



# Tort Reform Record

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The *TORT REFORM RECORD* is published every June and December to record the accomplishments of the latest legislative year. It includes a two-page, state-by-state summary of the ATRA-supported reforms enacted by the states since 1986.

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

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

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# Tort Reform Record At-A-Glance

	Punitive Damage Reform	Joint & Several Liability Reform	Prejudgement Interest Reform	Collateral Source Reform	Noneconomic Damage Reform	Product Liability Reform	Class Action Reform	Attorney Retention Sunshine	Appeal Bond Reform
Alabama	x			x		x			
Alaska	x	x	x	x	x				
Arizona	x	x		x					
Arkansas									
California	x	x				x			
Colorado	x	x	x	x	x				
Connecticut		x		x					
Delaware									
District of Columbia									
Florida	x	x		x	x	x			x
Georgia	x	x				x			x
Hawaii		x		x	x				
Idaho	x	x		x	x				
Illinois	x	x		x					
Indiana	x			x		x			
Iowa	x	x	x	x		x			
Kansas	x				x			x	
Kentucky		x		x					x
Louisiana	x	x	x			x	x		
Maine			x	x		x			
Maryland					x				
Massachusetts									
Michigan		x	x	x	x	x			
Minnesota	x	x	x	x	x				

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

\*Tennessee abolished joint and several liability by judicial decision

# THE RULE OF JOINT AND SEVERAL LIABILITY

When two or more defendants are responsible for a plaintiff's injury, the rule of joint and several liability makes each of them liable for the entire amount of damages regardless of the allocation of fault among defendants. This often produces unfair outcomes because a defendant who is only minimally responsible for a plaintiff's harm may have to pay the entire award since the defendant who is principally responsible is insolvent, uninsured or outside the jurisdiction of the court. Moreover, the rule often has the unintended effect of turning a lawsuit into a search for a peripherally involved party whose pockets are deep enough to pay a sizeable award. The rule of joint and several liability is superficially appealing because it increases the probability that a worthy claimant will be fully compensated. Its injustice, however, is apparent on even a moment's reflection. The peripheral defendant very fairly asks, "But why me?"

*ATRA recommends abolition of the rule of joint and several liability and adoption of a rule of pure several ("proportionate") liability.*

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

## ALASKA

### 1988—Proposition Two

Joint and several liability was abolished through a ballot initiative on November 8, 1988.

## ARIZONA

### 1987—SB 1036

Abolished joint and several liability 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.*

## CALIFORNIA

### 1986—Proposition 51

Abolished joint and several liability for noneconomic damages.

## COLORADO

### 1986—SB 70

Abolished joint and several liability (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

-- Modified joint and several liability to prohibit joint liability except where liable party's share of judgement is uncollectible. (1987 legislation by opposition limited this reform to noneconomic damages only.)

## FLORIDA

### 1999—HB 775

Provides for a multi-tiered approach for applying limits on 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

Abolished joint and several liability for noneconomic damages in negligence actions. Also abolished for economic damages for defendants less at fault than the plaintiff. This rule does not apply for economic damages for pollution, intentional torts, actions governed by a specific statute providing for joint and several liability, or actions involving damages no greater than \$25,000.

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

## GEORGIA

### 1987—HB 1

Eliminates joint and several liability when a plaintiff is assessed a portion of the fault.

## HAWAII

### 1994—HB 1088

Abolished joint and several liability for all governmental entities.

**1986—SB S1**

Joint and several liability abolished for low fault defendants (25% of fault or less). Applies for noneconomic damages only. Does not apply to auto, product, or environmental cases.

**IDAHO**

**1990—HB 744**

The term "acting in concert" defined as pursuing a common plan or design which results in the commission of an intentional or reckless tortious act as used in the 1987 joint and several liability modification.

**1987—SB 1223**

Joint and several liability abolished except in cases of intentional torts, hazardous waste, and medical and pharmaceutical products.

**ILLINOIS**

**1995—HB 20**

Abolished joint liability for economic and noneconomic damages so that a given defendant is only liable for damages in proportion to the assigned degree of fault.

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

**1986—SB 1200**

Abolished joint and several for defendants 25% or less at fault; applies for noneconomic damages only, but does not apply to auto, product, or environmental cases.

**IOWA**

**1997—HF 693**

Amended the 1987 statute on the doctrine of joint liability to provide that defendants 50% or more at fault are jointly liable for economic damages only.

**1985**

Abolished joint liability for defendants who are less than 50% responsible.

**KENTUCKY**

**1996—HB 21**

Abolished joint liability in all civil actions so that a given defendant is only liable for damages in proportion to the assigned degree of fault.

**1988—HB 551**

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

## LOUISIANA

### 1996—HB 21

Abolishes joint liability in all civil actions

## MICHIGAN

### 1995—HB 4508

Abolished joint liability making parties responsible for their own percentage of fault except for employers' vicarious liability. In medical malpractice cases where the plaintiff is determined not to have a percentage of fault, defendants are jointly liable. Provides venue control in product liability cases.

### 1986—HB 5154

Limited joint and several liability (except in products liability actions and actions involving a blame-free plaintiff), held defendants severally liable except when uncollectible shares of a judgment are reallocated between solvent co-defendants according to their degree of negligence. Joint and several liability was abolished for municipalities.

