A State by State Update of Tort Reform

All State Entries Updated and Edited by the Primerus Young Lawyers Section

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Important Information Regarding
The 2012/2013 Tort Reform Compendium Update

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Information Included by State

Each state's entry has been updated with the information outlined below, relative to each state. In the event that there has been no significant change in the state's policy, that particular section may be absent from the update.

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1. Introduction – History of Tort Reform in Alabama

Due in part to the perception that Alabama was a "tort hell" for defendants, the Alabama Legislature passed comprehensive tort reform legislation in 1987. The legislation was comprised of several bills pertaining to venue, structured judgments, punitive damages, the collateral source rule, and medical liability actions. Additional tort reform legislation pertaining to punitive damages caps was enacted in 1999. In 2011, the Legislature passed a comprehensive tort reform package, which is discussed in more detail below. Most notably, the Legislature adopted the federal *Daubert* standard for the admissibility of expert witness testimony.

2. Admissibility of Expert Witness Opinions

In June 2011, the Legislature adopted the federal *Daubert* standard for the admissibility of expert witness opinion testimony. Ala. Code § 12-21-160. Expert testimony is not admissible in civil or criminal actions under the following criteria:

A. **General Rule** – if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise. Ala. Code § 12-21-160(a).

B. **Opinions Admissible If** – expert testimony based on a scientific theory, principle, methodology, or procedure is only admissible if the testimony is based on 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. Ala. Code § 12-21-160 (b).

3. Joint and Several Liability

Alabama law has long provided for joint and several liability when there are multiple tortfeasors. However, in 1999, the Alabama Legislature amended the law on joint and several liability when it redrafted the previously unconstitutional Ala. Code § 6-11-21. The revised statute is outlined below:

A. **Punitive Damages** – defendants are liable only for punitive damages commensurate with their own conduct. In other words, tortfeasors are not jointly and severally liable for punitive damage awards (except in wrongful death actions). Ala. Code § 6-11-21(e).

B. **Wrongful Death** – there is joint and several liability for tortfeasors in wrongful death actions even though the only available damages are punitive damages. Ala. Code § 6-11-21(j).

4. Damages Caps

Although damages caps were part of the 1987 tort reform legislation, the Alabama Supreme Court ruled that statutes limiting the amount of available compensatory damages are unconstitutional. Specifically, Ala. Code § 6-5-544(b) provided that noneconomic damages in medical negligence cases shall be capped at $400,000. The Alabama Supreme Court held that this statute violated equal protection as guaranteed by the Alabama Constitution. *See Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 164 (Ala. 1991).

Despite the Supreme Court's clear holding that caps on compensatory damages are unconstitutional, the Alabama Legislature has made several attempts to enact legislation to limit a litigant's recovery. However, their efforts have thus far proven to be unsuccessful.

5. Punitive Damages

The 1987 tort reform legislation contained a provision limiting the amount of recoverable punitive damages. Just as with the limit on noneconomic compensatory damages discussed above, the Alabama Supreme Court held that statutory limitations on punitive awards violate a litigant's right to a trial by jury and are therefore unconstitutional. *See Henderson ex rel. Hartsfield v. Alabama Power*, 627 So. 2d 878 (Ala. 1993). However, Alabama Code § 6-11-21 was rewritten in 1999 and now provides for the following limitations:

A. **§ 6-11-21(a)** – in actions not involving wrongful death or physical injury, punitive damages shall not exceed three times the compensatory award or $500,000, whichever is greater.

B. **§ 6-11-21(b)** – in civil actions against a small business, punitive damages shall not exceed $50,000 or 10% of the business' net worth, whichever is greater. A "small business" is any business that has a net worth of $2,000,000 or less at the time of the occurrence made the basis of the suit. § 6-11-(b).

C. **§ 6-11-21(d)** – in civil actions for physical injury, punitive damages shall not exceed three times the compensatory award or $1,500,000, whichever is greater. "Physical injury," for purposes of this section, means actual injury to the body of the claimant proximately caused by the act complained of and does not include physical symptoms of the mental anguish or emotional distress for which recovery is sought

when such symptoms are caused by, rather than the cause of, the pain, distress, or other mental suffering. § 6-11-21(k).

D. **§ 6-11-21(e)** – abolishes joint and several liability for punitive awards.

E. **§ 6-11-21(h)** – provides that the limitations on punitive damages do not apply to class action lawsuits.

F. **§ 6-11-21(j)** – provides that the limitations on punitive damages do not apply to actions for wrongful death or intentional infliction of physical injury.

G. **§ 6-11-21(l)** – provides that no portion of a punitive damage award shall be allocated to the state or any agency or department of the state.

In addition to these limitations, Alabama Code § 6-11-20 provides that punitive damages shall not be awarded unless "it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff."

Additionally, should punitive damages be awarded, the parties have the option of requesting additional hearings and/or presenting additional evidence concerning the amount of punitive damages. Ala. Code § 6-11-23. Evidence that may be submitted includes the economic impact of the verdict on the parties; the amount of compensatory damages; whether or not the defendant has been guilty of the same or similar acts in the past; the nature and extent of any effort the defendant made to remedy the wrong; and, the opportunity or lack of opportunity the plaintiff gave the defendant to remedy the wrong. *Id.* No presumption of correctness applies to the amount of punitive damages awarded and if the trial court shall consider the evidence presented and reduce or increase the award if appropriate. *Id.*

If the award of punitive damages is appealed, there is no presumption of correctness and the appellate court shall, after reviewing the evidence, reduce or increase the award if appropriate. *See* Ala. Code § 6-11-24.

6. Medical Malpractice Reform

The Alabama Medical Liability Act of 1987 (the "AMLA") governs medical negligence actions in Alabama. *See* Ala. Code §§ 6-5-480 to -488, as supplemented by Ala. Code §§ 6-5-540 to –552. The Act was amended in 1996. The Act applies to actions against any medical practitioner, dental practitioner, medical institution, physician, dentist, hospital or other health care provider. Ala. Code § 6-5-542. Some of the more significant provisions of the Act include:

A. **Collateral Source Rule (Ala. Code § 6-5-545)** – this statute abolishes the collateral source rule in medical malpractice cases. Thus, defendants are entitled to present evidence that the plaintiff was reimbursed for any medical or hospital expenses incurred as a result of the defendant's alleged misconduct. This provision sparked much debate between the Plaintiff and Defense bars, but the Alabama Court of Civil Appeals recently settled the debate and once again upheld the admissibility of evidence demonstrating payment of a plaintiff's medical expenses. *Crocker v. Grammer*, --- So. 3d ----, 2011 WL 3963008 (Ala. Civ. App. Sept. 9, 2011).

B. **Similarly Situated Providers (Ala. Code § 6-5-548)** – this statute establishes the standard of care for health care providers and imposes a restriction that only a "similarly situated provider" may serve as an expert witness in medical malpractice actions. If the defendant medical provider is not a specialist, a "similarly situated health care provider" must: (1) be licensed by the appropriate regulatory board or agency of this or some other state; (2) be trained and experienced in the same discipline or school of practice; and (3) have practiced in the same discipline or school of practice during the year preceding the date that the alleged breach of the standard of care occurred. Ala. Code § 6-5-548(b). If the defendant medical provider is a specialist, a "similarly situated health care provider" must: (1) be licensed by the appropriate regulatory board or agency of this or some other state; (2) be trained and experienced in the same specialty; (3) be certified by an appropriate American board in the same specialty; and (4) have practiced in this specialty during the year preceding the date that the alleged breach of the standard of care occurred. Ala. Code § 6-5-548(c).

C. **Substantial Evidence Standard (Ala. Code § 6-5-549)** – this statute abolishes the scintilla rule of evidence and provides that the standard of proof shall be proof by substantial evidence.

D. **Detailed Complaint (Ala. Code § 6-5-551)** – this statute provides that the plaintiff's complaint must set forth in detail a specific description of each act and omission that plaintiff alleges renders the health care provider liable. Failure to include such specificity subjects the complaint to a dismissal for failure to state a claim upon which relief may be granted. Further, the plaintiff is prohibited from conducting discovery on any matter not specifically described in the complaint.

7. Wrongful Death Reform

The Alabama Supreme Court recently overruled two 18-year old medical malpractice cases and expanded its interpretation of the Alabama Wrongful Death Act by concluding that the Act permits an action for the death of a previable fetus. *Mack v. Carmack*, --- So. 3d ----, 2011 WL 3963006 (Ala. Sept. 9, 2011). The Court based its conclusion, in large part, upon the Legislature's 2006 amendment of Alabama's criminal statute defining homicide, which now defines a "person" as "a human being, including an unborn child in utero at any state of development, regardless of viability." Alabama joins six other jurisdictions in allowing for wrongful death actions even where the death of the fetus occurs before the fetus becomes viable: Illinois, Louisiana, Missouri, Oklahoma, South Dakota, and West Virginia.

In June 2011, the Legislature changed the venue rules for wrongful death actions as part of its tort reform package. Alabama Code § 6-5-410 provides that a wrongful death action may be filed only in a county where the deceased, if living, could have filed a civil action.

8. Products Liability Reform

Established in 1976, the Alabama Extended Manufacturers Liability Doctrine (the "AEMLD") governs products liability actions in Alabama. *See Casrell v. Altec Industries, Inc.,* 335 So. 2d 128, 132 (Ala. 1976); *Atkins v. American Motors Corp.*, 335 So. 2d 134, 137 (Ala. 1976). The "AEMLD" provides that a manufacturer, supplier, or seller who markets a product not reasonably safe when applied to its intended use in the usual and customary manner is negligent as a matter of law.

In June 2011, the Legislature passed a comprehensive tort reform package, most of which focused on products liability reform:

A. **"Innocent Conduit" Rule (Ala. Code §§ 6-5-501 and 6-5-521)** – this prohibits product liability actions against retailers, wholesalers, and other distributors if they are not the manufacturer, designer, tester, or packager of the product and did not cause any defect in the product. In other words, product retailers may not be sued for products liability.

B. **Good Faith Exception** – a plaintiff may file suit against a seller or distributor if he provides an affidavit certifying that he, or his attorney, has in good faith exercised due diligence but has been unable to identify the manufacturer of the product. The seller or distributor may then file an affidavit certifying the correct identity of the manufacturer, against whom the plaintiff must files suit against. Once the plaintiff has filed suit against the manufacturer and the

manufacturer has answered, the plaintiff shall voluntarily dismiss the claim against the seller or distributor.

In 2007, the Supreme Court held that in toxic exposure cases, the statute of limitations begins to accrue from the date of the last exposure, and not from the date the injury is discovered by the claimant (rejecting the so-called "discovery" rule). *Cline v. Ashland*, 970 So. 2d 755 (Ala. 2007). However, the Court noted that discovery rule still applies to asbestos claims.

9. Attorneys Fees

While there is no tort reform legislation that specifically governs attorney's fees, the AMLA does create a cause of action for malicious prosecution when a plaintiff institutes a civil action against a health care provider and he/she knew or should have known that the action was without adequate legal basis, false or unfounded. Ala. Code § 6-5-550. If the health care provider is successful with the malicious prosecution action, he/she may recover actual damages, including litigation costs or in the alternative, liquidated damages of $500 plus a reasonable attorney's fee and all other costs of litigation. *Id.*

10. Practice Pointers

The AMLA, among other things, requires that the plaintiff state with specificity the acts or omissions that he/she alleges make the health care provider liable. The Act also requires that discovery in a medical malpractice case be narrowly tailored to the specific allegations in the complaint. Therefore, it is important to keep the following in mind when defending a medical malpractice action:

A. **Has the plaintiff pled with specificity?** If not, a Rule 12(b)(6) motion to dismiss may be appropriate.

B. **Is plaintiff's discovery relevant to the allegations in the complaint?** If the complaint does not specifically describe the issue that the discovery addresses, consider filing a motion for protective order.

11. Special Issues

A. Alabama's Wrongful Death Statute

The Alabama Wrongful Death Act is unlike any other in the United States in that the only damages that available for recovery are punitive damages. *See* Ala. Code § 6-5-410. The theory behind this unique wrongful death statute is that human life has no measurable value. Thus, damages that one ordinarily associates with wrongful death actions, such as loss in income

and value of life, are not the relevant inquiries in Alabama wrongful death actions. Rather, the relevant inquiry is the culpability of the wrongdoer and the necessity of preventing similar actions. Additionally, because the only available damages are punitive, a defendant may find himself liable for punitive damages when he is guilty of only simple negligence.

B. Insurance Coverage for Punitive Damages

Alabama courts have held that it is not a violation of public policy for insurance contracts to exclude coverage for punitive damages. *See Hill v. Campbell*, 804 So. 2d 1107, 1109 (Ala. Civ. App. 2001). However, there is an exception for wrongful death: since punitive damages are the only damages recoverable in Alabama, punitive damages exclusions are unenforceable in Alabama for wrongful death actions. *Id.* The *Hill* court also held that a punitive damages exclusion violates the Alabama Uninsured Motorist Act, Ala. Code § 32-7-23. Thus, UIM insurers are required to provide coverage for punitive damages even in the non-wrongful death context, regardless of whether the insurance contract specifically excludes them. *Id.* at 1116.

C. Post-Judgment Interest

The Legislature recently lowered the post-judgment interest rate from 12 percent to 7.5 percent. Ala. Code § 8-8-10. This rate applies to all judgments, other than those based upon a contract action, and it apples from the date of entry of the judgment. Judgments based upon contract actions will bear interest from the day of the cause of action at the same rate of interest as stated in the contract.

D. Actions against Architects or Engineers

As part of the 2011 tort reform package, the Legislature decreased the statutory repose period for commencing a civil action against an architect, engineer, or builder from 13 to 7 years after the substantial completion of the construction or improvement. Ala. Code. §§ 6-5-221, 6-5-222, 6-5-225, and 6-5-227.

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1. Introduction – History of Tort Reform in ALASKA

In 1986, the Alaska Legislature passed the "Tort Reform Act" modeled after The Uniform Comparative Fault Act, in an effort to "create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance." The primary change made by this legislation was a broadening of the definition of "comparative negligence" in negligence cases to include other types of comparative fault including a plaintiff's ordinary negligence.

In 1997, the Alaska Legislature revised the 1986 "Tort Reform Act". The significant changes include a cap on punitive and non-economic damages, a continuation of the transition from joint and several liability to several liability, and the enactment of a ten year statute of repose.

2. Transition from Joint and Several Liability to Several Liability

In 1987 a voter initiative modified the 1986 damages apportionment schedule to abolish any remaining joint and several liability. The new system, which became effective in 1989, provided that "the court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault." Alaska Stat. § 09.17.080(d).

The Alaska Statute §09.17.080 is a comparative negligence statute that requires the finder of fact to assign a percentage share of responsibility for damages to each responsible party and non-party, and mandates that liability for damages must be apportioned between the responsible parties in accordance with their percentage of responsibility. Tort reform opponents objected that tort victims may not be fully compensated if fault can be allocated to a non-party. However, the Alaska Supreme Court held that tort victims would not be prejudiced since they can later sue the non-party tortfeasor. The comparative apportionment of damages amongst parties and non-parties at fault was held to be facially constitutional by the Alaska Supreme Court in 2002. *See*, *Evans ex. Rel. Kutch v. State*, 56 P.3d 1046 (2002).

3. Damage Caps

The 1997 legislation modified the 1986 Tort Reform Act to place caps on a plaintiff's recovery of noneconomic damages (defined as "pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, loss of consortium, and other non-pecuniary damage") in all actions for personal injury or wrongful death. Alaska Stat. § 09.17.010(a). Except in cases of "severe permanent physical impairment" or "severe disfigurement," the allowable non-economic damages may not exceed $400,000, or the injury person's life expectancy in years multiplied by $8,000, whichever is greater. Alaska Stat. §09.17.010(b). Where there is "severe permanent physical impairment" or "severe disfigurement," the allowable noneconomic damages a jury can award may not exceed $1,000,000 or the person's life expectancy in years multiplied by $25,000, whichever is greater. *Id*.

4. Collateral Source Rule

In 2008 the Alaska Legislature modified the "collateral source" rule in non-medical malpractice cases to allow the defendant to introduce evidence of amounts received or to be received by a claimant as compensation for the same injury from collateral sources that do not have a right of subrogation. After the fact finder has rendered an award to a claimant, and after the court has awarded costs and attorney fees, a defendant may introduce evidence of collateral sources. If the defendant elects to introduce evidence, the claimant may introduce evidence of any disparity between the actual amount of attorney fees incurred by the claimant compared to the court's award of attorney fees to claimant.

5. Punitive Damages

The 1997 legislation also modified the 1986 Tort Reform Act to limit the amount of punitive damages. In most cases punitive damages are limited to three times the compensatory damages, or $500,000, whichever is greater. However, if the jury determines that the defendant knowingly caused the injuries for financial gain, the cap is expanded to either (1) four times compensatory damages, (2) four times the amount of financial gain, or (3) $7,000,000, whichever is greater. Alaska Stat. § 09.17.020(f)-(h).

In actions for certain unlawful employment practices, the amount of punitive damages may not exceed $200,000 if the defendant employer has less than 100 employees in the state, $300,000 if the employer has between 100 and 200 employees, $400,000 if the employer has between 200 and 500 employees, and $500,000 for 500+ employees in the state.

In order for a jury to impose punitive damages, there must be "clear and convincing evidence" that a defendant's conduct "was outrageous, including acts done with malice or bad motives; or evidenced reckless indifference to the interest of another person." Alaska Stat. § 09.17.020(b). The statute requires that a separate proceeding be held to determine the amount of punitive damages to be awarded, during which proceedings that the jury is allowed to consider several factors, including:

- evaluating the likelihood that serious harm would arise from the defendant's conduct at the time it occurred,
- the degree of the defendant's awareness of this potential for harm,
- the amount of financial gain the defendant gained or hoped to gain by the conduct,
- the duration for the conduct and any intentional concealment of it,
- the attitude and conduct of the defendant upon discovery of the conduct,
- the financial condition of the defendant, and
- the "total deterrence" that would be imposed on the defendant, including an evaluation of the compensatory and punitive damages awards which have been

> or might be awarded to similarly situated person, and the severity of criminal penalties to which the defendant has ben or may be subjected.

Alaska Stat. § 09.17.020(c). After completion of these separate proceedings, the jury determines the amount of punitive damages to be awarded and the court enters judgment for that amount. Alaskan courts have the ability to review punitive damages for excessiveness on appeal.

Under AS 09.17.020(j), successful plaintiffs who receive any type of punitive damages must pay half of that award to the state treasury. In 2006, the Alaska Supreme Court has held that this statute does not violate due process rights, does not effect a taking without just compensation under the United States or Alaska Constitutions, and it does not violate a right to jury trial. *Reust v. Alaska Petroleum Contractors*, 127 P.3d 807 (2005).

6. Medical Malpractice Reform

The Alaska Legislature has also enacted a comprehensive series of statues with regard to medical malpractice issues. Alaska Stat. §§09.55.540-09.55.560.

A claimant in a malpractice action must prove, by a preponderance of the evidence (1) the degree of knowledge or skill possessed or the degree of care ordinarily exercised under the circumstances, at the time of the act complained of, by health care providers in the field or specialty in which the defendant was practicing; (2) that the defendant either lacked this knowledge or skill or failed to exercise the degree of care required; and (3) that as a proximate result of this lack of knowledge or skill or the failure to exercise the appropriate degree of care the plaintiff suffered injuries that would not otherwise have occurred. Alaska Statute §09.55.540(b).

Damages are to be awarded in accordance with common law principles, and the fact finder is required to render any award for damages by category of loss. Alaska Stat. §09.55.548(a). However, a plaintiff may only recover damages from the defendants that exceed amounts received by the claimant as compensation for the injuries from collateral sources, evidence of which is admissible after the fact finder has rendered an award. Alaska Stat. §0955.548(b).

Noneconomic damages for personal injury or death based on the provision of services by a health care provider are limited by statute. Alaska Stat. §09.55.549. Although damages may include both economic and non-economic damages, non-economic damage claims are limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, loss of consortium and other non-pecuniary damages, but may not include "hedonic damages." Alaska Stat. § 0955.549(c).

In suits against health care providers, the jury or court's award of non-economic damages may not exceed $250,000, regardless of the number of health care providers sued, or the number of separate claims or causes of action. Alaska Stat. §09.55.549(d). But in wrongful death cases, or cases of severe permanent physical impairment that is more than

70 percent disabling, this cap is increased to $400,000. Alaska Stat. § 09.55.549(e). The limitations on noneconomic damages do not apply if the damages resulted from an act or omission that constitutes reckless or intentional misconduct. Alaska Stat. § 09.55.549(f).

Advance payments made by a defendant health care provider or their insurer is not admissible as evidence or may not be construed as any admission of liability, but any final award in favor of the plaintiff is to be reduced to the extent of the advance payment. Alaska Stat. § 09.55.546.

Alaska allows a patient and a health care provider to enter into an agreement to allow submission of disputes, controversies, or issues arising out of care or treatment by the health care provider to voluntary arbitration. Alaska Stat. § 09.55.535(a). If such an agreement is entered into, upon the filing of a malpractice claim subject to the agreement to arbitrate, the claim shall be submitted to an arbitration board, with one arbitrator designated by the claimant, one by the health care provider, and the third arbitrator selected by agreement between the first two arbitrators. Alaska Stat. § 09.55.535(f).

Hospitals have partial immunity for actions taken by emergency room physicians who are not employees but are independent contractors. Under Alaska Stat. §09.65.096 hospitals are responsible only for exercising reasonable care in granting and reviewing privileges to practice in the hospital. Hospitals are not otherwise responsible for actions taken by emergency room physicians who are independent contractors, as long as the hospital provides notice, and the physicians have prescribed levels of malpractice insurance.

7. Products Liability Reform

The 1997 legislation also modified the 1986 Tort Reform Act for Products Liability Reform, actions for strict tort liability, including products liability claims such as breach of warranty, unreasonable assumption of the risk, and misuse of a product, are expressly included in the definition of "fault" for purposes of application of the statutory comparative fault provisions, as well as for application of the noneconomic and punitive damage limitations. Alaska Stat. § 09.17.900.

8. Statute of Repose

The 1997 revisions of the Tort Reform Act created a 10 year statute of repose. A person may not bring an action for personal injury, death, or property damage unless commenced within 10 years of the earlier of the date of substantial completion of the construction alleged to have caused the personal injury, death, or property damage or the last act alleged to have caused the personal injury, death, or property damage. However, this statute does not apply to injury, death, or property damage which resulted from, for example, prolonged exposure to hazardous waste, intentional or grossly negligent conduct, fraud, misrepresentation, or a breach of an express warranty.

However, the 1997 revision excluded from the 10 year statute of repose a class of minor plaintiffs whose injuries occur when they are under the age of eight. The applicable statute effectively tolled the personal injury statute, Alaska §09.10.070, only until the minor reached their eighth birthday and then the two-year personal injury statute of limitations would begin to run. The intent of the exclusion was to control the cost of medical malpractice in a population whose parent or legal guardian could bring suit. The result was that if a minor was injured one month before his eighth birthday, once the birthday occurred he had two years to file suit, but if the injury occurred one month after the minors eighth birthday, the 10 year statute of repose applied. In 2007, the Alaska Supreme Court held that the statute which tolled the statute of limitations for personal-injury claims for minors injured before their eighth birthday violated the minors' due-process right of access to the courts under the Alaska Constitution. *Sands ex.rel. Sands v. Green*, 156 P.3d 1130 (2007).

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1. HISTORY AND OVERVIEW OF TORT REFORM IN ARIZONA

In the last twenty-five years in Arizona, the judicial, legislative, and executive branches have enacted various tort reforms, starting with "reforms" in the 1960's to lift restrictions on access to the courts, such as abolishing certain immunities from suit, to more recent efforts to limit claims or damages in tort cases.

For the most part, "tort reform," as the phrase is commonly used, has not been successful in Arizona. Most legislative attempts to effectuate restrictions on bringing lawsuits or caps on damages have been struck down by the courts or rejected by the electorate. For example, the sweeping Personal Injury Reform Act of 1993 was largely overturned by popular vote in the 1994 referendum, and similar measures were rejected in 2003. In other instances, statutes of repose or legislation directed at capping or limiting damages have been declared unconstitutional by the courts.

Some statutory schemes that reduce the amount of personal injury damages to be recovered while preserving the fundamental right to bring an action to recover damages have been held constitutional, such that tort reform in Arizona is more likely to be promoted on a single topic or by a specific interest group, rather than through widespread legislative reform. Non-legislative changes, such as revisions to the rules of civil procedure in medical malpractice claims or changes to evidentiary rules for the admission of expert testimony have also effectuated changes in the legal landscape as well.

The following is an overview of certain topics common to tort reform legislation and the current status of the law in Arizona

2. GENERAL LIABILITY AND NEGLIGENCE CLAIMS

Statute of Limitations: 2 years for most negligence cases

Except for claims against public entities, and certain claims "arising out of statute" (such as dog bite cases), most negligence claims in Arizona are subject to a two year statute of limitations which begins to accrue from the time of discovery. Ariz. Rev. Stat. Ann. § 12-542.

