

# ATRA Tort Reform Record

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*September 2013*

The Tort Reform Record is published each July 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*    
 *Pre judgment 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	X	X	X
Alaska	X	X	X	X	X					
Arizona	X	X		X			X	X	X	X
Arkansas	◇	X							X	
California	X	X				X			X	
Colorado	X	X	X	X	X	X	X	X	X	X
Connecticut		X		X				X	+	
Delaware										
DC										
Florida	X	X	X	X	X	X	X	X	X	
Georgia	X	X	X	◇	X	X	X		X	
Hawaii		X		X	X				X	
Idaho	X	X		X	X				X	
Illinois	◇	◇		X	◇	◇				
Indiana	X			X		X		X	X	X
Iowa	X	X	X	X		X		X	X	
Kansas	X			◇	X		X	X	X	
Kentucky	◇	X		X					X	
Louisiana	X	X	X			X	X	\$	X	X
Maine			X	X		X			+	
Maryland					X					X
Massachusetts		X							+	
Michigan		X	X	X	X	X			X	
Minnesota	X	X	X	X	X			X	X	
Mississippi	X	X			X	X	\$\$	X	X	X
Missouri	X	X	X	X	◇		X	X	X	X
Montana	X	X		X	X	X			X	

◇ Denotes state where reform was struck down as unconstitutional and no additional reforms have been enacted.

+ Denotes state where appeal bond is not required for a defendant to appeal a decision.

\$ The Louisiana Attorney General does not possess the authority to hire contingency fee outside attorneys.

\$\$ Mississippi law prohibits class action lawsuits

## Tort Reform Record At-A-Glance

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

\*Tennessee abolished joint and several liability by judicial decision

◇ Denotes state where reform was struck down as unconstitutional and no additional reforms have been enacted.

+ Denotes state where appeal bond is not required for a defendant to appeal a 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.

*Forty 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. Thee 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

##### 2006—HB 145

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

##### 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 portion 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

##### 2005—SB 3

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

##### 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.

### 985

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

### 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**

**2004—HB 13 (special session)**

Abolished joint and several liability. Provided that defendants are not responsible for any fault allocated to an immune tortfeasor or a tortfeasor whose liability is limited by law.

**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**

**2005-HB 393**

Provided that joint and several liability applies if a defendant is 51 percent or more at fault. In such circumstances, the defendant is jointly and severally liable for the amount of the judgment rendered against the defendant. If a defendant is found to be less than 51 percent at fault, the defendant is only responsible for the percent of the judgment he or she is responsible for.

**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.

## OKLAHOMA

### 2011—SB 862

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

### 2009—HB 1603

Provided that unless a defendant is more than 50% at fault, the defendant will only be charged its proportionate share of the injury award.

*Held unconstitutional by the Oklahoma Supreme Court in Douglas v. Cox Retirement Properties, June 2013.*

### 2004—HB 2661

Restricted joint liability to only a defendant that is more than 50 percent at fault, except where any defendant acted with willful and wanton conduct or reckless disregard and then all defendants may be held joint and severable liable. Limitation only applies when the plaintiff has no comparative negligence.

## OHIO

### 2003—SB 120

Barred application of the rule of joint and several liability in the recovery of all damages from defendants found to be less than 50% unless the defendant committed an intentional tort. Barred application of the rule of joint and several liability in the recovery of noneconomic damages.

### 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 defendant 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****2011—SB 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.

**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. .

*The 2002 joint and several liability law violated the single subject rule of the PA Constitution. DeWeese v. Weaver, 880 A.2d 54 & 824 A.2d 364 (Pa. Cmwlth. 2005).*

**SOUTH CAROLINA****2005—S83**

Specified that if there are multiple defendants in a civil action, joint and several liability does not apply to any defendant 50 percent or less responsible for the damages. Furthermore, specified that comparative fault is included in the calculation of total fault in the case. If the plaintiff is found to be greater than 50 percent responsible for the total fault, then the plaintiff is completely barred from recovering damages. A defendant found to be less than 50 percent responsible is only responsible for its proportional share of damages based on its percentage of liability. Retained the right of the “empty chair” defense where a defendant retains the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged damages and may be liable for any or all damages alleged by another party.

**2005—H3008**

Provided that joint and several liability does not apply to defendants less than 50 percent responsible of the total fault. In the calculation of total fault, comparative fault of the plaintiff is to be

included. If the plaintiff is found to be 50 percent or greater at fault, the plaintiff shall then be barred from recovery. Defendant's less than 50 percent at fault shall only be responsible for its proportional share of the damages based on its percentages of liability.

#### **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.”

#### **TENNESSEE**

##### **2013 – S.B. 56**

Codified current state law by providing that if multiple defendants are found liable in a civil action governed by comparative fault, a defendant shall only be severally liable for the percentage of damages for which fault is attributed to such defendant by the trier of fact, and no defendant shall be held jointly liable for any damages.

#### **TEXAS**

##### **2003—HB 4**

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

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

##### **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

### 2005—SB 421

Eliminated joint and several liability for defendants 30 percent or less at fault. In such situations, defendants pay only percentage of fault as determined by the jury. Provided that if a claimant has not been paid after six months of the judgment, defendants 10 percent or more responsible are subject to reallocation of uncollected amount. Defendants less than 10 percent at fault or whose fault is equal to or less than the claimant's percentage of fault are not subject to reallocation.

### 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-four states have modified or abolished the collateral source rule. Two states have had reforms struck down as unconstitutional and have not enacted additional reforms.*

## 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

### 2005—HB 393

Modified the collateral source rule to allow the actual amount of paid medical expenses to be introduced into evidence rather than the amount billed.

### 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

### 2004—Am. Sub. S.B. 80

Provided that collateral source benefits can be introduced into evidence, except under certain circumstances.

### 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.

**WASHINGTON**

**2006—HB 2292**

Permitted the admissibility of evidence of collateral source payments in medical liability cases. Plaintiff may also present evidence of an obligation to repay any compensation.

