# Tort Reform Update: Recently Enacted Legislative Reforms and State Court Challenges

*By Andrew C. Cook*

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# Tort Reform Update: Recently Enacted Legislative Reforms and State Court Challenges

*Andrew C. Cook**

## Introduction

Since the 2010 elections altered the makeup of many state legislative and executive branches, nearly half the states (twenty-three) have passed some form of tort reform making the last two years a particularly active period for supporters and opponents of this issue.[1] Proponents of tort reform point to measures passed in Alabama, North Carolina, Tennessee, and Wisconsin as examples of the quantity and substance of newly enacted policies.[2]

The purpose of this paper is to provide a summary of the measures passed in those states[3] (Part I), and many others, and survey legal challenges to existing tort reform laws (Part II).

## I. Newly Enacted Tort Reform Laws

### A. Interest on Judgments

For plaintiffs and their attorneys, one of the biggest forms of compensation in any type of civil litigation is the interest on both pre- and post-judgments.[4] In some states, such as Wisconsin, the last time the interest rates were set was in the late 1970s when interest rates were rising to record levels.[5]

Because of the recent economic downturn and historically low interest rates, a number of legislatures have decided to lower pre- and post-judgment interest rates to match current interest rates. Some states have chosen to enact a fixed lower rate, whereas other states have chosen to enact variable rates to reflect current interest rates.

Below is a summary of states that have recently enacted legislation concerning interest rates on judgments.

#### 1. Alabama

The legislature lowered its interest on money judgments from 12 percent to 7.5 percent for all types of civil litigation, except for contract cases where the interest rate has been agreed upon by the parties.[6]

#### 2. Florida

Florida's new law[7] requires the state's Chief Financial Officer to set the interest rate for judgments four times a year (December 1, March 1, June 1, and September 1) and then to adjust the interest rate on a quarterly basis (April 1, July 1, and October 1) by averaging the discount rate of the Federal Reserve Bank of New York for the preceding twelve months and then adding 400 basis points (4 percent) to the averaged federal discount rate.[8]

#### 3. Tennessee

Tennessee's new law[9] enacted in 2012 replaced

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1 *See* American Tort Reform Association, State Tort Reform Enactments, http://www.atra.org/Publications/StateTortReformEnactments.

2 *Id.*

3 While it discusses most of the reforms passed during the past two years, it does not include all reforms that were enacted into law.

4 American Tort Reform Association, Prejudgment Interest Reform, http://www.atra.org/issues/prejudgment-interest-reform.

5 Chapter 271, Laws of 1979, *available at* https://docs.legis.wisconsin.gov/1979/related/acts/271.

6 Ala. Code § 8-8-10 (West 2012).

7 Fla. Stat. Ann. § 55.03 (West 2012).

8 *Id.*

9 H.B. 2982 (Tenn. 2012); Public Ch. No. 1043, *available at* http://state.tn.us/sos/acts/107/pub/pc1043.pdf.

the 10 percent interest for judgments with a variable rate. The new law provides that the interest rate must be 2 percent less than the weekly average prime rate established by the Federal Reserve System. Existing law provides that the interest cannot exceed 10 percent.[10]

4. Wisconsin

Wisconsin's legislation amended the previous pre- and post-judgment interest rate from a fixed rate of 12 percent to a variable rate, which is now 1 percent plus the prime rate as reported by the Federal Reserve Board in the Federal Reserve statistical release H. 15.[11]

### B. Government Retention of Private Plaintiff Attorneys on Contingency Fee Basis

Another reform that has been passed by a number of legislatures focuses on conditions that states must adopt before a state attorney general or governor is allowed to enter into a contingency fee arrangement with outside counsel. Such contracts are criticized by some as mechanisms for state attorneys general and governors to engage and then compensate friendly private plaintiff attorneys who sue targeted industries.[12] Critics argue that many of these private plaintiff attorney contracts are entered into without any competitive bidding, have very little or no oversight, and have the potential to be based on political favoritism.[13]

Below is a summary of states that have recently enacted legislation concerning contingency fees and outside counsel.

1. Arizona

Arizona's new law[14] provides that the state may not enter into a contingency fee contract with a private attorney unless the attorney general makes a written determination that contingency fee representation is both cost-effective and in the public interest.[15] The written determination must include specific findings for each of the following factors:

- Whether there exist sufficient and appropriate legal and financial resources within the attorney general's office to handle the legal matter.
- The time and labor required to perform the task, the novelty, complexity, and difficulty of the questions involved and the skill necessary to perform the attorney services properly.
- The geographic area where the attorney services are to be provided.
- The amount of experience desired for the particular kind of attorney services and the nature of private attorney's experience with similar issues and cases.[16]

If the attorney general makes a determination based on the above criteria that contingency fee representation is cost-effective and in the public interest, the attorney general must request proposals from private attorneys to represent the department on a contingency fee basis.[17] However, the law allows the attorney general to enter into a contingency fee contract without requesting such proposals if the attorney general makes a written determination that requesting proposals is not feasible.[18]

The law also places limitations on the amounts of money private plaintiff attorneys can collect based on the size of the recovery. For example, the state may not enter into a private contract that allows the private attorney to collect an aggregate contingency fee in excess of:

- 25 percent of any recovery less than $10 million.
- 20 percent of any recovery between $10 million and $15 million.

10 Tenn. Code Ann. § 47-14-103 (West 2012).

11 Wis. Stat. Ann. § 807.01 (West 2012).

12 *See* American Tort Reform Association, Government Rentention of Personal Injury Lawyers, http://www.atra.org/issues/government-retention-personal-injury-lawyers.

13 *Id.*

14 Ariz. Rev. Stat. Ann. § 41-4802 (West 2012).

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id*

- 15 percent of any recovery between $15 million and $20 million.
- 10 percent of any recovery between $20 million and $25 million.
- 5 percent of any recovery of $25 million or more.[19]

In addition, the law provides that the contingency fee contract may not exceed $50 million, except for reasonable costs and expenses—regardless of the number of lawsuits filed or the number of private attorneys retained by the state.[20]

The law provides for conditions that the state must adhere to when entering into the private attorney contingency fee contract, such as:

- Requiring the government attorney to retain complete control over the course and conduct of the case.
- Requiring the government attorney with supervisory authority to be personally involved in overseeing the litigation.
- Requiring the government attorney to retain veto power over any decisions made by the private attorney.
- Allowing any defendant that is subject to the litigation to contact the lead government attorney directly without having to confer with the private attorney.
- Providing that decisions regarding settlement of the case are reserved exclusively to the discretion of the government attorney and the state.[21]

The attorney general is required to develop a standard addendum for every contract that describes the expectations of both the contracted private attorney and the state. In addition, the attorney general is required to post on the attorney general's website a copy of the contract within five business days of entering into the contract with the private attorney. The attorney general must also post on the website all payments made to the private attorney within 15 days of the payment, and the information must remain on the website for 365 days.[22]

The legislation further requires the private attorney(s) to maintain detailed records, including documentation of all expenses, disbursements, charges, credits, underlying receipts and invoices, and other financial transactions.[23]

The attorney general is also required to provide a report to the legislature on a yearly basis of any new private attorney contracts.[24]

### 2. Indiana

In many ways, Indiana's private attorney retention law[25] mirrors Arizona's law, which is described in greater detail (see above). For example, Indiana's law prohibits a state agency from hiring a private attorney unless the state makes a written determination that it is cost effective and in the public interest.[26] Similar to Arizona's law, the new Indiana law outlines certain findings that must be made by the state agency before the retention of a private attorney on contingency fee basis.[27] The state must also request proposals, unless the state determines that it is infeasible to do so.[28] Similar to the Arizona law, the Indiana law caps the amount of money private attorneys can collect based on the size of the settlement or judgment.[29] In addition, the Indiana law contains the same reporting requirements.[30]

### 3. Missouri

In 2011, Missouri enacted a similar law[31] to Indiana and Arizona. The major exception to the Missouri private attorney retention law is that, unlike Indiana's

19 Ariz. Rev. Stat. Ann. § 41-4803 (West 2012).

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 Ariz. Rev. Stat. Ann. § 41-4804 (West 2012).