Apart from a 12-year statute of repose for contract/warranty-based claims for construction defects, statutes of repose have been held unconstitutional. *Hazine v. Montgomery Elevator Co.* 176 Ariz. 340, 861 P.2d 625 (1993)(12 year statute of repose for products liability claims unconstitutional).

Claims against public entities are subject to a one year statute of limitations and also require that a Notice of Claim filed and served within 180 days of the accrual of the action. A.R.S. 12-820.01. The statutory requirements for the Notice of

Claim and the manner in which it is served have been strictly construed and has been the source of much litigation in recent years. *See Deer Valley* case. *See Deer Valley Unified School District No. 97 v. Houser,* 214 Ariz. 293, 152 P.3d 490 (2007)(requiring factual details and demand for a sum certain in the Notice of Claim).

Comparative Fault/Joint and Several Liability: "Pure" Comparative Fault

The abolition of joint and several liability with the passage of the Uniform Contribution Among Tortfeasors Act (UCATA) in 1984 means Arizona is a "pure" comparative fault state. In this sense, a defendant can only liable for the proportionate share of the fault, and the jury can apportion fault to any other party or non-party whose negligence contributed to the injury, but the plaintiff is not barred from recovery, even if found to be more than 50% at fault.

The fault apportioned to the plaintiff does not preclude the plaintiff's right to recovery. The one exception, a tort reform measure from the 1993 enactments, provides that a plaintiff who is under the influence of alcohol or drugs and is found more than 50% at fault can be precluded from recovering any damages. A.R.S. 12-711; *Romero v. Southwest Ambulance*, 119 P.3d 467, 211 Ariz. 200, (Ariz.App. 2005) (Statute allowing claimant's intoxication from drugs or alcohol as affirmative defense in civil actions did not violate constitutional right of action to recover damages for injuries). A similar statute barring a plaintiff from recovering damages when injured while committing a criminal act, however, was found to be unconstitutional. *Sonoran Desert Investigations, Inc. v. Miller* 213 Ariz. 274, 141 P.3d 754 (App. 2006).

Arizona recognizes the defense of assumption of risk, where there is evidence that the plaintiff has knowledge of a particular risk, appreciates the magnitude, and voluntarily subjects himself to the risk under the circumstances, but it is not a complete bar to recovery. Instead, the jury is permitted to reduce the plaintiff's damages by the percentage of fault accordingly. RAJI (Civil) 4th Fault 10; *Hildebrand v. Minyard*, 16 Ariz. App. 583, 494 P.2d 1328; Ariz. Const. art 18, section 5.

Collateral Source Rule: Except medical malpractice actions, evidence of payments or benefits from any other collateral source is not admissible in evidence. A plaintiff can claim the full amount of the medical bill, even if the provider was paid a reduced amount by health insurance or through workers compensation. *Lopez v Safeway Stores*, 212 Ariz. 198, 129 P.3d 487 (App. 2006); *Warner v. Southwest Images*, 218 P.3d 986 (App. 2008)

3. MEDICAL MALPRACTICE CLAIMS

Collateral Source Rule

In Arizona, a defendant may elect to introduce evidence of the claimant's receipt of collateral payments, such as health insurance and disability benefits. A.R.S. § 12-565. If the defendant elects to introduce such evidence, however, the plaintiff may then offer evidence of payments made for the collateral benefits. *Id.* Allowing the jury to consider collateral source evidence in medical malpractice cases has been upheld as constitutional. *Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977).

Periodic Payments

A corresponding provision in earlier medical malpractice reform legislation allowing damages to be paid over time in periodic payments has been held to violate Arizona's constitutional protection against the abrogation of damages. *Smith v. Myers*, 181 Ariz. 11, 887 P.2d 541 (1994).

Expert Witness Testimony

By state statute, any claim against a health care provider requires the attorney's certification that expert testimony is necessary, and a "preliminary expert opinion affidavit" served with the initial disclosure statement (40 days after the Answer). A.R.S. § 12-2603. Courts have been increasingly strict in upholding the statutory requirements regarding the qualifications of the expert and the opinions on standard of care and causation. *Governale v. Lieberman,* 226 Ariz. 443, 250 P.3d 220 (App. 2011).

4. PRODUCTS LIABILTY CLAIMS

State statutes supplement the common law for all products liability claims in Arizona. See A.R.S. 12-681 et seq.

§ 12-683 set forth affirmative defenses including the "state of the art" defense, and non-liability if the product was altered or modified in an unforeseeable manner, or if the product was misused in an unforeseeable manner.

§ 12-686 provides that evidence of advancements or changes in the state of the art after the product was first sold is not admissible in a products liability action, nor can the plaintiff introduce evidence of any change made in the warnings, design or methods of manufacturing or testing after the product was first sold.

5. WITNESSES AND EVIDENCE

Expert Testimony and Qualifications

In response to court state court opinions rejecting the *Daubert* rule for the admission of expert testimony, in favor a standard more analogous to the *Frye* standard, in 2011 the Arizona Legislature enacted A.R.S. 12-2203 which was

designed to codify the *Daubert* rule. This statute faced constitutional challenges for infringing on the rulemaking authority of the Arizona Supreme Court, which largely became moot when the state supreme court amended Rule 702 of the Arizona Rules of Evidence with the stated intent of being consistent with the Federal Rules and *Daubert. See Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) *compare Frye v. United States,* 293 F. 1013 (D.C.Cir.1923).

As amended, Evidence Rule 702 permits a witness who is qualified as an expert by knowledge, skill, experience, training, or education to testify if: (a) the expert's scientific, technical, or other specialized 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. The comment to the rule echoes *Daubert's* recognition that the trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury's determination of facts at issue.

6. **DAMAGES**

The Arizona Constitution specifically bars the legislature from enacting any law precluding a party from bringing a personal injury action or passing a law abrogating the right to recover damages. Specifically, Article 2, Section 31, provides, "No law shall be enacted in this state limiting the amount of damages to be recovered for causing death or injury of any person." Also, Article 18, Section 6, provides, "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation." As such, tort reform measures that are ultimately enacted are often subject to constitutional challenges.

Caps or limits on Non-economic Damages: None

For example, A.R.S. 12-582 regarding "periodic payments" of damage awards in medical malpractice cases violated the Arizona State Constitution regarding damages. Likewise, Arizona does not place a cap on the amount of non-economic damages recoverable in a medical malpractice action.

Caps or Limits on Attorneys' Fees:

In March of 2012 the Governor signed into law a bill eliminating the right to recover attorneys' fees in nursing home/ vulnerable adult cases. This has yet to be challenged on constitutional grounds.

Punitive Damages: No legislative limits/restrictions

Limiting punitive damages is perennially on the legislative agenda but clashes with the constitutional prohibitions against abrogating damages in tort cases. Even still, the courts have made it clear that the burden of proof is higher and punitive damages should only be awarded in extraordinary cases.

To recover punitive damages, the plaintiff must establish, by clear and convincing evidence, that the defendant acted with an "evil mind." The required state of mind may be shown by any of the following: (1) intent to cause injury; (2) wrongful conduct motivated by spite or ill will; or (3) that the defendant acted to serve his own interests, having reason to know and consciously disregarding a substantial risk that his conduct might significantly injury the rights of others. See RAJI (Civil 4th) Personal Injury Damages 4; *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (9186); *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986).

Pending in the legislature in April 2012 is a bill to limit punitive damages in product liability cases. If the bill becomes law, it will not likely pass constitutional muster.

7. CONCLUSION

In every legislative session lawmakers sponsor a host of bills in the name of "tort reform" which are touted as the panacea to curb frivolous lawsuits, reduce insurance premiums and help businesses. Opponents decry such measures as placing special interests over the safety of consumers and usurping the right to trial by jury. In Arizona, sweeping tort reform measures have been largelyu emasculated by court decisions or rejected by the electorate when it comes to fundamental changes in the state's constitution. Changes in the law, as well as the rules of civil procedure and evidence, have been and will continue to be more incremental, with the validity of each measure being tested on a case-by-case basis.

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In 2003, the Arkansas legislature passed the Civil Justice Reform Act (CJRA) as comprehensive tort reform legislation applicable to all actions for personal injury, medical injury, property damage, and wrongful death. 2003 Ark. Acts 649. The CJRA was comprehensive and fully summarized in the previous installment of the Primerus Compendium. Since that time, the Supreme Court of Arkansas has found various sections of the CJRA unconstitutional. An overview of these cases and the effected tort reform statutes are identified below.

The first provision of the CRJA found unconstitutional was § 16-114-209(b), which requires a party to submit an affidavit of reasonable cause from a medical expert when filing a medical-malpractice action. See Summerville v. Thrower, 369 Ark. 231, 253 S.W.3d 415 (2007). In *Summerville*, the Court concluded that the statute was procedural in nature and conflicted with Ark. R. Civ. P. 3 regarding commencement of an action. Id. The Court held that the statute constituted a legislative encumbrance to commencing a cause of action that is not found in Rule 3 of the Arkansas Civil Rules and was thus unconstitutional as being in conflict with Rule 3. Id.

Another provision of the CJRA was challenged in *Johnson v. Rockwell Automation, Inc.,* 2009 Ark. 241, 308 S.W.3d 135 (2009). In *Johnson*, the Supreme Court of Arkansas was presented with a certified question regarding the validity of Ark. Code Ann. § 16–55–202, the statute governing nonparty fault. Id. The Petitioners argued that that provision was unconstitutional because, among other reasons, it violated the separation-of-powers clause found in Article 4, Section 2 of the Arkansas Constitution. Id. The Court ultimately struck down section 16–55–202 as unconstitutional. The Court stated:

> [T]he nonparty-fault provision in the instant case conflicts with our "rules of pleading, practice and procedure." While respondents assert the nonparty-fault provision should be upheld because it does not directly conflict with our rules of procedure as the legislative requirements did in *Summerville* and *Weidrick,* we take this opportunity to note that so long as a legislative provision dictates procedure, that provision need not directly conflict with our procedural rules to be unconstitutional. This is because rules regarding pleading, practice, and procedure are solely the responsibility of this court.

Johnson, 2009 Ark. 241, at 8, 308 S.W.3d at 141. Accordingly, the Court found the statute unconstitutional as it conflicted with Arkansas Rule of Civil Procedure Rule 7 governing pleadings. Id.

Likely the most significant update is the Arkansas Supreme Court's ruling that the CRJA statutory cap on punitive damages is unconstitutional. See Bayer Cropscience LP v. Schafer, 2011 Ark. 518 (2011). In *Bayer*, the Court held that Ark. Code Ann. § 16-55-208, which establishes limits on awards of punitive damages, was unconstitutional under Article 5, Section 32 of the Arkansas Constitution. Id. Article 5, Section 32 of the Arkansas Constitution states:

> The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees, and to whom said payment shall be made. It shall have power to provide the means, methods, and forum for adjudicating claims arising under said laws, and for securing payment of same. *Provided, that otherwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property;* and in case of death from such injuries the right of action shall survive, and the General Assembly shall prescribe for whose benefit such action shall be prosecuted.

Id. at 518 (emphasis original). The Court stated that Article 5, Section 32 bestows upon the General Assembly the power to limit the amount of recovery *only* in matters arising between employer and employee Id. (emphasis original). Furthermore, the General Assembly "may limit tort liability only where there is an employment relationship between the parties." Id. Based on these findings, the Court concluded that § 16-55-208 served to limit the amount of recovery outside the employment relationship, thereby finding the statutory cap on punitive damages unconstitutional.

Approximately one month after rejecting the punitive damages statute, the Court went on to void another provision of the CRJA, codified as Ark. Code Ann. § 16-114-206(a), which limits who may serve as an expert witness in civil lawsuits. See Broussard v. St. Edward Mercy Health System, 2012 Ark. 14 (2012). § 16-114-206 states that plaintiffs' expert testimony shall be "provided only by a medical care provider of the same specialty as the defendant" who can speak to "the degree of skill and learning ordinarily possessed and used by members of the profession of the [defendant] in good standing, engaged in the same type of practice or specialty in the locality in which he or she practices or in a similar locality" and can attest that the defendant "failed to act in accordance with that standard." Ark. Code Ann. § 16-114-206(a) (2011). The Court found that the statutory section attempted to dictate procedure and invade the province of the judiciary's authority to set and control procedure by setting forth additional expert witness requirements beyond Arkansas Rule of Evidence 702. See Broussard, 2012 Ark. 14. As such, the statutory section was found to violate the separation-of-powers doctrine, Amendment 80, and the inherent authority of the courts to protect the integrity of proceedings and the rights of litigants. Id. Nevertheless, the Court held that the challenged language, "[b]y means of expert testimony provided only by a medical care provider of the same specialty as the defendant," was severable from the remainder of the statute. Therefore, the rest of the Medical Malpractice Act, including the remainder of § 16-114-206(a)(1) and (2), are unaffected by this decision. Id.

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1. INTRODUCTION - HISTORY OF TORT REFORM IN CALIFORNIA

California is often recognized as one of the first states to initiate comprehensive tort reform. In 1975, responding to what many viewed as a crisis within the medical community, the California Legislature enacted the Medical Injury Compensation Reform Act ("MICRA"). At the time, some insurance carriers were declining to write additional policies in California and many physicians were either leaving the state entirely, or limiting their practice to lower risk specialties in order to be able to afford medical malpractice coverage. In 1986 and 1987, further reforms were made with the adoption of Proposition 51 and SB 241, respectively. Proposition 51 amended long-standing rules on joint and several liability concerning non-economic damages. SB 241 modified the procedures for calculating and defining punitive damages under California tort law. These three reforms have shaped California's tort reform system for the past three decades.

Since its adoption in 1975, there have been several attempts to amend MICRA's provisions and broaden its reforms. Specifically, MICRA's $250,000.00 damage cap for non-economic damages in medical liability cases has been targeted for reform on multiple occasions throughout the years. To date, these attempts as well as attempts to amend other MICRA provisions have proved unsuccessful. Today, both Congress and the White House are pushing to establish a national standard for medical liability tort reform. Many pundits, including the American Medical Association ("AMA"), have touted California's laws on medical malpractice tort reform, and specifically MICRA, as the "model for medical liability reform."[1] Efforts, such as the proposed Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011,[2] are currently underway to institute a national California-style medical tort system.

2. JOINT AND SEVERAL LIABILITY

Under the traditional common law principles of joint and several liability, each tortfeasor whose negligence is a proximate cause of the plaintiff's damages is responsible as a joint tortfeasor for the entire damage award regardless of their percentage of fault.[3] In recognition of the harshness of this rule, California has adopted comparative negligence principles in order to protect certain "deep-pocketed" joint tortfeasors from having to satisfy an entire damage award. These comparative principles include permitting negligent[4] defendants to pursue comparative equitable indemnity claims against other tortfeasors by filing a cross-

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[1] Getting the Most for our Healthcare Dollars: Medical Liability Reform, Am. Med. Ass'n (April, 2010), http://www.ama-assn.org/ama/pub/about-ama/strategic-issues/health-care-costs/medical-liability-reform.page.

[2] 18 J.L. Bus. & Eth. 91, 94.

[3] DaFonte v. Up-Right, Inc. (1992) 2 Cal.4th 593, 600.

[4] Cal. Code of Civ. Proc. § 875(d) (Defendants guilty of intentional misconduct are entitled to rights to indemnification and contribution).

complaint in the original action[5] or bringing a separate action for indemnification after paying more than their proportionate share of the damages.[6]

Additionally, comparative negligence measures allow courts to more accurately determine each individual tortfeasor's percentage of fault and liability. The apportionment of liability occurs as a result of trial. Defendants are entitled to have the fault of parties who: (a) are not present in the lawsuit, (b) are not amenable to suit, or (c) do not even still exist to be taken into account when determining the parties' apportionment of fault. This is especially important in actions where a tortfeasor is proven insolvent and unable to bear its fair share of the total damages, because any shortfall created by such insolvency is to be apportioned equitably among the remaining culpable, solvent parties in proportion to their respective percentages of fault.[7] Therefore, it is imperative multiple tortfeasors determine the extent of their liability in any given action in order to limit the amount of their judgment or settlement debt.

However, even with these comparative principles in place the legal doctrine of joint and several liability, also known as "the deep pocket rule," still creates a system of inequity and injustice[8] by saddling wealthy parties with the task of satisfying an entire judgment even when their percentage of fault was minimal. Furthermore, traditional joint and several liability maxims require these deep-pocketed defendants to spend extra time and money to seek reimbursement and contribution from their co-defendants and other culpable parties after satisfying the entire judgment award on their behalf. As a result, many deep-pocketed defendants increased their prices for goods and services offered to the public to help pay for these judgments and contribution proceedings.[9] Therefore, in June, 1986 the voters of California approved the "Fair Responsibility Act of 1986," which was later codified in Sections 1431 through 1431.5 of the California Civil Code, to address these problems.

Popularly known as Proposition 51, the 1986 Act modified the traditional, common law doctrine of joint and several liability so as to limit a tortfeasor defendant's liability for *non-economic damages* to an amount in direct proportion to the tortfeasor's percentage of fault.[10] Under this rule, claims for non-economic damages are deemed *several*. As such, traditional comparative fault principles concerning indemnification and contribution for joint tortfeasors do not apply to tortfeasor liability for non-economic damages. Moreover, because non-economic damages are several under Proposition 51, solvent tortfeasors are only responsible to pay their percentage of a non-economic damage award and are not responsible to cover an insolvent party's portion of the award.[11]

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[5] *See* American Motorcycle Assn. v. Sup. Ct. (1978) 20 Cal.3d 578, 608.
[6] Cal. Code of Civ. Proc. § 875(c).
[7] Paradise Valley Hospital v. Schlossman (1983) 143 Cal.App.3d 87, 91-93.
[8] Cal. Civ. Code § 1431.1(a).
[9] Ibid.
[10] Cal. Civ. Code § 1431.2(b)(2).
[11] Evangelatos v. Sup. Ct. (1988) 44 Cal.3d 1188, 1204-05.

Proposition 51 went into effect immediately the day after the election.[12] However, the California Supreme Court later held that Proposition 51 only applied to causes of action accruing after the effective date and did not apply retroactively to those that had accrued prior to the effective date.[13] Most importantly, Proposition 51 only applies to non-economic damages. Non-economic damages, that are subject to this rule, are defined as "*subjective, non-monetary losses, including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation*."[14] As such, economic damages[15] (i.e. objectively verifiable monetary losses – including medical expenses, loss of earnings, loss of employment, costs of repair/replacement, etc.) remain subject to traditional principles of joint and several liability.[16]

Proposition 51's principles regarding Joint and Several Liability reforms have had their most profound effect in cases involving strict products liability actions. Plaintiffs often tried to argue that Proposition 51's limitations did not apply to strict liability cases. In Arena v. Owens Corning Fiberglas Corp., it was argued that Proposition 51 could never be applied to allocate fault among defendants in a strict liability action.[17] The court rejected this argument citing long-standing Supreme Court precedent confirming the practice of allocating fault between strictly liable and negligent defendants.[18] Moreover, the court confirmed that "neither the principles of comparative fault nor the policy underlying Proposition 51 requires it to be interpreted to exclude its application in the strict liability context."[19] In strict products liability actions, Proposition 51 requires apportionment of the responsibility for the part of the injury caused by a particular product's chain of distribution.[20] This percentage of fault is allocated to the entire chain of defendants in a product's distribution network, who remain jointly and severally liable for all harm caused by that product.[21] Therefore, in cases with multiple defective products, Proposition 51 apportions fault between each defective

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[12] Cal. Const., Art. 2, § 10 (a) ("a referendum approved by a majority of votes thereon takes effect the day after the election").
[13] Evangelatos, supra note 11.
[14] Cal. Civ. Code § 1431.2(b)(2).
[15] Cal. Civ. Code § 1431.2(b)(1).
[16] Cal. Civ. Code § 1431.
[17] Arena v. Owens Corning Fiberglas Corp. (1998) 63 Cal.App.4th 1178, 1193.
[18] Arena, supra note 17, at 1193-94; see also Daly v. General Motors Corp. (1978) 20 Cal.3d. 725; Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal.3d 322, 325 (stating principles of comparative negligence "should be utilized as the basis for apportioning liability between two tortfeasors, one whose liability rests upon California's strict product liability doctrine and the other whose liability derives, at least in part, from negligence theory.").
[19] Arena, supra note 17, at 1195.
[20] Arena, supra note 17, at 1197.
[21] Arena, supra note 17, at 1197-98; Wimberly v. Derby Cycle Corp., (1997) 56 Cal.App.4th 618 (holding Proposition 51 has no application in a strict product liability case where plaintiff's injuries are caused solely by a defective product, because the parties in a defective product's chain of distribution are not joint tortfeasors in the traditional sense. As such, Proposition 51 does not apply to tortfeasors within a single, defective product's chain of distribution.)

product leaving all defendants within each product's chain of distribution jointly and severally liable for that product's apportionment of liability.

In Wilson v. John Crane, Inc., the court re-analyzed the concepts of strict liability and comparative fault as related to the application of Proposition 51 and apportionment of liability for non-economic damages in strict liability cases.[22] Plaintiff argued that Proposition 51 did not apply to strict liability cases because "an action sounding in strict products liability is not "based upon principles of comparative fault," because strict liability, by definition, excludes any consideration of "fault.""[23] The court distinguished plaintiff's literalistic interpretation of Proposition 51 by noting that "the doctrine allocates liability not simply on the relative blameworthiness of the parties' conduct, but on the proportion to which their conduct contributed to the plaintiff's harm."[24] A more accurate label may be "comparative responsibility"[25] or "equitable apportionment or allocation of loss."[26] This liberal interpretation of Proposition 51 emphasized the apportionment of loss caused by the tortfeasors' misconduct while disregarding the intent or neglect of the individual tortfeasors. To date, there have been no tort reform enactments that apply specifically or solely to products liability actions and, as such, Proposition 51 still applies in these cases.

The application of Proposition 51 in cases involving a negligent tortfeasor and at least one tortfeasor who acted intentionally varies. In Weidenfeller v. Star and Garter, it was held a negligent tortfeasor's liability for the plaintiff's non-economic damages was subject to the limitation of Proposition 51 notwithstanding the fact plaintiff's injuries were caused in part by a third party tortfeasor's intentional tort.[27] Any holding that the limitations of Proposition 51 do not apply in this context would frustrate the purpose of the statute and violate the commonsense notion that the more culpable party bear the financial burden caused by their intentional misconduct.[28]

However, in 2006 the court in Thomas v. Duggins Const. Co., held that an intentional tortfeasor was not entitled to a reduction or apportionment of non-economic damages under Proposition 51.[29] In support of this ruling, the court noted that Proposition 51 did not alter the principles existing at the time of its adoption governing an intentional tortfeasor's liability to an injured plaintiff, including the principle that intentional tortfeasors are not entitled to a reduction of a judgment in cases involving contributory or comparative negligence.[30] An intentional actor cannot rely on someone else's negligence to shift responsibility for his or her own

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[22] Wilson v. John Crane, Inc. (2000) 81 Cal.App.4th 847.
[23] Wilson, supra note 22, at 852.
[24] Wilson, supra note 22, 854.
[25] Ibid.
[26] Daly, supra note 18, at 736.
[27] Weidenfeller v. Star and Garter (1991) 1 Cal.App.4th 1.
[28] Weidenfeller, supra note 27, at 6.
[29] Thomas v. Duggins Cost. Co. (2006) 139 Cal.App.4th 1105.
[30] Thomas, supra note 29, at 1111; Cal. Civ. Proc. Code § 875(d).

conduct.[31] Therefore, Proposition 51 does not entitle an intentional tortfeasor to an apportionment of the plaintiff's non-economic damages or reduction in liability that is attributable to the tortfeasor's intentional tortuous conduct.

With regards to good faith releases, dismissals, settlements, and covenants not to sue, current legislation grants defendants a setoff for amounts paid by settling parties against any recovery received by a plaintiff in a civil action.[32] Before a defendant is entitled to receive this setoff, the court must inquire whether the settlement was made in good faith, and in particular, whether the settlement was within the reasonable range of the settling tortfeasor's proportional share of comparative liability for plaintiff's injuries.[33] Once the court determines a settlement was made in good faith, and the settling defendant makes payment to the plaintiff, that defendant is discharged from any further liability for contribution to other defendants.[34] The settlement credit to the remaining defendants is applied without reference to whether there is any proof the settling defendant had tort liability.