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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-three states have reformed punitive damages laws. One state had reforms struck down as unconstitutional and has not enacted additional reforms.*

## 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 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

##### 2012- HB 2503

Established reasonable liability rules for manufacturers, service providers and sellers of products with respect to punitive damages when their product or service is in compliance with state or federal laws/regulations. Recognized that the specific purpose of an award of punitive damages is to punish and deter unlawful conduct, and a defendant should not be punished in civil litigation when it is in compliance with applicable laws and regulatory requirements. Punitive damages do apply if it can be demonstrated that the defendant engaged in the following conduct: (1) the business withheld or misrepresented information utilized to gain regulatory approval; (2) the defendant made an illegal payment to an official to obtain approval of the product or service; or, (3) the defendant sold a product or service after the government ordered the product or service to be removed from the marketplace.

##### 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.

*The Arkansas Supreme Court held that the punitive damages limit of greater of \$250,000 or three times compensatory damages, not to exceed \$1 million, violated provision of State Constitution barring limits on recovery outside employment context, in Bayer CropScience LP v. Schafer, 2011 WL 6091323, December 8, 2011.*

## 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

### 2003—HB 1186

Prohibited a plaintiff from filing a claim for punitive damages unless the claim can show evidence of willful or wanton action that would justify such a claim.

### 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

##### 2006—SB 0296

Permitted the Attorney General’s office to negotiate and compromise the portion of a punitive damages award that is to be paid to the state in medical liability cases. Provided that the state’s interest in a punitive damages award is effective when a finder of fact announces a verdict that includes punitive damages.

**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

### 2004-HB 13 (special session)

Modified and lowered some caps on punitive damages, based upon the net worth of a defendant;

- \$20 million for a defendant with a net worth of more than \$1 billion;
- \$15 million for a defendant with a net worth of more than \$750 million but not more than \$1 billion;
- \$5 million for a defendant with a net worth of more than \$500 million by not more than \$750 million (new law);
- \$3.75 million for a defendant with a net worth of more than \$100 million but not more than \$500 million (new law);
- \$2.5 million for defendants with a net worth of more than \$50 million by not more than \$100 million (new law);
- Two percent of the defendant’s net worth for a defendant with a net worth of \$50 million or less (new law).

**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**

**2005—HB 393**

Limited the award of punitive damages to \$500,000 or five times the judgment, whichever is greater. The limit does not apply to certain cases involving housing discrimination.

**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

### 2004—Am. Sub. SB 80

Limited punitive damages to not more than two times compensatory damages. Limited punitive damages for small businesses to the lesser of two times compensatory damages or 10 percent of a defendant's net worth, not to exceed \$350,000. Small businesses are defined as having less than 100 employees or manufacturers that have less than 500 employees. Prohibited the award of punitive damages if punitive damages have already been awarded based on the same act or conduct that is alleged, except under certain circumstances.

Provided that in jury trials, if punitive damages are requested by any party, the trial is bifurcated so that the jury considers compensatory damages in one stage, and punitive damages in a second stage.

Provided that manufacturers of over-the-counter drugs and medical devices are not liable for punitive damages if the FDA approved the product. This was an extension of existing law which provided for a government standards defense for manufacturers of prescription drugs.

### 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**

#### **2011—H 3775**

Established procedure to claim punitive damages: (1) plaintiff must specifically plead for punitive damages in the complaint but may not specify an amount; and (2) bifurcated process to determine punitive damages.

Punitive damages are only awarded if plaintiff proves by clear and convincing evidence that harm was the result of defendant's willful, wanton, or reckless conduct.

In second state of the bifurcated trial, jury determines if defendant liable for punitive damages, and amount, if applicable. The factors for jury to consider in determining the amount of punitive damages:

- Defendant's degree of culpability;
- Severity of the harm caused by the defendant;
- Extent to which the plaintiffs own conduct contributed to harm;
- Duration of the conduct, the defendant's awareness, and any concealment;
- Similar past conduct;

- Profitability of the conduct to the defendant;
- Defendant's ability to pay;
- Likelihood the award will deter the defendant or others from like conduct;
- Awards of punitive damages against the defendant for same act or course of conduct;
- Criminal penalties against defendant for same act or course of conduct;
- Civil fines against defendant for same act or course of conduct.

Award must be specific to each defendant, and each defendant is liable only for the amount made against him or her.

With respect to limitations, these limitations cannot be disclosed to the jury. If the jury returns a verdict that exceeds these limits, the court shall enter judgment for the maximum amount allowed for under this statute.

First Limitation: punitive damages award may not exceed the greater of three times the amount of compensatory damages or \$500,000.

Second Limitations: punitive damages must not exceed the greater of four times the amount of compensatory damages or \$2 million dollars if: (1) the wrongful conduct proven under this section was motivated primarily by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was known or approved by the managing agent, director, officer, or the person responsible for making policy decisions on behalf of the defendant; or (2) the defendant's actions could subject the defendant to conviction of a felony and that act or course of conduct is a proximate cause of the plaintiffs damages

Limitations on punitive damages are not applied if: (1) at the time of injury the defendant had an intent to harm and determines that the defendant's conduct did in fact harm the claimant; or (2) the defendant has pled guilty to or been convicted of a felony arising out of the same act or course of conduct complained of by the plaintiff and that act or course of conduct is a proximate cause of the plaintiffs damages; or (3) the defendant acted or failed to act while under the influence of alcohol, drugs, other than lawfully prescribed drugs administered in accordance with a prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to the degree that the defendant's judgment is substantially impaired.

The consumer price index is to be applied to the amount recoverable for punitive damages.

### **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.

## **TENNESSEE**

### **2013 – S.B. 222**

Authorized the award of punitive damages in a civil action against a defendant based on vicarious liability only if the finder of fact determines by clear and convincing evidence that the act or omission was committed by a person employed in a management capacity while that person was acting within the scope of employment, the defendant was reckless in hiring or retaining the agent or employee, and the defendant authorized or approved the act with knowledge or conscious disregard that the act may result in the loss or injury.

