



American Tort Reform Association

1101 Connecticut Ave, NW ■ Suite 400 ■ Washington, DC 20036
(202) 682-1163 ■ Fax: (202) 682-1022 ■ www.atra.org

2011 State Tort Reform Enactments

Alabama

S.B. 207 (Cam Ward – R) – Judgment Interest Reform

Changes the rate of interest on judgments in Alabama from 12% to 7.5%. Prior to the enactment of S.B. 207, a defendant who lost a lawsuit and chose to appeal had to begin paying 12% post-judgment interest on the amount the court or jury awarded the plaintiff, creating a significant financial deterrent to appealing an unjust verdict.

S.B. 212 (Clay Scofield – R) - Venue Reform

Prohibits “forum shopping” of wrongful death actions by requiring that a suit can be brought only in the county where the decedent could have filed suit. This will prevent the practice of finding a personal representative in a plaintiff-favorable county solely for purposes of obtaining venue there due to the residency of the personal representative.

S.B. 187 (Ben Brooks – R) - Expert Evidence Reform

Adopts the *Daubert* standard and a later US Supreme Court decision, *Joiner*. Together these cases established a framework for admitting scientific expert testimony in order to preclude introduction of "junk science" into courtrooms. The federal three-part test for courts to use in determining whether to admit scientific expert testimony has been adopted in full and allows the courts to exclude unreliable testimony or even testimony that may draw from reliable procedures and principles, but whose conclusions are unsupported. This permits the full breadth of *Daubert* and *Joiner* to now be applied in Alabama courtrooms as it is in all federal courtrooms and a majority of other states. The compromise that was reached in S.B. 187 does not adopt the *Daubert* progeny called *Kumho*, which extends these rules to non-scientific expert testimony. Also exempted were certain criminal and domestic relations cases. However, nothing precludes the courts in Alabama from later extending these rules to such testimony.

S.B. 184 (Ben Brooks – R) - Products Liability Reform / Innocent Seller

Known as the Alabama Small Business Protection Act, S.B. 184 adds protection for Alabama’s retailers against product liability suits. The suits are aimed at the manufacturers, but often the trial lawyers sue Alabama retailers, wholesalers and distributors as defendants even though they did not participate in the manufacture or design of the product. This is done in some instances solely to allow the plaintiff to file suit in counties favorable to plaintiffs and keep an out-of-state manufacturer in an Alabama state court and out of federal court. If, on the other hand, the suit is brought against a retailer or distributor because the manufacturer is unknown and the retailer or distributor is needed in order to provide discovery concerning the manufacturer’s identity, the bill provides a mechanism to accomplish this in a reasonable manner so that suit can then proceed against the appropriate manufacturer.

Arizona

Appeal Bonds Reform- S.B. 1212, A.R.S. § 12-2108

Limits the amount of an appeal bond to the lesser of the total amount of damages awarded excluding punitive damages, 50% of the appellant's net worth, or \$25 million.

Government Retention of Personal Injury Lawyers- H.B. 2423, A.R.S. § 41-4801

Bars the state from entering into a contingency fee contract with a private attorney unless the attorney general first makes a written determination that the contingency fee representation is both cost effective and in the public interest. The contract must be posted on the attorney general's website for at least 365 days. Limits the amount of aggregate contingency fees that the attorney may receive. The private attorney may not receive more than 25% of any recovery less than \$10 million, 20% of any recovery of between \$10 million and \$15 million, 15% of any recovery of between \$15 million and \$20 million, 10% of any recovery of between \$20 million and \$25 million, and 5% of any recovery of more than \$25 million.

Colorado

Jury Service Reform- H.B. 1153, C.R.S. 13-71-101- 13-71-133

Requires each juror service summons to include instructions for retrieving jury service acknowledgment information. Allows jurors to be notified by telephone of date changes and requires juror service information to be available via internet for 12 months after time of juror service. Changes mandatory payment to jurors from weekly to within 10 days after service for trial jurors, and "at least on a monthly basis" for grand jurors.