25 Ind. Code Ann. § 4-6-3-2.5 (West 2012).

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 Mo. Ann. Stat. § 34.378 (West 2011).

and Arizona's laws, the Missouri law does not limit the amounts private attorneys may collect.[32]

Iowa[33] and Mississippi[34] have recently enacted similar laws.

### C. Trespasser Liability

A number of states recently introduced and passed legislation codifying existing common law as it relates to the duty of care owed to trespassers. This legislative push was a response to the recently drafted *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*, which altered the traditional rule pertaining to trespassers.[35] Most states and the Second Restatement provide that a possessor of land "owes no affirmative duty to a trespasser who has invaded the land without either express or implied permission."[36]

The new Restatement, however, changes the traditional rule by providing a duty of reasonable care to all trespassers except for "flagrant trespassers."[37] Concern has been raised that the terms "flagrant trespassers" are not well-defined and could expose land possessors to liability that did not exist under traditional common law principles or the Second Restatement.[38]

To address this concern, a number of state legislatures have introduced and passed legislation codifying existing common law principles. Such laws would prevent a state court from adopting the new Restatement's standard.

Below is a summary of states that have recently enacted legislation concerning trespasser liability issues; most of the laws are very similar, so this section provides brief overviews of each state's legislation, with in-depth discussion of just the first few.

1. Alabama

Similar to most pieces of legislation addressing this issue, Alabama's new law defines "trespasser" as a person who enters the property of another without either express or implied invitation. The legislation further defines "possessor" of real property as the owner, lessee, renter, or other lawful occupant of the property.[39]

The legislation then states the general rule that the possessor of the real property owes no duty of care to the trespasser, and then lists the exceptions to the general rule. For example, in Alabama the law lists the exceptions to the general rule as follows:

- The possessor must refrain from causing wanton or intentional injury to the trespassers, such as "by a trap or pitfall."

- The possessor must "exercise reasonable care" to avoid causing injury to a known trespasser "in a position of peril" and must also warn a known trespasser "of dangers known by the possessor to exist on the property."

- The possessor must also "exercise reasonable diligence" to warn a trespasser of dangers known after discovering the potential danger and after the possessor has knowledge of the trespasser on the property.[40]

The Alabama law reiterates that the new legislation does nothing to alter the state's "open and obvious" doctrine, and further notes that the possessor may also use force or cause injury to a trespasser in self-protection as allowed by existing common and statutory law. (Title 13A, Chapter 3, Article 2).[41]

In addition, similar to most other state trespasser liability laws and the common law, a possessor of land may be liable for injury or death to a child trespasser caused by an artificial condition upon the real property if certain conditions are met, such as:

32 *Id.*

33 IA House Bill 563 (2012), *available at* http://legiscan.com/gaits/text/632659.

34 Miss. House Bill No. 211(2012), *available at* http://billstatus.ls.state.ms.us/documents/2012/pdf/HB/0200-0299/HB0211SG.pdf.

35 Victor E. Schwartz & Christopher E. Appel, *Reshaping the Traditional Limits of Affirmative Duties Under the Third Restatement of Torts*, 44 J. Marshall L. Rev. 379, (2011), *available at* http://www.shb.com/attorneys/SchwartzVictor/ReshapingtheTraditionalLimitsofAffirmativeDuties.pdf.

36 *Id.*

37 *Id.* at 345.

38 *Id.*

39 Ala. Code § 6-5-345 (West 2012).

40 *Id.*

41 *Id.*

- The place where the condition existed is one which the possessor knew or had reason to know that a child would be likely to trespass.

- The possessor should have known that the condition would involve unreasonable risk of death or serious bodily harm to a child.

- The injured child, because of his or her age, did not discover that the condition was dangerous.

- A balancing test weighing the possessor's burden of maintaining the condition or eliminating the danger with the risk to the child.

- The possessor failed to exercise reasonable care to eliminate the danger or otherwise protect the child.[42]

Other states enacting similar laws include Arizona,[43] North Carolina,[44] North Dakota,[45] Ohio,[46] South Dakota,[47] Tennessee,[48] Texas,[49] and Wisconsin.[50]

### D. Caps on Punitive and Noneconomic Damages

Legislative limits on punitive and noneconomic damages are often a top priority of individuals and entities who are frequently sued, such as businesses, physicians and hospitals.[51]

Below is a summary of states that have recently enacted legislation placing caps on both noneconomic and punitive damages.[52]

#### 1. North Carolina

In 2011, North Carolina enacted comprehensive medical liability legislation that included a cap on noneconomic damages of $500,000 for all defendants named in the lawsuit. The new law provides that the $500,000 cap does not apply if the trier of fact determines that: 1) the plaintiff suffered disfigurement, loss of use of part of the body, permanent injury, or death, or 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. [53]

#### 2. Oklahoma

In 2011, Oklahoma amended its current cap on noneconomic damages for "any civil action arising from a claimed bodily injury" from $400,000 to $350,000.[54] Similar to the North Carolina law, Oklahoma's law includes an exception to the cap on noneconomic damages if the trier of fact finds that the defendant's acts were: 1) in reckless disregard of the rights of others, 2) grossly negligent, 3) fraudulent, or 4) intentional with malice.[55]

#### 3. South Carolina

In 2011, South Carolina passed comprehensive changes by limiting the size of punitive damages awards. The new law requires that a claim for punitive damages must be specifically requested in the complaint;

42 *Id.*

43 Ariz. Senate Bill 1410, Chapter 154, *available at* http://www.azleg.gov/legtext/50leg/2r/laws/0154.pdf.

44 Session Law 2011-283, *available at* http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H542v7.pdf.

45 House Bill 1452, *available at* http://www.legis.nd.gov/assembly/62-2011/bill-actions/ba1452.html.

46 129th General Assembly, Substitute Senate Bill Number 202, *available at* http://www.legislature.state.oh.us/bills.cfm?ID=129_SB_202.

47 House Bill 1087, *available at* http://legis.state.sd.us/sessions/2011/index.aspx.

48 Public Chapter No. 922; Senate Bill No. 2719, *available at* http://state.tn.us/sos/acts/107/pub/pc0922.pdf.

49 Senate Bill 1160, *available at* http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=82R&Bill=SB1160.

50 2011 Wisconsin Act 93, *available at* https://docs.legis.wisconsin.gov/2011/related/acts/93.

51 American Medical Association, Advocacy Resource Center (2012), *available at* http://www.ama-assn.org/resources/doc/arc/caps-on-damages-jan-2012.pdf.

52 Caps on noneconomic damages are often challenged by plaintiffs in the courts. Part II, *infra*, discusses recent case law in various state courts ruling on challenges to legislatively enacted caps on noneconomic damages.