**2011—HB 2008/SB 1522**

Limited punitive damages to two times compensatory damages or \$500,000, whichever is greater. Prohibited the award of punitive damages against the seller of the product, with certain exceptions and prohibited the award of punitive damages against drug or device manufacturers when the product was manufactured in accordance with relevant Federal law, with certain exceptions. Prohibited 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. The limit does not apply if the defendant had a specific intent to inflict serious physical injury, and the defendant's intentional conduct did, in fact, injure the plaintiff.

**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**

**2011—SB 1**

Limited punitive damages to \$200,000 or two times compensatory damages, whichever is greater.

**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-three states have modified the rules for awarding noneconomic damages. Four states have had reforms struck down as unconstitutional and have not enacted additional reforms.*

## 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

### 2005—SB 67

Lowered the limit on noneconomic damages in medical liability cases to \$250,000. In the most severe cases involving disfigurement, severe impairment, and wrongful death, the limit on noneconomic damages is \$400,000.

### 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

### 2004—SB 115

Limited noneconomic damages in breach of contract claims by specifying that noneconomic damages may only be recovered for breach of contract when recovery of such damages is specifically authorized in the contract that is the subject of the claim. The only other circumstance under which noneconomic damages may be recovered is for any first-party claim brought against an insurer for breach of an insurance contract and that the defendant willfully and wantonly breached the contract.

**2003—HB 1012**

Limited the award of noneconomic damages to \$300,000 in medical liability cases.

**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**

**2003 --CS/SB 2-D**

Provided for emergency room practitioner limits on noneconomic damages of \$150,000 per claimant, with an aggregate of \$300,000. Provided for emergency room facility limits on noneconomic damages of \$750,000 per claimant, with an aggregate of \$1.5 million and full setoffs for practitioner payments. Provided for non-practitioner limits on noneconomic damages of \$750,000 per claimant, with an aggregate for all claimants. Provided for practitioner limits on noneconomic damages of \$500,000 per claimant, with an aggregate limit for all claimants of \$1 million, but no single practitioner shall be liable for more than \$500,000 regardless of the number of claimants.

**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.*

## GEORGIA

### 2005—SB 3

Limited noneconomic damages to \$350,000 per healthcare provider, with an overall aggregate limit of \$1.05 million.

*The Georgia Supreme Court found the limit on noneconomic damages unconstitutional in Atlanta Oculoplastic Surgery, PC v. Nestlehutt, et. al, 286 Ga. 731, 691 S.E.2d 218. (2010)*

## 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

### 2005—SB 475

Limited the award of noneconomic damages in medical liability cases to \$500,000 per physician and \$1 million per hospital.

*Held unconstitutional by the Illinois Supreme Court in LeBron v. Gottlieb Mem. Hosp., 930 N.E.2d 895 (Ill. 2010).*

### 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

### 2004—HB 13 (special session)

Limited the recovery of noneconomic damages in all civil cases, with the exception of medical liability actions, to \$1 million.

Established a hard cap of \$500,000 on noneconomic damages in medical liability cases (the \$500,000 cap that was passed during a special session in 2002 contained an escalator clause which would have raised the cap to \$750,000 in 2011 and \$1 million in 2017).

### 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.

#### MISSOURI

##### 2005—HB 393

Limited the award of noneconomic damages in medical liability cases to \$350,000 regardless of the number of defendants in the case.

#### 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.

#### NORTH CAROLINA

##### 2011 – SB 33

Limited 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.

#### 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.

#### 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.*

## OHIO

### **2004-Am. Sub. SB 80**

Limited noneconomic damages in cases involving noncatastrophic injuries to the greater of \$250,000 or three times economic damages up to \$350,000, per plaintiff, with a maximum limit of \$500,000 per occurrence. Limits applied to all cases but medical liability cases. Specified that juries may not consider the following when determining noneconomic damages: (1) evidence of a defendant's alleged wrongdoing, misconduct or guilt; (2) evidence of the defendant's wealth or financial resources; (3) all other evidence that is offered for the purpose of punishing the defendant. Finally, S.B. 80 specified procedures and guidelines, based on ALEC's Full and Fair Noneconomic Damages Act, for trial courts to review (upon a motion) noneconomic damage awards.

### **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

### **2011-HB 2128**

Reduced 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. Did not impact damages such as lost wages, medical expenses and future loss of expected wages, and laid out exceptions to the limit in case of gross negligence, reckless disregard, intentional actions, or malicious conduct.

### **2009 – HB 1063**

Provided that in any civil action arising from a claimed bodily injury, the amount of compensation which a trier of fact may award a plaintiff for noneconomic loss shall not exceed \$400,000, except under certain circumstances.

*Held unconstitutional by the Oklahoma Supreme Court in Douglas v. Cox Retirement Properties, June 2013.*

**2004—HB 2661**

Limited noneconomic damages to \$300,000 in medical liability cases provided the defendant made an offer of judgment and the amount of the verdict is less than one-and-a-half times the amount of the final offer of judgment. Indexed the limit to inflation. Noneconomic damages do not include, by definition, exemplary damages. Limit on noneconomic damages may be lifted if nine or more members of the jury find by clear and convincing evidence that the defendant committed negligence or if nine or more members of the jury find by a preponderance of the evidence that the conduct of the defendant was willful or wanton. Provided, however, that the judge must, before submitting such determination to the jury, make a threshold determination that there is evidence from which the jury could reasonable make the findings set forth in the case. Provided that if the jury returns a verdict that is greater than \$300,000 but less than one-and-a-half times the amount of the final offer of judgment, the court shall submit additional forms of possible verdicts to the jury covering possible determinations of negligence and/or willful and wanton conduct. Provided that limited do not apply to wrongful death action.

