Provided that a manufacturer or seller is not liable if at the time the product left the manufacturer's control there was not available a practical and feasible *alternative design* that would have prevented the harm.

Provided that a product's design is not defective if the harm results from an inherent characteristic of the product that is known to the ordinary person who uses or consumes it.

Provided that a manufacturer or seller is not liable for a design defect if the harm results from an *unavoidably unsafe aspect* of a product and the product was accompanied by an *adequate warning*.

Provided that the state of the art provision does not apply if the court makes all of the following determinations:

1) that the product is egregiously unsafe;

2) that the user could not be expected to have knowledge of the product's risk; and

3) that the product has little or no usefulness.

Provided that a manufacturer or seller in a warning-defect case is not liable if an *adequate warning* is given. (An adequate warning is one that a reasonably prudent person in the similar circumstances would have provided.) Established a rebuttable presumption that a government (FDA) warning is adequate.

NORTH CAROLINA

1995—HB 637

Expressly provided that there shall be no strict liability in tort for product liability actions.

Provided statutory defenses to product liability claims, including assumption of the risk.

NORTH DAKOTA

1995—HB 1369

Established a ten-year statute of repose in product liability actions.

Provided a government standards defense.

Prohibited the award of punitive damages, when a manufacturer complies with government standards.

The 10-year statute of repose was found unconstitutional in Dickie v. Farmers Union Oil Co., 2000 ND 111 (N.D. May 25, 2000).

OHIO

1996—HB 350

Amended product liability law to include additional requirements for establishing liability.

Prohibited expanding theories of liability, including enterprise liability.

Adopted a fifteen-year statute of repose in product liability cases, absent latent harm or fraud.

Held unconstitutional by the Ohio Supreme Court in Ohio Academy of Trial Lawyers v. Sheward, August 1999.

1987—HB 1

Provided that a product's design is not defective if:

1) an injury occurs due to the inherent characteristics of a product, where the characteristics are recognized by the ordinary person with ordinary knowledge common to the community; or

2) an injury occurs because of a design which is state of the art, unless the manufacturer acted unreasonably in introducing the product into trade or commerce.

Provided that a product is not defective due to lack of warnings if the risk is open and obvious or is a risk that is a matter of common knowledge.

Established a complete defense for manufacturers and sellers of ethical drugs and/or devices if they have supplied adequate warnings to learned intermediaries, unless the FDA requires additional warnings.

Provided that a drug manufacturer shall not be liable for punitive damages if the drug was approved by the FDA.

TEXAS

2003—HB 4

Provided for a 15 year statute of repose for product liability cases. In cases involving latent diseases, the plaintiff must have been exposed within 15 years of the product's sale and must show symptoms more than 15 years after the sale.

Provided for an innocent seller provision which prohibits actions against non-manufacturing sellers except in specific circumstances such as if the seller participated in the design of the product or knew of the defect at the time of the sale.

1993—SB 4

Required proof of an economically and technologically feasible safer alternative design available at the time of manufacture in most product liability actions for defective design.

Provided a defense for manufacturers and sellers of inherently unsafe products that are *known* to be unsafe.

Established a fifteen-year statute of repose for product liability actions against manufacturers or sellers of manufacturing equipment.

Provided protection for innocent retailers and wholesalers.

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CLASS ACTION REFORM

Once considered a tool of judicial economy that aggregated many cases with similar facts, or similar complaints into a single action, class actions are now often considered a means of defendant extortion. Today, some class actions are meritless cases in which thousands, or millions, of plaintiffs are granted class status, sometimes without even notifying the defendant. In many of these cases, the victimized consumers often receive pennies, or nearly-worthless coupons, while plaintiffs' counsel receives millions in legal fees. State class action reformcan more equitably balance the interests of plaintiffs and the defendant.

Five states have reformed their laws pertaining to class actions

ALABAMA

1999—SB 72

Set procedures to certify class actions.