53 N.C. Gen. Stat. Ann. § 90-21.19 (West 2012).

54 House Bill 2128, *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=HB2023&Session=110.

55 *Id.*

however, the plaintiff may not plead a specific amount, only that punitive damages are being sought. [56]

If punitive damages are requested in the complaint, the defendant may request to have the case bifurcated into two stages. [57] In the first stage, the jury determines liability for compensatory damages and the amount, if any, that shall be awarded to the plaintiff.[58] At this stage, evidence concerning punitive damages is inadmissible.[59]

During the second stage, the jury determines whether the defendant is liable for punitive damages.[60] The plaintiff may be awarded punitive damages only if the jury awards the plaintiff compensatory damages, and the plaintiff proves by clear and convincing evidence that the injury was the result of the defendant's willful, wanton, or reckless conduct.[61] The jury shall consider all relevant evidence, along with eleven non-exhaustive criteria.[62]

If the jury awards punitive damages, the trial court is required to review the jury's decision to ensure that the award is not excessive.[63] If there are multiple defendants, a punitive damages award must be specific to each defendant and each defendant is liable only for the amount of the award that is made against that particular defendant.

With certain exceptions, the South Carolina law imposes a cap on punitive damages by limiting the total amount to three times the amount of compensatory damages or the sum of $500,000. [64]

Neither party is allowed disclose to the jury the amount of the caps.[65] If the jury awards punitive damages in excess of the caps, the plaintiff may still be allowed punitive damages above the limitations.[66]

For example, if the jury determines that the wrongful conduct was motivated primarily by "unreasonable financial gain" or that the defendant's actions could subject him or her to a felony conviction, then the caps ($500,000 or three times compensatory damages) do not apply.[67] Instead, the jury is allowed to award punitive damages up to four times the amount of compensatory damages award to each plaintiff, or $2 million.[68]

The new law further provides that no caps on punitive damages may be imposed if the trial court determines: 1) the defendant intentionally committed the act causing harm to the defendant, 2) the defendant has been convicted of a felony arising out of the same act that is the proximate cause of the plaintiff's damages, or 3) the defendant was under the influence of alcohol or drugs when committing the act causing harm to the plaintiff.[69]

Last, the caps on punitive damages must be indexed based on inflation on an annual basis.[70]

### 4. Arizona

Arizona's new law protects manufacturers and sellers from punitive and exemplary damages if the manufacturer or seller is in compliance with state or federal statutes and regulations.[71]

Specifically, the law provides that a "manufacturer,

56 S.C. Code Ann. § 15-32-510 ( West 2012).

57 S.C. Code Ann. § 15-32-520 (West 2012).

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.*

62 1) The defendant's degree of culpability; 2) the severity of the harm caused by the defendant; 3) the extent to which the plaintiff's own conduct contributed to the harm; 4) the duration of the conduct, the defendant's awareness, and any concealment by the defendant; 5) the existence of similar past conduct; 6) the profitability of the conduct to the defendant; 7) the defendant's ability to pay; 8) the likelihood the award will deter the defendant or others from like conduct; 9) the awards of punitive damages against the defendant in any state or federal court action alleging harm from the same act or course of conduct complained of by the plaintiff; 10) any criminal penalties imposed on the defendant as a result of the same act or course of conduct complained of by the plaintiff; 11) the amount of any civil fines assessed against the defendant as a result of the same act or course of conduct complained of by the plaintiff.

63 *Id.*

64 S.C. Code Ann. § 15-32-530 (West 2012).

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 S.C. Code Ann. § 15-32-220 (West 2012)

71 Ariz. Rev. Stat. Ann. § 12-689 (2012).

service provider, or seller" is not liable for such damages if: 1) the product was manufactured or designed according to terms, conditions, or license of a governmental agency; 2) the product or service complied with all federal and state statutes and regulations; and 3) "the act or transaction forming the basis of the claim" involved "terms of service" or "contract provisions" in compliance with federal and state statutes and regulations. [72]

Protection from punitive and exemplary damages is not allowed if the plaintiff is able to establish that the manufacturer, service provider, or seller did any of the following: 1) sold the product after the government issued an order to remove the product from the market, 2) intentionally withheld information or misrepresented to the government agency information material to the approval of the product or service, 3) made an illegal payment to an official or employee of a government agency to secure approval of the product or service, or 4) knowingly violated applicable regulations by failing to report to the agency risks of harm that caused the injury to the plaintiff. [73]

5. Tennessee

In 2011, the Tennessee legislature enacted comprehensive legislation that addressed both noneconomic and punitive damages. In addition, the new law bars punitive damages, with certain exceptions, against the seller of a product and drug and device manufacturers when the product was manufactured in compliance with federal law. Below is a discussion of the three major changes.

*a. Noneconomic Damages*

Under the new law, noneconomic damages[74] are capped at $750,000 for each plaintiff, except when the injury or loss is catastrophic[75] in nature, in which case the cap is $1 million. The law further provides that if there are multiple defendants, the noneconomic damages shall be apportioned among the defendants based upon the percentage of fault for each defendant. However, if the plaintiff's comparative fault is not equal to or greater than 50 percent, recovery is barred.[76]

*b. Punitive Damages*

Under Tennessee law, punitive damages may only be awarded if the plaintiff proves that the defendant acted "maliciously, intentionally, fraudulently or recklessly."[77] When a plaintiff seeks punitive damages, the trial is bifurcated to allow the jury to first determine whether compensatory damages are to be awarded and what amount.[78] Then, the jury is to determine whether the defendant's conduct was malicious, intentional, fraudulent or reckless.[79] If the jury finds that the defendant acted in such a manner, then the jury is to determine the amount, if any.[80] Similar to the South Carolina law, *supra* Part I (D)(3), the jury must consider a number of criteria when determining the amount of punitive damages.[81] The jury must also be instructed that the primary purpose of punitive damages is to punish the wrongdoer and to deter similar misconduct while the purpose of compensatory damages is to make the plaintiff whole.[82]

The new law caps punitive damages at two times compensatory damages, or $500,000, whichever is

72 *Id.*

73 *Id.*

74 "Noneconomic damages" means damages for the following: "physical and emotional pain; suffering; inconvenience; physical impairment; disfigurement; mental anguish; emotional distress; loss of society, companionship, and consortium; injury to reputation; humiliation; noneconomic effects of disability, including loss of enjoyment of normal activities, benefits and pleasures of life and loss of mental or physical health, well-being or bodily functions; and all other nonpecuniary losses of any kind or nature."

75 "Catastrophic loss or injury" is defined as any of the following: "Spinal cord injury resulting in paraplegia or quadriplegia, 2) amputation of two hands, two feet, or one of each; 3) third degree burns over forty percent or more of the body as a whole or third degree burns up to 40 percent or more of the face, or 4) wrongful death of a parent leaving a surviving minor child or children for whom the deceased parent had lawful rights of custody or visitation."