## MINNESOTA

### 1988—HF 1493

Limited joint and several liability for those who are 15% or less responsible—they pay no more than *four times* their share.

## MISSISSIPPI

### 1989—HB 1171

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

## MISSOURI

### 1987—HB 700

Limited several liability *only* when 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 less than 50% at fault. Revises 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. Allows those defendants to intervene in the action to defend against claims affirmatively asserted.

**1997—HB 572**

Abolished joint liability, and retains the modified comparative fault system.

*Takes effect only if HB 571 is held unconstitutional.*

**1995—SB 212**

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

**1987—SB 51**

Abolished joint liability for defendants who are 50% or less responsible.

**NEBRASKA**

**1991—LB 88**

Modified the joint and several liability doctrine by replacing current 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; and eliminates joint and several liability for noneconomic damages for all defendants in all types of cases.

**NEVADA**

**1987—SB 511**

Abolished joint and several liability for both economic and noneconomic damages except in product cases; cases involving toxic wastes; cases involving intentional torts; and cases where defendants acted in concert.

**NEW HAMPSHIRE**

**1989—SB 110**

Abolished joint and several liability for defendants who are less than 50% responsible.

**NEW JERSEY**

**1995—SB 1494**

Provides a 60% threshold for joint and several liability for both economic and noneconomic damages, and contains a toxic tort exception. Previous law extended the 60% threshold for noneconomic damages only.

**1987—SB 2703, SB 2708**

Modified joint and several liability. If the defendant is found to be less than 20% liable, the defendant is held responsible for his degree of fault; between 20% and 60% the defendant can be held responsible for full economic damages and only his share of noneconomic damages; and over 60% the defendant can be held liable for payment of all damages.



## NEW MEXICO

### 1987—SB 164

Codified common law application of several liability 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

Limited joint and several liability; a defendant who is 50% or less at fault is only severally liable for noneconomic damages. However, the limitation does not apply to actions in reckless disregard of rights of others, motor vehicle cases, actions involving the release of toxic substances into the environment, intentional torts, contract cases, products liability cases where the manufacturer could not be joined, and construction cases and other specific actions.

## NORTH DAKOTA

### 1987—HB 1571

Abolished joint and several liability except for intentional torts, cases in which defendants acted in concert, and products liability cases.

## OHIO

### 1996—HB 350

Abolished joint and several liability except for defendants who are more than 50% at fault who would then be jointly liable for *economic* damages only.

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

### 1987—HB 1

Abolished joint and several liability for noneconomic damages when the plaintiff is also assessed a portion of the fault.

## OREGON

### 1995—SB 601

Abolished joint liability except for cases in which one of the defendants within one year of the final judgement is determined to be insolvent. In those cases, a defendant less than 20% at fault would be liable for no more than two times their original exposure and defendant more than 20% liable would be liable for the full amount of damages.

### 1987—SB 323

Abolished joint and several liability with regard to noneconomic damages and a 15% threshold for economic damages.

## **SOUTH DAKOTA**

### **1987—SB 263**

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

## **TEXAS**

### **1995—SB 28**

Eliminated joint liability for defendants less than 51% at fault.

### **1987—SB 5**

Abolished joint liability for those who are 20% or less responsible except when plaintiff is fault free and 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**

Totally abolished joint and several liability.

## **VERMONT**

### **1985**

Totally abolished joint and several liability.

## **WASHINGTON**

### **1986—SB 4630**

Abolished joint and several liability except for cases in which defendants acted in concert, plaintiff is fault free, hazardous or solid waste disposal sites are involved, business torts are involved, and manufacturing of generic products is involved.

## **WISCONSIN**

### **1995—SB 11**

Abolished joint liability for defendants found to be less than 51% at fault. Additionally, a plaintiff's negligence will be measured separately against each defendant.

## WYOMING

### 1994—SF 35

Amended the joint and several reform passed in 1986. Defines when an individual is at fault as well as specifies the amount of damages recoverable in cases where more than one party is at fault. This new law clarifies the relationship between fault and negligence.

### 1986—SB 17

Totally abolished joint and several liability.

■ ■ ■

# 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-two states have modified or abolished the collateral source rule.*

## ALABAMA

1987

Collateral sources allowed as evidence—reduction not mandated.

## ALASKA

1986—SB 337

Collateral sources admissible as evidence and 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

Collateral sources admissible as evidence and offset with broad exclusions.

## CONNECTICUT

1986—HB 6134

Collateral sources admissible as evidence and offset with broad exclusions.

## FLORIDA

1986—SB 465

Mandatory 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

Allows evidence of funds received from collateral sources.

*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 claim for payment made from collateral sources for cost and expenses arising out of injury) from special damages recovered.

Prevents 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; and the amount of damages paid by the defendant to the plaintiff is not affected.

## IDAHO

### 1990—HB 745

Allowed the court to receive evidence of collateral source payments and reduce jury awards to the extent that they include double recoveries from sources other than federal benefits, life insurance, or contractual subrogation rights.

## ILLINOIS

### 1986—SB 1200

Only collateral sources for benefits over \$25,000 can be offset. Offset cannot reduce judgement by more than 50%.

## INDIANA

### 1986—SB 394

Admissible as evidence with certain exclusions; court may reduce awards at its discretion; and jury may be instructed to disregard tax consequences of its verdict.

## IOWA

### 1987—SF 482

Collateral sources allowed as evidence—reduction not mandated.