Codified Supreme Court rulings to ensure that a defendant receives adequate notice prior to class certification.

Provided for an immediate appeal of any order certifying a class or refusing to certify a class, and for an automatic stay of matters in the trial court pending such appeal.

COLORADO

2003—HB 03-1027

Provided for the interlocutory appeal of class action certification.

GEORGIA

2003—HB 792

Updated Georgia class action laws by providing for detailed procedures for class action cases.

Specified factors under which a court may decline to exercise jurisdiction in a cause of action of a nonresident occurring outside the state.

LOUISIANA

1997—HB 1984

Updated Louisiana class action laws by providing objective definitions of class action terms, and detailed procedures for class action cases.

OHIO

1998—HB 394

Provided for the interlocutory appeal of class action certification.

2003—HB 4

Provided for the interlocutory appeal of class action certification.

Reformed attorney fees whereby fees are based on time and cost expended rather than a percentage of recovery.

Provided for stay on all proceedings during appeal of class certification.

Provided for administrative relief which requires a court to consider administrative relief from state agencies before certifying a class.

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ATTORNEY RETENTION SUNSHINE

In state recoupment litigation against the tobacco industry, most states retained plaintiffs' personal injury lawyers on a contingent fee basis to assist them with their litigation. Unfortunately, many of these contracts, inked without competitive bidding, and with little or no outside oversight, were rife with political favoritism, inside dealing, and in at least one case, amid the stench of corruption. Many of these billion-dollar fees (which bore little or no relation to the value of the work performed) are being strategically reinvested into the political process, and into still more litigation. Attorney "sunshine" legislation requires legislative approval of most large contingent fee contracts, and reasserts the legislature's oversight of "regulation through litigation."

Five states have adopted this proposal.

COLORADO

2003—SB 03-086

Required monthly reports by outside counsel to include number of hours worked, court costs incurred, and to provide such data in aggregate from the effective date of the contingent fee contract.

Required, at the conclusion of representation, outside counsel to provide the state with a statement of hours worked and fees recovered through a contract for legal services between the state and outside counsel. Provided that in no instance shall the state pay fees, even on a contingent fee basis, in excess of $1,000 per hour.

KANSAS

2000—HB 2627

Required open and competitive bidding for all contingent fee contracts for legal services between the state and outside counsel, where fees and services exceed $7,500

Required proposed contracts for legal services between the state and outside counsel in excess of $1,000,000 to be submitted to the legislative budget committee for approval.

Required, at the conclusion of representation, outside counsel to provide the state with a statement of hours worked and fees recovered through a contract for legal services between the state and outside counsel. Provided that in no instance shall the state pay fees, even on a contingent fee basis, in excess of $1,000 per hour.

NORTH DAKOTA

1999—SB 2047

Required an emergency commission of the legislature to approve the attorney general's appointment of a special assistant attorney general in a case in which the amount of the controversy exceeds $150,000.

TEXAS

1999—SB 113

Required the state and outside counsel to first seek an hourly arrangement for contracts for legal services.

Required contingent fee contracts between the state and outside counsel in excess of $100,000 to be approved by a Legislative Review Board.

Required, at the conclusion of representation, outside counsel to provide the state with a statement of hours worked and fees recovered through a contract for legal services between the state and outside counsel.

VIRGINIA

2002—HB 309

Required open and competitive bidding in accordance with the Virginia Public Procurement Act for all contingent fee contracts for legal services between a state agency or state agent and outside counsel, where fees and services are reasonably expected to exceed $100,000.

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APPEAL BOND REFORM

According to Lawyer's Weekly USA, the total amount of 1999's top ten jury verdicts was three times higher than 1998's level, and 12 times higher than the 1997 total. While many of these verdicts are overturned or reduced on appeal, defendants in many states are required to post an appeal bond sometimes equal to 150 percent of the verdict in question. In an era when billion-dollar verdicts are no longer uncommon, appealing an outrageous verdict can force a company or an industry into bankruptcy. Appeal bond waiver legislation limits the size of an appeal bond when a company is not liquidating its assets or attempting to flee from justice.