76 Tenn. Code Ann. § 29-39-102 (West 2012).

77 Tenn. Code Ann. § 29-39-104 (West 2012).

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

greater.[83] The punitive damages cap does not apply if the defendant: 1) intentionally harmed the defendant, 2) intentionally falsified, destroyed or concealed records containing material evidence, or 3) was under the influence of alcohol or drugs when he or she injured or harmed the plaintiff.[84]

*c. Barring Punitive Damages for Selling or Manufacturing Certain Products that Comply with State or Federal Regulations*

The new law grants sellers immunity from punitive damages unless the seller "exercised substantial control" over the "design, testing, manufacture, packaging or labeling of the product" that caused harm to the plaintiff.[85] Similarly, immunity is not granted to a seller that alters or modifies the product which is a "substantial factor" in causing harm to the plaintiff, or if the seller had "actual knowledge" of the defective condition when the product was sold.[86]

In addition, the new law prohibits punitive damages against both sellers and manufacturers of a drug or device if: 1) the product was designed, manufactured, packaged, labeled, or sold in accordance with the terms of approval or license by a government agency, 2) the product was in compliance with a statute or regulation of the State or the United States.[87]

However, the law does not protect manufacturers or sellers from punitive damages if: 1) the product was sold after the effective date of a government agency order requiring the removal of the product from the market or the government withdrew its approval of the product, or 2) the manufacturer or seller in violation of applicable regulations withheld or misrepresented to the government information material to the approval of the drug or device.[88]

6. Wisconsin

In 1995, the Wisconsin Legislature adopted a heightened standard of conduct for the award of punitive damages.[89] However, in 2005 the Wisconsin Supreme Court issued two decisions on the same day that weakened the standard.[90] For example, in *Strenke v. Hogner*,[91] the court held that defendant's conduct giving rise to punitive damages didn't have to be directed at the specific plaintiff seeking punitive damages in order to recover under the statute.

In response to these decisions, Governor Scott Walker included in his omnibus tort reform legislation[92] caps on punitive damages. Now under Wisconsin law, punitive damages are capped at $200,000 or two times compensatory damages, whichever is greater.[93]

**E. Medical Liability Reform**

Medical liability lawsuits are among the most common forms of legal actions. According to the American Medical Society, 61 percent of physicians age fifty-five and older have been sued at some point during their careers.[94] Although 64 percent of all claims are ultimately dropped or dismissed, the cost to health care is significant.[95] To address medical liability lawsuits, many states have limited the liability to which physicians can be exposed.

Below is a summary of states that have recently enacted legislation concerning medical liability.

1. Florida

*a. Expert Witness Certification*

In order for a physician licensed in another state

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

88 Tenn. Code Ann. § 29-28-104 (West 2012).

89 Wis. Stat. Ann. § 895.043 (West 2012).

90 *See* Strenke v. Hogner, 2005 WI 25, 279 Wis. 2d 52, 694 N.W.2d 296; *see also* Wischer v. Mitsubishi Heavy Indus. America, Inc., 2005 WI 26, 279 Wis. 2d 4, 679 N.W.2d 320.

91 279 Wis. 2d at 58.

92 2011 Wisconsin Act 2, Wis. Stat. § 893.043(3) ("Plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in intentional disregard of the rights of the plaintiff.").

93 *Id.*

94 American Medical Society, Fixing America's medical liability system (2011), http://www.ama-assn.org/resources/doc/arc/mlr-now-flyer-web.pdf.

95 *Id.* (Medical liability lawsuits costs $70 billion to $126 billion a year in defensive medicine.)

to provide expert testimony, the physician must first register with the state.[96] If the physician is certified to provide an expert opinion in Florida, the certificate is valid for two years.[97] During that time period the physician can provide written expert testimony about the prevailing professional standard of care in connection with the medical negligence litigation pending in the state against another physician licensed in Florida.[98]

The new law further provides the Florida Board of Medicine, Osteopathic Medicine, and Dentistry the authority to discipline any physician issued an expert witness certificate for providing deceptive or fraudulent expert witness testimony.[99]

*b. Excludes from evidence records or policies involving insurer's reimbursement policies or reimbursement determination*

Under previous Florida law, the existence of a medical injury did not create an inference or presumption of negligence against a health care provider.[100] The new law adds to this section of the law that records, policies, or testimony of an insurer's reimbursement policies or reimbursement determination regarding the care provided to the plaintiff are not admissible as evidence in a medical negligence action.[101]

In addition, a health care provider's failure to comply with, or breach of a federal requirement, is not admissible as evidence in any medical negligence case.[102]

*c. Immunity for volunteer physicians for school team events*

Last, the new law extends immunity from liability for a volunteer physician "who gratuitously and in good faith conducts an evaluation . . . unless the evaluation was conducted in a wrongful manner," which encompasses bad faith, maliciousness, and wanton or willful behavior.[103]

96 Fla. Stat. Ann. § 458.3175 (West 2012).

97 *Id.*

98 *Id.*

99 Fla. Stat. Ann. § 456.072 (West 2012).

100 Fla. Stat. Ann. § 766.102 (West 2012).

101 *Id.*

102 *Id.*

2. North Carolina

As noted above, North Carolina also adopted comprehensive changes to its medical liability laws, including new caps for noneconomic damages in medical liability lawsuits. The discussion below summarizes the other changes imposed by the new law. [104]

*a. Bifurcation of trial*

The new law allows a defendant to seek a separate trial when the plaintiff files a lawsuit for more than $150,000. Under the new law, the court must have separate trials for the issue of liability and a second trial regarding damages, unless the court for good cause orders a single trial.[105]

*b. Expert review*

Previously, North Carolina law required that the plaintiff filing a medical negligence lawsuit to assert in the complaint that the medical care was reviewed by an expert witness. The new law requires the expert to also review the medical records pertaining to the alleged negligence. [106]

*c. Standard of care for non-emergency and emergency care*

When establishing the standard of health care in non-emergency cases, the new law provides that the health care provider is not liable unless the trier of fact finds by the "greater weight of evidence" that the action or inaction of the health care provider was not in accordance with standards of practice among similar health care providers situated in the same or similar communities.[107]

In medical malpractice cases involving emergency care, the plaintiff must prove that the health care provider violated the standards of practice by "clear and convincing" evidence.[108]

103 Fla. Stat. Ann. § 768.135 (West 2012).

104 N.C. Gen. Stat. Ann. § 1A-1,§ 1A-1,1A-1 Rule 42 (West 2012).

105 *Id.*

106 *Id.*

107 N.C. Gen. Stat. Ann. § 90-21.12 (West 2012).

108 *Id.*

### 3. Oklahoma

Under the 2011 Oklahoma law, a party may request to have the court order that future damages be paid in whole or in part in periodic payments rather than in a lump sum. However, the periodic payments may not exceed seven years from the date of the judgment. Future damages encompass medical, health care, or custodial services, along with physical pain and mental anguish, disfigurement, physical impairment, loss of consortium, or loss of earnings. [109]

If the court orders periodic payments, the court must make a specific finding of the dollar amount of the periodic payments that will compensate the plaintiff for the future damages. In addition, as a condition to authorizing periodic payments of future damages, the court must require the defendant who is not adequately insured to provide evidence of financial responsibility in an amount "adequate to assure full payment of damages . . . ."[110]

If the plaintiff dies before the periodic payments are made, the defendant is required to continue to make payments to the plaintiff's estate. In addition, each payment made by the plaintiff must include principal, plus interest at the applicable post-judgment interest rate.[111]

### 4. Rhode Island

In 2011, Rhode Island passed legislation protecting physician assistants who, not in their ordinary course of employment or practice, voluntarily or gratuitously render medical assistance during an emergency or disaster. [112]

## F. Expert Evidence in Court

In 1993, in the landmark decision *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the United States Supreme Court altered the standard for federal courts in determining the admissibility of expert testimony.[113]

In *Daubert*, the Supreme Court held that Rule 702 of the Federal Rules of Evidence superseded a previous Supreme Court opinion, *Frye v. United States*,[114] which previously had set the standard for determining the admissibility of evidence. The "*Frye* test" provides that evidence may only be admitted if the method via which it was obtained is generally accepted by experts in the particular field. Under the new test laid down in *Daubert*, the Court determined that scientific evidence must be subjected to a reliability test, rather than *Frye*'s "general acceptance test."[115] Under this new test, judges are "gatekeepers" and must assess whether "the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts."[116]

In two subsequent opinions, the U.S. Supreme Court modified the *Daubert* test. In *General Electric Co. v. Joiner*,[117] the Court held that federal courts must scrutinize the reliability of an expert's reasoning process and methodology. In addition, the *Joiner* Court explained that the decision of the trial court judge to admit particular scientific evidence is to be reviewed only for an abuse of discretion.