Florida

Crash Worthiness Doctrine – S.B. 142

Repeals the state's antiquated crashworthiness doctrines in cases brought against automobile manufacturers for vehicle malfunctions when there is an accident. Under the new law, juries will have all the facts and can apportion responsibility, upon a finding of liability.

Sink Hole Litigation Reform – S.B. 408

Limits lawsuits and losses for property insurers stemming from sinkhole claims, while allowing policyholders with legitimate claims to be compensated.

Judgment Interest Rate Reform – H.B. 567

Provides that the judgment interest rate will be set in accordance with the interest rate as set by the Chief Financial Officer based on the discount rate of the Federal Reserve Bank of New York for the preceding 12 months plus 400 basis points (4 percent). The interest rate on the judgment is to be adjusted annually on January 1 of each year.

Medical Liability Reform – H.B. 479

- Requires an M.D., D.O., or D.D.S. licensed in another state to obtain an expert witness certificate before being able to provide expert testimony in Florida.
- Gives the Boards of Medicine, Osteopathic Medicine, and Dentistry the specific authority to discipline any expert witness, both those licensed in state and those with an expert witness certificate, who provide deceptive or fraudulent expert witness testimony.

- Requires the Board of Medicine and the Board of Osteopathic Medicine to create a standard informed consent form that sets forth the recognized risks related to cataract surgery. Provides that an incident resulting from a recognized specific risk is not considered an adverse incident.
- Deletes the provision in current law that prohibits an insurance company from selling a malpractice insurance policy to a physician that gives the physician the authority to control settlement decisions.
- Excludes from evidence in any medical negligence action any information regarding an insurer's reimbursement policies or reimbursement determinations.
- Provides that the breach of, or failure to comply with, any federal requirement is not admissible as evidence in a medical negligence case.
- Provides that the expert witness who submits the pre-suit verified expert medical opinion is no longer immune from discipline.
- Creates a new pre-suit form, the "authorization for release of protected health information." This will make it easier for a physician to obtain the patient's health care information in a malpractice suit.
- Provides that volunteer team physicians are immune from suit when gratuitously rendering care at a school athletic event.

Indiana

Government Retention of Personal Injury Lawyers- S.B. 214, Burns Ind. Code Ann. § 4-6-3-2

Requires the attorney general to make certain determinations before entering into a contingency fee contract with a private attorney, and requires the attorney general to publish certain information concerning contingency fee contracts on the attorney general's website.

Kentucky

Consumer Protection in Motor Vehicle Accidents- H.B. 382, KRS § 367

Provides that during the first 30 days after a motor vehicle accident, a person may not directly solicit or knowingly permit another person to directly solicit an individual, or relative of an individual, involved in the motor vehicle accident for the provision of any service related to the accident.

Missouri

Government Retention of Personal Injury Lawyers - S.B. 59 (Sections 34.376, 34.378, and 34.380)

Prohibits the state and any of its agents from entering into a contingency fee contract with a private attorney, unless the Attorney General makes specific written findings. The Attorney General is required to request written proposals from private attorneys, unless the Attorney General makes a written determination that requesting proposals is not feasible. If the Attorney General requests proposals from private attorneys, the Attorney General is required to choose the lowest and best bid or request the office of administration establish an independent panel to evaluate the proposals and choose the lowest and best bid. A private

attorney who is representing the state on a contingency fee basis is required to maintain records about their expenses for at least four years after the contract terminates. The attorney general's office is required to respond to requests to make these records available to the public under the sunshine law. The Attorney General is required to post certain information about the contingency fee arrangement on their website. The Attorney General is also required to submit an annual report regarding the use of contingency fee contracts.

North Carolina

Affirmative Civil Justice Reform Package – H.B. 542

- Requires that juries be given accurate information about the medical bills actually paid.
- Establishes requirements for expert witness testimony that will make North Carolina consistent with the requirements in federal courts and the majority of other states. Makes courts more efficient and fair and help deter frivolous lawsuits.
- Addresses attorneys fees in small cases by restoring the original intent of the statute which was to encourage parties to negotiate reasonable settlements and reduce litigation.
- Codifies North Carolina common law to make clear that land owners are not liable for harm to trespassers on their property.