Twenty states have adopted this proposal.

ARKANSAS

2003 —HB 1038

Limited the amount a defendant can be required to pay to secure the right to appeal to $25 million.

COLORADO

2003—HB 1366

Limited the amount a defendant can be required to pay to secure the right to appeal to $25 million.

FLORIDA

2003—S 2826*

Limited the amount a defendant can be required to pay to secure the right to appeal to $100 million.

2000 —HB 1721

Limited the amount a defendant can be required to pay to secure the right to appeal punitive damages awards in class actions to the lesser of 10% of the defendants net worth or $100 million.

The reform applies in out-of-state judgments during the stay period only.

GEORGIA

2000 —HB 1346

Limited the amount a defendant can be required to pay to secure the right to appeal to $25 million.

The reform applies in out-of-state judgments during the stay period only.

IDAHO

2003 —HB 92

Limited the amount a defendant can be required to pay to secure the right to appeal punitive damage awards in any judgment to only the first of $1,000,000.

INDIANA

2002—HB 1204

Limited the amount a defendant can be required to pay to secure the right to appeal punitive damages awards to $25 million.

KANSAS

2003—SB 48*

Limited the amount a defendant can be required to pay to secure the right to appeal to $25 million.

KENTUCKY

2000 —SB 316

Limited the amount a defendant can be required to pay to secure the right to appeal to $100 million.

The reform applies in out-of-state judgments during the stay period only.

LOUISIANA

2001—HB 1524

Provided that, where the amount of a judgment exceeds $150 million, the trial court may, upon motion and after a hearing, and in the exercise of its broad discretion, fix the appeal bond in an amount sufficient to protect the rights of the judgment creditor, while at the same time preserving the favored status of appeals in Louisiana.

MICHIGAN

2002—HB 5151

Limited the amount a defendant can be required to pay to secure the right to appeal to $25 million. This limit will be adjusted on January 1, 2008 and on January 1 every 5 years after that adjustment by an amount determined by the state treasurer to reflect the annual aggregate percentage change in the Detroit consumer price index since the previous adjustment.

Provided that a court will rescind the limit if an appellee proves by a preponderance of the evidence that the party for whom the bond to stay execution has been limited is purposefully dissipating or diverting assets outside of the ordinary course of business for the purpose of avoiding ultimate payment of the judgment.

MISSISSIPPI

2001*

The Mississippi Supreme Court, acting on its own motion, imposed a $100 million limit on the amount a defendant can be required to pay to secure the right to appeal large punitive damages verdicts.

NEVADA

2001 —AB 576*

Limited the amount a defendant can be required to pay to secure the right to appeal to $50 million.

NORTH CAROLINA

2000 —SB 2

Limited the amount a defendant can be required to pay to secure the right to appeal to $25 million.

The reform applies in out-of-state judgments during the stay period only.

OHIO

2002—HB 161

Limited the amount a defendant can be required to pay to secure the right to appeal to $50 million.

OKLAHOMA

2001—SB 372*

Limited the amount a defendant can be required to pay to secure the right to appeal to $25 million.

TENNESSEE

2003—SB 1687

Limited the amount a defendant can be required to pay to secure the right to appeal to $75 million.

TEXAS

2003—HB 4

Limited the amount a defendant can be required to pay to secure the right to appeal to the lesser of 50% of a defendant's net worth or $25 million.

Provided that defendants are no longer required to post a bond to appeal a punitive damages award.

Provided that foreign judgments cannot be executed in Texas if appeal is pending in a foreign jurisdiction and a bond has been or will be posted.

VIRGINIA

2000 —HB 1547

Limited the amount a defendant can be required to pay to secure the right to appeal to $25 million.