Then, in 1999, the Court issued the third decision in the "*Dabuert* trilogy," *Kumho Tire Co. v. Carmichael*. In *Kumho Tire*,[118] the Court clarified that *Daubert* applies beyond just scientific evidence but to all expert testimony based on "technical" and "other specialized" knowledge within the meaning of Rule 702. The purpose of this was to contract the scope of admissibility of expert testimony.[119] In 2000, Rule 702 of the Federal Rules of Evidence[120] was amended to codify the *Daubert*

109 Okla. Stat. Ann. tit. 23, § 9.3 (West 2012).

110 *Id.*

111 *Id.*

112 R.I. Gen. Laws Ann. § 5-54-27 (West 2012).

113 509 U.S. 579 (1993).

114 293 F. 1013 (D.C. Cir. 1923).

115 David E. Bernstein & Jeffrey D. Jackson, *The* Daubert *Trilogy in the States*, 44 Jurimetrics J. 351 (Spring 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=498786.

116 *Daubert*, 509 U.S. at 593.

117 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508.

118 526 U.S. 137 (1999).

119 Bernstein & Jackson, *supra* note 115, at 5.

120 Fed. R. Evid. 702 provides in relevant part:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized

trilogy. Although federal courts are bound by the *Daubert* test, state courts are not required to abide by the heightened standard. However, many states have adopted all, or a portion, of the *Daubert* trilogy either through case law or legislation.[121]

Below is a summary of states that have recently enacted legislation adopting the *Daubert* trilogy.

### 1. Alabama

The new Alabama law closely follows Rule 702. Specifically, the law provides that if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[122]

The law further mirrors the federal rule by providing that "expert testimony based on a scientific theory, principle, methodology, or procedure is only admissible if: 1) the testimony is based on sufficient facts or data, 2) the testimony is the product of reliable principles and methods, and 3) the witness has applied the principles and methods reliably to the facts of the case."[123]

### 2. Wisconsin

Governor Scott Walker's omnibus tort reform legislation (2011 Wisconsin Act 2) included language adopting the *Daubert* language. Specifically, the legislation amended Wisconsin's lay opinion statutes to conform with Rule 701 of the Federal Rules of Evidence. Prior to Act 2, Wisconsin law provided that if the "witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."[124] Act 2 added a third provision providing that lay opinions cannot be based on "specialized knowledge."[125]

Act 2 further amended Wisconsin's expert opinion rule to more closely align itself with *Daubert*. Specifically, Wisconsin's law was amended to provide that an expert may testify only if the "testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case."[126]

The new law further provides that the testimony of an expert "may not be admitted if the expert witness is entitled to receive any compensation contingent on the outcome of any claim or case with respect to which the testimony is being offered."[127]

### 3. North Carolina

North Carolina recently amended its laws to adopt *Daubert*. Prior to the new law going into effect, North Carolina's law provided that if "technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion."[128] The law is amended by adding language closely tracking Rule 702 of the Federal Rules of Evidence. Specifically, the law provides that an expert may testify in the form of an opinion only if all of the following apply: 1) the testimony is based upon sufficient facts or data, 2) the testimony is the product of reliable principles and methods, and 3) the witness

knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;(

b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

121 Bernstein & Jackson, *supra* note 115, at 1.

122 Ala. Code § 12-21-160 (West 2012).

123 *Id.*

124 Wis. Stat. Ann. § 907.01 (West 2012).

125 *Id.*

126 Wis. Stat. Ann. § 907.02 (West 2012).

127 For more information about Wisconsin's new law, see Daniel D. Blinka, *The* Daubert *Standard in Wisconsin: A Primer*, Wisconsin Lawyer Vol. 84, No. 3 (March 2011), *available at* http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&template=/CM/ContentDisplay.cfm&contentid=100905.

128 N.C. Session Law 2011-283, House Bill 542, *available at* http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H542v7.pdf.

has applied the principles and methods reliably to the facts of the case.[129]

### G. Class Action Lawsuits

A class action lawsuit is one in which "a single person or a small group of people represents the interests of a larger group."[130] Before a class action is allowed, the named plaintiff must be a member of the class and possess the same interest and have suffered the same injury as the other class members.[131] Moreover, certain criteria must be satisfied before the class can be certified. Federal Rule of Civil Procedure 23[132] sets forth those criteria at the federal level. Many states have adopted identical or similar rules.

Specifically, for a class to be certified there must be an identifiable class and the named plaintiff must be a member of the class.[133]

Almost everyone acknowledges that class action lawsuits have a proper place in advancing civil justice, but members of the business community have expressed concern that class action laws have been abused by plaintiff attorneys without benefitting the actual class members. For example, the American Tort Reform Association argues that lawsuits are brought on behalf of a class, yet many of the class members have no knowledge of the lawsuit.[134] If the case is successfully litigated or a settlement is reached, the plaintiffs' attorneys are awarded large sums of money, while the individual class members often receive just pennies or a few dollars.[135]

Below is a summary of states that have recently enacted legislation concerning class actions to address this perceived problem of imbalance.

#### 1. Oklahoma

Oklahoma's class action law is closely aligned with the Federal Rule 23. Senate Bill 704[136] amended Oklahoma's law by changing the pleading standards. Specifically, the new law keeps intact the current language which provides that an action may be maintained as a class action if the prerequisites of a class action are satisfied, and if "the petition in the class action contains factual allegations sufficient to demonstrate a plausible claim for relief."[137]

The language mirrors the new federal pleading requirements based on recent United States Supreme Court decisions, *Bell Atlantic Corp. v. Twombly*[138]and *Ashcroft v. Iqbal*,[139] where the Court required plaintiffs to include more detailed facts in a complaint in order to survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Evidence.

#### 2. Tennessee

Prior to enactment of Senate Bill 1522/House Bill 2008, Tennessee law provided that a court of appeals had the discretion to determine whether to allow an appeal from an order from the trial court granting or denying a class action certification under Rule 23 of the Tennessee Rules of Civil Procedure within 10 days of the order.[140]

SB 1522/HB 2008 repealed this provision and instead requires a court of appeals to allow an interlocutory appeal if the notice is filed within ten days of the order either granting or denying class certification. In addition, the new law provides that "all proceedings in the trial court shall be automatically stayed pending the appeal of the class certification ruling."[141]

129 *Id.*

130 Black's Law Dictionary (7th ed. 2000).

131 East Tex. Motor Freight Sys., Inc. v. Rodriquez, 431 U.S. 395, 403 (1977).

132 Fed. R. Civ. P. 23, *available at* http://www.law.cornell.edu/rules/frcp/rule_23.

133 Bailey v. Patterson, 369 U.S. 31, 33, 7 L. Ed. 2d 512, 82 S. Ct. 549 (1962).

134 *See* American Tort Reform Association, Class Action Reform, http://www.atra.org/issues/class-action-reform.