Medical Liability Reform – S.B. 33

- Bifurcation of Trials - Upon motion of any party in an action in tort wherein the plaintiff seeks damages exceeding \$150,000, the court shall order separate trials for the issue of liability and the issue of damages, unless the court for good cause shown orders a single trial. Evidence relating solely to compensatory damages shall not be admissible until the trier of fact has determined that the defendant is liable. The same trier of fact that tries the issues relating to liability shall try the issues relating to damages.
- Expert Review - Current North Carolina law requires a plaintiff to have an expert witness who is qualified and willing to testify that there was a deviation in the standard of care in order for a case to proceed. S.B. 33 requires such expert witnesses to review all reasonably available medical records in making such a determination rather than relying on hypothetical scenarios.
- Non-emergency Care - Provides that in any medical malpractice action arising out of the provision of emergency services, the health care provider shall not be liable for the payment of damages unless it is found that the care provided was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action.
- Emergency Care - Provides that in the treatment of an emergency medical condition, as defined in 42 U.S.C. § 1395dd(e)(1)(A), the claimant must prove a violation of the standards of practice by clear and convincing evidence.

- Noneconomic Damages Reform - Limits noneconomic damages in medical liability cases to \$500,000 against all defendants. The limit is subject to adjustments every three years starting on January 1, 2014, based on the Consumer Price Index. The legislation does provide for an exception to the limit if: (1) the plaintiff suffered disfigurement, loss of use of part of the body, permanent injury or death; and (2) the defendant's acts or failures, which are the proximate cause of the plaintiff's injuries, were committed in reckless disregard of the rights of others, grossly negligent, fraudulent, intentional or with malice.
- Statute of Limitations for Actions by Minors or on Minor's Behalf - Provides that an action may be brought at any time prior to a minor's 10th birthday. For minors ruled to be abused or neglected, then the action must be commenced within three years of such judgment or consent order or before the minor reaches his/her 10th birthday – whichever is later. For minors in the custody of the state, county or child placing agency, the action must be brought one year post-custody or before the minor's 10th birthday – whichever is later.

North Dakota

Landowner Immunity for Injuries to Trespassers- H.B. 1452

Codifies existing law with respect to trespassers by providing landowners immunity from liability for injuries to trespassers. Establishes that a possessor of land does not owe a duty of care to a trespasser, except for cases when the land possessor knows of the trespasser's presence on the premise or in certain instances involving child trespassers.

Oklahoma

Class Action Reform- S.B. 704

Adopts *Iqbal/Twombly* language and adds a new requirement for class action lawsuits. Provides that an action may be maintained as a class action if the petition contains factual allegations sufficient to demonstrate a plausible claim for relief.

Evidence Admissibility Reform- H.B. 2023, 12 Okl. St. § 3009.1

Outlines procedures for unpaid medical bills for personal injury cases. Allows for payment to be made at the level of actual payment, not what was charged.

Joint and Several Liability Reform- S.B. 862, 23 Okl. St. § 15.1

Eliminates joint and several liability except where the state brings the lawsuit.

Jury Instructions- S.B. 865, 12 Okl. St. § 577.4

Provides that jury instructions applicable in a civil case shall include an instruction notifying the jury that no part of an award for damages for personal injury or wrongful death is subject to federal or state income taxes. Any amount that the jury determines to be proper compensation for personal injury or wrongful death should not be increase or decreased by any consideration for income taxes.

Lawsuit Reform Act- H.B. 2024, 23 Okl. St. § 9.3

Provides that upon request of a party, the court shall order that medical, health care, or custodial services awarded in an action be paid in whole or in part in periodic payments rather than by a lump-sum payment. Also, upon request of a party, the court may order that future damages other than medical, health care, or custodial services awarded in a health care liability action be paid in whole or in part in periodic payments rather than by a lump-

sum payment. This section only applies when the present value of the award of future damages, as determined by the court, equals or exceeds \$100,000. Payment must be made within seven years and interest shall be paid at the rate of a post-judgment award.