*Provisions of this section sunsets on November 1, 2010.*

Ob/gyn's and emergency room care: Extended the sunset provisions on the limit on noneconomic damages for ob/gyn's and emergency care situations (SB 629, 2003) from July 1, 2008 until November 1, 2010.

**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.*

**SOUTH CAROLINA**

**2005—S83**

Limited noneconomic damages in medical liability cases to \$350,000 per provider, with an overall aggregate limit of \$1.05 million.

**TENNESSEE**

**2011—HB 2008 / SB 1522**

Limited noneconomic damages to \$750,000 per occurrence in medical liability actions, and provided for a limit of \$1 million if the injury or loss is catastrophic in nature. The limit does not apply if the defendant had a specific intent to inflict serious physical injury, and the defendant's intentional conduct did, in fact, injure the plaintiff.

**TEXAS**

**2003—H.J.R. 3 (PROPOSITION 12)**

Constitutional amendment that provided the Texas Legislature with the authority to place limits on noneconomic damages.



**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 facilities, creating in effect an overall limit of noneconomic damages in medical malpractice cases of \$750,000.

**UTAH**

**2010—S.B. 145**

Provided for limit on noneconomic damages in medical liability cases of \$350,000 for causes of action arising after May 15, 2010.

**2001—SB 129**

Modified the limit on noneconomic damages in medical liability cases. For a cause of action arising before July 1, 2001, limited noneconomic damages to \$250,000. For a cause of action arising on or after July 1, 2001 and before July 1, 2002, the limit is adjusted to \$400,000. For a cause of action arising on or after July 1, 2002, the limit shall be adjusted for inflation by July 15 of each year. Limits are to be rounded to the nearest \$10,000 and apply to a cause of action arising on or after the date the annual adjustment is made. Inflation is defined as the seasonally adjusted consumer price index for all urban consumers as published by the Bureau of Labor Statistics of the United States Department of Labor.

**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**

**2007—SB 194**

Limited appeal bond amounts to \$50 million, adjusted for inflation.

**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**

**2012 - S.B. 202**

Eliminated punitive and compensatory damages under the Wisconsin Fair Employment Act (WFEA) – a 2009 invention in Wisconsin law. This forced Wisconsin employers to not only defend WFEA claims in the administrative hearing process, but also then re-litigate the same case in State Court in a full jury trial (or in a new trial to the court) in defense of potential punitive and compensatory damages, and additional costs and attorney fees. At the same time, Wisconsin employers continued to be forced to defend simultaneously cross-filed claims under federal laws based on the same facts and alleged types of claims before federal agencies, and then in state or federal court under federal law. The

types of damages WFEA made available were already accessible under several federal statutes under which much litigation came.

**2006—AB 1073**

Limited the award of noneconomic damages in medical liability cases to \$750,000.

**1995—AB 36**

Limited the award of noneconomic damages in medical liability cases to \$350,000, indexed for inflation.

*The Wisconsin Supreme Court held the limit on noneconomic damages unconstitutional in Matthew Ferdon v. Wisconsin Patients Compensation Fund (2003AP988).*

**WYOMING**

**2007—HB 196**

Limited appeal bond amounts to \$25 million. Contained \$2 million limit for individuals or small businesses defined as an employer with 50 or fewer employees.

# 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.

*Twenty states have enacted prejudgment interest reforms.*

## ALABAMA

### **2011—S.B. 207**

Changed the interest rate on judgments from 12% to 7.5%.

## 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.

## FLORIDA

### **2011—H.B. 267**

Provided 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.

## 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

### 2005—HB 393

Specified that prejudgment interest is to be calculated at an interest rate equal to the Federal Funds Rate plus three percent.

### 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.

## OHIO

### 2003—HB 212

Changed the pre-judgment interest rate from a flat ten percent per annum, to a rate based upon the federal short-term rate, unless a written contract provides a different rate of interest. Changed the rules on when pre-judgment interest may accrue.

## OKLAHOMA

### 2013 – S.B. 1080

Provided that if a rate of interest is specified in a contract and does not exceed the lawful rate, postjudgment interest shall be calculated at the contractual rate.

### 2009—HB 1603

Provided that prejudgment interest does not begin to accrue until two years after the beginning of a lawsuit; reduced the interest rate charged.

*Held unconstitutional by the Oklahoma Supreme Court in Douglas v. Cox Retirement Properties, June 2013.*

### 2004—HB 2661

Set postjudgment and prejudgment interest rate at the prime rate plus 2 percent (effective January 1, 2005).

### 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.

**TENNESSEE**

**2012- HB 2982**

This bill established the Federal Reserve weekly average prime loan rate as the standard interest rate on judgments so long as such rate does not exceed 10%.

**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.

**WEST VIRGINIA**

**2006—SB 576**

Set the prejudgment interest rate with a floor of 7% and a ceiling of 11%.

**WISCONSIN**

**2011—Special Session SB 14**

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

□□□

# 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.

*Nineteen states have enacted laws specifically to address product liability. Three states have had reforms struck down as unconstitutional and have not enacted additional reforms.*

## ALABAMA

### 2011—S.B. 184

Provided for innocent seller protections which, in general, prohibits product liability actions against parties who were not the manufacturer of the product. If the suit is brought against a retailer or distributor because the manufacturer is unknown and the retailer or distributor is needed to provide discovery concerning the manufacturer's identity, the bill provided a mechanism to accomplish this in a reasonable manner so that the suit can proceed against the appropriate manufacturer.

## 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**

##### **2004—HB 13 (special session)**

Provided that the seller of a product, other than a manufacturer, cannot be held liable unless the seller had substantial control over the harm causing aspect of the product, the harm was caused by a seller's alteration or modification of the product, the seller had actual knowledge of the defective condition at the time the product was sold, or the seller made an express warranty about the aspect of the product which caused the plaintiff's harm.

**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

### 2004—Am. Sub. SB 80

Provided for a ten-year statute of repose for product liability actions, with certain exceptions. Abolished the “consumer expectation test” as an independent test to prove design defect in product liability cases. Modified the risk/utility test, which is now the sole test for providing all design defect product liability cases. Established that product liability cases may only be brought pursuant to Ohio statutes, and that common law product liability theories are abolished.