3. DAMAGE CAPS/LIMITATIONS

The most profound effect of the MICRA reform enacted in 1975 was the limitation on non-economic damages in medical liability cases.[35] MICRA effectively capped non-economic damage awards in these types of cases at $250,000.00.[36] The MICRA limitation is enforced after judgment by the court and automatically reduces any non-economic damage award exceeding the limit to $250,000.00. This limitation has remained at $250,000.00 since 1975, and has neither been increased nor indexed for inflation, despite repeated efforts of various interest groups over the years. It has been estimated that had it been indexed for inflation, the current value of the cap would be slightly over one million dollars.[37] Still, the $250,000.00 remains the standard and is one of the cornerstones of the HEALTH Act.[38]

On November 5, 1996, the California electorate adopted Proposition 213, which was subsequently codified in Sections 3333.3 and 3333.4 of the California Civil Code, to create two other "damage caps" akin to MICRA's limitation on non-economic damage awards in medical malpractice cases. Section 3333.3 prevents a person from recovering any damages if plaintiff's injuries were in any way proximately caused by plaintiff's commission of a felony, or immediate flight therefrom, and plaintiff has been duly convicted of the felony. Section 3333.4

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[31] Thomas, supra note 29, at 1112.
[32] Cal. Civ. Proc. Code § 877(a).
[33] See Tech-Bit, Inc. v. Woodward-Clyde & Associates (1985) 38 Cal.3d. 488, 499.
[34] Cal. Civ. Proc. Code § 877(b).
[35] Specifically, this limitation applies in any action "for injury against a health care provider based on professional negligence; Cal. Civ. Code § 3333.2(a).
[36] Cal. Civ. Code § 3333.2(b).
[37] 18 J.L. Bus. & Eth, 91, 92-93.
[38] H.R. 5, 112th Cong. (2011).

precludes a person from recovering any non-economic damages in actions arising out of specified vehicular offenses involving the operation or use of a motor vehicle.

Under MICRA, a superior court shall, upon a party's request, order that money damages, or its equivalent, for future damages be paid in whole, or in part, by periodic payments rather than by lump-sum if the award for "future damages" is greater than or equal to $50,000.00.[39] "Future damages," as applied under this rule, include damages for future medical treatment, care or custody, loss of earnings, loss of bodily function, or future pain and suffering.[40]

In August 2011, the Supreme Court of California in Howell v. Hamilton Meats & Provisions, Inc. issued a new rule controlling how negotiated rate differentials made in satisfaction of medical debt affect the amount of economic damages plaintiffs are entitled to recover in civil tort actions. Typically, when a tortiously injured person receives medical care for his or her injuries, the provider of that care often accepts as full payment, pursuant to a preexisting contract with the injured person's health insurer, an amount less than that stated in the provider's bill.[41] Under the collateral source rule, compensation the plaintiff has received from sources independent of the tortfeasor are precluded from being deducted from damages the plaintiff "would otherwise collect from the tortfeasor."[42] This ensures that plaintiff is entitled to recover damages in the amounts their insurer paid for their medical care.[43]

The court in Howell found that the collateral source rule has no bearing on amounts that were included in a provider's bill but for which the plaintiff never incurred liability because the provider, by prior agreement, accepted a lesser amount as full payment.[44] Such sums are not damages the plaintiff would otherwise have collected from the defendant and are neither paid to the provider's on the plaintiff's behalf nor paid to the plaintiff in indemnity for their expenses.[45] For that reason, they do not represent an economic loss for the plaintiff[46] and plaintiff cannot claim the difference between the amount stated in the provider's bill and the amount paid in satisfaction for medical services rendered as economic damages in a civil tort action. Therefore, under Howell an injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial.[47]

4. PUNITIVE DAMAGES

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[39] Cal. Civ. Proc. Code § 667.7(a).
[40] Cal. Civ. Proc. Code § 667.7(e)(1).
[41] Howell v. Hamilton Meats & Provisions, Inc. (2011) 52 Cal.4th 541, 548.
[42] Ibid
[43] Ibid.
[44] Ibid.
[45] Howell, supra note 41, at 549.
[46] Ibid.
[47] Howell, supra note 41, at 566.

In 1987 the California Legislature amended the California Civil Code to require a plaintiff to show by "clear and convincing evidence" a defendant acted with oppression, fraud or malice in order to support an award of punitive damages.[48] In addition, the Legislature's amendment permitted a defendant to preclude the admission of defendant's profits or financial condition until after the trier of fact returns a verdict for actual damages and finds the defendant guilty of oppression, fraud, or malice under Section 3294.[49] This preclusion, in effect, bifurcates a case involving a punitive damages claim so the propriety of a punitive damage award and the amount of a punitive damage award are determined as part of two separate proceedings.

5. COLLATERAL SOURCE ADDENDUM

Another important reform made to California medical malpractice litigation through the passage of MICRA was an addendum to the traditional "collateral source rule" as it applies to medical liability cases. This addendum, which was subsequently codified under Section 3333.1 of the California Civil Code, permits the defendant in an action for personal injury against a healthcare provider to introduce evidence of any amount payable as a benefit to plaintiff from certain collateral sources as a result of the personal injury.[50] These collateral source payments/benefits include benefits from social security, state/federal disability insurance, worker's compensation, health, sickness, or income-disability insurance, accident insurance, and any other benefits related to the reimbursement of medical care costs.[51] When such evidence is introduced, the plaintiff is entitled to introduce evidence of any monies used to secure his or her right to these collateral source benefits about which the defendant has provided evidence, such as insurance premiums.[52] This was a drastic departure from the traditional "collateral source" rule whereby a jury was not permitted to take into account any third-party benefits in determining plaintiff's damages.

Furthermore, this rule provides that plaintiff's collateral sources are prohibited from going after the plaintiff to recover any monies paid on the plaintiff's behalf from any malpractice award or settlement that plaintiff may receive in a malpractice action.[53] Notwithstanding, it has been determined that payments made on the plaintiff's behalf through Medi-Cal fall outside the protections of Section 3333.1 and recovery of Medi–Cal payments may be sought against either the successful plaintiff through the Medi–Cal lien procedure or in a direct action against the third-party tortfeasor.[54]

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[48] Cal. Civ. Code § 3294(a).
[49] Cal. Civ. Code § 3295(d).
[50] Cal. Civ. Code § 3333.1(a).
[51] Ibid.
[52] Ibid.
[53] Cal. Civ. Code § 3333.1(b).
[54] Hernandez v. California Hospital Medical Center (2000) 78 Cal.App.4th 498, 506; see also Cal. Welf. & Inst. Code § 14124.71.

6. ATTORNEYS' FEES

Among MICRA's numerous medical malpractice tort reforms only the limitation on contingency fee awards for plaintiffs' attorneys in medical malpractice cases has been amended by statute. Originally, MICRA capped plaintiffs' attorneys' contingency fee awards in medical malpractice cases at: (1) forty percent (40%) of the first $50,000.00 recovered; (b) thirty-three and one-third percent (33 1/3 %) of the next $50,000.00 recovered; (c) twenty-five percent (25%) of the next $100,000.00 recovered; and ten percent (10%) of the recovery in excess of $200,000.00. These limits were codified under California Business and Professions Code Section 6146.

In 1987, the Legislature amended the last two contingency fee levels so that attorneys would be entitled to enter into contingency fee agreements for up to twenty-five percent (25%) of any recovery between $100,000.00 and $600,000.00 and up to fifteen percent (15%) of any recovery in excess of $60,000.00.[55] The maximum levels of 40% of the first $50,000.00 and 33 1/3% of the second $50,000.00 remained unchanged.[56] The 1987 limits are still in effect today and apply regardless of whether the recovery is received by settlement, arbitration, or judgment.[57]

7. ARBITRATION OF CLAIMS

California Code of Civil Procedure Section 1295 permits patients and physicians to enter into binding contracts for medical services which include provisions for arbitration of any and all disputes as to professional negligence.[58] All contracts of this type shall include the following language in Article 1 of the contract:

> "It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration."[59]

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[55] Cal. Bus. & Prof. Code § 6146(a).
[56] Ibid.
[57] Ibid.
[58] Cal. Civ. Proc. Code § 1295(a).
[59] Ibid.

In addition, immediately before the signature line the following phrase must appear in at least 10-point bold red type:

> "NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT."[60]

Courts have routinely upheld the enforcement of these arbitration agreements created under MICRA.

[60] Cal. Civ. Proc. Code § 1295(b).

Colorado

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1. Joint and Several Liability

In 2009 the Colorado Supreme Court determined that the premises liability statute, § 13-21-115, when construed in context, does not mandate that the damages resulting from defendant's negligence be assessed without regard to the negligence of the injured party or fault of a nonparty. Consequently, sections 13-21-111 and 13-21-111.5 may apply to reduce a defendant's liability in premises liability actions. *See Union Pac. R. Co. v. Martin*, 209 P.3d 185 (Colo. 2009).

2. Damage Caps

The damage caps for wrongful death actions are even more limited though. Generally, section 13–21–102.5 states that a tort claimant's total award of noneconomic damages may not exceed $250,000, absent "clear and convincing evidence" supporting a higher award of up to $500,000, and section 13–21–203, governing wrongful death actions, imports its definition of noneconomic damages from 13–21–102.5. However, section 13–21–203 also expressly provides that noneconomic damages in wrongful death actions may *never* exceed $250,000, unless the conduct constitutes a "felonious killing." *See* § 13–21–203(1)(a) (stating that the cap shall apply unless the wrongful act "constitutes a felonious killing," in which case "there shall be no limitation on the damages for noneconomic loss or injury recoverable in such action"). Thus, section 13–21–203 caps noneconomic damages at $250,000 even when there is clear and convincing evidence to support a higher award. *See Lanahan v. Chi Psi Fraternity*, 175 P.3d 97, 100 (Colo. 2008); *Aiken v. Peters,* 899 P.2d 382, 385 (Colo.App.1995) (holding that the provisions of section 13–21–102.5 that authorize the court to enter an award of damages higher than $250,000 are to be disregarded in a wrongful death case).

3. Punitive Damages

In 2011 the Colorado Supreme Court held that the U.S. Supreme Court's decision in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), did not support a facial challenge to section 13-21-102(1), C.R.S. *See Qwest Services Corp. v. Blood*, 252 P.3d 1071, 1083 (Colo. 2011), as modified on denial of reh'g (June 20, 2011), *opinion modified and superseded on denial of reh'g,* 09SC534, 2011 WL 2449471 (Colo. June 20, 2011) and *cert. dismissed,* 132 S. Ct. 1087, 181 L. Ed. 2d 805 (U.S. 2012). Further, the Court found the jury's 18 million dollar exemplary damages award was within a constitutionally permissible range that is not "grossly excessive." *Id.* The Court specifically determined that "subsection 13–21–102(1)(b) of the statute complies with the holding in *Philip Morris* to the extent it permits the jury to consider the 'rights and safety of others' in assessing the willful and wanton nature (i.e. the reprehensibility) of the defendant's conduct." *Id.* at 1083.

4. Attorneys Fees

The Colorado Supreme Court has affirmed that the unambiguous language in section 13–17–201 makes an award of attorney fees mandatory when a plaintiff's complaint is dismissed under C.R.C.P. 12(b). *See Crandall v. City & County of Denver,* 238 P.3d 659, 663

(Colo. 2010) ("sections 13-16-113(2) and 13-17-201 unequivocally mandate an award of costs and attorney fees to a defendant when it prevails on a pre-trial C.R.C.P. 12(b) motion to dismiss."). "The statute was enacted as part of the General Assembly's tort reform efforts of the mid–1980s, and its clear language does not allow for a judicially created exception when an action is dismissed under Rule 12(b)(1)." *Crow v. Penrose-St. Francis Healthcare Sys.*, 262 P.3d 991, 996 (Colo. App. 2011).

5. Special Issues

Plaintiffs are Entitled to Recover Medical Costs Billed Rather than Costs Paid by Insurer: Colorado has codified the common law collateral source rule by essentially abolishing the rule, except in a few specific circumstances. *See* § 13-21-111.6, C.R.S. 2011. On such exception to the abolishment of the collateral source rule is for amounts paid to a plaintiff "as a result of a contract entered into and paid for by or on behalf of such person." *Id.* This is known as the "contract exception." In 2010 the Colorado Supreme Court considered the implications of this exception when an insurer has negotiated a reduction in the medical costs associated with a personal injury plaintiff's injuries. *See Volunteers of Am. Colorado Branch v. Gardenswartz et al.*, 242 P.3d 1080 (Colo. 2010) (hereinafter "*Volunteers*"). In *Volunteers* the Court determined that where a plaintiff who had health insurance proved at trial that he was billed $74,242 for medical services, the contract exception prevented any reduction of this part of the jury award, even though the health insurer had satisfied the bills for only $43,236 due to discounts it negotiated with plaintiff's medical providers. *Id.* at 1085. This decision settled what had been a hotly debated question by the defense and plaintiff's bars, and firmly established that plaintiffs were entitled to damages measured by the amounts *billed* by their medical care providers, rather than the amounts *paid* by their insurers to the same providers. As the Court stated, "[t]he collateral source rule prevents [the defendant] from standing in [the plaintiff's] shoes and enjoying the same discounted medical rates as his insurance company receives. To hold otherwise 'is to allow the tortfeasor to receive a windfall in the amount of the benefit conferred to the plaintiff from a source collateral to the tortfeasor.'" *Id.* at 1085 (*quoting Pipkins v. TA Operating Corp.*, 466 F.Supp.2d 1255 (D.N.M.2006)). Several subsequent legislative attempts to overturn the *Volunteers* decision have failed.

Connecticut

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1. Introduction: History of Tort Reform in Connecticut

In 1986, the Connecticut General Assembly enacted Public Acts 1986, No. 86-338 (P.A. 86-338), known as Tort Reform I, which replaced the common law rule of joint and several liability that holds each defendant liable for only his or her proportionate share of damages. Under Tort Reform I, to avoid the possibility that a jury would find that the negligence of a nonparty was a proximate cause of the plaintiff's injuries, the plaintiff was required to name as defendants all persons whose actions suggested even the slightest hint of negligence. The unwanted practical effect, therefore, was that plaintiffs were required to pursue claims of weak liability against third parties, thereby fostering marginal and costly litigation in our courts.

The legislature amended these tort recovery provisions just one year later when it enacted No. 87–227 of the 1987 Public Acts (Tort Reform II), the pertinent provisions of which now are codified in part under Conn. Gen. Stat. § 52–572h. These revisions, which took effect October 1, 1987, altered the class of individuals to whom the jury could look in determining whose negligence had been a proximate cause of a plaintiff's injuries. In short, these revisions changed the focus of this class of negligent individuals from any person to any party and certain other identifiable persons. Thus, while Tort Reform I provided that the jury, in determining the percentage of responsibility of a particular defendant, could also consider the entire universe of negligent persons, Tort Reform II limited this universe to only those individuals who were parties to the legal action or who had been released from the action.

In sum, in substantially revising and rewriting Conn. Gen. Stat. §52–572h, the legislature: limited the persons to whom percentages of negligence could be attributed; required the jury or court to specify any findings of fact necessary for the court to articulate recoverable economic damages and recoverable noneconomic damages; and revised the method of reallocating an uncollectible amount of damages so that all recoverable economic damages would be reallocated among the other defendants and would compensate the claimant fully for such recoverable economic damages.

Nonetheless, Tort Reform II overlooked certain significant details required to implement effectively the newly created fault apportionment system. Among other things, Tort Reform II did not specify the procedure to be used in asserting an apportionment claim. To remedy this and other problems, the legislature, in 1995, enacted Conn. Gen. Stat. §52-102b, which delineates the manner in which apportionment claims under Conn. Gen. Stat. §52-572h are to be brought. Section 52-102b(c) sets forth the notice that is required when a defendant asserts an apportionment claim against a nonparty to the action who has settled with the plaintiff or who has been released from the plaintiff's claims.

2. Limitations on Liability

a. Contributory negligence

In causes of action based on negligence, contributory negligence shall not bar recovery in an action to recover damages from personal injury, wrongful death or damage to property, if the negligence was not greater than the combined negligence of the person or persons against whom recovery is sought including settled or released persons. The economic and/or noneconomic damages allowed shall be diminished in proportion of the percentage of negligence attributable to the person. Conn. Gen. Stat. §52-572h(b).

For example, if the plaintiff was 20% at fault and the defendant was 80% at fault, the plaintiff recovers 80% of his damages. If the plaintiff was 50% at fault and the defendant was 50% at fault, the plaintiff recovers 50% of his damages. However, if the plaintiff was more than 50% at fault, he was more at fault than the party he has sued and he recovers no damages.

In a case in which a plaintiff has brought an action against two defendants between whom an award of damages may be allocated and one or both defendants have filed a special defense of comparative negligence against the plaintiff, then the total amount of the negligence that causes the injury must equal 100%, but the negligence must be allocated among all of the parties. If the fact finder determines, for instance, that the plaintiff is 40% at fault, defendant A is 30% at fault and defendant B is 30% at fault, the plaintiff would recover 40% of his damages, divided equally by defendant A and defendant B. As before, if the plaintiff was more than 50% at fault, he recovers no damages.

b. Joint and several liability

In a negligence action to recover damages resulting from personal injury, wrongful death or damage to property, if the damages are determined to be proximately caused by the negligence of more than one party, each party against whom recovery is allowed shall be liable to the claimant only for such party's proportionate share of the recoverable economic damages and the recoverable noneconomic damages. Conn. Gen. Stat. §52-572h(c).

d. Apportionment Liability

A defendant in any civil action to which section 52-572h applies may serve a writ, summons and complaint upon a person not a party to the action who is or may be liable for a proportionate share of the plaintiff's damages in which case the demand for relief shall seek an apportionment of liability. Conn. Gen. Stat. §52-102b (a).

Any such writ, summons and complaint (the apportionment complaint) shall be served within 120 days of the return date specified in the plaintiff's original

complaint. Id. The defendant filing an apportionment complaint shall serve a copy of such complaint on all parties to the original action in accordance with the rules of practice of the Superior Court on or before the return date specified in the apportionment complaint. Id. The person upon whom the apportionment complaint is served shall be a party for all purposes. Id.

The apportionment complaint shall be equivalent in all respects to an original writ, summons and complaint, except that it shall include the docket number assigned to the original action. Conn. Gen. Stat. §53-102b(b). The apportionment defendant has available to him all remedies available to an original defendant, including the right to assert defenses, set-offs or counterclaims against a party. Id. If the apportionment complaint is served within 120 days of the return dated specified in the plaintiff's original complaint, no statute of limitation or repose shall be a defense or bar to such claim for apportionment, except that if the action against the defendant who instituted the apportionment complaint is subject to such a defense or bar, the apportionment defendant may plead such a defense or bar to any claim brought by the plaintiff directly against the apportionment defendant. Id.

Notwithstanding any applicable statute of limitation or repose, the plaintiff, within 60 days of the return date of the apportionment complaint, may assert any claim against the apportionment defendant arising out of the transaction or occurrence that is the subject matter of the original complaint. Conn. Gen. Stat. §52-102b(d).

e. Reallocation

Upon motion by the claimant to open the judgment filed, after good faith efforts by the claimant to collect from a liable defendant, not later than one year after judgment becomes final through lapse of time or through exhaustion of appeal, whichever occurs later, the court shall determine whether all or part of a defendant's proportionate share of the recoverable economic damages and recoverable noneconomic damages is uncollectible from that party, and shall reallocate such uncollectible amount among the other defendants in accordance with the provisions of this subsection. Conn. Gen. Stat. § 52-572h(g)(1).

The court shall order that the portion of such uncollectible amount which represents recoverable noneconomic damages be reallocated among the other defendants according to their percentages of negligence, provided that the court shall not reallocate to any such defendant an amount greater than the defendant's percentage of negligence multiplied by such uncollectible amount. Conn. Gen. Stat. § 52-572h(g)(2).

The court shall order that the portion of such uncollectible amount which represents recoverable economic damages be reallocated among the other defendants. The court shall reallocate to any such other defendant an amount equal to such uncollectible amount of recoverable economic damages multiplied by a faction in which the numerator is such defendant's percentage of negligence and the

denominator is the total of the percentages of negligence of all defendants, excluding any defendant who liable is being reallocated. Conn. Gen. Stat. § 52-572h(g)(3).

To illustrate, if the fact finder finds damages in the amount of $1,000.00 and finds the plaintiff to be 10% at fault, defendant A to be 60% at fault, and defendant B to be 30% at fault, then defendant A and defendant B would be jointly and severally liable for $900.00 (60% of $1,000.00, or $600.00 plus 30% of $1,000.00, or $300.00). Upon determining the judgment against defendant B is uncollectible, defendant A's proportionate share (60%) of defendant B's share of the judgment ($300.00) would be reallocated to defendant A (approximately $255.00).

d. Liability Limitations for Certain Volunteers And Members of Nonprofit Corporations and Organizations

Certain uncompensated members of and volunteers for nonprofit corporations or organizations are immune from civil liability if their conduct is made in the exercise of such person's policy or decision-making responsibilities and the person was acting in good faith and with the scope of their official functions and duties. Conn. Gen. Stat. §52-557m. This immunity does not apply to reckless, willful or wanton misconduct. Id.

3. Damage Caps

a. Reduction for collateral source payments

In any civil action where the plaintiff seeks to recover damages from personal injury or wrongful death and wherein liability is admitted or is determined by the trier of fact and damages are awarded to compensate the plaintiff, the court shall reduce the amount of such award which represents economic damages by an amount equal to the total of amounts determined to have been paid under subsection (b) of this section less the total of amounts determined to have been paid, contributed or forfeited under subsection (c) of this section, except that there shall be no reduction for (A) a collateral source for which a right of subrogation exists, and (B) the amount of collateral sources equal to the reduction in the plaintiff's economic damages attributable to the claimant's percentage of negligence. Conn. Gen. Stat. §52-225a(a).

Upon a finding of liability and an awarding of damages by the trier of fact and before the court enters judgment, the court shall receive evidence from the claimant and other appropriate persons concerning the total amount of collateral sources which have been paid for the benefit of the plaintiff as of the date the court enters judgment. Conn. Gen. Stat. §52-225a(b).

The court shall receive evidence from the claimant and any other appropriate person concerning any amount which has been paid, contributed or forfeited, as of the date the court enters judgment, by, or on behalf of, the claimant or members of

his immediate family to secure his right to any collateral source benefit which he has received as a result of such injury or death. Conn. Gen. Stat. §52-225a(c).

Connecticut General Statutes §52-225b defines collateral sources as any payments made to the claimant, or on his behalf, by or pursuant to: (1) any health or sickness insurance, automobile accident insurance that provides health benefits, and any other similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by him or provided by others; or (2) any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the costs of hospital, medical, dental or other health care services. Collateral sources do not include amounts received by a claimant as settlement.

4. Punitive Damages

In a products liability action, punitive damages may be awarded if the claimant proves that the harm suffered was the result of the product seller's reckless disregard for the safety of product users, consumers or others who were injured by the product. If the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such damages not to exceed an amount equal to twice the damages awarded to the plaintiff. Conn. Gen. Stat. §52-240b.

In any civil action to recover damages resulting from personal injury, wrongful death or damage to property, the trier of fact may award double or treble damages if the injured party has specifically pleaded that another party has deliberately or with reckless disregard operated a motor vehicle in violation of the following statutes: section 14-218a, 14-219, 14-222, 14-227a, 14-230, 14-234, 14-237, 14-239 or 14-240a; and that such violation was a substantial factor in causing such injury, death or damage to property. Conn. Gen. Stat. §14-295. The owner of a rental or leased motor vehicle shall not be responsible for such damages unless the damage arose from such owner's operation of the motor vehicle. Id.

A court may exercise its discretion to award punitive damages to a party who has suffered any ascertainable loss pursuant to Connecticut Unfair Trade Practices Act ("CUTPA"). Conn. Gen. Stat. §42-110g(a). In order to award punitive or exemplary damages, evidence must reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights. Gargano v. Heyman, 203 Conn. 616, 622 (1987).

5. Medical Malpractice Reform

In a medical malpractice action where a party seeks damages for personal injury or wrongful death, in which it is alleged that such injury or death resulted from the negligence of a health care provider, the party filing the action must make a reasonable inquiry to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. Conn. Gen. Stat. §52-190a(a).

The initial pleading shall contain a certificate of the attorney or party filing the action that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant. Id. To show the existence of such good faith, the claimant or the claimant's attorney shall obtain a written and signed opinion of a similar health care provider that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. Id. The claimant shall retain the original written opinion and shall attach a copy of such written opinion with the name and signature of the similar health care provider expunged, to such certificate. Id.

Conn. Gen. Stat. §52-184c defines "similar health care provider" and the definition depends on whether the defendant health care provider is certified by the appropriate American board as being a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist. If he is/does, a similar health care provider is one who: (1) is trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty. Conn. Gen. Stat. §52-184c(c). If the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a similar health care provider. Id.

If he is not/does not, a similar health care provider is one who: (1) is licensed by the appropriate regulatory agency of this state or another state requiring the same or greater qualifications; and (2) is trained and experienced in the same discipline or school of practice and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine within the five year period before the incident giving rise to the claim. Conn. Gen. Stat. §52-184c(b).

The failure to obtain and file the written opinion required by Conn. Gen. Stat. §52-190a(a) shall be grounds for the dismissal of the action.

6. Products Liability Reform

The Connecticut Product Liability Act ("CPLA") is the exclusive remedy for plaintiffs harmed by a product. A "product liability claim" includes all claims or actions brought for personal injury, death or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging or labeling of any product. Conn. Gen. Stat. §52-572m(b). It includes all actions based on the following theories: strict liability in tort, negligence, breach of warranty, express or implied, breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent, and misrepresentation or non-disclosure, whether negligent or innocent. Id.