## KANSAS

### 1988—HB 2693

In cases in which damages exceed \$150,000, the trier of fact can hear evidence of collateral sources. When the court assigns comparative fault, it must make a setoff of the collateral sources determined.

*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

The jury must be advised of collateral source payments and subrogation of rights of collateral payers.

## MAINE

### 1990

Mandatory offset of collateral sources that have not exercised subrogation rights within 10 days after a verdict for the plaintiff.

## MICHIGAN

### 1986—HB 5154

Admissible after the verdict and before judgement is entered. Courts can offset awards but cannot reduce the plaintiffs' damages by more than amount awarded for economic damages.

## MINNESOTA

### 1986—SB 2078

Admissible as evidence only for the court's review; offset is provided for but collateral sources having rights of subrogation are excluded.

## MISSOURI

### 1987—HB 700

Collateral sources allowed as evidence but if used as evidence, defendant waives the right to a credit against the judgement for that amount.

## MONTANA

### 1987—HB 567

Collateral source rule abolished. Reimbursement from collateral sources is admissible in evidence, unless the source of reimbursement has a subrogation right under state or federal law, court is required to offset damages over \$50,000.

## NEW JERSEY

1987—SB 2703, SB 2708

Mandatory offset of collateral source benefits other than workers' compensation and life insurance benefits.

## NEW YORK

1986—SB 9351

Mandatory offset of collateral source benefits by the court.

## NORTH DAKOTA

1987—HB 1571

Mandatory offset of collateral source benefits other than life insurance or insurance purchased by recovering party.

## OHIO

1996—HB 350

Allowed collateral source payments, including workers' compensation benefits, to be submitted as evidence to the trier of fact, 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

Provides for a mandatory postjudgement deduction of collateral source benefits (which are not subrogated) which have been paid or are likely to be paid within 60 months of judgement.

## OREGON

1987—SB 323

Allows a judge to reduce awards for collateral sources excluding: life insurance and other death benefits; benefits for which plaintiff has paid premiums; retirement, disability, and pension plan benefits; and federal social security benefits.

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# PUNITIVE DAMAGES

Punitive damages are awarded not to compensate a plaintiff but to punish a defendant for intentional or malicious misconduct and to deter similar future misconduct. While punitive damage 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.
- 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-two states have reformed punitive damage laws*

## ALABAMA

1999—SB 137

In non-physical injury cases:

- 1) General rule: limits punitive damages to the greater of three times compensatory damages or \$500,000.
- 2) For small businesses: with a net worth of less than \$2 million, limits punitive damages to \$50,000 or 10% of net worth up to \$200,000, whichever is greater.
- 3) In physical injury cases: limits punitive damage awards to the greater of three times compensatory damages or \$1.5 million.
- 4) Prohibits joint liability in all punitive damage actions by requiring a punitive damage award be specific to each defendant and in an amount commensurate with each defendant's conduct. (Exceptions include: wrongful death, intentional infliction of physical injury, and class actions.)
- 5) The limit will be adjusted on January 1, 2003 and increased at three-year intervals in accordance with the Consumer Price Index.

1987

- 1) Requires proof of "wanton" conduct by "clear and convincing" evidence.
- 2) Limits punitive damages at \$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.*

- 3) Requires trial and appellate judges to review all punitive damage awards reducing 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

Limits amount of punitive damages to the greater of three times compensatory damages or \$500,000.

Exceptions include:

- 1) When the defendant's action is motivated by financial gain in which case 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.
- 3) Establishes a "clear and convincing" evidence standard to prove conduct was "outrageous" or evidenced "reckless indifference."
- 4) Provides for a bifurcated trial when punitive damages are awarded.

### 1986—SB 337

Requires "clear and convincing" evidence for punitive damage recovery.

## ARIZONA

### 1989—SB 1453

Provides a government standards defense for FDA approved drugs and devices.

## CALIFORNIA

### 1987—SB 241

Requires "clear and convincing" evidence of oppression, fraud, or malice; the trial is bifurcated allowing evidence of defendants' financial conditions only after a finding of liability.

## COLORADO

### 1991—HB 1093

Expanded 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

- 1) Provides that punitive damages may not be alleged in a professional negligence suit until discovery is substantially completed.
- 2) Provides that discovery cannot be reopened without an amended pleading.
- 3) Provides 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. The bill also prohibits punitive damages from being assessed against physicians because of the act of another unless he directed the act or ratified it.

### 1986—HB 1197

Punitive damage award may not exceed compensatory award: court may reduce if deterrence achieved without award, but also may increase to three times compensatory if misbehavior continues during trial. One third of the award goes 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

- 1) Limits punitive damages to three times compensatory damages or \$500,000, whichever is greater.
- 2) The limit is increased to four times compensatory damages or \$2,000,000, whichever is greater, if the defendant's wrongful conduct was motivated by unreasonable financial gain or the likelihood of injury was known.
- 3) Prohibits multiple punitive damage awards based on the same act or course of conduct unless the court makes a specific finding that earlier punitive damage awards were insufficient.
- 4) Establishes a "clear and convincing" evidence standard for intentional misconduct or gross negligence.
- 5) Outlines circumstances when an employer is liable for punitive damages arising from an employee's conduct.
- 6) Exceptions include: abuses to the elderly, child abuse cases, or cases where the defendant is intoxicated.