### 2002-SB 120

Allowed evidence of a plaintiff’s comparative fault as a defense reducing defendants’ liability in all strict liability in product liability cases.

### 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.

## OKLAHOMA

### 2009—HB 1603

Reduced the exposure of manufacturers to products liability lawsuits by ensuring that a manufacturer shall not be liable if the product is inherently unsafe and restricting admissibility of evidence. Stated that in a product liability action, “if measures are taken which, if taken previously, would have made an event less like to occur, evidence of the subsequent measures is not admissible to prove a defect in a product, negligence, or culpable conduct in connections with the event.”

*Held unconstitutional by the Oklahoma Supreme Court in Douglas v. Cox Retirement Properties, June 2013.*

**2013- S.B. 13**

States that in a product liability action, a manufacturer or seller shall not be liable if the product is inherently unsafe and known to be unsafe by the ordinary consumer. Sets out the defenses to be used in such cases. For purposes of this section, the term “product liability action” does not include an action based on manufacturing defect or breach of the warranty. States that in a product liability action, “if measures are taken which, if taken previously, would have made an event less likely to occur, evidence of the subsequent measures in not admissible to prove a defect in a product, negligence, or culpable conduct in connections with the event.

**TENNESSEE**

**2011—HB 2008 / SB 1522**

Provided for an innocent seller provision which prohibits product liability action against parties who were not the manufacturer of the product.

**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.

**WISCONSIN**

**2011—SB 1**

Required proof of a “reasonable alternative design” in an alleged defective design of a product, moving Wisconsin away from the broad “consumer expectation” test.

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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 reform can more equitably balance the interests of plaintiffs and the defendant.

*Eleven 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.

## ARIZONA

### 2013 – S.B. 1346

Allowed for interlocutory appeal of class certification. If the court certifies the class, it is required to certify its action in writing, outlining why the action should be maintained as a class (including providing evidence in support of determination). If an appeal is filed, all discovery and other proceedings shall be stayed, except that if a party makes a motion, the court may permit discovery proceedings to continue during the pendency of the appeal. Finally, provided for the trial court to make appropriate orders governing the management of the proceedings and provide for appropriate orders for the protection of class members during the trial proceedings.

## COLORADO

### 2003—HB 03-1027

Provided for the interlocutory appeal of class action certification.

## GEORGIA

### 2005—SB 19

Specified detailed procedures for the filing and certification of class action lawsuits. Provided for the interlocutory appeal of class action certifications.

### 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.

#### **FLORIDA**

##### **2009—SB 2198**

Provided that a stay of judgment is executed during interlocutory appeal.

##### **2006—HB 7529**

Established venue reform to prohibit out-of-state residents from filing class action lawsuits in Florida courts unless the claim occurred or emanated from the state. Required claimants to prove actual damages in order to maintain certain types of class actions. Would not preclude the Attorney General from bringing a class action to cover statutory penalties.

#### **KANSAS**

##### **2004—HB 2764**

Provided for the interlocutory appeal of class action certifications.

#### **LOUISIANA**

##### **2013 – H.B. 472**

Provided that a class action cannot be maintained if the court would be required to look at the merits of any individual class member's claim to determine whether or not the individual would fall within the defined class. Furthermore, at the hearing on the motion to certify a class action, the plaintiff bears the burden of proof.

##### **2012 - HB 464**

Provided that when two or more actions requesting the same certification of a class are filed in two or more Louisiana courts regarding the same transaction or occurrence at the same location, and such classes would encompass one or more of the same plaintiffs suing in the same capacities against the same defendants, the defendant may have all such actions transferred to the district court where the event occurred. Provided that when two or more actions requesting certification of a class are filed in two or more Louisiana courts regarding multiple related transactions or occurrences in different locations, the defendant may have all such actions transferred to the district court where the first suit was brought. Also, if within 30 days of certification of a class action, there were related putative class actions pending, they may be transferred to the court where the related action has been certified. Defined domicile for venue purposes, with regards to a corporation or business, as either the state of formation or the state of its principal place of business, whichever is most pertinent to the particular issue.

##### **1997—HB 1984**

Updated Louisiana class action laws by providing objective definitions of class action terms, and detailed procedures for class action cases.

#### **MISSOURI**

##### **2004—HB 1211**

Provided for the interlocutory appeal of class certifications.

**OHIO**

**1998—HB 394**

Provided for the interlocutory appeal of class action certification.

**OKLAHOMA**

**2011—SB 704**

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

**2009—HB 1603**

Streamlined process for determining classes; allowed for quicker appeal of class determination; defined who can be a member of a class action lawsuit; set up a procedure for the court to determine class attorneys and fees to be paid; allowed for the court to appoint an independent attorney to represent the class in any dispute over attorney fees; and, provided that settlements in which coupons are awarded, the attorney shall also receive his fee in coupons.

*Held unconstitutional by the Oklahoma Supreme Court in Douglas v. Cox Retirement Properties, June 2013.*

**2013 – S.B. 16**

Defines who can be a member of a class and set a procedure for the court to determine class attorneys and fees to be paid. Allows the court to appoint an independent attorney to represent the class in any dispute over attorneys' fees. Provides that in coupon settlements, the attorney shall receive fee in coupons.

**TENNESSEE**

**2011—HB 2008 / SB 1522**

Provided for the interlocutory appeal of class action certification.