A. Elements of a product liability claim – Strict Liability

In order to prove a claim under the Connecticut Product Liability Act, (the "CPLA"), a plaintiff must prove the following: (1) that the defendant is a "product seller" as defined by the statute; (2) that the product was defective; and (3) that the defect existed at the time the product left the defendant, and the product was expected to reach the user without substantial change in condition and did reach the user without substantial change in condition as to the feature claimed to be a defect.

a. Product Seller

A product seller is any person or entity, including a manufacturer, wholesaler, distributor or retailer who is engaged in the business of selling products whether the sale is for resale or for use or consumption. Conn. Gen. Stat. §52-572m(a). The term "product seller" also includes lessors or bailors of products who are engaged in the business of leasing or bailment of products. Id. The CPLA further defines "manufacturer" as "product sellers who design, assemble, fabricate, construct, process, package or otherwise prepare a product or component part of a product prior to its sale to a user or consumer." Conn. Gen. Stat. §52-572m(e).

b. Existence of a Defect

In order to prove that a product was defective, the plaintiff must prove that the condition that is claimed to be a defect made the product unreasonably dangerous. A product is unreasonably dangerous if, at the time of sale, it is defective to an extent beyond that which would be contemplated by the ordinary consumer. Wagner v. Clark Equipment Co., Inc., 243 Conn. 168 (1997).

Under Connecticut law, a plaintiff does not need to demonstrate the specific defect so long as there is evidence of some unspecified dangerous condition. Giglio v. Connecticut Light & Power Co., 180 Conn. 230, 235 (1980). In other words, in the absence of a specific, identifiable cause of a defective product, evidence of malfunction is sufficient evidence under Connecticut law. Accordingly, under the "malfunction doctrine" a product defect may be inferred from circumstantial evidence that: (1) the product malfunctioned; (2) the malfunction occurred during proper use; and (3) the product had not been altered or misused in a manner that probably caused the malfunction. Fallon v. The Matworks, 50 Conn. Supp. 207, 217 (2007).

c. Absence of Substantial Change

The plaintiff must also prove that the feature or condition that is claimed to be a defect, or to make the product defective, existed at the time that the product left the defendant, that the product was expected to reach the user without substantial change in condition as to the feature claimed to be a defect, and that the product in fact reached the ultimate user without substantial modification. A product seller is not liable if another person (including the plaintiff) alters the product in a way that creates a defect, unless the product seller expected or reasonably should have expected such an alteration to occur. An alteration that does not substantially

change the product with regard to the feature that is proven to be defective does not, however, remove the product seller's liability for the defect.

If the defendant proves that the product was modified or altered and that the alteration or modification was the sole proximate cause of the harm to the plaintiff, then the defendant is not liable. For the defendant to be liable, the plaintiff must prove that the harm would have occurred notwithstanding the alteration or modification. If there was a defect that was not caused by modification or alteration of the product, and if that defect was a substantial factor in causing the harm, then the product seller is liable even if modification or alteration also proximately caused the harm.

A product seller shall not be liable for harm that would not have occurred but for the fact that his product was altered or modified by a third party unless: (1) the alteration or modification was in accordance with the instructions or specifications of the product seller; (2) the alteration or modification was made with the consent of the product seller; or (3) the alteration or modification was the result of conduct that reasonably should have been anticipated by the product seller. Conn. Gen. Stat. §52-572p(a).

B. Elements of a product liability claim – Recklessness

Connecticut General Statutes §52-240b provides that punitive damages may be awarded in a products liability action if the claim proves that the harm suffered was the result of the product seller's reckless disregard for the safety of product users, consumers or others who were injured by the product.

Accordingly, in order to state a cause of action under this statute, the plaintiff must allege that the defendant was aware of the alleged defects and willfully, wantonly and recklessly failed to eliminate the defects. Wagner at 201. The Connecticut Supreme Court has further stated that even though evidence is presented that the defendant was aware of the general danger, the plaintiff must provide sufficient evidence to demonstrate that the defendant's conduct rose to the level of reckless conduct. Id.

C. Allocation of Fault

In any claim made under the Connecticut Product Liability Act, the comparative responsibility of, or attributed to, the claimant, shall not bar recovery but shall diminish the award of compensatory damages proportionately, according the measure of responsibility attributed to the claimant. Conn. Gen. Stat. §52-572o(a).

Each of the liable defendants is liable only for that portion of the plaintiff's net award for which it is responsible, and thus, under such a system, a plaintiff who is 70 percent responsible would nonetheless recover 30 percent of his proven

damages, and each liable defendant would be responsible for its proportional share of that 30 percent. Barry v. Qualified Steel Products, 280 Conn. 1 (2006).

In determining the percentage of responsibility, the trier or fact shall consider, on a comparative basis, both the nature and quality of the conduct of the party. Conn. Gen. Stat. §52-572o(c). The court shall determine the award for each claimant according to these findings and shall enter judgment against parties liable on the basis of the common law joint and several liability of joint tortfeasors. Conn. Gen. Stat. §52-572o(d). The judgment shall also specify the proportionate amount of damages allocated against each party liable, according to the percentage of responsibility established for each party. Id.

A product seller may implead any third party who is or may be liable for all or part of the claimant's claim, if such third party defendant is served with the third party complaint within one year from the date the cause of action is returned to court. Conn. Gen. Stat. §52-577a(b).

a. Contribution

If a judgment has been rendered, any action for contribution must be brought within one year after the judgment becomes final. Conn. Gen. Stat. §52-572o(e). If no judgment has been rendered, the person bringing the action for contribution either must have (1) discharged by payment the common liability within the period of the statute of limitations applicable to the right of action of the claimant against him and commenced the action for contribution within one year after payment, or (2) agreed while action was pending to discharge the common liability, and, within one year after the agreement, have paid the liability and brought an action for contribution. Id.

These preconditions to the initiation of a contribution action apply only where the party elects to pursue an independent cause of action for contribution rather than impleading the prospectively liable third party. Malerba v. Cessna Aircraft Co., 210 Conn. 189 (1989).

A non-settling defendant cannot bring an action for contribution against a defendant who did settle; under the comparative fault rule, the finder of fact has to determine the percentage of plaintiff's harm attributable to the settling defendant, multiply that percentage by the judgment against the non-settling defendant, and the deduct the resulting amount from the judgment. Stefano v. Smith, 705 F. Supp. 733 (D. Conn. 1989).

b. Indemnification

With respect to indemnification claims, the Connecticut Supreme Court has held that where all the potential defendants are parties to the litigation, the common law indemnification principals have been abrogated in product liability actions by

virtue of the provisions of Connecticut General Statutes §52-572o(b). Krytatas v. Stop & Shop, Inc., 205 Conn. 694 (1988).

One year later, the Connecticut Supreme Court held that "common law indemnification continues as a viable cause of action in the context of product liability claims and that the comparative responsibility principles that serve as its foundation do not bar a later determination of liability as between an indemnitee and indemnitor." Malerba at 198-99.

There is a split of authority in the superior courts regarding the issue of whether direct defendants may state a cross claim for common law indemnification in the context of product liability claims. Several superior courts have allowed a cross claim for common law indemnification among existing defendants; *see, i.e.*, Rotonto v. Access Industries, Inc., 26 Conn. L. Rptr. 274 (2000); others have held that common law indemnification in product liability actions is not proper amongst existing defendants. *See, i.e.,* Sebastiano v. Grundfos Pumps Corp., 2001 WL 1203385 (2001).

Parties may bring claims for contractual indemnification.

7. Attorney's fees

In any contingency fee agreement, the fee shall be the exclusive method for payment of the attorney and shall not exceed an amount equal to a percentage of the damages awarded and received by the claimant or of the settlement amount received by the claimant as follows: (1) 33.3% of the first $300,000.00; (2) 25% of the next $300,000.00; (3) 20% of the next $300,000.00; (4) 15% of the next $300,000.00; and (5) 10% of any amount which exceeds $1,200,000.00. Conn. Gen. Stat. §52-215c(b).

In addition, Conn. Gen. Stat. §52-568 creates a cause of action for groundless or vexatious suit when a plaintiff institutes an action without probable or without probable cause with a malicious intent unjustly to vex and trouble such other person. If a defendant is successful in proving the action was instituted without probable cause, he is entitled to double damages. If he also proves malicious intent, he is entitled to treble damages.

8. Practice Pointers

A. Statute of Limitations

No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of. Conn. Gen. Stat. §52-577.

No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, podiatrist, chiropractor, hospital or

sanatorium, shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of, except that a counterclaim may be interposed in any such action any time before the pleadings in such action are finally closed. Conn. Gen. Stat. §52-584.

B. Discovery

In all personal injury actions alleging liability based on the operation or ownership of a motor vehicle or alleging liability based on the ownership, maintenance or control of real property, interrogatories and requests for production are limited to those set forth in Forms 201, 202 and/or 203, and Forms 204, 205 and/or 206 of the Connecticut Practice Book. Practice Book §13-6 and §13-9. The judicial authority may, upon motion, determine that such interrogatories and/or requests for production are inappropriate or inadequate in the particular action. Id.

C. Venue

All civil process shall be made returnable to a judicial district as follows: (1) if all the parties reside outside the state, to the judicial district where (A) the injury occurred, (B) the transaction occurred, or (C) the property is located or lawfully attached; (2) if the defendant is not a resident, to the judicial district where the attached property is located; (3) if either or both the plaintiff or defendant are residents of this statute, to the judicial district where either the plaintiff or defendant resides. Conn. Gen. Stat. §51-345 (providing exceptions to the third situation).

9. Special Issues: Connecticut Dram Shop Act

In Connecticut, in order for a third party to recover for personal injuries or other damages from a liquor seller resulting from the sale of liquor to an intoxicated person, suit must be brought pursuant to Conn. Gen. Stat. §30-102, the Connecticut Dram Shop Act. There is no cause of action for negligent sale of liquor to a person twenty-one years of age or older.

In order to succeed on a claim brought pursuant to the Connecticut Dram Shop Act, a plaintiff needs to plead and prove three elements: (1) the sale of alcoholic liquor;

(2) that the sale was to an intoxicated person; and (3) that the intoxicated person caused injury to another's person or property as a result of his intoxication.

The decision to pursue a Dram Shop Claim has three important consequences: (1) there is a statutory cap on damages in the amount of $250,000.00; (2) defendants in these types of claims may not plead the contributory

negligence of the plaintiff so there is no reduction of the judgment; and (3) if there is a Dram Shop Claim, it is intended to be the exclusive remedy for the plaintiff with regards to the provision of alcohol. Furthermore, the Dram Shop Act does not authorize relief for injuries sustained by an intoxicated party.

Delaware

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1. TORT REFORM IN DELAWARE

Since the last publication, there has been no real "tort reform." However, below is an over-view of tort law and practice of what First State practitioners need to be aware.

2. JOINT AND SEVERAL LIABILITY.

10 Del. C. § 6301, *et seq*., defines a joint tort feasor, and provides how the right of subrogation among Delaware joint-tort feasors arises. Most notably, a joint –tort feasor cannot obtain a money judgment for contribution unless it has paid the full amount of the common liability, or more than its pro-rata share. Such a claim is perfected either by filing a cross-claim, or moving "for judgment for contribution against any other joint judgment debtor, where in a single action a judgment has been entered against joint tort-feasors one of whom has discharged the judgment by payment or has paid more than his or her pro rata share thereof." 10 Del. C. § 6306 (b).

3. COMPARATIVE NEGLIGENCE.

The fact that a Plaintiff may be contributorily negligent does not bar recovery unless the negligence is greater than that of the defendant or the combined negligence of all defendants. 10 Del. C. § 8132. In such cases where the negligence of the Plaintiff is less than that of the defendant(s), any damages awarded the Plaintiff will be off-set in proportion to the negligence apportioned to the Plaintiff.

4. DAMAGE CAPS/PUNITIVE DAMAGES

In general, Delaware's Tort Claims Act, 10 Del. C. § 4010, *et seq*., governs limitations on damages, and any exceptions to immunity. However, it should be pointed out that caps to liability are at $300,000.00 unless the governmental entity purchases insurance in excess of $300,000.00. Also, any political subdivision may require a notice "by ordinance, so long as said notice requirement does not bar suit if notice is given within 1 year of occurrence." 10 Del. C. § 4013(c).

5. MEDICAL NEGLIGENCE CLAIMS, 18 Del. C. § 6861, *et. seq*.

Delaware modified "malpractice" to "medical negligence" in 1998. The statute governing these claims is found under "Title 18 – Insurance," as claims are part and parcel of the requirements of medical insurance. Delaware codified a collateral source rule. Specifically,

> [i]n any medical negligence action for damages because of property damage or bodily injury, including death resulting there from, there may be introduced, and if introduced, the trier of facts shall consider evidence of:
>
> (1) Any and all facts available as to any public collateral source of compensation or benefits payable to the person seeking such damages (including all sums which will probably be paid payable to such person in the future) on account of such property damage or bodily injury; and
>
> (2) any and all changes, including prospective changes, in the marital, financial or other status of any persons seeking or benefiting from such damages known to the parties at the time of trial; provided, however, this section shall not be applicable to life insurance or private collateral sources of compensation or benefits.

18 Del. C. 6862.

In practice, "[t]he purpose of this section is to prevent the collection of a loss from a collateral public source (such as Social Security) and then the collection for the same loss from the party or hospital being sued." Nanticoke Memorial Hospital, Inc., v. Uhde, 498 A.2d 1071, 1075 (Del. Supr. 1985).

This is at variance with non-medical negligence cases where such information of "collateral sources" is only available to impeach if testimony of a collateral source was introduced on direct examination. See, James v. Glazer, 570, A.2d 1150 (Del. Supr. 1990).

Future damages of any kind can be paid over time, pursuant to court order. 18 Del. C. § 6864

Attorneys' fees in medical negligence matters are subject to statutory regulation. Such fees cannot exceed 35% of the first $100,000.00, 25% of the next $100,000.00 and 10% of the balance of any damages awarded. 18 Del. C. § 6865. Note, however, that if the attorney provides in the retainer, a plaintiff may elect to pay a mutually agreeable *per diem* rate.

6. **INTERESTING NOTES**.

a. Interest Awarded from Date of Injury

Delaware, like many jurisdictions, permits offers of judgment by the defense bar. Superior Court Civil Rule 68. Thus, any time not less than 10 days before trial, a defendant may offer that a judgment be entered against it for a sum specified in that offer, along with costs. If the plaintiff rejects that

offer and judgment, but fails to obtain a judgment in excess of the amount offered, the plaintiff will be obligated to pay the costs of the defendant.

However, the plaintiff's bar has an interesting counterpart. Buried within "Title 6-Commerece and Trade," is a useful tool. If the plaintiff in any tort action for compensatory damages in the Superior Court or the Court of Common Pleas, makes a written settlement demand valid for a minimum of 30 days in an amount less than the amount of damages upon which the judgment was entered,

> interest shall be added to any final judgment entered for damages awarded, calculated at the rate established in subsection (a) of this section, commencing *from the date of injury*…

6 Del. C. § 2301(d).

In 2011, our State Supreme Court reviewed the use of the statute in the context of uninsured motorist coverage. State Farm Mutual Automobile Insurance Company, v. Joanne Enrique, 16 A.3d 938; 2011 Del. LEXIS 163 (Del. Supr., 2011). In affirming the finding of the superior court below, the Court found that the Plaintiff/Appellee had made the demand to settle for $65,000.00, held the demand open for 30 days, and that the Defendant/Appellant had rejected the demand. When the award of the jury came back for $260,000.00, the final requirement fell into place. However, one issue raised on appeal was whether the recovery of prejudgment interest was capped by the coverage available on the underlying policy. In rejecting that reading of the statute, the court stated that,

> [t]he contracted policy limit forms the basis for the prejudgment interest award but does not set the cap for recovery on litigation costs and fees, which may include expert witness fees, witness fees, and court reporter fees. Indeed, we agree with the rationale of the trial judge that prejudgment interest is an expense associated with the defense costs and strategy in the case.
>
> *Ibid*.

b. Minor Negligence Imputed to the Adult Who Signed the Application for the Minor's License

If a minor causes any damages by his or her use of a motor vehicle, the individual who signed the application for the driver's license of that minor can be held responsible for the minor's negligence. 21 Del. C. § 6104. Specifically, the statute imposes joint and several liability on the minor and the adult who signs the application for the minor. That liability will continue through any renewal so long as the driver remains a minor regardless if the signing adult signs the renewal paperwork. 21 Del. C. § 6104 (b).

However, the issue of whether a child acted negligently or recklessly was a question of fact a jury would have to decide. Hufford v. Moore, 2007 Del. Super. LEXIS 365 (Del. Super. Ct. Nov. 8, 2007).

c. No Premises Liability to Guests for Owners and Occupiers of Land

There is no cause of action for a guest or a trespasser who comes on to private residential or farm property and is injured unless "such accident was intentional on the part of the owner or occupier or

was caused by the willful or wanton disregard of the rights of others." 25 Del. C. § 1501. The key here is a guest "without payment" which has led to an entire line of cases as to who is a guest without payment.

d. Limits of Liability for Those Injured in the Course of Equine Activities.

In 1995 the legislature wanted to encourage the equestrian industry. Thus if passed legislation to shelter owners of horses from liability if an individual was injured while engaged in such sport. 10 Del. C. § 8140. There are no reported cases regarding this statute, however.

Florida

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1. Introduction

In the past twenty years, the Florida Legislature has made various attempts to reform the tort system in Florida; primarily by creating special statutory structures for traditional common law tort causes of action. The Legislature has also limited the type and amount of damages available to successful claimants and created or expanded existing immunities to liability. This article discusses these tort reforms and the laws enacted to effectuate them.

2. Joint and Several Liability

Beginning in 1986, the Florida Legislature sought to change the doctrine of joint and several liability. These efforts are illustrated by the enactment of, and later amendments to, Section 768.81, Florida Statutes, concerning comparative fault. Originally, joint and several liability could be imposed only on defendants whose negligence was found to equal or exceed the negligence of the claimant. Additionally, the doctrine applied only to economic damages awards.

In 1999, the Legislature adopted a tiered system, which eliminated joint and several liability for damages under $25,000. Under this revised statutory scheme, recovery under the joint and several liability theory depended on whether a Plaintiff was found comparatively at fault. Joint and several liability attached only to defendants whose relative fault exceeded certain enumerated levels and applied only to economic damages above a certain threshold.

Section 768.81 also provides for the assessment of fault against all potentially negligent entities including non-parties. A defendant must affirmatively plead the fault of a nonparty either in a motion or in the initial responsive pleading and identify the nonparty by name or description.

In 2006, the Florida Legislature abolished joint and several liability altogether. Florida's courts are now instructed to "enter judgment against each party liable on the basis of each party's percentage of fault and not on the basis of the doctrine of joint and several liability." § 768.81(3), *Fla. Stat. (2006)*. The statute continues to provide for the apportionment of fault against nonparties.

3. Damages

In 1986, the Florida Legislature began to impose limits on the recovery of punitive damages. Current statutes establish proof requirements at the pleadings stage, define the nature of conduct justifying such damages, and limit both the amount of damages recoverable and the number of times such damages may be assessed against a defendant.

a. Punitive Damages

In a civil action, a claim for punitive damages shall only be permitted after the claimant has shown by proffer or evidence of record that a reasonable basis exists for recovery of such damages. § 768.72, *Fla. Stat.*

i. Burden of Proof

Florida Statute § 768.725 requires the plaintiff to prove entitlement to an award of punitive damages by clear and convincing evidence. The burden changes with respect to the amount of damages awardable, which amount must be proven by the greater weight of the evidence.

ii. Type of Misconduct Required

Punitive damages may not be awarded against a defendant, if the plaintiff was under the influence of any alcoholic beverage or drug, at the time of the act or omission giving rise to the punitive damages claim, to the extent that the Plaintiff's normal faculties were impaired or Plaintiff's blood or breath alcohol level equals or exceed 0.08 percent. § 768.736, *Fla. Stat.*

Employers may also be immunized from liability for punitive damages based on acts of an employee unless the employer actively participated in or approved the conduct or engaged in grossly negligent conduct that contributed to the loss. "Gross negligence" generally refers to the "conscious disregard or indifference to the life, safety or rights" of the injured.

iii. Limitations on Damages

Under Florida Statute § 768.73, no more than one punitive damage award can arise from the same act or single course of conduct unless the court determines by clear and convincing evidence that prior awards arising from the same conduct (including both state and federal awards) were insufficient to punish the defendant. In such cases, defendant is entitled to a set-off for prior awards. The court may consider whether or not the defendant has ceased the egregious conduct. Attorney fees are payable based on the final judgment for punitive damages.

Section 768.73 provides a tiered cap system for punitive damages:

- Punitive damages are generally limited to the greater of $500,000 or 3 times compensatory damages;

- If defendant's wrongful conduct was motivated solely by unreasonable financial gain and defendant had actual knowledge of the dangerous nature of the conduct, then punitive damages are limited to the greater of $2,000,000 or 4 times compensatory damages;

- There is no limit on the amount of punitive damages when, at the time of injury, the defendant had specific intent to harm the claimant.

In any civil action based upon child abuse, abuse of the elderly, or abuse of the developmentally disabled, punitive damages may not exceed three times the amount of compensatory damages awarded to the claimant. Fla. Stat. § 768.735. In Fla. Stat. §768.736 (1999), a final exception where there is no cap on punitive damages is created for drunken tort-feasors, *i.e.,* those having a blood alcohol content of 0.08 percent or more.

b. Non-economic Damages

The Tort Reform and Insurance Act of 1986 was enacted in response to legislative perceptions of an insurance crisis in Florida. The second part of the Act capped non-economic damages awards at $450,000. The Florida Supreme Court ruled this aspect of the Act unconstitutional in *Smith v. Dept. of Ins., et al.,* 507 So.2d 1080 (Fla. 1987).

Currently there is no cap on the amount of non-economic damages that can be awarded. The Legislature previously enacted § 627.737, which requires a showing of permanent injury in motor vehicle cases in order to recover non-economic damages. Although the statute was to be repealed effective October 1, 2007, because of the Legislature's failure to reenact the measure during the 2006 Legislative session, the statute was revived and reenacted during the 2007 Legislative session.

4. Medical Malpractice Reform

a. General

i. Immunity provisions

In an effort to confront the explosion of medical malpractice lawsuits, the Florida Legislature has taken measures to bestow upon certain medical providers immunity from suit for medical negligence.

Florida's "Good Samaritan Act," § 768.13. *Fla. Stat.*, was enacted to provide immunity from suit to individuals who render emergency aid outside a hospital. In 1988, the statute was amended to specifically provide for immunity to practitioners within a hospital or trauma center while providing emergency care. Practitioners may still be held liable if damages arise from their reckless disregard for the patient, which refers to "conduct that a health care provider rendering emergency medical services knew or should have known, at the time such services were rendered, created an unreasonable risk of injury so as to affect life or health of another, and such risk was substantially greater than that which is necessary to make conduct negligent." § 768.13(2)(b)(3), *Fla. Stat*.

In 2004, this immunity was expanded to include practitioners who respond to a medical emergency in a hospital involving a patient with whom the practitioner has no prior treatment relationship. Immunity does not apply if the "care or treatment is proven to amount to conduct that is willful and wanton and would likely result in injury so as to affect the life or health of another." § 768.13(2)(c), *Fla. Stat*.

Earlier, in 1992, healthcare providers were given statutory immunity from suit for the treatment of women or infants arising as a result of care by a midwife, absent a showing of reckless disregard for the patient. § 467.017(2), *Fla. Stat*. Further, in an effort to correct a perceived lack of access to medical care by indigent patients, the Legislature declared that any health care practitioner who contracts with the state to provide free medical services has sovereign immunity. § 766.1115, *Fla. Stat*. In 2011, Fla. Stat. § 766.1115 extended sovereign immunity protections to non-profit private colleges and universities which own or operate a medical school and provide teaching services at hospitals.

Fla. Stat. § 768.135 was also amended in 2011 to extend immunity to volunteer team physicians for malpractice liability, unless the medical care was given in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Volunteer Team Physicians are defined as (1) Any person licensed to practice medicine pursuant to chapter 458, chapter 459, chapter 460, chapter 461, or chapter 466:

> (a) Who is acting in the capacity of a volunteer team physician in attendance at an athletic event sponsored by a public or private elementary or secondary school; and,
>
> (b) Who gratuitously and in good faith prior to the athletic event agrees to render emergency care or treatment to any participant in such event in connection with an emergency arising during or as the result of such event, without objection of such participant.

ii. Procedural requirements

a. Out of State Expert Witness Certificate – Fla. Stat. § 458.3175 (effective October 1, 2011)

Fla. Stat § 458.3175 requires any out-of-state physician or dentist with an active and valid license from somewhere other than Florida, who wishes to provide expert testimony in Florida, to obtain a certificate from the Board of Medicine, Board of Osteopathic Medicine, or Board of Dentistry, respectively. The certificate provides the necessary nexus to Florida, so that the respective boards have authority to discipline a physician or dentist (in-state or out-of-state with certificate) for providing deceptive or fraudulent expert witness testimony related to the practice of medicine.

b. Authorization for Release of Protected Health Information – Fla. Stat. § 766.1065 (effective October 1, 2011)

Fla. Stat. § 766.1065 is created to require that presuit notice in a medical negligence action must include an authorization for release of protected health information and provides requirements for a standardized form. If the release authorization does not accompany the presuit notice, then the presuit notice is void. If the release authorization is revoked, the presuit notice and any tolling or postponement effect the release had on the statute of limitations is deemed retroactively void. The bill also amends Fla. Stat. §766.206 such that if the authorization for release of protected medical information included with the presuit notice is not completed in good faith or does not comply with reasonable investigation requirements, the court shall dismiss the claim.

iii. Damages

In 2003, the Florida Legislature enacted caps on non-economic damages in medical negligence cases. Section 766.118 limits non-economic damages to $500,000 per practitioner and $750,000 per health care facility, regardless of the number of claimants or the number of practitioners or facilities sued. If negligence resulted in a permanent vegetative state or death, non-economic damages may not exceed $1 million from all practitioners, or $1.5 million from all facilities. Other claimants may recover up to $1 million or $1.5 million if they suffered a catastrophic injury other than death or persistent vegetative state, upon a showing that the non-economic damages are particularly severe and manifest injustice would occur unless additional damages are awarded.