135 California Citizens Against Lawsuit Abuse, Class Action Abuse, http://www.cala.com/issues/class-action.

136 S.B. 704 (Okl. 2011), http://www.oklegislature.gov/BillInfo.aspx?Bill=SB704&Session=1100.

137 12 Okl. St. § 2023.B.

138 550 U.S. 544, 127 S. Ct. 1955 (2007).

139 556 U.S. 662, 129 S. Ct. 1937 (2009).

140 27-1-125; Acts 2005, ch. 280, § 1.

141 Tenn. House Bill 2008; Public Ch. No. 510, § 13; Tenn. Code Ann. § 27-1-125 (West 2012)

3. Louisiana

In 2012, Louisiana adopted changes to its class action venue statute. First, when two or more actions requesting certification of a class are filed in two or more Louisiana courts regarding the same transaction or occurrence at the same location, and the classes encompass one or more of the same plaintiffs, the defendant may request to have all the actions transferred to the district court where the transaction occurred or where the occurrence took place.[142]

Second, if two or more class actions are filed in more than one Louisiana court regarding multiple related transactions or occurrences in different locations and the classes encompass one or more of the same plaintiffs, the defendant may have all such transactions transferred to the district court where the first suit was brought.[143]

## H. Joint and Several Liability

Joint and several liability is "liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's direction."[144] Thus, "each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from nonpaying parties."[145]

State joint and several liability laws are varied. For example, co-defendants in some states are only liable for his or her percentage of fault as determined by the jury. [146] Other states provide that a co-defendant may be liable for 100 percent of the damages if he or she is a certain percent (typically 50 percent or more) at fault.[147] Moreover, other states continue to have pure joint and several liability, which means a co-defendant as little as one percent at fault can be liable for 100 percent of the damages.[148]

Below is a summary of states that have recently enacted legislation providing codefendants with greater protection from pure joint and several liability.

1. Oklahoma

In 2009, Oklahoma enacted legislation that made co-defendants jointly and severally liable only if they were more than 50 percent at fault.[149] Just two years later, the legislature went even further by amending the law to completely eliminate joint and several liability. Thus, under Oklahoma's new law, "the liability for damages caused by two or more persons shall be several only and a joint tortfeasor shall be liable only for the amount of damages allocated to that tortfeasor." [150]The law further provides that it does not apply to actions brought by or on behalf of the state.[151]

2. Pennsylvania

Pennsylvania's newly enacted legislation modifies the state's joint and several liability laws. First, it eliminates pure joint and several liability and replaces it with a modified version.[152] Under the new law, a co-defendant is only liable for the proportion of damages based on the amount of fault attributed to that person.[153] However, if the co-defendant is more than 60 percent at fault, the co-defendant is jointly and severally liable and thus potentially liable for 100 percent of the damages.[154] In addition, the new law provides that the co-defendant is still held jointly and severally liable in the following circumstances: the defendant 1) committed an intentional tort, 2) made an intentional misrepresentation, 3) released an environmental hazard, or 4) was under the influence

142 House Bill 464, *available at* http://www.legis.state.la.us/billdata/streamdocument.asp?did=812066.

143 *Id.*

144 Black's Law Dictionary (7th ed. 2000).

145 *Id.*

146 Ind. Code Ann. § 34-51-2-8 (West 2012).

147 Wis. Stat. Ann. § 895.045 (West 2012).

148 Matkin v. Smith, 643 So. 2d 949, 951 (Ala. 1994) ("In Alabama, damages are not apportioned among joint tortfeasors; instead, joint tortfeasors are jointly and severally liable for the entire amount of damages awarded.").

149 House Bill 1603, *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1603&Session=0900.

150 *Id.*

151 *Id.*

152 42 Pa. Cons. Stat. Ann. § 7102 (West 2012).

153 *Id.*

154 *Id.*

of an illegal substance.[155]

In addition, the law provides that in cases where a co-defendant has been held jointly and severally liable and pays more than his or her proportionate share of the total liability, that co-defendant is entitled to recover contribution from the other co-defendants who have paid less than their proportionate share.[156]

## I. Collateral Source Rule

The collateral source rule generally provides that if a plaintiff receives compensation for his or her injuries from an independent source, the payment shall not be deducted from damages that the tortfeasor is required to pay the plaintiff.[157]

An issue that commonly arises is whether a defendant can offer evidence of the amount of past medical bills actually paid the plaintiff's insurance company—or Medicaid or another government source if the person does not have private insurance—rather than the amount that was billed by the medical provider.[158] In situations where a state's law is silent on this issue, some state courts have determined that the collateral source rule prohibits a defendant from offering evidence of the amount actually paid by the injured party's health insurance company (a collateral source) for medical treatment rendered to the plaintiff.[159]

Meanwhile, other courts have taken the opposite view and held that the plaintiff is not entitled to the amount billed by the medical provider, but instead is only entitled to the amount actually paid by the insurer or government source.[160] Finally, other courts simply allow the jury to see the evidence of the amount billed by the medical provider and the amount paid, and then the jury is to determine how much the plaintiff is entitled to receive in the form of damages from the defendants.[161]

While courts are generally split on this issue, a number of legislatures are beginning to introduce and pass legislation addressing the issue of plaintiffs being awarded damages for amounts that they never paid.[162]

Below is a summary of states that have recently enacted legislation that overturns the collateral source rule.

### 1. North Carolina

North Carolina's new law protects defendants from having to pay the amount billed for past medical expenses. Instead, the law provides that "[e]vidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied."[163]

### 2. Oklahoma

Oklahoma's law similarly limits the ability of the plaintiff to be paid for the full amounts of past medical expenses billed by the medical provider, and instead limits the recovery to the amount actually paid.

For example, the law provides that, "[u]pon the trial of any civil case involving personal injury, the actual amounts paid for any doctor bills, hospital bills, ambulance service bills, drug bills and similar bills for expenses incurred in the treatment of the party shall be the amounts admissible at trial, not the amounts billed for expenses incurred in the treatment of the party."[164]

The legislation provides an exception where there is a lien filed by the medical provider. Under this exception, "if a medical provider has filed a lien in the case for an amount in excess of the amount paid, then bills in excess of the amount paid but not more than the amount of the lien shall be admissible."[165]

155 *Id.*

156 *Id.*

157 Black's Law Dictionary (7th ed. 2000).

158 Cary Silverman, *Reducing Wasteful Spending on Litigation: ALEC's Model Phantom Damages Elimination Act*, Inside ALEC (American Legislative Exchange Council) (Jan. 2012), at 15.

159 *See* Leitinger v. DBart, 2007 WI 84, 302 Wis. 2d 110, 736 N.W.2d 1.

160 *See* Howell v. Hamilton Meats and Provisions, Inc., 52 Cal. App. 4th 541; *see also* Hanif v. Authority of Yolo County, 200 Cal. App. 3d, 635, 246 Cal. Rptr. 192 (1988).