**1986—SB 465**

Punitive damage awards may not exceed three times compensatory damages unless plaintiff can demonstrate by "clear and convincing" evidence that a higher award would not be excessive. Sixty percent of the award goes to the state's General Fund or Medical Assistance Trust Fund. (Amended in 1992 so that 35% of any punitive damage 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**

- 1) Limits punitive damages at \$250,000 except in product liability cases, however, in product liability cases 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.*

- 2) Requires that 75% of all punitive damage awards 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**

**1987—SB 1223**

Requires preponderance of evidence of "oppressive, fraudulent, wanton, malicious or outrageous" conduct.

**ILLINOIS**

**1995—HB 20**

- 1) Limits punitive damages to three times economic damages.
- 2) Prohibits punitive damage awards unless conduct is "with an evil motive or with a reckless indifference to the rights of others."
- 3) Bifurcated trials allow the claim for punitive damages to be considered separately at the request of the defendant.
- 4) Requires courts to reduce awards in excess of limit.

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

**1986—SB 1200**

Plaintiffs no longer able to plead punitive damages in original complaint; subsequent motion to add punitive claim must show at hearing reasonable chance that the plaintiff will win punitive award at trial; defendant must be shown to have acted "willfully and wantonly;" court has discretion to award among plaintiff, plaintiff's attorney, and State Department of Rehabilitation Services.

**INDIANA**

**1995—HB 1741**

- 1) Limits punitive damages to the greater of three times compensatory damages or \$50,000.
- 2) Redirects 75% of punitive damage awards to state fund.

**IOWA**

**1987—SF 482**

Changed the standard for awarding punitive damages to "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**

Punitive damages may only be awarded where "willful and wanton disregard for the rights and safety of another" is proven; 75% or more of the award goes to State Civil Reparations Trust Fund. In 1987 the evidence standard was elevated to "clear, convincing, and satisfactory" evidence.

**KANSAS**

**1988—HB 2731**

- 1) Limits punitive damage awards at lesser of defendant's annual gross income or \$5 million. The 1992 legislature amended this statute to allow a judge who felt annual gross income was not a sufficient deterrent, to look at 50% of the defendant's net assets, awarding the lesser of that amount or \$5 million.
- 2) 1987 legislation had required the court, not the jury, to determine the amount of the punitive damages award and required "clear and convincing" evidence.
- 3) Punitive damages are to be awarded only if the trier of fact finds defendant acted with willful or wanton conduct, fraud, or malice.
- 4) The determination of punitive damages will be made in a separate proceeding.

**1987—HB 2025**

- 1) Limits punitive damage awards at the lesser of defendant's highest annual gross income during the preceding five years or \$5 million. If the defendant earned more profit from the objectionable conduct than either of these limits, the court could award 1.5 times that profit.
- 2) Provides for a bifurcated trial with the judge determining the punitive damage award in the second stage of the trial.
- 3) Requires a higher standard of proof (clear and convincing evidence) for punitive damages.
- 4) Provides seven criteria for the judge to consider in punitive damage cases including whether this is the first award against a given defendant.

**KENTUCKY**

**1988—HB 551**

Required "clear and convincing" evidence that conduct constituted 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**

Repeals the statute which authorized punitive damages to be awarded for 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**

- 1) Raises the standard of conduct for punitive damages from the current "willful indifference" to a standard of "deliberate disregard."
- 2) Establishes a defendant's right to insist on a bifurcated trial when a claim includes punitive damages.
- 3) Provides trial and appellate judges the power to review all punitive damage awards.

**1986—SB 2078**

Provides that punitive claims no longer are allowed in original complaints — plaintiff must make *prima facie* showing of liability before an amendment of pleadings is permitted by the court.

## MISSISSIPPI

### 1993—HB 1270

- 1) Establishes a "clear and convincing" evidence standard for the award of punitive damages.
- 2) Requires bifurcation of trials on the issue of punitive damages.
- 3) Prohibits the award of punitive damages in the absence of compensatory awards.
- 4) Prohibits the award of punitive damages against an innocent seller.
- 5) Establishes factors for the jury to consider when determining the amount of a punitive damages award.

## MISSOURI

### 1987—HB 700

Bifurcated trial for punitive damages. The jury still sets the amount for punitive damages if in the first stage they find defendant liable for punitives; defendant's net worth is admissible only in punitive section of trial; 50% of the punitive damage award goes to the state fund; multiple punitive awards prohibited under certain conditions.

## MONTANA

### 1997—SB 212

Requires a unanimous jury to determine the amount of punitive damage awards.

### 1987—HB 442

- 1) Requires "clear and convincing" evidence of "actual fraud" or "actual malice."
- 2) Bifurcates the trial with evidence of defendant's net worth only admissible in second section of trial.
- 3) Requires judge to review all punitive awards and issue an opinion on whether he increased, decreased, or let stand the punitive award.

## NEVADA

### 1989 — AB 307

- 1) Limits punitive damage awards to \$300,000 in cases in which compensatory damages are less than \$100,000 and to three times the amount of compensatory damages in cases of \$100,000 or more.

Limits do not apply in 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; a person for defamation.

- 2) Requires a higher standard of liability — "oppression, fraud, or malice."

- 3) Requires "clear and convincing" evidence.
- 4) Bifurcates the trial allowing financial evidence only after a finding of liability.