In 2011, Fla. Stat. §766.118 was amended to include subsection (6) which limits non-economic damages in medical malpractice actions for medical practitioners who provide services and care to Medicaid recipients unless the practitioner acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Specifically, the provision limits noneconomic damages to no more than $300,000 per claimant and limits liability to a practitioner to no more than $200,000 in noneconomic damages, unless the claimant pleads and proves that the practitioner acted in a wrongful manner.

In February 2012, the Florida Supreme Court addressed the constitutionality of the medical malpractice caps, which had previously been upheld as constitutional by the United States District Court for the Northern District of Florida, in Estate of McCall v. U. S., 663 F. Supp. 2d 1276 (N.D. Fla. 2009). In McCall, the court interpreted Florida state law and rejected all constitutional challenges to the application of the caps. The Florida Supreme Court has not yet issued a decision.

iv. Attorneys' Fees

In 2004, Florida voters approved an amendment to the Florida Constitution limiting recovery attorneys' fees in medical malpractice cases. Article I, Section 26, known as the *Claimant's Right to Fair Compensation*, provides that a claimant must receive at least 70% of any award up to $250,000, or less, exclusive of reasonable

and customary costs. A claimant is entitled to receive 90% of any award greater than $250,000. An "award" includes a judgment or settlement, and the fee limitation applies regardless of the number of defendants.

In response to this amendment, the Florida Supreme Court has approved an amendment to the Florida Rules of Professional Conduct governing contingent attorneys' fees. The Court approved a form for use by attorneys that would allow a claimant to knowingly and voluntarily waive their rights under Article 1, Section 26. *In re: Amendment to the Rules Regulating the Florida Bar—Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct*, 939 So.2d 1032 (Fla. 2006).

v. Discovery issues

Also in 2004, voters approved an amendment to the Florida Constitution providing patients access to incident reports and other records previously protected by peer review statutes. Article X, Section 25, entitled *Patients' Right to Know about Adverse Medical Incidents* a/k/a Amendment 7 provides that patients have a right to access any records made or received in the course of business by the healthcare provider relating to any adverse medical incident. The amendment defines "adverse medical incident" to include negligence, intentional misconduct, or any other act that caused or could have caused injury or death to a patient. In disclosing such records, the identity of the patient is to be protected.

There has been an enormous amount of Amendment 7 litigation since its passage in 2004. Most recently, in 2012, the Florida Supreme Court issued its opinion in West Florida Regional Medical Center, Inc. v. See. 37 Fla. L. Weekly S22 (Fla. 2012).

Of greatest importance is the broad reading the Court gives to Amendment 7 in finding that:

1. A blank application for medical staff privileges is a record of an adverse medical incident and therefore not protected from discovery under sections 766.101(5) and 395.0191(8) and is discoverable under Amendment 7;
2. Fla. Stat. section 381.028(7)(b)1, Florida Statutes, is invalid because the Amendment 7 disclosure requirements are not limited to only incident reports such as Code 15 reports and AHCA annual reports listed in sections 395.0197(5) and (7) (the hospital risk management statute); and,
3. The federal Health Care Quality Improvement Act ("HCQIA") does not preempt Amendment 7 because HCQIA and Amendment 7 each address different concerns and do not conflict with each other.

As a result of this opinion, the range of documents and types of "adverse incidents" subject to disclosure under Amendment 7 is broader than the Code 15 reports and annual reports and "severe injuries" described in sections 395.0197(5) and (7) and includes documents such as blank applications.

vi. Miscellaneous

Informed Consent Form for Cataract Surgery:

Fla. Stat. §458.351 and §459.026 were amended in 2011 to add subsection (6) which expressly authorize the Boards of Medicine to adopt by rule a standard informed consent form that would clearly and uniformly list the recognized risks of cataract surgery, which is the most commonly performed surgery in Florida. The new subsections also clarify that upon signature by the patient of the standard informed consent form, a rebuttable presumption is made that the doctor properly disclosed the risks. Further, incidents resulting from recognized specific risks would no longer be "adverse incidents" for reporting purposes.

Authority to Settle Medical Malpractice Insurance Contracts:

As amended in 2011, Fla. Stat. §627.4147 permits physicians to enter into insurance contracts that give the physician authority to approve or deny settlement of the insurance claim, provided the insurer voluntarily offers such a policy. Likewise, insurance companies are permitted, but not required, to provide policies that allow this physician settlement decision.

Admissibility of Reimbursement Policies:

In 2011, Fla. Stat. §766.102 to provide that records, policies, or testimony of an insurer's reimbursement policies or reimbursement determinations are not admissible to show the deviation of care or to prove medical negligence. In addition, noncompliance with a federal rule, regulation, or standard may not be used as evidence in a medical negligence action.

Scientific Diagnostic Disease Methodologies:

In 2011, Section (3) of Fla. Stat. §766.110 was created to allow health care facilities' medical review committees to adopt scientific diagnostic disease technologies to ensure comprehensive risk management for disease diagnoses.

b. Nursing Home Litigation

In 1980, in response to investigations into the treatment of Florida's substantial elderly population in nursing homes, the Florida Legislature created a list of rights belonging to all nursing home residents. § 400.02, *Fla. Stat*. The Legislature also established a statutory cause of action to enforce those rights. § 400.023, *Fla. Stat*. The result of this statute, intended or not, was to create a separate statutory scheme for medical negligence issues relating to care and treatment received in nursing homes and assisted living facilities. Specifically, section 400.022(1)(l) guarantees a nursing home resident the right to "receive adequate and appropriate health care and protective and support services." While violation of one of the guaranteed rights is evidence of negligence, it is negligence per se. § 400.023(2), *Fla. Stat*.

In 2001, the Legislature enacted a series of amendments to change the procedures and limit damages in these types of cases. Section 400.0233 requires that prior to filing a claim for violation of a resident's rights or a claim for negligence, the claimant must notify all prospective defendants of the alleged violation or negligence. No suit may be filed for a period of 75 days after notice is mailed. During this time, the facility is required to conduct an investigation and respond by either rejecting the claim or making a settlement offer. If a settlement offer is made, the resident has 15 days to respond. Similar to pre-suit requirements in medical negligence cases, the statute of limitations is tolled during the investigation, which can be extended by agreement of the parties. This section also provides for informal discovery and mandatory mediation, similar to medical negligence cases.

Under the statutory scheme enacted in 1980, Florida courts had determined that when a claimant died as a result of nursing home negligence, the plaintiff was not limited to wrongful death damages, but could continue to seek damages under Chapter 400. The Legislature amended section 400.023 to require a personal representative to elect either survivor damages or wrongful death damages. The statute of limitations was shortened in 2001 from four years to two years and a statute of repose was established at four years from the date of the incident leading to the claim. The Legislature also established that the provisions of Chapter 400 are the "exclusive remedy for a cause of action for recovery of damages for the personal injury or death of a nursing home resident arising out of negligence or a violation of rights specified in § 400.022." § 400.023(1), *Fla. Stat*.

Section 400.0237 allows for a claimant to seek punitive damages in nursing home litigation after a "reasonable showing" that a reasonable basis exists for punitive damages. Punitive damages may only be recovered if, based on clear and convincing evidence, the defendant is "personally guilty of intentional misconduct or gross negligence." § 400.0237(2), *Fla. Stat*. The statutory scheme includes a tiered system of caps on punitive damages that limits punitive damages to the greater of three times compensatory damages to each claimant or $1 million. If the defendant's wrongful conduct was motivated solely by unreasonable financial gain and the defendant had actual knowledge of the unreasonably dangerous nature of the conduct and the high likelihood of injury, punitive damages are limited to the greater of $2 million or four times compensatory damages to each claimant. If, at the time of injury the defendant is show to have had specific intent to harm the claimant, there is no limit on punitive damages.

The statutory scheme prior to 2001 provided for the recovery of attorneys' fees. In 2001, the Legislature amended the statute to limit the recovery of attorneys' fees to $25,000 and to provide that fees "shall be awarded solely for the injunctive or administrative relief and not for any claim or action for damages." § 400.023(1), *Fla. Stat.*

c. NICA

In 1988, the Florida Legislature enacted §§ 766.301, *et seq*., the Florida Birth Related Neurological Injury Compensation Plan (NICA), which created a statutory scheme of compensation without fault for birth-related neurological injuries that render a full-term infant permanently and substantially impaired. The statute provides for the payment of all medical expenses and a one-time payment to the parents of $100,000, based upon findings made by administrative law judges, who hear all NICA cases. If parents are put on notice that a health care provider participates in NICA, it is the exclusive remedy for these types of injuries, unless the provider committed bad faith or willful disregard.

In 1993, the statute of limitations for a NICA claim was reduced from seven years to five years.

5. Products Liability Reform

a. General

In 1999, several statutes were enacted or amended to specifically address issues relating to causes of actions for products liability.

Florida Statute § 95.031(2)(b) revises the Statute of Limitations for product liability causes of action. The section essentially created a products liability statute of repose running 12 years from the date of sale, unless the manufacturer has represented that the product has an expected useful life of less than 10 years. In that case, the repose period runs to the end of the expected useful life. Exceptions are provided for escalators, elevators, and improvements to real property, as well as a 20-year repose period for vessels. The statute provides that there is no repose period for a product if exposure to the product occurs within 12 years of sale, but the injury does not manifest itself until after the repose period.

Florida evidence rule, section 90.407, expands the prohibition against the use of evidence of subsequent remedial measures to prove negligence. Florida Statute § 768.1257 requires the finder of fact to consider the state of the art of scientific and technical knowledge at the time of manufacture, not at the time of injury. Section 768.1256 provides for a rebuttable presumption of no liability based upon compliance with government rules at time of manufacture, as well as a rebuttable presumption that a product is defective if it is not in compliance with government rules at time of manufacture.

b. Asbestos Claims

In 2005, the Asbestos and Silica Compensation Fairness Act was enacted. This Act, set out in Florida Statute §§ 774.201 through 209, imposed a series of requirements on individuals who wish to file an asbestos or silica claim. It also creates a threshold that an individual must meet in order to file suit. The Act also limits the liability of successor corporations that have assumed asbestos-related liabilities as the result of a merger or consolidation that occurred prior to January 1, 1972.

c. Automotive Products Liability: Crashworthiness Doctrine

In 2011, Fla. Stat. §768.81 was amended to explicitly require the jury consider the fault of all who contributed to the accident when apportioning fault in any products liability lawsuit alleging that injuries were enhanced by a defective product. The legislature included a specific statement that the law was intended to "overrule *D'Amario v. Ford Motor Co,* [….].which [….] fails to apportion fault for damages consistent with Florida's statutory comparative fault system." The Florida Legislature also required "this act be applied retroactively."

6. Motor Vehicle Liability

a. Law Enforcement Immunity

In 2006, Florida Statute § 768.28 was amended to provide that a law enforcement agency is not liable for injury, death, or property damage caused by a person fleeing a law enforcement officer under certain circumstances. Specifically, sovereign immunity attaches if (1) the pursuit is conducted in a manner that does not involve conduct by the officer which is so reckless or wanting in care as to constitute disregard of human life, human rights, safety, or the property of another; (2) at the time the law enforcement officer initiates the pursuit, the officer reasonably believes that the person fleeing has committed a forcible felony; and (3) the pursuit is conducted by the officer pursuant to a written policy governing high-speed pursuit. This immunity applies to all causes of action accruing on or after June 20, 2006.

b. Streetlight Immunity

Florida Statute § 768.1382 was enacted in 2005 and provides certain immunity to providers of streetlights. Such providers have immunity from lawsuits alleging negligent streetlight maintenance if they repair inoperative streetlights within certain time periods and provide a process for customers to report outages. In most cases, a streetlight provider must repair inoperative streetlights within 60 days of actual notice of an outage. More complex repairs must be made within 180 days. Following a state of emergency, providers have 365 days to make a repair.

c. Rental Car Liability

Also in 2005, the financial responsibility statute (§ 324.021, *Fla. Stat.*) was modified to expand the definition of the term "rental company" to allow certain companies to qualify for the vicarious liability caps. The definition was expanded to include: (1) A related rental or leasing company that is a subsidiary of the same parent company as that of the renting or leasing company that rented or leased the vehicle; and (2) The holder of a motor vehicle title or an equity interest in a motor vehicle title if the title or equity interest is held under or to facilitate an asset-backed securitization of a fleet of motor vehicles used solely in the business of renting or leasing motor vehicles to the general public and under the dominion and control of a rental company in the operation of such rental company's business. (Note: The Federal Transportation Act of 2005 completely abolished all vicarious liability for rental car companies. In 2011, the Florida Supreme Court held that the federal Graves Amendment, 49 U.S.C § 30106 preempted Fla. Stat. §324.021 (9)(b)(2), which provides for limited vicarious liability on the part of car rental companies.)

d. Leased Vehicle Liability

In 1999, Florida Statute § 324.021 was modified to place limits on vicarious liability for an owner of a leased vehicle when there is an agreement in place to lease the motor vehicle for one year or longer, which requires the lessee to obtain statutorily identified minimum levels of auto insurance. If the minimum level of insurance are met, the owner shall not be deemed the owner of the leased vehicle for the purpose of determining financial responsibility.

When the vehicle is leased for less than one year, the lessor shall be deemed the owner of the motor vehicle for the purpose of determining liability for the operation of the vehicle or the acts of the operator only up to $100,000 per person and up to $300,000 per incident for bodily injury and up to $50,000 for property damage. If the lessee or the operator of the motor vehicle is uninsured or has less than $500,000 combined property damage and bodily injury liability coverage, the lessor shall be liable for up to an additional $500,000 in economic damages arising out of the use of the motor vehicle. The statute provides a set-off for all other available insurance or self-insurance covering the lessee or operator. These limits do not apply to commercial vehicles carrying hazardous materials unless at the time of lease the lessee indicates in writing that the vehicle will not be used for such transport or the lessee has $5 million in insurance coverage.

7. Premises Liability

In 2010, Florida Statute §768.0710, the Statute that set the burden of proof in claims of negligence involving transitory foreign objects or substances against persons or entities in possession or control of business premises was repealed and replaced by Fla. Stat. §768.0755. The most significant change is that Section §768.0755 reintroduces the notice requirement for a Plaintiff to plead and prove into premises liability actions. Notice as a required element of pleading and proof has been absent since the Florida Supreme Court decided *Owens v. Publix* in 2001.

Previously, under Florida Statute §768.0710, the defendant in a premises case was allowed to offer evidence of lack of notice but the statute specifically stated that "actual or constructive notice of the transitory foreign object or substance is not a required element of proof of a claim."

Newly enacted, Florida Statute §768.0755 provides if a person slips and falls on a transitory foreign substance in a business establishment, the injured person must prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it. Constructive knowledge may be proven by circumstantial evidence showing that:

> (1) The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or
> (2) The condition occurred with regularity and was therefore foreseeable.

8. Attorneys Fees

The subject of attorneys' fees is addressed within the specific topic areas, where applicable.

9. Miscellaneous

a. Class Action Reform

In 2006, the Florida Legislature reformed the venue provisions for class action lawsuits under Florida law to prevent non-residents of Florida from filing class action lawsuits in Florida. Specifically, Section 768.734 provides that claimants having the capacity to sue are limited to residents of the state at the time of the alleged conduct, unless the "conduct giving rise to the claim occurred in or emanated from" Florida. The statute also requires class action claimants seeking monetary damages to plead and prove actual damages.

b. Food & Beverage Liability

In 2004, as efforts increased to hold McDonalds and other fast food vendors liable for serving allegedly unhealthful fare, the Florida Legislature enacted Section 768.37, which exempts manufacturers, distributors and sellers of food and nonalcoholic beverages from liability if "liability is premised upon a person's weight gain or obesity, or a health condition related to weight gain or obesity, resulting from the person's long-term consumption of such foods or nonalcoholic beverages." If the defendant did not make nutritional information available to the plaintiff as required under certain state and federal regulations or provided "materially false or misleading information to the public," the exemption does not apply.

c. Sinkhole Reform

In 2011, Florida's Sinkhole legislation was extensively revised. Below, is a summary of the changes to Fla. Stat §627.706 through .7074:

(1) Statement of legislative intent. According to the new law, technical or scientific definitions that were adopted in the 2005 legislation are clarified to implement and advance the Legislature's intended reduction of sinkhole claims and disputes; and other revisions are enacted to rely on scientific or technical determinations, reduce the number and cost of disputes, and ensure that repairs are made.

(2) Pre-coverage inspection. An insurer may require inspection of the property before issuance of sinkhole loss coverage.

(3) Principal building limitation. Insurers may restrict coverage for sinkhole and catastrophic ground cover collapse (CGCC) to the principal building.

(4) Claim-filing deadline. There is a new claim-filing deadline of two years from discovery.

(5) Database. The sinkhole database is repealed.

(6) Claim inspection. Inspection procedures for the insurer's claim inspection and the written notice to the policyholder following the insurer's initial claim inspection.

(7) Policyholder demand for testing and liability for cost. If the insurer denies a claim without testing, the policyholder now has no more than 60 days to demand testing. If testing is performed due to policyholder demand, the policyholder pays up front the lesser of 50% of testing costs or $2,500. The insurer reimburses the policyholder if the insurer's testing confirms a sinkhole loss.

(8) Repairs. (a) For a confirmed sinkhole loss or CGCC, the insured must repair damage or loss in accordance with the recommendations of the insurer's professional engineer. (b) If the insurer's professional engineer determines that repairs cannot be completed within policy limits, the insurer must (i) pay to complete the recommended repairs or (ii) tender policy limits. (c) The policyholder must enter into a contract for building stabilization or foundation repairs within 90 days after the insurer notifies the policyholder that a sinkhole loss is confirmed (the time period is tolled for neutral evaluation). (d) Stabilization and repairs must be completed within 12 months after entering a contract for repairs, unless there is mutual agreement or the claim is in neutral evaluation, litigation, appraisal or mediation. (e) There is no longer a requirement of obtaining policyholder consent for an insurer to make payment directly to persons selected by the policyholder to perform land and building stabilization and foundation repairs (although lienholder written consent is still required).

(9) Rebates prohibited: If the policyholder accepts a rebate from a contractor (person performing repairs), coverage is void and the policyholder must refund the

rebate. The contractor who "offers" a rebate commits insurance fraud and third degree felony.

(10) Nonrenewal. Modifies circumstances in which the insurer may nonrenew on the basis of filing of sinkhole claims, including the addition of a sentence that the insurer may nonrenew the policy if it pays policy limits.

(11) Reports. Modifies the content of the report of insurer's professional engineer or geologist, to conform to other changes in the law. Clarifies that the presumption of correctness (in favor of the findings, opinions, and recommendations of the professional engineer and geologist) is limited to the insured's engineer and geologist.

(12) Stabilization/repair certificate. The professional engineer who monitored repairs is required to issue a report specifying what repairs were performed and certifying that repairs have been properly performed.

(13) Clerk of courts filing. Adds requirement to file: (a) the neutral evaluator's report (if sinkhole activity caused damage), (b) the stabilization certificate, and (c) the amount paid by the insurer.

(14) Seller's disclosure. A policyholder-seller is required to disclose to the property buyer (prior to closing) the amount of payment received for a sinkhole loss.

Georgia

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Tort Reform in Georgia

1. Introduction

In enacting the Tort Reform Bill known as Senate Bill 3 in 2005, the Georgia Legislature made comprehensive changes to tort law in Georgia substantively and procedurally. Although the preamble to Senate Bill 3 focuses primarily on issues such as insurance premiums, the explosion of medical malpractice suits and other healthcare-related issues, it is clear that the Georgia Legislature intended to address a broad scope of issues pertaining to all civil cases. This article discusses key provisions of the Georgia Tort Reform Bill and subsequent appellate court decisions affecting the impact of SB3.

2. Joint and Several Liability

The old joint and several liability rule in Georgia permitted a jury to award damages to a plaintiff against any and all of the defendants in a case. O.C.G.A. § 51-12-31. Thus, under the old rule, a plaintiff could recover fully against one or more responsible defendants, regardless of the degree of each defendant's fault in causing the plaintiff's injury.

The old rule was changed in 1987 by the Georgia Legislature to take into account situations where the plaintiff is negligent to some degree. Under the 1987 version, the trier of fact, in calculating the total amount of damages to award, was permitted to apportion the total amount of damages "among the persons who are liable and whose degree of fault is greater than that of the injured party according to the degree of fault of each person." If damages were apportioned in this fashion, the liability was assigned severally against each person at fault, not jointly. Furthermore, no right of contribution existed between the parties at fault under the 1987 apportionment statute. (O.C.G.A. § 51-12-33).

In 2005, Senate Bill 3 brought about a new variation with regard to apportionment of fault. The most recent version of O.C.G.A. § 51-12-31 provides that "the plaintiff may recover damages for an injury caused by any of the defendants against **only the defendant or defendants liable for the injury** . . ." Importantly, the current version of the apportionment statute also makes it mandatory for the jury to "determine the percentage of fault of the plaintiff." Also, the trial judge is required to "reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault."

The current apportionment statute adds a new subsection permitting the trier of fact to apportion fault among nonparty tortfeasors. Jurors must indicate on the verdict form which of the party and/or nonparty tortfeasors should have fault assessed against them. To consider the fault of a nonparty tortfeasor, certain conditions precedent must be met. The plaintiff must have entered into a settlement agreement with the nonparty, or a defendant must provide notice at least 120 days before trial "that a nonparty was wholly or partially at fault." O.C.G.A. § 51-

12-33(d)(1). The statute provides the specific manner in which notice must be given to the litigants, as well as the basis for believing that a nonparty tortfeasor is at fault. Although a nonparty can have fault assessed against him at trial, he or she would not be subject to liability in that action; nor can the finding of fault be introduced in a subsequent action against that particular nonparty tortfeasor.

Since its adoption, Georgia's new apportionment statute has been the subject of several appellate court decisions. A challenge to the statute's constitutionality (specifically with respect to the abolition of joint and several liability where the plaintiff bears no fault for his own injuries) was rejected by the Georgia Court of Appeals in *Cavalier Convenience, Inc. v. Sarvis*, 305 Ga. App. 141, 699 S.E.2d 104 (2010). More recently, in *McReynolds v. Krebs* (Ga. S.Ct. No. S11G0638, decided March 23, 2012), the Supreme Court of Georgia confirmed, after some considerable uncertainty among the Georgia Bar (due to an apparent conflict in several appellate decisions), that (1) joint and several liability is indeed abolished in Georgia and (2) a tortfeasor to whom fault is apportioned may not seek contribution from another tortfeasor.

As has always been the case, the apportionment statute does not apply, if the jury determines that the plaintiff is 50% or more liable. In those situations, as always, the plaintiff would be barred from any recovery.

3. Compensatory Damages Caps

Currently, there are no limits on the amount of compensatory (non-economic) damages awardable in other types of suits in Georgia. However, Senate Bill 3 created a $350,000 cap on compensatory damages awarded in medical malpractice suits against one or more physicians. O.C.G.A. § 51-13-1. The statute further provided that an additional $350,000 could be awarded where a "medical facility," such as a hospital or medical center, was held liable.

The SB3 medical malpractice compensatory damages cap was recently overturned by the Georgia Supreme Court in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218 (2010). In *Nestlehutt*, the plaintiff developed severe complications after a facelift surgery, resulting in her permanent disfigurement. The jury returned a verdict of $1,265,000, which included an award of $900,000 in noneconomic damages for the plaintiff's pain and suffering. The Georgia Supreme Court held that the limitation of awards of noneconomic damages to a predetermined amount in medical malpractice cases violates the state constitutional right to a jury trial.

4. Punitive Damages Caps

Senate Bill 3 did not change the law in Georgia with respect to caps on punitive damages. O.C.G.A. § 51-12-5.1(g) places a $250,000 cap generally on punitive damages awards except under certain specified facts. The $250,000 cap does not apply to products liability cases, but only one award of punitive damages

can be recovered "from a defendant for any act or omission if the cause of accident arises from products liability, regardless of the number of causes of action which may arise from such act or omission." O.C.G.A. § 51-12-5.1(e)(1). Moreover, the Georgia Office of Treasury and Fiscal Services would be entitled to 75% of the punitive damages awarded in this instance, subtracting litigation costs and reasonable attorney's fees.