**TEXAS**

**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."

*Fifteen states have adopted this proposal.*

## ALABAMA

### 2013 - H.B. 227

Provided that any state entity seeking to enter into a contingency fee contract must make a written determination that such representation is both cost-effective and in the public interest. This must include details about whether the state has sufficient legal and financial resources to handle the matter on its own without a contingency fee contract; the expected time and labor required, as well as the complexity and skill necessary to handle the issues; and the amount of experience desired for the particular attorney services and the nature of private attorney's experience with similar matters. Mandated that a government attorney retains complete control over the litigation; the government attorney has supervisory authority, retains veto power over any decisions by private attorneys, may be contacted directly by defendants, must attend all settlement conferences, and has exclusive discretion over settlement decisions. Contingency fees limited to 22 percent of the first \$10 million; plus 20 percent of the next \$15 million; plus 16 percent of the next \$25 million; plus 12 percent of the next \$25 million; plus 8 percent of the next \$25 million; plus 7.1 percent of any recovery exceeding \$100 million. Total fees are capped at \$75 million per action. Contingency fee attorneys must keep detailed records of expenses and time spent on a case, which would be available to the state for inspection. The contingency fee contract and all payments made are to be posted on the state's Open Alabama website.

## ARIZONA

### 2011—HB 2423

Barred 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. Limited 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.

### 2012- SB 1132

Limited contingency fees by prohibiting the state from entering into a contingency fee contract providing for the state's private attorney to receive a contingency fee from this state's portion of the recovery. Also required posting of executed contingency fees contracts unless the attorney general

determines that the posting may cause damage to the reputation of any business or person. Allowed for settlement conferences to take place over the phone.

## **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.

## **CONNECTICUT**

### **2005—HB 7502 (SEC. 104)**

Required proposals or requests for qualification and negotiation procedures for any contract between the Attorney General or state agency and private attorneys in which the contingency fee is reasonably expected to exceed \$250,000. Specified that the Attorney General is to develop such procedures and qualifications.

## **FLORIDA**

### **2010—H.B. 437**

Prohibited the Department of Legal Affairs of the Office of the Attorney General from entering into contingency fee contracts with private attorneys unless the Attorney General made a written determination prior to entering into such a contract that contingency fee representation was both cost effective and in the public interest. Required the Attorney General, upon making his or her written determination, to request proposals from private attorneys to represent the Department of Legal Affairs on contingency-fee basis unless the Attorney General determined in writing that requesting such proposals were not feasible under the circumstances. Provided that written determination did constitute final agency action, and provided that requests for proposals and contract awards were not subject to challenge under the Administrative Procedure Act. Required maintenance of specified records, limited the amount of contingency fee that may be paid to private attorney pursuant to contract with the Department of Legal Affairs, and required Internet posting of specified information

## **IOWA**

### **2012- HF 563**

Provided that the state shall not enter into a contingency fee contract with a private attorney unless the Attorney General makes a written determination prior to entering into the contract, that contingency fee representation is both cost-effective and in the public interest. Limited the aggregate contingency fee a private attorney can receive to 25% of any recovery up to \$10 million, 20% of any recovery between \$10-\$15 million, 15% of any recovery between \$15-\$20 million, 10% of any portion between \$20-\$25 million, and 5% of any recovery that exceeds \$25 million. In no event shall the aggregate contingency fee of any recovery exceed \$50 million. Allowed the caps to be waived if approved by the majority of the state Executive Council (Governor, Secretary of State,

Auditor, Treasurer, and Secretary of Agriculture). Required the contract, payments made under the contract, and the attorney general's written determinations to be posted on the attorney general's website.

#### INDIANA

##### **2011 – SB 124**

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

#### 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.

#### MINNESOTA

##### **2005—HF 1481 (ARTICLE 2 ,SEC. 5 {8.065})**

Specified that the attorney general may not enter into a contract for legal services in which the fees and expenses paid by the state, or can reasonably be expected to exceed \$1 million unless the attorney general first submits the proposed contract to the Legislative Advisory Commission, and waits at least 20 days to receive a possible recommendation from the commission.

#### MISSISSIPPI

##### **2012- HB 211**

Enacted conditions required of the Attorney General before entering into a contingency fee contract for legal services. Required public notice of contracts entered into and contingency fees paid, and places incremental restrictions upon the amount of contingency fees that can be paid out of a specific recovery amount.

#### MISSOURI

##### **2011 – SB 59 (S.B. 59 (Sections 34.376, 34.378, and 34.380))**

Prohibited 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 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.

#### **WEST VIRGINIA**

##### **2008—HB 104 (1<sup>st</sup> Extraordinary Session)**

Required the Attorney General to notify the Governor and Legislature when filing a lawsuit and when entering into settlement negotiations.

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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.

*Forty states have adopted this proposal.*

## ALABAMA

### 2006 – HB 220

Limited the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to \$125 million.

## ARIZONA

### 2011-SB 1212

Limited the amount a defendant can be required to pay to secure the right to appeal to the lesser of the following: damages awarded, excluding punitive damages; 50% of the appellant's net worth; or \$25 million.

## ARKANSAS

### 2003 —HB 1038

Limited the amount a defendant can be required to pay to secure the right to appeal to \$25 million.

## CALIFORNIA

### 2003 -- AB 1752

Limited the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to \$150 million and applies to all judgments in civil litigation regardless of legal theory.

## COLORADO

### 2003—HB 1366

Limited the amount a defendant can be required to pay to secure the right to appeal to \$25 million.

## FLORIDA

### 2006—HB 841

Limited the appeal bond amount in any civil action, except for certified class actions subject to 768.733, to \$50 million.

**2003—S 2826**

Limited the amount a signatory to the Master Settlement Agreement 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**

**2004—SB 411**

Expanded the cap of \$25 million on appeal bonds that applied to punitive damages and expanded the cap to cover all forms of judgments in all civil cases.

**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.

**HAWAII**

**2006—HB 3250**

Limited the appeal bond to \$25 million, regardless of the amount of judgment. Provided a provision for small businesses that limit the appeal bond to \$1 million.

**2004—SB 2840**

Limited the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to \$150 million.

**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.

**IOWA**

**2004—SF 2306**

Limited the amount a defendant can be required to pay to secure the right to appeal to \$100 million.