#### **NEW HAMPSHIRE**

##### **1986—HB 513**

Prohibits punitive damages.

#### **NEW JERSEY**

##### **1995—SB 1496**

- 1) Limits punitive damage awards to five times compensatory damages or \$350,000, whichever is greater.
- 2) Provides exemptions including: bias crimes, discrimination, AIDS testing disclosure, sexual abuse, and injuries caused by drunk drivers.

##### **1987—SB 2805**

- 1) Requires evidence of "actual malice" or "wanton and willful disregard" of the rights of others.
- 2) Provides for a bifurcated trial.
- 3) Provides for an FDA government standards defense to punitive damages.
- 4) Excludes environmental torts.

#### **NEW YORK**

##### **1992—SB 7589**

Requires that 20% of all punitive damages be paid to the New York State General Fund.

#### **NORTH CAROLINA**

##### **1995—HB 729**

- 1) Limits punitive awards to three times compensatory damages or \$250,000, whichever is greater while providing an exception for harms caused by driving while impaired.
- 2) Requires "clear and convincing" evidence that the defendant is liable for compensatory damages and engaged in fraud, malice, willful or wanton conduct.
- 3) Provides for a bifurcated trial on motion of defendant.

## NORTH DAKOTA

### 1997—HB 1297

Requires a preponderance of the evidence to prove oppression, fraud, or actual malice before a moving party may amend pleadings and claim punitive damages.

### 1995 — HB 1369

- 1) Requires "clear and convincing" evidence that the defendant has been guilty of oppression, fraud, or actual malice.
- 2) Provides for an FDA government standards defense to punitives.

### 1993—SB 2351

- 1) Limits punitive damages to the greater of \$250,000 or two times compensatory damages.
- 2) Requires bifurcated trials on the issue of punitive damages.
- 3) Prohibits a defendant's financial worth from being admitted in the punitive damages portion of a trial.

### 1987—HB 1571

- 1) Punitives not allowed in original complaint.
- 2) Plaintiff must show *prima facie* evidence for claim for punitives.
- 3) Plaintiff must show "oppression, fraud, or malice."

## OHIO

### 1996—HB 350

- 1) Limited amount of punitive damages recoverable from all parties except large employers to the lesser of three times compensatory damages or \$100,000.
- 2) 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 amount of compensatory damages or \$250,000.
- 3) Provided that any party may request a bifurcated trial.
- 4) Limited multiple punitive damage awards based on the same act or course of conduct.
- 5) 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**

Requires "clear and convincing" evidence; judge sets amounts; punitives cannot be awarded unless plaintiff has proven "actual damages" were sustained because of defendant's "malice, aggravated or egregious fraud, oppression or insult;" provided a government standard defense for FDA approved drugs.

**OKLAHOMA**

**1995—SB 263**

Codifies factors which the jury must consider in awarding punitive damages, then provides three separate "categories" for limiting punitive awards. When the 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 \$100,000 or actual damages awarded, whichever is greater.
- 2) Acted intentionally and with malice, the limit is either \$500,000; two times actual damages awarded; or the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing injury.
- 3) If the court finds evidence *beyond a reasonable doubt* that the defendant acted intentionally and with malice in conduct life-threatening to humans, the limit is lifted.

**1986—SB 488**

Limits punitive award at amount of compensatory damages unless plaintiff establishes his case by "clear and convincing" evidence, in which case there is no limit.

**OREGON**

**1995—SB 482**

- 1) Provides that 40% of the punitive award is paid to the prevailing party and 60% is paid to a state fund, and no more than 20% of the award may be paid to the attorney of the prevailing party.
- 2) Imposes a "clear and convincing" evidence standard to prove 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."
- 3) Provides court review of jury awarded punitive damages.
- 4) Prohibits punitive damages in the original complaint. A *prima facie* case for liability is required before the complaint can be amended to include a punitive damages claim.

**1987—SB 323**

- 1) Requires "clear and convincing" evidence.
- 2) Provides an FDA standards defense to punitive damages.

## **SOUTH CAROLINA**

**1988**

Requires "clear and convincing" evidence for punitive damage award.

## **SOUTH DAKOTA**

**1986—SB 280**

Requires "clear and convincing" evidence of "willful, wanton, or malicious" conduct.

## **TEXAS**

**1995—SB 25**

- 1) Limits punitive damage awards to the greater of \$200,000 or two times economic damages plus non-economic damages up to \$750,000.
- 2) Requires "clear and convincing" evidence to prove malice defined as the "conscious indifference to the rights, safety, or welfare of others."
- 3) Provides for a bifurcated trial on motion by a defendant.

**1987—SB 5**

- 1) Allows punitive damages to be awarded against a particular defendant if the plaintiff shows that the defendant's conduct was fraudulent, malicious, or grossly negligent.
- 2) Limits the amount of punitive damages at four times the amount of actual damages or \$200,000, whichever is greater.

## **UTAH**

**1989—SB 24**

Provides for a higher standard of liability (from "reckless" to "knowing and reckless"), a government standard defense for FDA approved drugs, bifurcation of trials involving punitives, a "clear and convincing" evidence standard and the payment of 50% of punitive damage awards over \$20,000 to the state fund.

## **VIRGINIA**

**1987—SB 402**

Limits punitive damages at \$350,000.