The $250,000 cap on punitive damages also does not apply in cases where the jury finds that "the defendant acted, or failed to act, with the specific intent to cause harm, or that the defendant acted or failed to act while under the influence of alcohol, drugs other than lawfully prescribed drugs administered in accordance with prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to that degree that his or her judgment is substantially impaired . . ." O.C.G.A. § 51-12-5.1(f).

In all other cases that do not involve products liability or a finding of specific intent to cause harm, awards of punitive damages in Georgia are limited to $250,000.

5. Medical Malpractice Reform

In addition to caps on compensatory damages in medical malpractice suits, which are discussed above, Senate Bill 3 attempted to make significant changes in other areas involving medical malpractice, such as the standard of care for emergency medical providers, apparent agency, venue specifically related to medical malpractice cases, and the expert affidavit and medical authorization filing requirements.

a. Standard of Care for Emergency Medical Providers

The law prior to Senate Bill 3 concerning the standard of care for negligence cases against emergency medical providers was the familiar, objective standard of ordinary care. Medical providers were required to use "that degree of skill and care exercised generally by the members of the profession under the same conditions and like surrounding circumstances." This standard of care became a victim of tort reform by the Georgia Legislature due to concerns that "there presently exists a crisis affecting the provision and quality of healthcare services in this state" and the rising number of healthcare liability claims. Accordingly, Senate Bill 3 changed the standard of care for emergency medical providers from negligence to *gross negligence* and the plaintiff's burden of proof from preponderance of the evidence to *clear and convincing evidence*. This portion of SB3 is codified under O.C.G.A. § 51-1-29.5. Subsection (d) of the statute requires a fact-finder deliberating the fault of an emergency medical provider to consider (1) whether the medical provider was given a complete medical history; (2) whether or not the provider and patient had established a pre-existing doctor-patient relationship; (3) the circumstances constituting the emergency; and (4) the circumstances surrounding the delivery of emergency medical care.

b. Apparent Agency

As it relates to hospitals, Senate Bill 3 abolished the theory of vicarious liability known as apparent agency. Under that theory of liability, a principal can be held liable for the conduct of an independent contractor, provided the principal "holds out" the independent contractor as its employee and the plaintiff relies justifiably on this holding out to his detriment. *Cooper v. Olivent*, 271 Ga. App. 563, 610 S.E.2d 106 (2005). Typically, a plaintiff will attempt to hold a hospital responsible for the alleged negligent conduct of independent contractors, such as physicians, radiologists, and others, particularly emergency medical providers.

Senate Bill 3 makes it possible for a hospital to avoid this kind of liability by posting a sign "conspicuously in the hospital lobby or a public area of the hospital" with specific wording and type size. O.C.G.A. § 51-2-5.1. Alternatively, the hospital can have the patient, or his or her representative, "sign a written acknowledgment in plain language that the hospital is not responsible for actions of independent contractors."

c. Venue in Medical Malpractice Suits

In Senate Bill 3, the Georgia Legislature carved out an exception in the venue area for medical malpractice suits. Subsection (c) of the current venue statute provides that a non-resident defendant in a medical malpractice claim ". . . may require that the case be transferred to the county of that defendant's residence if the tortious act upon which the medical malpractice claim is based occurred in the county of that defendant's residence." O.C.G.A. § 9-10-31(c).

Because this portion of the statute allowed the defendant, not the court, to require transfer of venue, this portion of the statute has come under considerable attack by the plaintiff's attorneys in Georgia. Ultimately, they succeeded in March, 2006, when the Supreme Court of Georgia held that this portion of the new venue statute is unconstitutional. It runs afoul of a Georgia constitutional provision stating that "suits against tortfeasors residing in different counties may be tried in either county." Georgia Constitution, Article VI, Section II, Paragraph IV; *EHCA Cartersville, LLC v. Turner/Garland v. Earle*, 280 Ga. 333, 626 S.E.2d 482 (2006). Consequently, malpractice suits must now follow the general venue rules laid out in O.C.G.A. §§ 9-10-31 and 9-10-31.1, which are discussed in another section below.

d. Expert Affidavit/Medical Authorization Filing Requirements

Senate Bill 3 also made significant changes to the requirement that a plaintiff file an expert affidavit alleging negligence against a medical provider in a malpractice suit, as required by O.C.G.A. § 9-11-9.1. The Appellate Courts of Georgia have held that the purpose for such an expert affidavit "is to reduce the number of frivolous malpractice suits being filed . . ." *Bowen v. Adams*, 203 Ga. App. 123, 416 S.E.2d 102 (1992). Prior to the enactment of SB3, a plaintiff could be granted a 45-

day extension to file the necessary expert affidavit and the trial court could extend that deadline in the interest of justice. SB3 changed that portion of the expert affidavit statute, requiring that an expert affidavit must be filed contemporaneously with the complaint in every medical malpractice case or face possible dismissal on the merits (with certain exceptions), which under the statute would foreclose the possibility of a subsequent renewal action to correct the error.

The second change brought about by SB3 deals with the issue of when a defendant must challenge the sufficiency of the expert affidavit. Under the old law, defendant was required to file a motion to dismiss ". . . with its initial responsive pleading . . ." Now, a defendant may file a motion to dismiss the sufficiency of the expert affidavit ". . . on or before the close of discovery . . ." O.C.G.A. § 9-11-9.1(b). If a motion to dismiss is filed, the plaintiff may cure the defective affidavit by filing an amendment, pursuant to O.C.G.A. § 9-11-15, ". . . within 30 days of service of the motion alleging that the affidavit is defective." The trial court retains the discretion to allow an extension to file this amendment, a response to the defendant's motion to dismiss, "or both, as it shall determine justice requires." O.C.G.A. § 9-11-9.1(b).

Senate Bill 3 also made changes to the law governing the release of personal medical information in medical malpractice actions. O.C.G.A. § 9-11-9.2 required a plaintiff filing a medical malpractice suit to include with his or her complaint an authorization permitting the release to defense counsel of plaintiff's protected health information. The authorization would also permit opposing counsel to speak with the plaintiff's medical providers about his or her care and treatment. Under the statute, a failure to provide this authorization would subject the complaint to dismissal.

Since its adoption, the Georgia Court of Appeals has held that O.C.G.A. § 9-11-9.2 is preempted by the federal Health Insurance Portability and Accountability Act (HIPAA). *Northlake Medical Center, LLC v. Queen*, 280 Ga. App. 510, 634 S.E.2d 486 (2006). Consequently, the statute is no longer valid and the failure to provide an authorization does not subject a complaint to dismissal. Any attempts to obtain medical information from a plaintiff in a medical malpractice suit must comply with HIPAA requirements, which, notably, include the requirement that the plaintiff/patient be notified of his or her right to revoke the authorization. 45 C.F.R. § 164.508(c)(2)(i).

6. Venue

In light of the recent ruling from the Supreme Court of Georgia striking as unconstitutional the venue exception created by SB3 in medical malpractice suits, all of Georgia's statutory venue rules are now consistent with Article VI, Section II, Paragraph IV of the Georgia Constitution. "Subject to the provisions of Code Section 9-10-31.1, joint tortfeasors . . . residing in different counties, may be subject to an action as such in the same action in any county in which one or more of the defendants reside." O.C.G.A. § 9-10-31(b).

Senate Bill 3 also created a new forum *non conveniens* statute, which permits a defendant to have venue transferred to a more convenient county within, or outside, Georgia, with consideration given to the following factors: (1) Relative ease of access to sources of proof; (2) Availability and cost of compulsory tests for attendance of unwilling witnesses; (3) Possibility of viewing of the premises, if viewing would be appropriate to the action; (4) Unnecessary expense or trouble to the defendant not necessary to the plaintiff's own right to pursue his or her remedy; (5) Administrative difficulties for the forum courts; (6) Existence of local interests in deciding the case locally; and (7) The traditional deference given to a plaintiff's choice of forum. O.C.G.A. § 9-10-31.1.

Before a court will dismiss and transfer a case to another venue under this statute, all of the defendants must agree to waive any statute of limitation defense regarding the refiling of the case in another venue. The initial case must have been filed within the applicable limitations period. O.C.G.A. § 9-10-31.1(b). Unlike the provisions of SB3 pertaining to medical malpractice suits, the new forum *non conveniens* statute has been upheld by Georgia's courts. *EHCA Cartersville, LLC v. Turner/Garland v. Earle*, 280 Ga. 333, 626 S.E.2d 482 (2006); *R.J. Taylor Memorial Hospital, Inc. v. Beck*, 280 Ga. 660, 631 S.E.2d 684 (2006).

7. Offers of Judgment

The Georgia Offer of Judgment statute is codified at O.C.G.A. § 9-11-68 ("Written offers to settle tort claims; liability of refusing party for attorney's fees and expenses"). In its original form (enacted in 2005 with SB3), the statute was ambiguous with respect to who may serve an offer of judgment (also commonly referred to in Georgia as an "offer of settlement," consistent with the statute's title) and allowed for the anomalous situation whereby both the plaintiff and defendant could owe fees and expenses to each other.

The statute was amended in 2006 to correct these issues after the original statute was struck down as unconstitutional. Under the current statute, a defendant is entitled to recover reasonable attorney's fees and expenses of litigation from the date of the rejection of the offer through the entry of judgment if the final judgment is either (1) in favor of the defendant with respect to liability or (2) in favor of the plaintiff, but is **less than 75%** of the amount of the defendant's offer of settlement. O.C.G.A. § 9-11-68(b)(1). Alternatively, if a defendant rejects a plaintiff's offer of settlement and the plaintiff recovers a final judgment **in excess of 125%** of the amount of defendant's offer of settlement, the plaintiff is then entitled to recover reasonable attorney's fees and expenses from the defendant.

The revised offer of settlement statute has withstood constitutional challenges since its enactment in 2006 and its validity is now reasonably well-established. However, several cases have ruled unconstitutional the *retroactive* enforcement of the statute, both as to cases filed prior to its enactment (*Olarsch v. Newell*, 671 S.E.2d 253, 295 Ga. App. 210 (2008)), as well as cases filed after its enactment where the underlying injury occurred before the effective date of the

statute (*L.P. Gas Indus. Equipment Co. v. Burch*, 306 Ga. App. 156, 701 S.E.2d 602 (2010)).

8. Expert Opinions

Prior to the enactment of Senate Bill 3 in 2005, the evidentiary rules pertaining to the admission of expert opinions was quite broad. "The opinions of experts on any question of science, skill, trade, or like questions shall always be admissible; and such opinions may be given on the facts as proved by other witnesses." O.C.G.A. § 24-9-67. In SB3, the Georgia legislature made extensive revisions to the old law, and carved out a specific approach for the admission of expert testimony in medical malpractice suits. O.C.G.A. § 24-9-67.1.

There is an unresolved conflict in the new expert statute regarding whether the facts and data relied upon by the expert in reaching his or her opinion must in and of themselves be admissible. Subsection (a) of the statute clearly states that they need not be **if** the facts and data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject opinion or inference to be admitted." However, subsection (b) of the statute then states that an expert witness may testify as to scientific, technical, or other specialized knowledge in the form of an opinion if the testimony "is based upon sufficient facts or data **which are or will be admitted** into evidence at the hearing or trial; (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 this case."

This conflict was addressed by the Georgia Supreme Court in *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 658 S.E.2d 603 (2008). In *Mason*, the trial court held that subsections (a) and subsection (b)(1) are contradictory. In order to correct the inconsistency, the trial court severed subsection (b)(1) and then applied the revised statute, ultimately ruling that a different subsection precluded the testimony of the plaintiffs' expert. The Supreme Court agreed that these two provisions are inconsistent and cannot be harmonized, rendering the statute unconstitutionally vague. The Court further held that the trial court was not required to strike the statute in its entirety because invalid portions of a statute may be severed where they are not mutually dependent on the remaining portions and the legislative intent is not compromised.

SB3 also changed Georgia law with regard to qualifications of an expert witness. Under O.C.G.A. § 24-9-67.1, it is now the trial court's duty to hold a pretrial hearing (if requested by a party) to determine whether witnesses' qualifications comply with the standards set out in subsection (b) of the statute mentioned above. Typically, this pre-trial hearing is held just before trial and in conjunction with a motion in limine or a pre-trial conference. It has become the practice of Georgia trial courts to identify these pre-trial hearings as "*Daubert* hearings." In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the United States Supreme Court put forth a new standard for evaluating the reliability of expert testimony and for the first time, announced the requirement that a trial court play the role of

determining the qualifications of the expert, as well as the reliability of the expert's methodology. These factors include: (1) whether or not the theory or technique was able to be tested; (2) whether the theory or technique had been published in appropriate scientific circles and subjected to peer review; (3) the potential rate of error of the theory or technique; (4) the existence and maintenance of standards within the particular community controlling the technique's operation; and (5) whether the technique or theory had been generally accepted by the particular relevant scientific community. *Daubert* and its progeny make it clear that this list of factors is not all inclusive and is merely an attempt to provide the trial judge with a guideline.

The Georgia General Assembly intended with SB3 to bring the standards for admitting expert witness testimony used in Georgia courts closer in line with national standards. In that regard, O.C.G.A. § 24-9-67.1(f) announces the legislature's intent that Georgia courts "not be viewed as open to expert evidence that would not be admissible in other states" and Georgia courts are specifically authorized by the statute to draw from the opinions of the United States Supreme Court in *Daubert* and its progeny. This portion of the statute was also challenged in *Mason* on the premise that it constituted an invasion of the province of the judiciary by the legislature. However, the Supreme Court rejected this challenge on the basis that the statute uses permissive language (providing that Georgia courts **"**may**"** draw from the opinions of the U.S. Supreme Court) rather than mandatory language. The Supreme Court held that subsection (f) is merely an application of the generally accepted principle that, given the similarity of the Georgia Civil Practice Act to the Federal Rules of Civil Procedure, it is proper to consider and give weight to constructions placed on the federal rules by federal courts. Consequently, O.C.G.A. § 24-9-67.1 could not be declared unconstitutional on this ground.

The statute contains additional specific requirements for admissibility of expert opinions in medical malpractice suits in Georgia. The proffered expert must be ". . . licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time." O.C.G.A. § 24-9-67.1(c)(1). Additionally, the proffered expert must have "actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given," either because the proffered expert has been practicing actively in the area of specialty "for at least three of the last five years," or has been teaching in that area of specialty for at least that period of time as a faculty member at an accredited educational institution. O.C.G.A. § 24-9-67.1(c)(2)(A) and (B). Also, the proffered expert must be of the same profession as the medical provider/defendant in the medical malpractice suit in question. As was the case prior to SB3, a medical doctor is permitted to testify against an osteopath and an osteopath may testify against a medical doctor. O.C.G.A. § 24-9-67.1(c)(2)(C)(ii) and (iii). Georgia has another exception to the general rule that the proffered expert be of the same profession as the defendant in the suit. A physician is permitted to testify against nursing personnel, provided the physician "supervised, taught, or instructed" nursing personnel "during at least three of the last five years immediately preceding the time the act or omission is alleged to have occurred . . ."

However, nursing personnel are not permitted to testify against a physician regarding the applicable standard of care. O.C.G.A. § 24-9-67.1(c)(2)(D).

A final point to keep in mind in the area of medical malpractice and expert opinions is that all of the above-mentioned requirements pertaining to the qualifications, as well as the reliability of facts and data supporting an expert's opinion, apply also to O.C.G.A. § 9-11-9.1. In other words, all of the requirements under O.C.G.A. § 24-9-67.1 must be met by any medical provider, whose testimony is obtained by affidavit as a condition precedent for filing a medical malpractice suit under O.C.G.A. § 9-11-9.1.

Hawaii

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1. INTRODUCTION – HISTORY OF TORT REFORM IN HAWAII

Hawaii has experienced little tort reform. Since 1986, the Legislature has enacted modest reforms directed at several discrete aspects of the tort system. SB S1, enacted in a special session in 1986, limited non-economic damages for physical pain and suffering and modified Hawaii law regarding joint and several liability. In 1994, HB 1088 abolished joint and several liability with regard to damages recoverable from government entities. In 2001 the Legislature enacted Act 300 which amended Hawaii Revised Statutes, Chapter 663, to provide that a settlement, determined by the court to be made in good faith, will discharge the settling party from any liability for contribution to the non-settling party.

2. JOINT AND SEVERAL LIABILITY

Joint and several liability has been abolished subject to the following exceptions:

(1) recovery of economic damages involving death or injury to persons;
(2) recovery of economic and non-economic damages involving:
(A) Intentional torts;
(B) Torts relating to environmental pollution;
(C) Toxic and asbestos-related torts;
(D) Aircraft accidents;
(E) Strict and products liability; and
(F) Torts relating to motor vehicle accidents, except claims involving maintenance and design of highways where given reasonable notice of similar occurrence and not given notice limited to (3) below;
(3) recovery of non-economic damages when tortfeasor found less than 25% at fault, then the tortfeasor is only liable for assigned percentage share of fault; and,
(4) recovery of economic and noneconomic damages as to design professionals and certified public accountants for physical injury to persons. HRS §663-10.9.

3. CONTRIBUTION

Act 300 enacted in 2001 and codified at HRS § 663-15.5, provides that a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce a judgment that is given in good faith under to one or more joint tortfeasors, or to one or more co-obligors who are mutually subject to contribution rights, shall:

(1) Not discharge any other joint tortfeasor or co-obligor not released from liability unless its terms so provide;
(2) Reduce the claims against the other joint tortfeasor or co-obligor not released in the amount stipulated by the release, dismissal, or covenant, or in the amount of the consideration paid for it, whichever is greater; and
(3) Discharge the party to whom it is given from all liability for any contribution to any other joint tortfeasor or co-obligor.

This subsection does not apply to co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves. Case law has interpreted the "good faith" requirement as a determination at the discretion of the trial court in light of the totality of the circumstances surrounding the settlement including but not limited to consideration of: (1) the type of case and difficulty of proof at trial ...; (2) the realistic approximation of total damages that the plaintiff seeks; (3) the strength of the plaintiff's claim and the realistic likelihood of his or her success at trial; (4) the predicted expense of litigation; (5) the relative degree of fault of the settling tortfeasors; (6) the amount of consideration paid to settle the claims; (7) the insurance policy limits and solvency of the joint tortfeasors; (8) the relationship among the parties and whether it is conducive to collusion or wrongful conduct; and (9) any other evidence that the settlement is aimed at injuring the interests of a non-settling tortfeasor or motivated by other wrongful purpose.

4. DAMAGES/PUNITIVE DAMAGES

The only damages cap in Hawaii is a $375,000.00 limit for non-economic damages for pain and suffering except in cases in which joint and several liability was not abolished, ie. intentional torts; torts

relating to environmental pollution; toxic and asbestos-related torts; aircraft accidents; strict and products liability; and certain torts relating to motor vehicle accidents.

5. MEDICAL MALPRACTICE REFORM

In 1976 the legislature enacted HRS chapter 671so that medical malpractice claims are required to proceed before an administrative panel before a complaint can be filed in court. HRS § 671-3 codified the tort of a physician's negligent failure to disclose risk information prior to treatment. The statute was subsequently amended in 1983 and again in 2011 so that physicians are required to supply the following information to the patient prior to obtaining consent to undertake a proposed medical or surgical treatment or diagnostic or therapeutic procedure:

> (1) The condition to be treated;
> (2) A description of the proposed treatment or procedure;
> (3) The intended and anticipated results of the proposed treatment or procedure;
> (4) The recognized alternative treatments or procedures, including the option of not providing these treatments or procedures;
> (5) The recognized material risks of serious complications or mortality associated with:
> (A) The proposed treatment or procedure;
> (B) The recognized alternative treatments or procedures; and
> (C) Not undergoing any treatment or procedure; and
> (6) The recognized benefits of the recognized alternative treatments or procedures.

6. PRODUCTS LIABILITY REFORM

There has not been any reform applicable to products liability cases.

7. ATTORNEYS' FEES

There has not been any reform that allows the award of attorneys fees in tort actions under Hawaii law.

Idaho

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1. INTRODUCTION

Idaho has implemented many tort reforms that limit the ability of plaintiffs to bring civil tort actions. Limitations apply to specific types of actions, include general limitations on damages and liability, and require certain actions to be submitted to alternative dispute resolution. All of these limitations make it more difficult for plaintiffs to ultimately recover damages in civil tort actions.

2. LIMITATIONS ON LIABILITY

a. Comparative Fault

Idaho employs a system of comparative fault. In actions to recover damages for negligence, gross negligence, or comparative responsibility that results in death, bodily injury, or property damages, contributory fault or comparative fault does not prevent recovery if the comparative responsibility is not as great as the fault of the person from whom recovery is sought. Even if recovery is not entirely barred, however, any recovery is reduced in proportion to the comparative responsibility. Idaho Code § 6-801.

A party may request that the court instruct a jury to find separate special verdicts that determine the amount of damages and the percentage of fault of each party. Idaho Code § 6-802.

b. Limited Joint and Several Liability

Idaho employs a limited joint and several liability approach. The common law concept of joint and several liability applies only to actions where the parties were acting in concert or when a person was acting as an agent or servant of another party. Idaho Code § 6-803(3); Idaho Code § 6-803(5). "Acting in concert" means that the parties engaged in a common plan or design that resulted in an intentional or reckless tortious act. Idaho Code § 6-803(5).

In actions where a trier of fact apportions a percentage of fault to parties described in special verdicts as discussed above, separate judgments are rendered against those parties to the extent of their individual fault that is compared individually to the comparative fault of the person seeking to recover. "Judgment against each such party shall be entered in an amount equal to each party's proportionate share of the total damages awarded." Idaho Code § 6-803(3).

c. Liability Limitations for Certain Volunteers And Members of Nonprofit Corporations and Organizations

Certain uncompensated members of and volunteers for nonprofit corporations or organizations are immune from civil liability if their conduct is within the course and scope of their duties and functions and at the direction of the corporation or organization. Idaho Code § 6-1605(1). This immunity does not apply to willful, wanton, or fraudulent conduct, to the extent of insurance coverage for such conduct, to intentional breaches of fiduciary duties, to damages resulting from the operation of a motor vehicle, or to various other types of conduct. Idaho Code § 6-1605(1)(a)-(g).

d. Employer Liability Limitations for Torts of Employees

Employers are not liable for tort actions based upon an employer and employee relationship for acts or omissions of an employee that occur after the employee's employment is terminated unless clear and convincing evidence demonstrates that the employer's actions or omissions were grossly negligent, reckless, or willful and wanton, and the employer's actions or omissions caused the damage. Idaho Code § 6-1607(1).

A rebuttable presumption exists that the employer of a *current* employee is not liable for a tort action based upon an employee and employer relationship for a current employee's acts or omissions unless the employee was or had the appearance of entirely or partially engaging in the employer's business, was on the employer's premises when the tort occurred, or was under the direction and control of the employer. Clear and convincing evidence may overcome this presumption if the evidence shows the employer's acts or omissions were grossly negligent, reckless, or willful and wanton, and the employer's actions or omissions caused the damage. Idaho Code § 6-1607(2).

Upon motion, an employer is also entitled to a hearing where the party seeking recovery must establish a reasonable likelihood of showing facts that support the liability of the employer. If the party seeking recovery against the employer cannot establish those facts, the claims against the employer must be dismissed. Idaho Code § 6-1607(3).

e. Liability limitations for mental health professionals

Mental health professionals may not be liable for a cause of action for failure to "predict or take precautions to provide protection form a patient's violent behavior" unless the mental health care professional does not employ the ordinary skill, knowledge, and care possessed and exercised by other professionals in his or her specialty. Idaho Code § 6-1904(1). This liability limitation will not apply if a mental health professional does not warn a victim that a patient has communicated a direct threat of imminent harm to the mental health professional as described in Idaho Code § 6-1902.

3. LIMITATIONS ON DAMAGES

a. Noneconomic Damages Defined

Idaho defines noneconomic damages as the following:

> Noneconomic damages" mean subjective, nonmonetary losses including, but not limited to, pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party; emotional distress; loss of society and companionship; loss of consortium; or destruction or impairment of the parent-child relationship.

Idaho § Code 6-1601(5).

b. Limitation on Noneconomic Damages

In actions for damages for personal injury or death, Idaho limits recovery for noneconomic damages to a maximum amount of $250,000. This amount, however, may be altered because every July 1, this amount must increase or decrease based upon a percentage amount of increase or decrease by which the Idaho Industrial Commission changes the annual average wage. Idaho Code § 6-1603(1).

This limitation on economic damages is not disclosed to a jury, and the limitation does not apply to actions based upon willful or reckless misconduct or when a jury finds beyond a reasonable doubt that a cause of action would have constituted a felony. Idaho Code § 6-1603(3)-(4).

c. Reduction for collateral source payments

In Idaho, for personal injury and property damage actions, judgment may only be entered that for damages that exceed the amounts received by a plaintiff from collateral sources. Collateral sources of payment for the injury or damage may derive from private, or group or governmental sources. Collateral sources, however, do not include benefits from federal sources that must seek subrogation by law, death benefits from life insurance, benefits from certain service corporations, and benefits that are recoverable under legal or contractual subrogation rights. Idaho Code § 6-1606.