## KANSAS

### 2005—HB 2457 (SUB)

Provides that if the appellant proves by a preponderance of the evidence that setting the supersedeas bond at the full amount of the judgment will result in the appellant suffering an undue hardship or a denial of the right to appeal, the court may reduce the amount of the bond as follows: (1) if the judgment is less than or equal to \$1 million, the supersedeas bond shall be set at the full amount of the judgment; or (2) if the judgment exceeds \$1 million in value, the supersedeas bond shall be set at a total of \$1 million plus 25 percent of any amount in excess of \$1 million.

### 2003—SB 48

Limited the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to \$25 million.

## KENTUCKY

### 2007—HB 426

Limited total appeal bond required collectively of all appellants during the appeal of a civil action to one hundred million dollars (\$100,000,000) in the aggregate, regardless of the amount of the judgment.

### 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

### 2003—HB 1819

Broadened the cap provided in HB 1807 (2001) to cover affiliates of signatories to the Master Settlement Agreement.

### 2001—HB 1807

Limited the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to \$50 million.

## 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.

## MINNESOTA

### 2004—HF 1425

Limited the amount a defendant can be required to pay to secure the right to appeal to \$100 million.

## MISSISSIPPI

### 2001

The Mississippi Supreme Court, acting on its own motion (Rule 8), provided for a limit of the lesser of: (1) 125% of the judgment; (2) 10% of the defendants net worth; or (3) \$100 million. The limits only apply to secure the right to appeal punitive damages judgments for signatories to the Master Settlement Agreement.

## MISSOURI

### 2005—HB 393

Limited the amount all defendants can be required to pay to secure the right to appeal to \$50 million.

### 2003—SB 242

Limited the amount signatories to the Master Settlement Agreement can be required to pay to secure the right to appeal to \$50 million.

## MONTANA

### 2013 – H.B. 224

Limited the amount all defendants can be required to pay to secure the right to appeal to \$25 million.

## NEBRASKA

### 2004—LB 1207

Limited the amount a defendant can be required to pay to secure the right to appeal to the lesser of the amount of the judgment, 50 percent of the appellant's net worth, or \$50 million.

## NEVADA

### 2001 —AB 576

Limited the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to \$50 million.

## NEW JERSEY

### 2003—SB 2738

Limited the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to \$50 million.



## NEW MEXICO

### 2007—SB 335

Established a maximum bond amount of one-hundred million (100,000,000) dollars on supersedeas bonds required of signatories to the master settlement agreement.

## NORTH CAROLINA

### 2003 —SB 784

Limited the amount a defendant can be required to pay to secure the right to appeal to \$25 million regardless of legal theory. Provided that foreign judgments cannot be executed in North Carolina if appeal is pending in a foreign jurisdiction or the judgment has been stayed by the court that rendered it and a bond has been posted.

### 2000 —SB 2

Limited the amount a defendant can be required to pay to secure the right to appeal to \$25 million. Provided that limits on bond appeals for out-of-state judgments apply during the stay period only.

## NORTH DAKOTA

### 2005—SB 2773

Limited the amount a defendant can be required to pay to secure the right to appeal to \$25 million.

## OHIO

### 2002—HB 161

Limited the amount a defendant can be required to pay to secure the right to appeal to \$50 million.

## OKLAHOMA

### 2009—HB 1603

Limited the amount a defendant can be required to pay to secure the right to appeal to \$25 million. Eliminated the bonding requirement to appeal a punitive damages judgment.

*Held unconstitutional by the Oklahoma Supreme Court in Douglas v. Cox Retirement Properties, June 2013.*

### 2001—SB 372

Limited the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to \$25 million.

## OREGON

### 2003—HB 2368

Limited the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to \$150 million.

## PENNSYLVANIA

### 2003—HB 1718

Limited the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to \$100 million.

## RHODE ISLAND

### 2008—HB 2509 –

Limited the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to \$50 million.

## SOUTH CAROLINA

### 2011—H 3775

Limited the amount a defendant can be required to pay to secure the right to appeal to \$25 million for businesses with 50 or more employees and gross revenues of over \$5 million, and \$1 million for all other entities.

### 2004—H 4823

Provided that judgments are to be stayed during the appeal of a judgment by signatories to the Master Settlement Agreement. Such defendants are not required to post an appeal bond.

## SOUTH DAKOTA

### 2003—Rule 03-13

The South Dakota Supreme Court, acting on its own motion, imposed a \$25 million limit on the amount a defendant can be required to pay to secure the right to appeal.

## TENNESSEE

### 2011—HB 2008 / SB 1522

Lowered the amount a defendant can be required to be to secure the right to appeal from \$75 million to \$25 million.

### 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.

## UTAH

### **2005—SUPREME COURT ORDER 2005-03-22 (AMENDING URCP 62)**

Limited the amount a defendant can be required to pay to secure the right to appeal compensatory damages to \$25 million in class actions or actions involving multiple plaintiffs in which compensatory damages are not proved for each plaintiff individually.

Provided that in all actions, there is no bonding requirement to appeal a punitive damages award.

## VIRGINIA

### **2004—HB 430/SB 172**

Expanded limit of \$25 million on appeal bond amounts for punitive damages to apply to appeal bond amounts for all forms of damages.

### **2000 —HB 1547**

Limited the amount a defendant can be required to pay to secure the right to appeal to \$25 million. The reform applied to out-of-state judgments during the stay period only.

## WASHINGTON

### **2006—SB 6541**

Limited the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to \$100 million.

## WEST VIRGINIA

### **2007—SB 194**

Limited appeal bond amounts to \$50 million, adjusted for inflation

### **2001—SB 661**

Limited the amount a signatory to the Master Settlement Agreement 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.

## WISCONSIN

### **2003—AB 548**

Limited the amount a defendant can be required to pay to secure the right to appeal to \$100 million.

## WYOMING

### **2007—HB 196**

Limited appeal bond amounts to \$25 million; contained \$2 million limit for individuals or small businesses defined as an employer with 50 or fewer employees.