*The Virginia Court of Appeals upheld the constitutionality of this statute in Wackenhut Applied Technologies Center Inc. v. Syngetron Protection Systems, No. 91-1655, November 1992.*

**WISCONSIN**

**1995—SB 11**

Allows punitive damages only where the defendant acts "maliciously or in intentional disregard of the rights of the plaintiff."

# NONECONOMIC DAMAGES

Damages for noneconomic losses are damages for such things as pain and suffering, emotional distress and loss of consortium or companionship. These damages do not involve a direct economic loss and have, therefore, no precise value. It is very difficult for juries to assign a dollar value to these losses, particularly with the minimal guidance they are normally given. 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.

*Thirteen states have modified the rules for awarding noneconomic damages.*

## ALABAMA

1987

\$250,000 limit on noneconomic damages in medical malpractice cases.

*The Supreme Court of Alabama found the limit on noneconomic damages unconstitutional in Moore v. Mobile Infirmary Association, 592 So. 2d 156 (Ala. 1991).*

## ALASKA

1997—HB 58

Limits 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—SB337

Establishes a \$500,000 limit on noneconomic damages other than physical impairment or disfigurement.

## COLORADO

1988—SB 143

Limits liability 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**

Establishes a \$250,000 limit on noneconomic damages (unless court finds justification by "clear and convincing" evidence for a larger award which cannot exceed \$500,000).

*The \$250,000 limit on noneconomic damages in medical liability actions was held constitutional by the Colorado Supreme Court in Scholz v. Metropolitan Pathologists, P.C., No. 92-8A277, Co. Sup. Ct., April 26, 1993.*

**FLORIDA**

**1988—CS/SB 6-E**

**In medical malpractice actions:**

Establishes a volunteer system of arbitration which sets a \$250,000 limit on noneconomic damages if parties agree to arbitration. If the claimant rejects the defendant's offer to arbitrate, the noneconomic damage limit is set at \$350,000.

**1986—SB 465**

Established a \$450,000 limit on noneconomic damages.

*The Florida Supreme Court held the limit on noneconomic damages unconstitutional in Smith v. Department of Insurance, Inc., 507 So. 2d 1080 Florida, 1987.*

**HAWAII**

**1986—SB S1**

Establishes a \$375,000 cap on physical pain and suffering, other noneconomic damages are not limited.

**IDAHO**

**1990—HB 574**

Removed the 1992 sunset to the \$400,000 limit on noneconomic damages enacted in 1987.

**1987—SB 1223**

Limits noneconomic damages at \$400,000; sunset in June 1992.

## ILLINOIS

### 1995—HB 20

Limited awards for 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

Noneconomic damages limited to \$250,000.

### 1987

\$250,000 limit on pain and suffering (not other noneconomic losses).

## MARYLAND

### 1994—SB 283

#### Noneconomic damages for wrongful death:

Limits noneconomic damages in wrongful death actions to \$500,000. In cases where there are two or more beneficiaries, the limit is \$700,000. The limit is not retroactive but effective on October 1, 1994. (This bill 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

Limits noneconomic damages in public entity suits at \$200,000 per person/\$500,000 per incident.

### 1986—SB 558

\$500,000 limit on noneconomic damages.

*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)

Noneconomic damages in medical malpractice:

Provides a variable limit on noneconomic damages (\$280,000 for an ordinary occurrence; \$500,000 for incidents falling within certain exceptions).

## MINNESOTA

### 1986—SB 2078

Establishes limits at \$400,000 for all awards based on loss of consortium, emotional distress, or embarrassment (no limit for pain and suffering).

## MONTANA

### 1995—HB 309

#### Noneconomic damages in medical malpractice:

Limits noneconomic damages in medical malpractice cases to \$250,000 and includes periodic payments of future damages over \$50,000.

## NORTH DAKOTA

### 1995—HB 1050

#### Noneconomic damages in medical malpractice:

Limits noneconomic damages to \$500,000 in medical malpractice cases and includes an alternative dispute resolution provision.

## NEW HAMPSHIRE

### 1986—HB 513

Established a \$875,000 limit on noneconomic damages.

*The New Hampshire Supreme Court held this statute unconstitutional in Brannigan v. Usitalo, No. 90-377, March 13, 1991.*

## OHIO

### 1997—HB 350

1) In all civil actions, limited noneconomic damages to the greater of \$250,000 or three times economic damages to a maximum of \$500,000 unless there is:

- a) permanent and severe physical deformity;
- b) permanent physical functional injury that permanently prevents the injured person from being able to independently care for herself or himself and perform life sustaining activities.

2) If plaintiff establishes 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.*

## OREGON

### 1987—SB 323

Established a \$500,000 limit on noneconomic damages.

*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.*

## WASHINGTON

### 1986—SB 4630

Limited 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).*

## WISCONSIN

### 1995—AB 36

Noneconomic damages in medical malpractice:

Limits noneconomic damages to \$350,000, indexed for inflation, in medical malpractice actions.



## PREJUDGEMENT INTEREST

In the absence of an applicable statute or rule, the courts generally applied the traditional common-law rule that prejudgement 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 prejudgement 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 prejudgement interest statutes can be inequitable and counter-productive. Prejudgement 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, prejudgement 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 judgement provision should be included.

*Fifteen states have enacted prejudgement interest reforms:*

### ALASKA

#### 1997—HB 58

Ties interest rate to the Twelfth Federal Reserve District's discount rate plus 3%. Repealed prejudgement interest for future damages and punitive damages.