161 Stanley v. Walker, 906 N.E.2d 852 (Ind. 2009); *see also* Robinson v. Bates, 857 N.Ed.2d 1195 (Ohio 2006).

162 Silverman, *supra* note 158, at 16.

163 N.C. Gen. Stat. Ann. Chapter 8C, Art. 4, Rule 414.

164 Okla. Stat. Ann. tit. 12, § 12-3009.1 (2012).

165 *Id.*

### J. Jury Service

Other recently enacted laws focus on making juries more representative of the entire public by more adequately compensating jurors and reducing the barriers for people to serve as jurors. Below is a summary of states that have recently enacted legislation related to jury service.

#### 1. Arizona

Prior to enactment of the new law, the "Arizona Lengthy Trial Fund" allowed jurors to be paid for lost earnings during jury service. Jurors were to allowed to receive, based on availability of monies, a range of $40 per day to $300 per day, beginning on the fourth day of jury service. [166]

In 2011, the Arizona Legislature amended the law to allow jurors to begin receiving payment for his or her first day of jury service, rather than beginning on the fourth day of service if his or her employer does not compensate them for those first three days of service.[167]

#### 2. Colorado

Colorado's recently enacted legislation amends the state's comprehensive existing jury service laws. For example, the new law creates a juror service "acknowledgment" which contains specific information for each juror, such as the juror's name, the jury commissioner's contact information, and the number of days the juror served, among other information.[168] The new law requires the jury commissioner to retain the juror service acknowledgment information for each juror and to make it available electronically via the internet for twelve months after the juror completes his or her service.[169]

In addition, the new law changes payment method for jury service. The law eliminates weekly pay and instead provides that payment is to be made within 10 days after conclusion of the juror's service. In addition, the state is required to pay grand jurors at least on a monthly basis.[170]

Last, the new law amends existing law by requiring the jury commissioner to notify the juror by telephone or in writing of any new jury dates, rather than providing the information via a new summons.[171]

#### 3. Oregon

Prior to the new law going into effect, a judge or court clerk was allowed, for good cause, to allow a juror to defer service to any other term beginning within one year. [172]The newly enacted law limits the juror to only one such deferral.[173] In addition, the person seeking the deferral must provide a list of at least ten dates within the six-month period that the person would be available to serve as a juror.[174]

Finally, an employer is not allowed to require an employee to use vacation leave, sick leave, or annual leave for time spent in responding to a summons for jury duty. The employer must also allow the employee to take leave without pay for time spent by the employee in responding to a summons for jury duty.[175]

## II. Court Challenges to Legislatively Enacted Tort Reforms: Recent State Supreme Court Decisions

To counter the enacted tort reforms, plaintiff attorneys have headed to the courts to challenge these new laws.[176] In most instances, tort reform opponents have sought to strike down statutes imposing caps on noneconomic damages.[177]

Below is a summary of recently decided cases involving challenges to legislatively enacted tort reforms.

166 Ariz. Rev. Stat. Ann. § 21-222.

167 *Id.*

168 Colo. Rev. Stat. Ann. § 13-71-102 (West 2012).

169 Colo. Rev. Stat. Ann. § 13-71-132 (West 2012).

170 Colo. Rev. Stat. Ann. § 13-71-132 (West 2012).

171 Colo. Rev. Stat. Ann. § 13-71-116 (West 2012).

172 Or. Rev. Stat. Ann. § 10.055 (West 2012).

173 *Id.*

174 *Id.*

175 *Id.*

176 *See infra* notes 178–211 and accompanying text.

177 *Id.* at 2–5.

### A. Kansas: *Miller v. Johnson* (Noneconomic Damages)

The most recent decision involving a challenge a state's cap on noneconomic damages is *Miller v. Johnson*.[178] This highly anticipated decision involved a challenge to Kansas's statute[179] which imposes a cap of $250,000 noneconomic damages in all personal injury actions.

The plaintiff, Amy Miller, sued Dr. Carolyn Johnson for negligently removing Miller's left ovary during a surgery intended to remove the right ovary. The jury awarded Miller $400,000 in noneconomic damages, but the lower court judge lowered the award to $250,000 to comply with the statute.[180]

Miller argued the statutory cap violated four provisions in the Kansas Constitution: 1) right to jury trial under Section 5 of the Kansas Constitution Bill of Rights, 2) right to remedy by due course of law under Section 18 of the Kansas Constitution Bill of Rights, 3) equal protection under Section 1 of the Kansas Constitution Bill of Rights, and 4) the doctrine of separation of powers. The court rejected each claim and upheld the statute's $250,000 noneconomic damages limit.

In reaching its decision, the court addressed the first two challenges together involving the right to jury trial and right to remedy by due course of law. Despite noting its "concern" with the fact that the legislature has not increased the statutory $250,000 cap since its enactment in 1988, the court upheld the statute under both Sections 5 and 18 of the Kansas Constitution.[181] The court noted that the legislature's failure to increase the cap has not "sufficiently diluted the substitute remedy to render the present cap clearly unconstitutional when viewed in the light of the other provisions in the Act that directly and exclusively benefit a medical malpractice plaintiff."[182]

Next, the court applied a rational basis test in analyzing the equal protection claim. Under the rational basis test, the party attacking the statute has the burden of negating "every conceivable rational basis that might support the classification challenged."[183] In upholding the statutory cap of $250,000 on noneconomic damages, the court held that it is "reasonably conceivable" that the statute "furthers the objective of reducing and stabilizing insurance premiums by providing predictability and eliminating the possibility of large noneconomic damages awards."[184]

Finally, the court addressed the plaintiff's argument that the $250,000 cap on noneconomic damages "abolishes the judiciary's authority to order new trials and robs judges of their judicial discretion by functioning as a statutory remittitur effectively usurping the court's power to grant remittiturs."[185]

The court stated that the "balance of the applicable factors weighs against finding that the cap's implicit prohibition on granting a new trial when an award of noneconomic damages is inadequate below the $250,000 cap significantly interferes with judicial power."[186] Therefore, the court rejected the separation of powers argument.

### B. Missouri: *Watts v. Lester E. Cox Medical Centers* (Noneconomic Damages)

In *Watts v. Lester E. Cox Medical Centers*,[187] the issue before the Supreme Court of Missouri was whether Missouri's statute[188] limiting noneconomic damages in medical malpractice cases to $350,000 violated the right to jury trial under the Missouri Constitution.[189]

178 Miller v. Johnson, No. 99,818, *available at* http://www.kscourts.org/Cases-and-Opinions/opinions/SupCt/2012/20121005/99818.pdf.

179 Kan .Stat .Ann. § 60-19a02.

180 Miller v. Johnson, No. 99,818 (Supreme Court of Kansas, Oct. 5, 2012), *available at* http://www.kscourts.org/Cases-and-Opinions/opinions/SupCt/2012/20121005/99818.pdf.

181 *Id.* at 35.

182 *Id.*

183 *Id.* at 38.

184 *Id.*

185 *Id.* at 40–41.

186 *Id.* at 46.

187 2012 WL 3101657 (Mo.), No. SC91867 (July 31, 2012).

188 Mo. Ann. Stat. § 538.210 (West 2012).

189 Mo. Const. art. V, § 3 ("the right of trial by jury as heretofore enjoyed shall remain inviolate.").

The plaintiffs in *Watts* challenged the statutory cap on noneconomic damages when the trial court reduced the amount from $1.45 million, the amount awarded by the jury, to the statutory $350,000 limit.