Collateral source payment evidence is only admissible after a fact finder has issued a verdict. The fact finder's award will be reduced to the extent that the award includes amounts that have been compensated by collateral sources. These rules prevent double recoveries from collateral sources. Idaho Code § 6-1606.

d. Limitation on Punitive Damages

To recover punitive damages, a plaintiff must show by clear and convincing evidence that the party against whom the claim for punitive damages is asserted acted oppressively, fraudulently, maliciously, or outrageously. Idaho Code § 6-1604(1).

A party seeking punitive damages may not file a claim containing a prayer of relief for punitive damages. Instead, the party may submit a pretrial motion and must attend a hearing to determine if the party can amend pleadings to seek punitive damages. The court must allow the party to amend the pleadings if the court determines that the party has established a reasonable likelihood of showing facts at trial that would entitle the party to punitive damages. Idaho Code § 6-1604(2).

Punitive damages may not exceed the greater amount of $250,000 or an amount that is three times the compensatory damages in the judgment, but a jury is not to be instructed as to this limitation. Idaho Code 6-1604(3).

e. Periodic payment of damages

For civil actions based upon personal injury or property damage where verdict for future damages is greater than $100,000, a court, at the request of a party, has discretion to enter judgment that allows for periodic payment of the judgment. Idaho Code § 6-1602(1). The court must request that each party submit a proposal detailing why or why not periodic payments are appropriate, the manner and method of the periodic payments as described in Idaho Code § 6-1602, other factors the court considers appropriate. Idaho Code § 6-1602(2)(a)-(c).

In determining whether periodic payments are appropriate the court will consider several factors, including, but not limited to, the age, health, education, occupation, and other considerations relevant to the party to receive the payment, the financial condition of the party to pay the judgment, whether future damages are certain and ascertainable, insurance coverage, the future earnings of the party to be paid, security of the full value, tax effects, and other factors. Idaho Code § 6-1602(3)(a)-(j).

Periodic payment schedules are generally not available for damages based on certain willful and fraudulent conduct. Idaho Code § 6-1602(4).

4. PRODUCTS LIABILITY ACTIONS

a. "Product Seller" Defined

In Idaho, products liability actions are brought against a "product seller" as defined in the Idaho Code. A product seller includes the following:

"Product seller" means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. The term also includes a party who is in the business of leasing or bailing such products.

Idaho Code § 6-1402(1).

Product sellers do not include certain providers of professional services, nonprofessional providers of services as long as a product is not the principal basis of a transaction, certain commercial resellers of used products, and finance lessors. Idaho Code § 6-1402(1)(a)-(c).

b. Time Limitations on Products Liability Actions

Certain time limitations apply to products liability actions in Idaho. A product seller is not subject to liability if the product seller can demonstrate by a preponderance of the evidence that a harm was caused after the expiration of a product's "useful safe life," unless the product seller expressly warrants the product for a longer time. Idaho Code 6-1403(1)(a)-(b).

A product's useful safe life begins when the product is delivered to its first purchaser and continues during the time that a product would normally perform or be stored in a safe manner. Idaho Code 6-1403(1)(a). A presumption exists, however, that harm caused more than ten years after the time of delivery occurred after the useful safe life expired. Idaho Code 6-1403(2)(a). This presumption is limited where a seller expressly warrants a period longer than ten years or the seller makes intentional misrepresentations concerning a product, or if a harm was caused by a prolonged exposure to a defective product or the harm was not discoverable. Idaho Code 6-1403(2)(b)(1)-(2); Idaho Code 6-1403(2)(b)(4).

A statute of limitation of two years further limits products liability actions. Idaho Code § 6-1403(3).

c. Comparative responsibility in products liability actions

Comparative fault will not completely prevent recovery in a products liability action for bodily injury or death, or property damage, if the comparative fault was not as great as the fault of the person that a plaintiff seeks recovery from. To the extent that recovery is allowed, the damages are reduced in proportion to the comparative fault. Idaho Code § 6-1404.

Certain actions that affect comparative fault include failure to notice an obvious defect, use of a known defective product, product misuse, and certain modifications or alterations of a product. See Idaho Code § 6-1405.

d. Evidentiary Limitations

Certain evidentiary limitations also apply in products liability actions. Changes in technology, warning standards, design, industry custom, and certain other changes are typically not admissible to demonstrate that a product is defective. Such evidence, however, may occasionally be admitted for other purposes. See Idaho Code § 6-1406.

e. Liability Limitations for Certain Product Sellers

Product sellers other than manufacturers cannot be found liable if they did not have the opportunity to inspect a product that would have revealed defects and the product seller did not expressly warrant the product. Idaho Code § 6-1407(1).

This liability limitation does not apply, however, if the product seller knew of the defect, altered the product and the alteration causes harm, provided the plans and specifications for the product, is a wholly owned subsidiary of the manufacturer or visa versa, or the product was sold after its expiration date. Idaho Code § 6-1407(1)(a)-(e).

A product seller will be responsible for the liability of the manufacturer if the manufacturer is not subject to service of process under a claimant's domicile, the manufacturer is insolvent, or the court determines it is highly probable a claimant will not be able to enforce a judgment against a manufacturer. Idaho Code § 6-1407(4)(a)-(c).

5. PRELITIGATION PROCEDURES AND ALTERNATIVE DISPUTE RESOLUTION

a. Prelitigation Requirements for Medical Malpractice Actions

In a medical malpractice action where a party seeks damages against an Idaho physician or surgeon, or a licensed acute care general hospital operating in Idaho, the Idaho state board of medicine is directed to provide "a hearing panel in the nature of a special civil grand jury and procedure for prelitigation consideration of personal injury and wrongful death claims for damages arising out of" the failure to provide or the provision of medical care in Idaho. Idaho Code § 6-1001.

The proceedings are informal and nonbinding, but are required prior to commencement of formal litigation proceedings. Normal rules of evidence do not apply. Idaho Code § 6-1001.

b. Small Lawsuit Resolution Act

Idaho implemented the Small Lawsuit Resolution Act to promote the "swift, fair and cost-effective resolution of disputes . . ." Idaho Code § 7-1502.

Alternative dispute resolution choices under the Act include arbitration, mediation, and early neutral evaluation. Idaho Code § 7-1502. The Act applies to civil actions for money damages that are not greater than $25,000 and do not include claims for punitive damages. Idaho Code § 7-1503(1). Either party may file notice of the court to trigger the Act. Idaho Code § 7-1503(2). After filing of notice, the parties must confer to evaluate whether the case should be evaluated or mediated. Idaho Code 7-1503(3).

If the parties are unable to reach agreement as to whether the case should be evaluated or mediated, a party has seven days after the filing of notice to file a motion for the court to determine what alternative dispute resolution option will apply to the case. A party filing the motion is entitled to a hearing, and the court must consider certain factors, including the nature of the claims and defenses, the parties' previous experience with alternative dispute resolution, whether the facts alleged will likely lead to liability, and the complexity of the lawsuit. Idaho Code § 7-1503(4).

The parties may move for removal from evaluation for good cause that includes a change in circumstances or the ability of a party to amend a pleading to assert punitive damages. Idaho Code § 7-1503(5).

If the case remains in alternative dispute resolution and an evaluator reaches an ultimate decision, the evaluator will issue a written decision within fourteen days of making the decision and must file notice of the decision with the clerk of court. The evaluator cannot award more than $25,000 in damages, and the evaluator cannot grant exemplary or punitive damages. The evaluator may only award costs and attorney's fees pursuant to a contract, and only the court may otherwise grant costs and attorney's fees. Idaho Code § 7-1509(1).

21 days after the notice of the decision is filed, a party may file a request for a trial de novo in the district court. Idaho Code § 7-1509(2). If a trial de novo is conducted, no reference to the evaluator's decision can be made, but discovery and recorded statements obtained during the evaluation process may be admitted under Idaho rules of civil procedure and evidence. Idaho Code § 1509(3).

If the party seeking a trial de novo fails to obtain a more favorable outcome during the trial de novo by at least 15%, the trial court must order that party to pay the evaluator's fee, and costs and attorney's fees incurred by the other party after the request for trial de novo is made. The court must also grant expert witness fees and other expenses beyond those provided for by statute or rule if they were "reasonably incurred." Idaho Code § 1509(5).

If no party requests a trial de novo 21 days after the notice of the evaluator's decision is filed, either party can submit a judgment with a copy of the evaluator's decision to the court and a binding judgment can then be entered. Idaho Code § 1509(8).

Illinois

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1. Introduction – History of Tort Reform in Illinois

For more than 30 years, the proponents of tort reform in Illinois have been attempting to convince the legislature (with some success) and the courts (with very little success) to reform the tort system and "level the playing field" for plaintiffs and defendants. Both limited and sweeping changes to the Illinois tort system have met with fierce opposition from the plaintiffs' bar and, as outlined below, the courts as well.

The first real effort at tort reform in Illinois occurred in 1976. In that year, the legislature grew concerned with a perceived medical malpractice crisis and passed legislation designed to reform the medical malpractice tort system. As a result, the legislature passed a bill that placed a $500,000 limit on compensatory damages (economic and non-economic) in medical malpractice actions and created a requirement that every medical malpractice case was to be reviewed by a three person panel. The panel was to consist of one circuit judge, one practicing physician and one practicing attorney. *See,* Public Act 79-960. Following a full evidentiary hearing, the review panel was to make a determination on the issue of liability and, if liability was found, on the issue of fair and just compensation for the injuries suffered. If the parties agreed to be bound in writing by the decision of the panel, judgment would be entered in accordance with the panel's decision. If the parties did not unanimously agree, and a written rejection was filed, the case would proceed to trial like any other case. Both of these provisions were held to be unconstitutional by the Illinois Supreme Court in *Wright v. Central DuPage Hospital Ass'n*., 63 Ill.2d 313, 347 N.E.2d 736 (1976).

In August of 1985, the legislature again passed a series of amendments to the Illinois Code of Civil Procedure that were designed to address a perceived medical malpractice crisis. *See*, Public Act 84-7. These amendments resurrected the three judge review panel (with some modifications), provided for the periodic payment of future damages, modified the collateral source rule (in negligence actions against hospitals and physicians, plaintiff's recovery could be reduced by amounts received from collateral sources), prohibited an award of punitive damages in legal and medical malpractice cases and set a sliding scale for contingency fees in medical malpractice cases. Following a legal challenge, the three judge review panel was again found unconstitutional. The remaining four provisions were deemed to pass constitutional muster. *Bernier v. Burris*, 113 Ill.2d 219, 497 N.E.2d 763 (1986).

In 1989, the reformers joined forces again and convinced the legislature that additional steps needed to be taken in order to rein in medical malpractice premiums. In that year, the legislature amended Section 2-622 of the Illinois Code of Civil Procedure. The amended Section 2-622 required any plaintiff who filed a medical malpractice action to also file, contemporaneous with the complaint, a report from a health care professional attesting to the meritorious nature of the claims raised in the plaintiff's complaint. This particular reform also survived a constitutional challenge. *See* Section 5 infra.

In March of 1995, the Illinois legislature passed the most comprehensive tort reform bill ever introduced in this state. There was almost no aspect of the civil tort system that was not directly or indirectly affected by the passage of the Civil Justice Reform Act of 1995. Public Act 89-7, as the tort reform bill was widely known, made sweeping changes to the procedures applicable to claims for punitive damages, to product liability practice, to medical malpractice actions, to claims based on apparent or ostensible agency, to discovery and depositions, to jury instructions, to itemized verdicts and to joint and several liability. In essence, Public Act 89-7 prohibited the award of punitive damages in cases where no actual damages were awarded; prohibited the award of punitive damages in product liability actions where the manufacturer or retailer complied with applicable federal or state statutes or regulations regarding the safety or use of the product in question; limited punitive damages to three times the amount of compensatory damages; amended the reporting requirement of Section 2-622 to require that the report be provided from a "health professional licensed in the same profession, with the same class of license, as the defendant"; required a similar certificate of merit to be filed in all product liability actions; codified the burden of proof necessary to prevail in claims based on apparent or ostensible agency; eliminated the physician/patient privilege as a bar to allowing defense counsel to speak to plaintiff's treating physicians[1]; modified the rules for contribution from employers; prohibited the trial court from informing the jury that the plaintiff would receive no money if they found he was more than 50% at fault in causing his own injuries; required the court to instruct the jury that any verdict entered in favor of the plaintiff would not be taxed; placed a cap on non-economic damages and eliminated joint and several liability.

Not surprisingly, the plaintiffs' bar in Illinois took issue with the legislature's efforts to substantially modify the tort landscape. Within just a few short weeks of passage, Public Act 89-7 was under attack. Cases challenging most of the amended provisions of the Code of Civil Procedure were filed in several venues. Judges in both Madison County and Cook County declared that all or large portions of the Tort Reform Act were unconstitutional. The defendants then appealed to the Illinois Supreme Court.

In *Best v. Taylor Machine Works, et al*., 179 Ill.2d 367, 228 Ill.Dec. 636, 689 N.E.2d 1057 (1997), the Illinois Supreme Court affirmed the decisions of the trial courts and declared that Public Act 89-7, in its entirety, was unconstitutional. However, rather than analyzing the Act as a whole, the Supreme Court focused on three provisions: the portion of Public Act 89-7 which enacted a $500,000 cap on

[1] Pursuant to the case of *Petrillo v. Syntex Laboratories*, 148 Ill.App. 3d 581, 499 N.E.2d 952 (1st Dist. 1986) and its progeny, defense counsel are prohibited from speaking with any of the plaintiff's treating physicians outside the deposition setting. This is true even if the plaintiff has placed his or her medical condition at issue in the case. Any contact between the defense attorney and the treating physician (outside of a deposition) can result in severe sanctions, including fines and an inability of the defendant to call the treating physician to testify at trial. The amendments to Section 2-1003 of the Code of Civil Procedure, as envisioned by Public Act 89-7, would have eliminated this impediment and would have allowed defense attorneys to speak freely with treating physicians in order to ascertain the plaintiff's health status.

compensatory damages for non-economic injuries (735 ILCS 5/2-1115.1), the portion which allowed third-party plaintiffs to credit the employer's share of liability in contribution against their own liability even if it exceeded the amount of the employer's workers' compensation lien (735 ILCS 5/2-1116)[2], and the portion which abolished joint and several liability in Illinois (735 ILCS 5/2-1116, 2-1117).

As discussed more fully below, a majority of the justices on the Illinois Supreme Court believed that Public Act 89-7 violated the prohibition against special legislation found in the Illinois Constitution since the provisions at issue were not rationally related to a legitimate state interest. The justices also held that some of the provisions outlined above also violated the separation of powers clause of the Illinois Constitution.

After finding that some of the provisions of the Civil Justice Reform Act were unconstitutional, the court addressed the severability clause in the legislation which was intended to preserve portions of the Act if other portions were found to be unconstitutional. The court concluded that a severability clause is merely a presumption of severability and enforceable only if the legislature would have passed the Act in its truncated form after the invalidated provisions were eliminated. The court, quoting legislative history, noted that "the [damages] cap is the centerpiece of all these reforms." Once it found the caps and the elimination of joint and several liability were unconstitutional, the court held "without these core provisions, which were essential to the passage of the Act and which are inseparable from the remainder of Public Act 89-7, the legislation must fail in toto."

Only Justice Benjamin Miller dissented from the ruling (except for the issue of the medical disclosure requirements). Justice Miller criticized the court's willingness to apply the rational basis test in such an arbitrary manner. Noting that the legislature has the power to change, modify or eliminate common law rights and remedies, Justice Miller argued that the majority's application of the rational basis test was in error. Specifically, he noted that the only requirement under the rational basis test is to find a rational relationship to a legitimate governmental purpose. According to Justice Miller, since creating damage caps, giving credits for workers' compensation awards and abolishing joint and several liability could all be related to some legitimate governmental purpose, all three legislative acts satisfied the rational basis test. He also argued against the majority's refusal to sever the invalidated sections from the remainder of the Act.

Subsequent to *Best*, in 2005, the legislature passed a law which placed a cap solely on non-economic damages in medical malpractice actions. *See,* Public Act 94-677. That reform was also challenged in the courts, and overturned by *Lebron v. Gottlieb Memorial Hospital* in February 2010. After this most recent development in tort reform many articles and commenters are citing a "three strikes and you're out"

[2] Pursuant to the case of *Kotecki v. Cyclops Welding Corp.*, 146 Ill.2d 155, 585 N.E.2d 1023 (1991), in Illinois, an employer's liability in a contribution action is limited to the extent of the employer's workers' compensation lien.

rule, claiming that tort reform in Illinois is finished. The *Lebron* decision has also sparked a discussion over the role that both providers and insurers are taking in controlling legal costs in the medical arena. The *Lebron* decision and the latest effort at capping damages in a specialized set of cases is discussed in the medical malpractice reform section set forth below.

2. Joint and Several Liability

Illinois is a "partial" comparative negligence jurisdiction. Illinois Code of Civil Procedure § 735 ILCS 5/2-1116 provides that a plaintiff may not recover damages in a tort action where the jury finds the contributory fault on the part of the plaintiff is more than 50% of the proximate cause of the injury. The jury is told that a finding of more than 50% fault on the part of the plaintiff will result in no award to the plaintiff. When the plaintiff's fault is 50% or less, the damages are diminished in proportion to the amount of fault attributable to the plaintiff.

Under the current rule in Illinois, in cases involving bodily injury, death or damages to property based on negligence, or product liability based on strict tort liability, a plaintiff can collect the entire judgment from any one of the defendants found liable for his injuries without regard to the defendant's proportionate degree of fault. There is an exception to this rule. See 735 ILCS 5/2-1117. In cases in which a defendant is found to be *less than* 25% at fault in causing the plaintiff's injuries and damages, that defendant is jointly and severally liable only for the plaintiff's medical and medically related expenses. For all other damages, that party is severally liable. In determining the percentage of fault, the jury analyzes the fault attributable to the plaintiff, the defendants sued by the plaintiff and any third party defendant except the plaintiff's employer.

A split in authority developed between various districts of the Illinois Appellate Court (the appellate court in Illinois has 5 different geographical districts) concerning the appropriateness of including settling defendants who have been dismissed from the case on the verdict form for purposes of fault apportionment under § 2-1117. In *Ready v. United/Goedecke Services, Inc.*, 367 Ill.App.3d 272, 854 N.E.2d 758 (1st Dist. 2006), the First District Appellate Court held that in order to give full effect to the plain language of Section 2-1117, the names of settling defendants should be included on the jury verdict form for purposes of fault apportionment. An opposite result was reached in the case of *Blake v. Hy Ho Restaurant, Inc.*, 273 Ill.App.3d 372, 652 N.E.2d 807 (5th Dist. 1995), wherein the Fifth District Appellate Court held that settling defendants should not be included in fault apportionment because the phrase "defendants sued by the plaintiff" referred to only those defendants who remained in the case when it was submitted to the jury.

The Illinois Supreme Court granted a petition for leave to appeal the Ready case, and reached its decision in November 2008, in *Ready v. United/Goedecke Services, Inc.*, 232 Ill.2d 369, 905 N.E.2d 725 (2008). The Supreme Court found that the *Ready* language was ambiguous as to whether it included or excluded settling tortfeasors.

In reaching its decision the *Ready* court noted that Public Act 89-7, discussed above, attempted to change the language of the statute to define a tortfeasor as "any person, excluding the injured person, whose fault is a proximate cause of the injury for which recovery is sought, regardless of whether that person is the plaintiff's employer, regardless of whether that person is joined as a party to the action, and *regardless of whether that person may have settled with the plaintiff*." Finding that the attempt to rewrite the statute was an attempt at tort reform, the Illinois Supreme Court in *Ready* relied on the rules of statutory construction and held that the proposed act was intended to change the law. The Supreme Court therefore held that the statute as originally written excluded settling defendants.[3]

As discussed in Section 1, Public Act 89-7 would have eliminated joint and several liability in Illinois. It would have replaced the current system with a proportionate several liability system whereby no defendant would be held financially liable beyond its pro rata share of total damages, calculated by the percentage of fault attributed to it by the jury.

Of all the issues addressed by the Illinois Supreme Court in *Best*, the abolition of joint and several liability seemed to hold the most promise for a finding of constitutionality since the legislature had modified joint and several liability in the past. Aware of this fact, the court spent much of its analysis chiding the legislature for abolishing joint and several liability without expressly eliminating contribution. According to the court, once joint and several liability was eliminated, a party could not pay more than its pro rata share of liability, thereby eliminating the need for contribution.

Despite the extensive analysis of these inconsistencies, the court's rationale for striking down the elimination of joint and several liability was narrower than would be expected. The problem, it seems, was the legislature's foresight. The legislature, aware of the fact that the damages cap may be found to be unconstitutional, included a provision that if the caps were found to be unconstitutional, medical malpractice cases would be governed by joint and several liability, rather than several liability. The effect, according to the court, was to treat medical malpractice plaintiffs differently from similarly situated plaintiffs in other tort actions. By doing so, the court found that the legislature had created special legislation which was not reasonably related to a legitimate state interest. As such, the court found the provision of Public Act 89-7 which abolished the doctrine of joint and several liability was unconstitutional.

The *Best* court further examined the legislature's move to amend the contribution statutes in light of the concurrent legislation abolishing joint and several liability in tort actions and replacing it with the proportionate several liability system. The contribution statutes were rewritten to limit an employer's contribution to the

[3] Though there was a subsequent change to the statute post-*Ready*, that change merely removed the plaintiff's employer from the third-party defendants subject to a finding of fault. *See Heupel v. Jenkins*, 395 Ill.App.3d 689, 919 N.E.2d 378 (1st Dist. 2009).

amount of the employer's liability to the plaintiff under the Workers' Compensation Act, codifying current Illinois law. However, the statute further noted that a tortfeasor seeking contribution from an employer could not receive money from that employer and instead would receive a credit for the employer's share of liability in contribution.

The court noted that the amount for which an employer may be found liable could well exceed the employer's liability to the plaintiff under the Workers' Compensation Act. Working in tandem with the new several liability statute, a third-party tortfeasor's recovery would first be reduced by the percentage of the employer's comparative fault and then reduced by the credit given to the tortfeasor for the employer's fault, generating a double credit. For example, in a case in which a plaintiff was awarded $1,000,000, where a non-employer tortfeasor was found to be 25% at fault and the employer was found to be 75% at fault, and where there was a $100,000 workers' compensation lien, the non-employer tortfeasor would owe $250,000 and then be entitled to a $750,000 credit. Once credited, the non-employer tortfeasor would incur no liability to the plaintiff. Moreover, the plaintiff's employer would only pay $100,000, the amount of its liability under *Kotecki.* The court, critical of this harsh result, found that all aspects of the modified Contribution Act were irreconcilable and therefore not reasonably related to a legitimate state interest.

3. Damage Caps

In Illinois there are no existing damage caps. Most recently, the legislature attempted to create damage caps in medical malpractice actions. Under Section 5/2-1706.5 of the Illinois Code of Civil Procedure (held unconstitutional), awards against hospitals, their personnel, or hospital affiliates for non-economic damages were limited to $1,000,000. In cases against physicians, physicians' businesses, corporate entities, and personnel or health care professionals, awards for non-economic damages were limited to $500,000. 735 ILCS 5/2-1706.5. Non-economic damages were defined as loss of consortium, damages for pain and suffering, inconvenience, disfigurement and physical impairment.

In February 2010, the Illinois Supreme Court held the statute violated the separation of powers clause of the state constitution. *See Lebron v. Gottlieb Memorial Hosp*., 237 Ill.2d 217, 930 N.E.2d 895 (2010). The court found that because the statute required the court to override a jury's deliberative process and reduce damages in excess of the cap, it violated the separation of powers clause. The elimination of a remittitur by judicial prerogative in favor of a mandatory legislative remittitur was found to be a constitutional violation.

Additionally, Illinois law formerly contained a damage cap for wrongful death actions. See 740 ILCS 180/2. The damage cap reached a high of $30,000 before being abolished in 1967. As discussed in the *Best* case, the wrongful death damages cap passed constitutional muster because the courts reasoned that since a wrongful death action was a statutory creation, the legislature had the power to set a

statutory maximum recovery. *See also, Hall v. Gillins*, 13 Ill.2d 26, 147 N.E.2d 352 (1958).

As discussed above, Public Act 89-7 provided for a limit on the awarding of non-economic damages. Under the Act, non-economic damages in negligence actions were limited to $500,000 per plaintiff with no recovery for "hedonic" damages. The $500,000 cap was to be indexed to the consumer price index. Non-economic damages were defined to include damages for pain and suffering, disability, disfigurement, loss of consortium and loss of society. 735 ILCS 5/2-115.2(b). Economic damages, which were not subject to a cap, were defined to include damages for past and future medical expenses, loss of income or earnings and other property loss. 735 ILCS 1115.2(a).

According to the preamble to Public Act 89-7, there were 18 findings and 8 purposes which served as the foundation for the proposed cap on damages. Included among those findings were the following:

(1) limiting non-economic damages will improve health care in rural Illinois;
(2) more than 20 states limit non-economic damages;
(3) the cost of health care has decreased in those states;
(4) non-economic losses have no monetary dimension and no objective criteria and no jurisprudence exists for assessing or reviewing non-economic damages awards;
(5) such awards are highly erratic and depend on subjective preferences of the trier of fact;
(6) highly erratic non-economic damages awards subvert the credibility of such awards and undercut the deterrent function of tort law;
(7) such awards must be limited to provide consistency and stability for all parties and society; and
(8) a federal executive branch working group determined that limiting non-economic damages was the most effective step toward legislative reform of tort law because it reduces litigation costs and expedites settlement.