The reform applies in out-of-state judgments during the stay period only.

WEST VIRGINIA

2001—SB 661*

Limited the amount a defendant can be required to pay to secure the right to appeal to $200 million.

Provided that an appeal bond may not exceed $100 million for compensatory damages and $100 million in punitive damages.

*Pursuant to the master Settlement Agreement entered into between this state and tobacco product manufacturers.

JURY SERVICE REFORM

The right to a trial by a jury of one's peers is one most Americans support and take for granted. Recently, however, our juries are becoming less and less representative of the community. Some studies indicate that up to 20% of those summoned for jury duty do not respond and some jurisdictions have an even higher no-show rate. Occupational exemptions, flimsy hardship excuses, lack of meaningful compensation, long terms of service and inflexible scheduling results in a jury pool that makes it difficult for working Americans to serve on a jury and disproportionately excludes the perspectives of many people who understand the complexity of issues at play during trial. ATRA supports legislation to improve the jury system so that defendants and plaintiffs alike receive a fair trial.

- Eliminating occupational exemptions that allows members of certain professions to opt-out from jury service.
- Ensuring that only those who experience true hardship are excused from jury service.
- Providing jurors flexibility in scheduling their service and guaranteeing potential jurors they will not spend more than one day at the courthouse unless they are selected to serve on a jury panel.
- Protecting employees from any adverse action in the workplace due to their responding to a juror summons.
- Establishing a lengthy trial fund, financed by a nominal court filing fee, to pay jurors who serve on long civil trials.

Three states have enacted reform.

Arizona

2003—H.B. 2520

Required all people to serve on juries unless they experience undue or extreme physical or financial hardship.

Established a lengthy trial fund from a modest filing fee to compensate jurors a minimum of $40 and a maximum of $300 per juror, per day for trials lasting more than 10 days, starting on the eleventh day of trial. In such circumstances, jurors would also be eligible to retroactively collect at least $40 but not more than $100 per day from the fourth day to the tenth day of service.

Provided for employee protection by prohibiting an employer to require an employee to use annual or sick leave for the time spent in the jury service process. In addition, it prohibited employers to dismiss or in any other way penalize employees for responding to a jury service summons.

Provided for protection of small business owners by requiring the court to postpone the service of an employee if another employee of that business is already serving on a jury.

Allowed for one automatic postponement from service.

Provided for jurors to serve no more than one day unless selected to serve on a trial.

Provided that a willful failure to appear for jury duty is a Class 3 misdemeanor.

LOUISIANA

2003—H.B. 2008

Required all people to serve on juries unless they experience undue or extreme physical or financial hardship.

Established a lengthy trial fund to compensate jurors up to $300 per juror, per day for trials lasting more than 10 days, starting on the eleventh day of trial. In such circumstances, jurors would also be eligible to retroactively collect up to $100 per day from the fourth day to the tenth day of service. The bill did not specify a financing mechanism, but tasked the Louisiana Supreme Court to develop recommendations for the Legislature to consider at some point in the future.

Prohibited employers from dismissing or otherwise subjecting employees to any adverse employment action for responding to a jury service summons.

Allowed for one automatic postponement from service.

UTAH

2003—HB 324

Required all people to serve on juries unless they experience undue or extreme physical or financial hardship or incur substantial costs or lost opportunities due to missing an event that was scheduled prior to the initial notice of potential jury service.

Provided that a person who fails to appear for jury duty is in contempt of court and subject to penalties under Title 78, Chapter 32, Contempt.

Provided that a person who willfully misrepresents a material fact regarding qualification for, excuse from, or postponement of jury service is guilty of a class C misdemeanor.

Provided for employee protection by prohibiting an employer to require an employee to use annual, vacation, or sick leave for the time spent in the jury service process. In addition, it prohibited employers to dismiss or in any other way penalize employees for responding to a jury service summons.

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