Noneconomic Damages Reform- H.B. 2128, 23 Okl. St. § 61.2

Reduces the limit on the amount of noneconomic damages that may be awarded for noneconomic loss arising from a claim of bodily injury from \$400,000 to \$350,000. Does not impact damages such as lost wages, medical expenses and future loss of expected wages, and lays out exceptions to the limit in case of gross negligence, reckless disregard, intentional actions, or malicious conduct. Eliminates the establishment of the Health Care Indemnity Fund.

Trespass Reform- S.B. 494, 21 Okl. St. § 1835.4

Codifies Oklahoma common law which provides that land possessors do not owe a duty of care to trespassers, except under very narrow circumstances.

Oregon

Jury Service Reform – H.B. 3034

Provides that a judge or clerk of the court may not defer jury service for a person more than once unless the person seeks deferral for a specified emergency and the person could not have anticipated circumstances when the first deferral was granted. Under the legislation, an employer may not require that an employee use vacation leave, sick leave, or annual leave for time spent by an employee in responding to summons for jury duty and the employer must allow the employee to take leave without pay for time spent.

Liability Against Professional Counselors and Marriage Therapists – H.B. 2217

Provides that punitive damages may not be awarded against professional counselors or licensed marriage and family therapists if they were acting in the scope of their practice.

Charitable Immunity – H.B. 2312

Eliminates the liability of charitable corporations for damages arising out of providing eyeglasses, hearing aids or other medical devices without charge.

Pennsylvania

Joint and Several Liability Reform - S.B. 1131

Bars the application of the rule of joint and several liability in the recovery of all damages, except when a defendant has: (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.

Rhode Island

Medical Liability Reform / Physician Assistants – S-303 Substitute A

Provides that physician assistants are not subject to liability when gratuitously rendering emergency care.

South Carolina

Affirmative Civil Justice Reform Package – H. 3375

- Provides for limits on punitive damages modeled after Florida law.
- Limits the amount a defendant can be required to secure the right to appeal a decision to \$25 million for businesses with 50 or more employees and gross revenue of over \$5 million, and \$1 million limit for all other entities.
- Requires that the attorney general approve civil actions by circuit solicitors.
- Requires disclosure of insurance policy limits for personal auto policies accident cases.

South Dakota

Landowners and Trespassing Liability- H.B. 1087

Based on the ALEC model *Trespasser Responsibility Act*, codifies existing South Dakota law with respect to trespassers by providing landowners immunity from liability for injuries to trespassers. Provides that a landowner does not owe a duty of care to a trespasser and is immune from liability for any injury to a trespasser, unless the physical injury or death was intentionally caused. Provides an exception for physical injury or death caused to a child thirteen years of age or younger resulting from an artificial condition on the land, if the landowner knew or had reason to know that children of that age were likely to trespass at the location of the artificial condition or if the person knew or should have known that the condition involved an unreasonable risk to such children. The landowner also is liable for a child's injury if the child did not realize the risk involved in the artificial condition, the utility to the person of maintaining the artificial condition and the burden of eliminating the danger were slight as compared with the risk to the child, and the person failed to exercise reasonable care to eliminate the danger.

Tennessee

Comprehensive Civil Justice Reform – H.B. 2008 / S.B. 1522

- Appeal Bond Reform – Lowers the amount a defendant can be required to pay to appeal a decision from \$75 million to \$25 million not to exceed 125% of the judgment.
- Class Action Reform – Provides for interlocutory appeal of class certifications.
- Consumer Protection Act Reform – Amends the Tennessee Consumer Protection Act (“TCPA”) as follows: eliminates a private right of action for actions based on the sale or marketing of securities, since those claims are governed by state and federal securities laws; provides that only the Attorney General may pursue actions under the “catchall provision” of the TCPA on behalf of Tennessee consumers; prohibits the award of punitive damages for an unfair or deceptive act or practice if the judge awards treble damages and attorney fees; and prohibits class actions from being brought under the consumer fraud statute and makes other changes to the consumer fraud statute.