### COLORADO

#### 1995—SB 165

Allows the interest assessed during the period between accrual of the action and filing of the claim to remain under the \$1,000,000 limit on the total amount recoverable in medical malpractice claims.

### IOWA

#### 1997—HF 693

Ties interest rate to U.S. Treasury Rate plus 2%.

#### 1987—SF 482

Repealed judgement interest for future damages (other interest accrues from the date of commencement of the actions at a rate based on U.S. Treasury Bill).

## LOUISIANA

1997

Sets judicial interest to the average Treasury Bill rate for 52 weeks plus 2%. Provides varying rates of interest for actions pending or filed during the last 10 years.

1987—HB 1690

Ties prejudgement interest to the prime rate plus 1% with a floor of 7% and a cap of 14%.

## MAINE

1988—LD 2520

Ties prejudgement interest and postjudgement interest rate to U.S. Treasury Bill rate.

## MICHIGAN

1986—HB 5154

Prohibits prejudgement interest on awards for future damages.

## MINNESOTA

1986—SB 2078

Prohibits prejudgement interest on awards for future damages.

## MISSOURI

1987—HB 700

Allows prejudgement interest only in cases where judgement exceeds settlement offer.

## NEBRASKA

1986—LB 298

Reduces rate of interest to 1% above the rate on U.S. Treasury Bill. Offer of settlement provision allows the award of prejudgement interest for unreasonable failure to settle.

## NEW HAMPSHIRE

1995—HB 375

Sets the prejudgement interest rate at the 52-week discount U.S. Treasury Bill rate plus 2%.

## OKLAHOMA

1986—SB 488

Prohibits prejudgement interest on punitive damage awards. Rate of interest reduced to 4% above the rate on U.S. Treasury Bill.

## **RHODE ISLAND**

### **1987—HB 5885**

Ties prejudgement interest to U.S. Treasury Bill rate which accrues from date suit is filed.

## **TEXAS**

### **1987—SB 6**

Limits the period during which prejudgement interest may accrue if the defendant has made an offer to settle.

■■■

# 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.

*Fifteen states have enacted laws specifically to address product liability.*

## CALIFORNIA

### 1986—SB 241

Confirms 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.

## FLORIDA

### 1999—HB 775

1) Provides 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.

2) Provides for 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.

3) Exceptions include: improvements to real property including elevators and escalators; latent injury cases; and when 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

In product liability cases only one award of punitive damages can be assessed against any given defendant.

## ILLINOIS

### 1995—HB 20

1) Created a product liability affidavit requirement.

2) Created presumptions of safety for manufacturers which meet state and federal standards and where no practical or feasible alternative design existed at the time product was manufactured.

- 3) Applied statutes of repose on all product liability cases to bar an action after 12 years from first sale or 10 years from 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

- 1) Abolishes joint liability in product liability actions.
- 2) Provides a rebuttable presumption that the product was not defective if a) the manufacturer of the product was in conformity with recognized "state of the art" safety guidelines; or b) the manufacturer of the product complied with government standards (*i.e.* approved by FDA, FAA etc...).
- 3) Restricts strict liability actions to the manufacturer of the product.

#### IOWA

##### 1997—HF 693 Statute of Repose

Establishes a 15-year statute of repose for product liability lawsuits with an exception for fraud, concealment, latent diseases caused by harmful materials, and specified products.

#### LOUISIANA

##### 1988—SB 684

- 1) A product may be unreasonably dangerous only because of one or more of the following characteristics:
  - a) defective construction or composition,
  - b) defective design,
  - c) failure to warn or inadequate warning,
  - d) nonconformity with an express warranty.
- 2) A manufacturer of a product shall not be liable for damage proximately caused by a characteristic of the product's design if the manufacturer proves that at the time the product left his control:
  - a) 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;
  - b) 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 claimant;
  - c) the alternative design identified by the claimant was not feasible, in light of then-existing reasonably available scientific and technological knowledge or existing economic practicality.

## MAINE

### 1996—LD 346

Provides 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

- 1) Abolishes joint liability in product liability actions.
- 2) Provides statutory defenses including government standards, FDA, and sellers' defense; provides absolute defense if claimant was 50% or more at fault due to intoxication or a controlled substance.
- 3) Limits noneconomic damages at \$280,000 unless death or loss of vital bodily function which extends limit to \$500,000 in product actions.

## MISSISSIPPI

### 1993—HB 1270

- 1) Provides that product liability cases must be based on a design, manufacturing or warning defect, or breach of an express warranty, which caused the product to be unreasonably dangerous.
- 2) Provides that a product which 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.
- 3) Provides 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.
- 4) Completely bars 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.
- 5) Relieves a manufacturer or seller from the duty to warn of a product that poses an open and obvious risk.
- 6) Provides that a properly functioning product is not defective unless there was a practical and economically feasible design alternative available at the time of manufacture.
- 7) Provides for indemnification of innocent retailers and wholesalers.

## MONTANA

### 1987—SB 380

Authorizes product liability defenses of assumption or risk and misuse of product.

## NEW HAMPSHIRE

### 1993—SB 76

Established New Hampshire manufacturers' rights of indemnification from the original purchaser of a product for damages caused by the product if it is significantly altered after it leaves the New Hampshire manufacturer's control.