The Supreme Court of Missouri struck down the $350,000 limitation on noneconomic damages, holding that it violated the Missouri Constitution's right to jury trial. According to the court, the phrase "heretofore enjoyed" means that "citizens of Missouri are entitled to a jury trial in all actions to which they would have been entitled to a jury when the Missouri Constitution was adopted" in 1820.[190] The court determined that Missouri common law in 1820 entitled plaintiffs to a trial on the issue of noneconomic damages in medical negligence cases and therefore the plaintiff in *Watts* similarly had a right to a trial jury on her claims of negligence.[191]

In striking down the noneconomic damages cap, the court reversed a previous 1992 decision where the court upheld the same statute as constitutional. In *Adams By and Through Adams v. Children's Mercy Hospital*,[192] the Supreme Court of Missouri faced similar legal issues and held that the statute imposing the $350,000 cap on noneconomic damages did not violate the right to jury trial under the Missouri Constitution. In *Adams*, the Missouri Supreme Court explained that the role of the jury is to determine liability and to measure damages as a result of liability.[193] The court further explained that once the jury has completed its fact-finding duty, it has completed its constitutional task and it is then the court's duty to apply the law.[194]

Despite the court's precedent in *Adams*, the Supreme Court in *Watts* held that the cap on noneconomic damages now violates the right to jury trial under the Missouri Constitution.[195]

### C. California: *Stinnett v. Tam* (Noneconomic Damages)

190 *Watts*, at 3.

191 *Id.*

192 832 S.W.2d 898, 907 (Mo. 1992).

193 *Id.*

194 *Id.*

195 *Watts*, at 10.

*Stinnett v. Tam*[196] involved a medical negligence claim against the defendant-physician. The jury awarded the injured plaintiff $6 million in noneconomic damages. However, the trial court reduced the amount to $250,000 based on the Medical Injury Compensation Reform Act (MICRA), which capped noneconomic damages in "any action for injury against a health care provider based on professional negligence."

The plaintiff challenged the MICRA's noneconomic damages cap of $250,000 arguing that it was a violation of her right to equal protection under the 14th Amendment of the United States Constitution and the California Constitution.[197] In addition, the plaintiff alleged that the law violated her right to a jury trial under the California Constitution.[198]

The California Court of Appeal, Fifth District, upheld the $250,000 limitation on noneconomic damages. The court addressed the two constitutional claims in order: 1) the alleged violation of equal protection, and 2) the alleged violation of right to jury trial.

Before discussing the two legal issues, the court provided a lengthy summary of four prior decisions[199] where the California Supreme Court previously upheld MICRA's provisions from constitutional challenges.

The appellate court, in striking down the equal

196 198 Cal.App.4th 1412; 130 Cal. Rptr. 3d 732 (2011).

197 Art. I, § 7, subd. (a).

198 Art. I, §16.

199 America Bank & Trust Co. v. Community Hospital, 36 Cal.3d 359 (1984) (rejecting claim that MICRA's provision requiring future damages be paid periodically violated plaintiff's due process rights; rejecting claim that MICRA denied equal protection by limiting its operation to medical malpractice cases; rejecting claim that MICRA violated constitutional right to jury); Barme v. Wood, 37 Cal.3d 174 (1984) (rejecting claim that MICRA provision which bars a collateral source from obtaining reimbursement of medical expenses or benefits provided to a medical malpractice plaintiff from a medical malpractice defendant denied due process and equal protection); Roa v. Lodi Medical Group, Inc., 37 Cal.3d 920 (1985)(rejecting claim that provision limiting fees an attorney representing a party in a medical malpractice action may obtain on a contingency fee basis denied due process and equal protection); Fein v. Permanente Medical Group, 38 Cal.3d 137 (1985) (rejecting claim that cap on noneconomic damages denied due process and equal protection).

protection argument, cited precedent from a previous case: "[t]he Legislature retains broad control over the measure, as well as the timing, of damages that a defendant is obligated to pay and a plaintiff is entitled to receive, and that the Legislature may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest."[200]

Once again citing precedent,[201] the court rejected the plaintiff's claim that only a jury has the authority to set damages. The court explained that "it is well established that a plaintiff has no vested property right in a particular measure of damages, and . . . the Legislature possesses broad authority to modify the scope and nature of such damages."[202]

### D. Louisiana: *Oliver v. Magnolia Clinic* and *Arrington v. Galen-Med, Inc.* (General Damages)

*Oliver v. Magnolia Clinic*[203] involved a challenge to the Louisiana Medical Malpractice Act which contains a provision[204] imposing a $500,000 limit for total damages. Parents sued on behalf of their infant, whose cancer went undiagnosed after thirty-two visits over a year with the nurse practitioner-defendant. The jury awarded the plaintiffs $6 million in total damages. The court later reduced this amount to $500,000 based on the medical malpractice law.[205]

The plaintiff alleged that the statutory cap on damages didn't apply to nurse practitioners even though the statute defined "health care providers" as a "registered or licensed practical nurse or certified nurse assistant."[206] The court rejected this argument and held that nurse practitioners were covered under the statute.[207]

Next, the court addressed the constitutional claims[208] alleged by the plaintiff. In upholding the law as constitutional, the court cited its previous decision, *Butler v. Flint Goodrich Hospital of Dillard University*,[209] where the court upheld prior challenges to the statutory cap on damages. In affirming *Butler*, the court held that "any discrimination resulting from the cap, while unfortunate, substantially furthers a legitimate state interest . . . ."[210]

Shortly after its decision in *Oliver*, the Louisiana Supreme Court issued a short *per curiam* opinion in *Arrington v. Galen-Med, Inc.*,[211] also upholding caps on total medical malpractice damages. According to the court, in "*Oliver*, we reiterated our holding in *Butler v. Flint Goodrich Hospital* [citations omitted], and recognized the malpractice cap was constitutional."

### Conclusion

Over the past two years, state legislatures throughout the nation have passed a significant number of substantive tort reforms. This legislation is often controversial and many of the new statutes will undoubtedly be challenged by opponents.

Historically the most common tort reforms to be challenged are statutory caps on noneconomic damages in personal injury cases. Litigants challenging the laws have experienced mixed success. Most recently, the Kansas Supreme Court upheld that state's statutory cap of $250,000 noneconomic damages. Yet just months prior to the Kansas decision, the Supreme Court of Missouri struck down that state's $350,000 cap for noneconomic damages in medical malpractice cases.

200 *Stinnett*, 198 Cal. App. (citing *Fein*, 38 Cal.3d at 158).

201 Yates v. Pollock, 194 Ca.App.3d 195 (1987).

202 *Stinnett*, 198 Cal App. (citing *American Bank*, 36 Cal.3d at 368).

203 85 So.3d 39, 2011-2132 (La.3/13/12).

204 La.R.S. 40:1299.42(B).

205 *Oliver*, 85 So.3d at 42.

206 La.R.S. 40.1299.41(A)(10).

207 *Oliver*, 85 So.3d at 46.

208 The plaintiffs alleged that the statutory cap on total medical malpractice damages violated the following provisions of the Louisiana Constitution: Article I, § 2 (due process); Article I, § 3 (equal protection); Article I, §22 (adequate remedy); Article V, § 16 (original jurisdiction of the courts); Article V, § 1 (judicial power); Article II, §§ 1 and 2 (separation of powers); and Article II, § 12 (3) and (7) (prohibition against special laws).

209 607 So.2d 517 (La. 1992).

210 *Oliver*, 85 So.3d at 85.

211 89 So.3d 1159, 2012-0909 (La. 5/22/12).

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