- **Healthcare Liability** - Amends existing Tennessee medical malpractice laws to replace the term “medical malpractice” with “health care liability action” and expands the definition of “health care provider,” to expressly include nursing homes, assisted living facilities, mental health centers, pharmacists and employees of these individuals and entities within the ambit of medical malpractice laws.
- **Innocent Seller** – Prohibits products liability lawsuits against a retailer unless it exercised substantial control over the design, manufacture, packaging or labeling of the product, altered the product, gave an express warranty or the manufacturer is insolvent or not subject to process in Tennessee.
- **Noneconomic Damages Reform** – Limits noneconomic damages to \$750,000 per occurrence in medical liability actions, and a limit of \$1 million if the injury or loss is catastrophic in nature. The limits on noneconomic damages do not apply if the defendant acted with intent to harm, falsified records or acted under the influence of drugs or alcohol.
- **Punitive Damages Reform** - Limits punitive damages to two times compensatory damages or \$500,000, whichever is greater. The limits on noneconomic damages do not apply if the defendant acted with intent to harm, falsified records or acted under the influence of drugs or alcohol.
- **Regulatory Compliance** - Prohibits the award of punitive damages against the seller of the product, with certain exceptions, and prohibits the award of punitive damages against drug or device manufacturers when the product was manufactured in accordance with relevant Federal law, with certain exceptions. Prohibits the award of punitive damages when the defendant was in compliance with relevant federal and state regulations setting forth specific standards applicable to the activity in question to protect a class of persons or entities that includes the plaintiff.
- **Venue Reform** - Outlines the venues where civil suits can be filed to include the county where the claim accrued, where the defendant’s principal place of business is located or where the defendant’s registered agent is located. If the defendant does not have a registered agent in Tennessee, venue is proper in the county where the person designated by statute as the defendant’s agent for service of process is located. This provision seeks to prevent forum shopping and deviates from current law, under which a business can be sued in any county in which it has an office.

Texas

Early Offer of Settlement – H.B. 274

The main elements of the legislation are as follows: (1) an early dismissal of actions provision in which the Texas Supreme Court is directed to promulgate a new rule of civil procedure providing for the dismissal of cases that have no basis in law or fact; (2) a section that requires the Texas Supreme Court to promulgate rules of civil procedure to “promote the prompt, efficient, and cost-effective resolution of civil actions” in which the amount in dispute is less than \$100,000; (3) removal of a requirement that a trial judge obtain permission from all parties before he or she can certify a question for appellate review, and clarification of the procedure for taking the appeal; (4) changes and modifications to the early offer of settlement statute which are intended to make the statute more balanced and, therefore, more useful; and (5) provisions pertaining to the designation of responsible third parties.

Trespasser Liability Reform - S.B. 1160

S.B. 1160 codifies traditional common law rules with respect to the duty a landowner owes to a trespasser and prevent courts from adopting the new radical standard recommended in the Restatement of Torts (third). In Texas, landowners currently do not owe a duty of care to trespassers and are not liable for their injuries. There are certain exceptions, but these are narrow in scope and well defined. Specifically, S.B. 1160: (1) defines a trespasser; (2) codifies the existing rule that land possessors owe no duty of care to trespassers; (3) provides well-recognized exceptions to the general rule; (4) provides that a child who is at least 14 years of age appreciates the risk of a highly dangerous artificial condition on land; (5) makes clear that the use of justifiable force to repel an intruder, as permitted under the Penal Code, will not result in civil liability for injury to a trespasser; (6) clarifies that this new code does not affect other statutory provisions regarding the duty owed by land possessors, or otherwise create or increase the liability of any person or entity; and (7) provides that the legislation is prospective only.