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# 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 give allow 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.

*Fourteen states have enacted reform.*

## ALABAMA

### 2005—S.B. 97

Provides the right to one automatic postponement with the requirement that service be rescheduled within six months of the original summons. Protects small businesses (defined as having five or fewer full time employees) by requiring the court to postpone and reschedule the service of an employee of a small business if another employee of that employer is already serving. Limits the frequency of service to no more than once every two years. Prohibits an employer from taking any adverse employment action against an employee solely because the person serves on a jury. Clarifies that employers may not require an employee to use annual, vacation, or sick leave time for the period in which he or she leaves. Sets stricter for prospective jurors to be excused from service. Increases the maximum fine for contempt for failure to appear from \$100 to \$300.

## ARIZONA

### 2012- SB 1142

Allowed jurors of lengthy trials to begin being paid at the higher rate on the first day of service, instead of the fourth day, if their employer does not compensate them.

**2006—H.B. 2133**

Modified key provisions of ALEC’s Jury Patriotism Act that was adopted in 2003 to make jurors eligible to receive compensation from the lengthy trial fund (up to \$300 per day) for those who serve on juries for more than five days. In such circumstances, jurors would then receive additional compensation beginning from the fourth day served.

**2005—H.B. 2305**

Amended criteria for perspective jurors to be excused from service by permitting a person who is at least 75 years of age to have the option to be temporarily or permanently excused from service. Provided that a judge or jury commissioner may temporarily excuse a prospective juror for good cause, such as a lack of transportation or absence from the jurisdiction. Included technical changes to the statement required for verification of the medical need for an excuse due to a mental or physical condition that makes the prospective juror unfit for service.

**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.

**COLORADO**

**2004—HB 1159**

Established stricter criteria for jurors to be excused from services. Provided protections for small business by allowing employees of small businesses to reschedule service if another employee from the same firm already is serving on a jury.

**INDIANA**

**2009 – H.B. 1686**

Provided that an individual at least 75 years of age may be exempted from jury duty if the individual requests an exemption from jury duty.

**2006—SB 232**

Provided a one-time postponement to another date within one year upon a showing of hardship, extreme inconvenience, or necessity.

Protected an individual called for jury service who provides reasonable notice to his or her employer from being subjected to adverse employment action.

Prohibited employers from requiring or requesting employees to use annual leave for jury service. In addition, it eliminated automatic postponement from jury service including those for ferry-keepers and person employed in attendance at such ferry, people age 65 and older, government officials, legislators, armed services, veterinarians, dentists, Indianapolis School Board Members, and police and fire department members.

**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.

**MARYLAND**

**2005-HB 1185**

Increased juror compensation from \$15 to \$50 per day, after the fifth day of service. Provided leave time protections for employees.

**MISSISSIPPI**

**2006—SB 2488**

Postponed the enactment of the jury service portion of H.B. 13 (2004) until January 1, 2008.

**2004—HB 13 (special session)**

Established a lengthy trial fund to compensate jurors up to \$300 per day, starting on the eleventh day of service. In such circumstances, jurors who can show hardship may also receive compensation of up to \$100 per day from the fourth through tenth days of service. Specified circumstances under which jurors may be excused from service. Provided for penalties for those who fail to appear: fines up to \$500 and/or three days imprisonment, or alternatively community service.

## MISSOURI

### 2004—HB 1211

Provided for stricter criteria for jurors to be excused from service. Allowed one automatic postponement from service. Specified a maximum fine of \$500 for those who fail to appear for jury service. Provided for employee protections which prohibits employers from requiring employees to use personal or sick leave for time spent responding to a summons for jury duty. Provided for small business protections which required a court to reschedule the service of a summoned juror if the juror works for an employer with five or fewer employees and has another employee summoned during the same period.

## NEW MEXICO

### 2005—SB 240

Provided for: automatic postponement, allowing summoned jurors to reschedule service within six months of the original date; small business protections, allowing jurors who work for employers with fewer than five employees to postpone service if another employee is summoned within the same time period; leave time protection; and an expansion of juror source lists to include income tax filers. The legislation included a hardship standard, defining that an excused juror must demonstrate that participating in their service would (1) be required to abandon another person under the person's care or supervision due to the extreme difficulty of obtaining an appropriate substitute caregiver during the period of jury service; (2) incur costs that would have a substantial adverse impact on the payment of necessary daily living expenses of the person or the person's dependent; or (3) suffer physical hardship that would result in illness or disease. Hardship would not exist solely because a prospective juror will be absent from employment.

## OHIO

### 2004—SB 71

Provided jurors the right to automatically postpone service one time, allowing jurors to reschedule service within six months of the original date of the summons. Set stricter criteria for jurors to be excused from service. 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 from disciplining employees for responding to a jury service summons. Provided for small business protections which required a court to reschedule the service of a summoned juror if the juror works for an employer with 25 or fewer employees and has another employee summoned during the same period. Reduced the maximum period of availability for jury service from three weeks to two weeks. Provided for the establishment of an electronic notification system to alert jurors of the need to appear in person in court during the period of availability provided in the juror summons. Eliminated the maximum permitted daily juror compensation rate of \$40. Provided the Board of County Commissioners with authority to provide a higher rate of compensation. Increased the minimum fine of failure to appear for jury service from \$25 to \$100.

## OKLAHOMA

### 2004—SB 479

Provided jurors the right to automatically postpone service one time. Reduced the length of service from a two-week term to no more than one day unless selected to serve on a jury. Limited jury service to once every two years.

## OREGON

### 2011—HB 3034

Provided 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 have 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.

## TEXAS

### 2005—SB 1704

Increases juror pay in both civil and criminal cases from not less than \$6 per day to not less than \$40 per day, beginning on the second day of service. The increased compensation is to be financed by a \$4 fee placed on individuals convicted of a crime. Provides prospective jurors with one automatic postponement from service, in which cases prospective jurors are required to reschedule service within six months after the date of the original summons.

## 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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