### 1992—SB 339

Establishes a committee to study the impact of product liability on New Hampshire businesses.

## NEW JERSEY

### 1995 —SB 1495

Excludes product sellers from strict liability in product liability actions.

### 1987—SB 2805

1) Provides that a manufacturer or seller of a product is liable only if the claimant proves by preponderance of evidence that the product was not suitable or safe because it:

- a) deviates from the design specifications or performance standards;
- b) fails to contain adequate warnings;
- c) is designed in a defective manner.

2) Provides 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.

3) Provides that a product is not defective in design if harm results from an inherent characteristic of the product that is known to the ordinary person who uses or consumes it.

4) Provides that a manufacturer or seller is not liable for a design defect if harm results from an *unavoidably unsafe aspect* of a product and the product was accompanied by an *adequate warning*.

5) Provides that the state of the art provision does not apply if the court makes all of the following determinations:

- a) that the product is egregiously unsafe;
- b) that the user could not be expected to have knowledge of the product's risk;
- c) that the product has little or no usefulness.

6) Provides 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.)

7) Establishes a rebuttable presumption that a government (FDA) warning is adequate.

## NORTH CAROLINA

### 1995—HB 637

1) Expressly provides that there shall be no strict liability in tort for product liability actions.

2) Provides several statutory defenses for manufacturer or sellers including an assumption of the risk defense.

## NORTH DAKOTA

### 1995—HB 1369

1) Creates a ten-year statute of repose in product liability actions.

2) Provides for a government standards defense.

3) Prohibits punitive damage awards when manufacturer complies with government standards

*The 10-year statute of repose was found unconstitutional in Dickie v. Farmers Union Oil Co., 2000 ND 111 (N.D. May 25, 2000).*

## OHIO

### 1996—HB 350

Amends product liability law to include additional requirements for establishing liability; prohibits expanding theories of liability including enterprise liability; and adopts a fifteen-year statute of repose in product liability cases unless there is latent harm or fraud.

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

### 1987—HB 1

1) Codifies product liability law including the consumer-expectancy standard, for design defect cases providing that a product is not defective in design if:

a) an injury occurs due to the inherent characteristics of a product provided the characteristics are recognized by the ordinary person with ordinary knowledge common to the community;

b) 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.

2) Provides 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; establishes 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; provides that a drug manufacturer shall not be liable for punitive damages if the drug was approved by the FDA.



## TEXAS

### 1993—SB 4

1) Requires proof of an economically and technologically feasible safer alternative design available at the time of manufacture in most product liability actions for defective design.

2) Provides a defense for manufacturers and sellers of inherently unsafe products that are *known* to be unsafe.

3) Establishes a fifteen-year statute of repose for product liability actions against manufacturers or sellers of manufacturing equipment.

4) Provides protection for innocent retailers and wholesalers.

■ ■ ■

# 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 receive millions in legal fees. State class action reform can more equitably balance the interests of plaintiffs and the defendant.

*Three states have reformed their laws pertaining to class actions*

## ALABAMA

1999—SB 72

Sets procedures to certify class actions.

1) Codifies Supreme Court rulings to ensure that a defendant receives adequate notice prior to class certification.

2) Provides 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.

## LOUISIANA

1997—HB 1984

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

## OHIO

1998—HB 394

Provides for the interlocutory appeal of class action certification.

■■■

## 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."

### KANSAS

#### 2000—HB 2627

Provides that any state agency that enters into a contract for legal services with an attorney or firm when legal fees are \$7500 or more, shall not do so until a competitive bidding process has taken place.

Prior to entering into a contract for legal services in excess of \$1,000,000, a proposed contract must be submitted to the legislative budget committee for approval.

Requires that at the conclusion of representation, the state receive a statement of hours worked and fee recovered. In no instance shall the state pay fees (even on a contingent fee basis, in excess of \$1000 per hour).

### NORTH DAKOTA

#### 1999—SB 2047

Provides that an emergency commission of the legislature must 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

Requires that all contracts with outside counsel first seek an hourly arrangement; provides that contingent fee contracts in excess of \$100,000 be approved by a Legislative Review Board. Requires that at the conclusion of representation, the state receive a statement of hours worked and fee recovered.



## **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.

### **FLORIDA**

#### **2000 —HB 1721**

Places a monetary limit on bond requirements in punitive damage awards in class actions during the appeal process at 10% of the defendants net worth or \$100 million, whichever is less. In out-of-state judgements, limits on bond appeals would apply during the stay period only.

### **GEORGIA**

#### **2000 —HB 1346**

Places a \$25 million limit on bond requirements in punitive damage awards during the appeal process. In out-of-state judgements, limits on bond appeals would apply during the stay period only.

### **KENTUCKY**

#### **2000 —SB 316**

Places a \$100 million limit on bond requirements in punitive damage awards during the appeal process. In out-of-state judgements, limits on bond appeals would apply during the stay period only.

### **NORTH CAROLINA**

#### **2000 —SB 2**

Places a \$25 million limit on bond requirements in punitive damage awards during the appeal process. In out-of-state judgements, limits on bond appeals would apply during the stay period only.

### **VIRGINIA**

#### **2000 —HB 1547**

Places a \$25 million limit on bond requirements in punitive damage awards during the appeal process. In-out-of-state judgements, limits on bond appeals would apply during the stay period only.