Barratry - S.B. 1716

Provides that a client may bring an action to void any contract for legal services that was procured as a result of barratry by attorneys or other persons. The client is entitled to receive all fees and damages paid to that person under any voided contract, actual damages caused by the prohibited conduct and reasonable attorney's fees and the attorney at fault shall pay a civil penalty of \$5,000.

Utah

Negligent Credentialing- S.B. 150, Utah Code Ann. § 78B-3-425

Overturns a court ruling that determined that negligent credentialing would be a new cause of action in Utah. Provides that negligent credentialing is not a cause of action in Utah.

Tortious Act Arbitration- S.B. 52, Utah Code Ann. § 78B-10a-101 thru 109

Promotes arbitration in tort cases and prohibits claims for punitive damages in such actions. Creates filing and notice limits and provides for the selection of a single arbitrator or a panel of arbitrators. Decisions by arbitrators are final, but either party can request for trial de novo. If the plaintiff, as the moving party, does not obtain a verdict that is at least \$5,000 and 30% greater than the arbitration award, the plaintiff is responsible for all of the defendant's costs. If a defendant, as the moving party, does not obtain a verdict that is at least 30% less than the arbitration award, then the defendant is responsible for all of the plaintiff's costs.

Washington

Unauthorized Passengers in a Vehicle (Respondeat Superior Reform)- H.B. 1719

Overrules the holding in *Rahman v. State* that a government or private employer may be held liable for injuries to unauthorized occupants of the employer's vehicle.

West Virginia

Manufacturers' Liability for Prescription Drug Warning- S.B. 474, W. Va. Code § 55-8-16

Provides a choice of law provision when nonresidents bring an action against the manufacturer or distributor of a prescription drug for inadequate warnings. Application of the learned intermediary doctrine would be dependent on the law of the state in which the injury occurred.

Wisconsin

Comprehensive Civil Justice Reform- S.B. 1

- Products Liability – Requires proof of a “reasonable alternative design” in an alleged defective design of a product, moving Wisconsin away from the broad “consumer expectation” test.
- Expert Opinion (*Daubert*) – Adopts the *Daubert* standards for cases tried in Wisconsin courts. This common sense provision affects both parties in litigation by limiting testimony of experts and evidence to that which is based on sufficient facts or data and is the product of reliable principles and methods.
- Risk Contribution (*Thomas v. Mallet*) –Overturns the Wisconsin Supreme Court’s 2005 decision, *Thomas v. Mallet*, where the court adopted the deeply flawed “risk contribution” theory in cases involving lead-based paint. Wisconsin is the only state in the country to have adopted this theory.
- Punitive Damages –Limits punitive damages to \$200,000 or two times compensatory damages, whichever is greater.

Other issues addressed in the bill include sanctions on frivolous lawsuits, limits on noneconomic damages for long-term care providers, confidentiality of health care services reviews, use of health care reports or employee statements, and language pertaining to crimes in certain situations involving healthcare providers.

Judgment Interest Reform – Special Session S.B. 14

Changes the pre- and post judgment interest rate in all civil cases from 12 percent to the Federal Reserve prime rate plus one percent, and provides the rate to be set twice a year (January 1 and July 1).

Trespass Liability Reform – Special Session S.B. 22

Codifies current law as it relates to the duty of care owed to a trespasser by a possessor of land. The purpose of the bill is to prevent the courts from adopting the new Restatement (Third) of Torts, which expands the duty of care owed to trespassers and exposing possessors of land to greater liability.

Attorney Fees – Special Session S.B. 12

Sets forth a number of criteria courts are to consider when awarding attorneys’ fees in fee-shifting cases. The bill also sets a rebuttable presumption that attorneys’ fees are no more than three times compensatory damages.

Wyoming

Recreation Safety Act- S.B. 79, Wyo. Stat. § 1-1-121, Wyo. Stat. § 1-1-123

Grants parents the right to release or waive a minor child's prospective claim for negligence against the provider of a sport or recreational opportunity in which the minor participates. Provides that only a parent may sign a waiver or release form and it need not be signed by the minor. A parent may not waive a minor's prospective claim against the provider for willful, wanton or reckless acts.