Proponents of tort reform argued that the damages cap was intended to serve several legitimate governmental interests, including reducing the cost of health care, increasing accessibility to healthcare, promoting consistency in awards, reestablishing the credibility of the civil justice system, establishing parameters or guidelines for non-economic damages, protecting the economic health of the state and ensuring the affordability of insurance. Opponents argued that the cap was unconstitutional for a variety of reasons.

In examining this "centerpiece" of the Civil Justice Reform Act, the *Best* court focused its analysis on determining whether the legislation violated the special legislation clause of the Constitution. Applying the rational relationship test, the court concluded that the damages cap constituted special legislation and was therefore unconstitutional. In the court's opinion, a variety of similarly situated individuals would be treated inconsistently due to the cap. As an example, the court cited to the

fact that a plaintiff who lost both legs in one accident would be limited to $500,000 in non-economic damages while a plaintiff who lost one leg in one accident and then a second leg in a separate accident would receive $1,000,000 in non-economic damages for an identical loss. In light of this example, and others, the court was not convinced that the damages cap was rationally related to the legitimate state interest of providing consistency and rationality to jury verdicts.

As separate grounds for finding the damages cap unconstitutional, the court also concluded that the legislature intruded into the judiciary's exclusive province by creating what essentially amounted to a legislative remittitur (the same argument which was later used in *Lebron* case cited above). According to the court, the damages cap acted as an automatic, legislatively imposed reduction in any non-economic portion of a verdict that exceeded $500,000. In the court's opinion, only the judiciary can, in appropriate circumstances, reduce the amount of a verdict. Thus, the court believed that the damages cap violated the separation of powers clause of the Illinois Constitution as well.

The decisions in the *Best* and *Lebron* cases obviously do not bode well for any effort to impose damage caps in any future Illinois legislation.

4. Punitive Damages

In Illinois, punitive damages may be granted only where torts are committed "with fraud, actual malice, or deliberate violence or oppression or when the defendant acts willfully or with such gross negligence as to indicate a wanton disregard of the rights of others." *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353, 23 Ill.Dec. 559, 115 L.R.R.M. (BNA) 4371 (1978). In all actions on account of bodily injury or physical damage to property, based on negligence, or product liability based on strict product liability, the plaintiff is prohibited from including a request for punitive damages in her initial complaint. 735 ILCS 5/2-604.1. The plaintiff may, however, after the filing of a pretrial motion and subsequent hearing, amend the complaint to include a prayer for relief seeking punitive damages. The court is to allow the motion to amend the complaint to add a prayer for punitive damages if the plaintiff establishes at the hearing "a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." 735 ILCS 5/2-604.1 The motion to amend the complaint to add a prayer for punitive damages must be made no later than 30 days after the close of discovery.

In Illinois, punitive damages are not recoverable in medical or legal malpractice cases. 735 ILCS 5/2-1115. Illinois courts have upheld this limitation as constitutional. *Bernier v. Burris*, 113 Ill.2d 219, 487 N.E.2d 763 (1986). The *Bernier* court held that the elimination of punitive damages in medical malpractice cases served the legitimate legislative goal of reducing damages against the medical profession. It distinguished the limitation on punitive damages from prior attempts to limit compensatory damages by noting that punitive damages are by their very nature intended to punish rather than compensate. As a result, prohibiting an

award of punitive damages in medical malpractice cases would not result in a failure to make the plaintiff whole.

In addition, punitive damages are generally not recoverable for claims brought pursuant to the Illinois Survival Act (755 ILCS 5/27-6, *et seq.*) or the Illinois Wrongful Death Act (740 ILCS 180/1, *et seq.*), both of which are designed to provide compensatory damages. *See, Kleinwort Benson North America, Inc., v. Quantum Financial Services, Inc.*, 181 Ill.2d 214, 692 N.E.2d 269 (1998); *see also, Ballweg v. City of Springfield*, 114 Ill.2d 107, 499 N.E.2d 1073, 102 Ill.Dec 360 (1986). The *Kleinwort* court recognized that exceptions may exist when the underlying action is predicated upon an act which allows for punitive damages. *See also, Vincent v. Alden-Park Strathmoor, Inc.,* 399 Ill.App.3d 1102, 928 N.E.2d 115 (2nd Dist. 2010). Moreover, punitive damages are not allowed in loss of consortium cases (*Hammond v. North American Asbestos Corp.*, 97 Ill.2d 195, 454 N.E.2d 210 (1983)) and in actions for intentional infliction of emotional distress (*Knierim v. Izzo*, 22 Ill.2d 73, 174 N.E.2d 157 (1961); *Gragg v. Calandra*, 297 Ill.App.3d 639, 650, 696 N.E.2d 1282, 1290 (2nd Dist 1998)).

Public Act 89-7 would have amended Illinois law to limit punitive damages to three times the amount awarded to the claimant for economic damages. A plaintiff would also have been required to show "by clear and convincing evidence that the defendant's conduct was with evil motive or a reckless and outrageous indifference to a highly unreasonable risk of harm and with a conscious indifference to the rights and safety of others." Public Act 89-7 also proposed a presumption against punitive damages in a product liability action. Punitive damages would not be available in a product liability action where a manufacturer or retailer complied with applicable federal or state statutes or regulations regarding the safety or use of the product at issue. In addition, the new law authorized bifurcation, permitting punitive damages claims to be tried separately from liability and compensatory damages issues if requested by the defendant. All of these provisions were invalidated by the Illinois Supreme Court when the *Best* decision was issued.

As the law currently stands, Illinois statutes permit trial courts the discretion to remit a verdict or order a new trial where a jury award for punitive damages is excessive. 735 ILCS 5/2-1207. The Illinois Supreme Court, in the case of *International Union of Operating Engineers, Local 150 v. Lowe,* 225 Ill.2d 456, 870 N.E.2d 303 (2006), adopted the precedent established by the United States Supreme Court in *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996) and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and held that there must be a "reasonable relationship between the punitive damages award and the potential and actual damages resulting from the defendant's conduct."

At the beginning of 2007, the Illinois Supreme Court Committee on Pattern Jury Instructions in Civil Cases recognized that the Illinois courts have embraced the rulings in *BMW* and *Campbell* and revised the pattern jury instructions in Illinois dealing with the issue of punitive damages. Illinois Pattern Jury Instruction 35.01 states the following:

In addition to compensatory damages, the law permits you under certain circumstances to award punitive damages. If you find that __[Defendant's name]__ conduct was [fraudulent][intentional][willful and wanton] and proximately caused [injury][damage] to the plaintiff, and if you believe that justice and the public good require it, you may award an amount of money which will punish __[Defendant's name]__ and discourage [it/him/her] and others from similar conduct.

In arriving at your decision as to the amount of punitive damages, you should consider the following three questions. The first question is the most important to determine the amount of punitive damages:

1. How reprehensible was __[Defendant's name]__ conduct?

On this subject, you should consider the following:

a) The facts and circumstances of defendant's conduct;
b) The [financial] vulnerability of the plaintiff;
c) The duration of the misconduct;
d) The frequency of defendant's misconduct;
e) Whether the harm was physical as opposed to economic;
f) Whether defendant tried to conceal the misconduct;
[g) Other]

2. What actual and potential harm did defendant's conduct cause to the plaintiff in this case?

3. What amount of money is necessary to punish the defendant and discourage defendant and others from future wrongful conduct [in light of defendant's financial condition]?

[In assessing the amount of punitive damages, you may not consider defendant's similar conduct in jurisdictions where such conduct was lawful when it was committed.]

> The amount of punitive damages must be reasonable [and in proportion to the actual and potential harm suffered by the plaintiff.]

The bracketed material can be added or deleted as the circumstances of the case warrant. While Supreme Court Rule 239(a) prescribes the use of Illinois Pattern Jury Instructions, the Illinois Supreme Court has held that an instruction is approved or rejected only after it has been judicially questioned and considered. *Powers v. Illinois Central Gulf Railroad Company, 91 Ill. 2d 375 (1982)*. Illinois Pattern Jury Instruction, Civil, No. 35.01, is now safely part of Illinois law. See *Blount v. Stroud*, 395 Ill.App.3d 8, 915 N.E.2d 925 (1st Dist. 2009).

5. Medical Malpractice Reform

As a result of medical malpractice reforms passed in 1985, attorneys for plaintiffs in medical malpractice actions must file an affidavit attached to their complaint noting that a health professional has been consulted and has reviewed the facts of the case, including the medical records, and that the health professional is (1) knowledgeable in the medical area addressed by the complaint, (2) has practiced or taught within the last 6 years in the medical area at issue, (3) is qualified or competent in the subject matter and has determined in a written report that there is a reasonable and meritorious basis for the filing of the case. The attorney's affidavit must also state that based on the reviewing health professional's review and consultation there is a reasonable and meritorious cause for filing the action. 735 ILCS 5/2-622. Section 2-622 of the Code of Civil Procedure also requires counsel to attach to the complaint a copy of the written report authored by the consultant setting forth the bases for the conclusion that there is a meritorious basis for filing the suit. A separate report must be filed for each defendant in the action.

In *Deluna v. St. Elizabeth's Hospital*, 147 Ill.2d 57, 588 N.E.2d 1139 (1992), the Illinois Supreme Court found that the affidavit and report requirements were constitutional. The court did not view the report requirement as a usurpation of judicial power since the medical doctor who provides the report is acting in the same capacity he would be acting in as an expert at trial. The affidavit further attested to the good faith of the action, a requirement for all cases. The Supreme Court also distinguished the affidavit requirement from prior efforts at medical malpractice reform which attempted to establish unconstitutional quasi-judicial three-person panels to certify medical malpractice actions. The affidavit requirement was held to be rationally related to a legitimate government interest and sufficiently tailored to serve the legislative purpose it was designed to fulfill.

As noted above, in August of 2005, the Illinois legislature attempted to amend various provisions of the Code of Civil Procedure that apply to medical malpractice actions. Among the amendments: the report required by Section 2-622 would include the reviewing health care professional's name, address, current license number and state of licensure (735 ILCS 5/2-622); defendants could elect to pay for future medical expenses and costs of life care by purchasing an annuity (735 ILCS

5/2-1704.5); expressions of grief, apology or explanation provided within 72 hours of an adverse outcome would not be introduced into evidence (735 ILCS 5/8-1901); standards for expert witnesses were strengthened (735 ILCS 5/8-2501)[4] and caps were placed on non-economic damages (735 ILCS 5/2-1706.5). Pursuant to the express terms of the statute, it was meant to apply to all causes of action accruing on or after the statute's effective date (August 25, 2005). However, the *Lebron* decision held that the provisions of Public Act 94-677 were unconstitutional.

The highlight of the latest reform efforts—caps on non-economic damages—were found in Section 2-1706.5 of the Code of Civil Procedure. That section of Code was to read as follows:

> **§ 5/2-1706.5. Standards for economic and non-economic damages.**
>
> (a) In any medical malpractice action or wrongful death action based on medical malpractice in which economic and non-economic damages may be awarded, the following standards shall apply:
>
> (1) In a case of an award against a hospital and its personnel or hospital affiliates, as defined in Section 10.8 of the Hospital Licensing Act, the total amount of non-economic damages shall not exceed $1,000,000 awarded **to all plaintiffs** in any civil action arising out of the care.
>
> (2) In a case of an award against a physician and the physician's business or corporate entity and personnel or health care professional, the total amount of non-economic damages shall not exceed $500,000 awarded **to all plaintiffs** in any civil action arising out of the care.
>
> (3) In awarding damages in a medical malpractice case, the finder of fact shall render verdicts with a specific award of damages for economic loss, if any, and a specific award of damages for non-economic loss, if any.

[4] Under revised Section 8-2501, in any case in which the standard of care applicable to a medical professional was at issue, the court was required to apply a number of standards in determining whether a witness qualified as an expert and could testify on the issue of the appropriate standard of care, including whether the witness was board certified or board eligible or had completed a residency in the same or substantially similar medical specialties as the defendant and was otherwise qualified by significant experience with the standard of care, methods, procedures, and treatments relevant to the allegations against the defendant. In addition, under the revised statute, an expert would be required to provide evidence of active practice, teaching, or engaging in university-based research. If retired, an expert would be required to provide evidence of attendance at and completion of continuing education courses for the 3 years prior to giving testimony. An expert who had not actively practiced, taught or been engaged in university-based research, or any combination thereof, during the preceding 5 years would not be qualified as an expert witness. 735 ILCS 5/8-2501.

> The trier of fact shall not be informed of the provisions of items (1) and (2) of this subsection (a)
>
> (b) In any medical malpractice action where an individual plaintiff earns less than the annual average weekly wage, as determined by the Illinois' Workers' Compensation Commission, at the time the action is filed, any award may include an amount equal to the wage the individual plaintiff earns or the annual average weekly wage.
>
> (c) This Section applies to all causes of action accruing on or after the effective date of this amendatory Act of the 94th General Assembly.

735 ILCS 5/2-1706.5 (held unconstitutional) (emphasis added).

As noted above, on November 20, 2006, a case was filed in Cook County, Illinois on behalf of a minor child who was born with extensive brain damage, allegedly as the result of negligence on the part of her physician and the hospital that employed him. This case, *Lebron v. Gottlieb Hospital, et al.*, No. 06 L 012109 (Cook Co., Ill., Cir. Ct. 2006), served as the vehicle by which the plaintiffs' bar in Illinois had Public Act 94-677 declared unconstitutional. The *LeBron* complaint, in addition to seeking damages for the minor infant's injuries, contained a declaratory judgment count that challenged the constitutionality of the reforms put in place by Public Act 94-677. The Illinois Supreme Court decided the case, invalidating Public Act 94-677 in its entirety, on February 4, 2010. *Lebron v. Gottlieb Memorial Hosp*., 237 Ill.2d 217, 930 N.E.2d 895 (2010).

6. Products Liability Reform

There have been no efforts to reform the products liability system in Illinois since the passage of the Civil Justice Reform Act of 1995 and its resounding defeat, two years later, in *Best v. Taylor Machine Works, supra*.

Public Act 89-7 attempted to radically rework the rules that applied to product liability actions in this state (and, indeed, it may have been this radical approach to reform—too much, too quickly—that led to the demise of these amendments). Public Act 89-7 would have imposed upon plaintiffs filing a product liability action an affidavit requirement similar to the one that exists for medical malpractice actions. The plaintiff's attorney would have been required to file an affidavit stating that he or she had consulted and reviewed the facts of the case with a qualified expert who had completed a written report. That report, which was to be completed after an examination of the product at issue or a review of literature pertaining to the product, would have to have identified the specific defects in the product that allegedly caused the plaintiff harm. In a strict liability action or an implied warranty action, the report was required to identify specific defects and contain a determination that the product was unreasonably dangerous and in a defective condition when it left the manufacturer. In all other product liability

actions the report had to identify the specific negligent act or omission or other fault on the part of the defendant that produced the injury.

Public Act 89-7 would also have created several presumptions in product liability actions. It set forth a presumption that a product was reasonably safe if the component which caused the harm was specified or required or specifically exempted for particular applications or users by a federal or state statute or regulation promulgated by an agency responsible for the safety or use of the product. Similarly, a product was presumed to be reasonably safe unless there was a practical and technically feasible alternative design available which would have prevented the harm without significantly impairing the usefulness, desirability or marketability of the product. Under the Act, warnings were deemed reasonable if they conformed with the generally recognized standards in the industry and were considered adequate if they gave adequate notice to reasonably anticipated users. In addition, defendants would not be held liable for a failure to warn if the risk of using a product was obvious to a reasonably prudent user as a matter of common knowledge. Just as importantly, manufacturers and retailers would not be held liable for harm caused by an inherent characteristic of a product.

Unfortunately, all of these amendments to the Code of Civil Procedure were declared unconstitutional when the Illinois Supreme Court issued its opinion in *Best*. Many defense counsel believed that at least some of the provisions, like the Certificate of Merit requirement, would be quickly reenacted, since similar requirements for medical malpractice cases had already survived a constitutional challenge. Time has proven them wrong.

7. Attorneys Fees

In Illinois an attorney's fees must be reasonable. In determining whether fees are reasonable the court will examine a number of factors outlined in the Illinois Rule of Professional Conduct 1.5. Those factors include the time and labor required, the difficulty of the questions involved, the skill required, the possibility that the employment will preclude other employment, the customary fee, the amount involved, the results obtained, any time limitations, the experience of the lawyer, and whether the fee is fixed or contingent. Contingent fee representation is prohibited in domestic relations matters and criminal defense cases. *See,* Illinois Rule of Professional Conduct 1.5 (d)(1) and (2).

Illinois also places limitations on the amount of contingent fees attorneys can recover in medical malpractice actions. The legislature has limited contingency fees to 33.3% of the first $150,000 recovered, 25% of the next $850,000 recovered and 20% of any amount recovered over $1,000,000. § 735 ILCS 5/2-1114. This limitation on contingency fees has survived a constitutional challenge. *See, Bernier v. Burris, supra.*

8. Practice Pointers

Given the general absence of damage caps, Illinois is considered a favorable jurisdiction for the plaintiffs' bar. In 2011, the American Tort Reform Association ranked Madison County and St. Clair County, Illinois (just east of St. Louis, Missouri) and McLean County, Illinois (in the Bloomington-Normal, Illinois Metropolitan Statistical Area) three of the country's top ten "judicial hellholes."[5] Cook County, Illinois (Chicago, Illinois and suburbs) moved from the list of hellholes to the "watch list."[6] ATRA described Madison and St. Clair Counties as holding a significant one-sided trial that favored the plaintiff and an epicenter for asbestos litigation wherein defense counsel are placed at a disadvantage against favored local plaintiff's lawyers.[7] ATRA described McLean County as particularly troubling for product liability cases that were allowed to go to trial, without the presentation of any evidence that the plaintiff worked for the employer or that the plaintiff was exposed to any of the named defendant's products.[8]

In light of the perceived problems with the circuit courts in Illinois, and in particular the circuit courts in Madison County, St. Clair County, McLean County and Cook County, every effort should be made to have appropriate cases transferred to the federal district courts in Illinois. The federal district courts streamline discovery, keep a tight rein on their dockets, and do not hesitate to grant dispositive motions where warranted. In addition, the juries in federal court cases tend to be more conservative and defense oriented than those found in Madison, St. Clair, McLean and Cook Counties (based in large part on the larger geographic pool from which federal court jurors are selected). Moreover, if possible, the defendant should ask the court where the matter is pending to undertake a choice of law analysis and, if possible, ask the court to apply the law of a state in which caps or other impediments to large damage awards have been sustained.

In cases where the plaintiff is seeking punitive damages, the defendant must make every effort to have the court issue a modified jury instruction that sets forth the due process limitations recognized by the Supreme Court in *BMW* and *Campbell.* Essentially, jurors should (where appropriate) be provided with instructions that:

- explain the nature and purpose of punitive damages;
- explain the principle that punitive damages constitute punishment for civil wrongdoing;
- provide an explanation that the imposition of punitive damages is within the jury's discretion;
- inform the jury that it cannot base the amount of punitive damages on a defendant's out-of-state conduct;
- inform the jury that it cannot punish the defendant for harms suffered by non-parties;
- inform the jury that it cannot increase a punitive damages award simply because the defendant is wealthy or a large corporation;

[5] http://www.judicialhellholes.org/wp-content/uploads/2011/12/Judicial-Hellholes-2011.pdf
[6] *Id.*
[7] *Id.*
[8] *Id.*

- inform the jury that any punitive damages award must bear a reasonable relationship to the compensatory damages award;
- explain that the deterrent goal of punitive damages may be satisfied where the compensatory damages are substantial or include a punitive element; and
- advise the jury to consider the "reprehensibility" of the defendant's conduct.

Most importantly, retain a firm that knows the nuances of the system in Illinois and will provide a rigorous defense consistent with the principles outlined herein.

Indiana

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1. INTRODUCTION

Indiana has generally been fairly progressive in regards to the law of negligence and products liability. As a consequence, there has been very little tort reform necessary.

2. INDIANA HAS A COMPARATIVE FAULT STATUTE WHICH ELIMINATED JOINT AND SEVERAL LIABILITY

Indiana is governed by the Indiana Comparative Fault Act. The Act eliminated joint and several liability. The main provisions are contained in Indiana Code Section 34-51-2-1 et sequitur. Pertinent provisions are summarized as follows:

a. It is not applicable to tort claims against governmental entities or public employees. Indiana Code Section 34-51-2-2;

b. Claimant's fault must be fifty percent (50%) or less in order to recover and claimant's fault diminishes proportionately any recovery. Indiana Code Section 34-51-2-5, Indiana Code Section 34-51-2-6;

c. Intentional torts are viewed as one hundred percent (100%) recoverable from a convicted defendant on the same evidence. Indiana Code Section 34-51-2-10;

d. There is no right of contribution. Indiana Code Section 34-51-2-12; and

e. Defendant may assert a non-party defense which is an entity that is not sued but defendant asserts that claimant's damages were caused in full or in part by that entity. Indiana Code Section 34-51-2-14.

3. IMMUNITIES HAVE BEEN EXTENDED

Due to increased awareness and requests for defibrillators, the legislature passed a statute providing immunities for any user, provider or institution for such use so long as their actions do not constitute gross negligence or wrongful and wanton conduct. Indiana Code Section 34-30-12-1.

Immunity was also extended to clerks or other court personnel regarding duties presented by statute as long as their performance was done in good faith and does not amount to gross negligence or willful and wanton misconduct. Indiana Code Section 34-26-5-3.

4. DAMAGE CAPS/PUNITIVE DAMAGES

Indiana legislation has not passed any tort reform laws that would place caps upon compensatory damages except for governmental entities. On the other hand legislation has been passed which increases the compensation for claims against governmental entities and public employees under the Indiana Tort Claims Act, Indiana Code Section 34-13-3-1 et sequitur. Prior to January 1, 2006, the cap regarding recovery against a governmental entity was $300,000.00 per person. This was amended to increase the cap to $500,000.00 for a cause of action that accrues after January 1, 2006 and before January 1, 2008. After January 1, 2008 the cap was

increased to $700,000.00 per person. This cumulative cap for one event has also been increased to $5,000,000.00 per occurrence. Indiana Code Section 34-13-3-4(a).

A governmental entity or its employee acting within the scope of employment is not liable for punitive damages. Indiana Code Section 34-13-3-4(b).

There are certain statutory provisions regarding wrongful death actions and medical malpractice actions.

As in most states actions for the wrongful death of a person is purely statutory. The Indiana Wrongful Death Act is codified in Indiana Code Section 34-23-1-1 et sequitur. The action must be brought by the personal representative(s) within two (2) years. The damages allowable are (1) reasonable medical, hospital, funeral and burial expenses, (2) lost earnings of the deceased person, (3) amount of money for other things of value furnished by decedent or the reasonable value of what could reasonably have been expected to be received by the decedent during decedent's lifetime, and (4) the reasonable value of loss of care, love and affection (and reasonable value of loss of parental training and guidance).

The damages in a wrongful death action concerning an adult who does not have any dependent children or dependent next of kin, may include, but are not limited to (A) reasonable medical, hospital, funeral, and burial expenses necessitated by the wrongful act or omission that caused the adult person's death; and (B) loss of the adult person's love and companionship. Indiana Code Section 34-23-1-2 (c)(3)(A)-(B). The aggregate damages that may be recovered under subsection (c)(3)(B) for loss of the adult person's [decedent's] love and companionship may not exceed three hundred thousand dollars ($300,000). Indiana Code Section 34-23-1-2 (e). In addition, the damages for the loss of the decedent's love and companionship inure to the exclusive benefit of a nondependent child of the adult person [decedent]. Indiana Code Section 34-23-1-2 (d). A nondependent child who wishes to recover damages under this statute has the burden of proving that the parent had a genuine, substantial, and ongoing relationship with the adult person before the child may recover damages. Indiana Code Section 34-23-1-2 (f). In addition, when an adult decedent has no dependents, the damages may not include damages for a survivor's grief. Indiana Code Section 34-23-1-2(c)(2).

There is no cap on the damages allowed for loss of love and companionship for dependent children and dependent next of kin. (*See* Indiana Code Section 34-23-1-1). Dependency is determined mostly on financial/monetary support or services. To recover damages as a dependent under wrongful death statute (Indiana Code Section 34-23-1-1), it must be shown that need or necessity of support existed on the part of the person alleged to be dependent coupled with the contribution to such support by the deceased. *Necessary v. Inter-State Towing*, 697 N.E.2d 73, 76 (Ind. App. 1998). Also, there cannot be simultaneous recovery by a dependent child as well as a dependent next of kin who is not a child.

The statute for an action for the wrongful death (or injury) of a child is set forth in Indiana Code Section 34-23-2-1. The act defines a child to be an unmarried individual without dependents who is : (1) under the age of twenty (20) or age of twenty-three (23) **if** enrolled in a postsecondary educational institution or a career and technical education school or program that is not a postsecondary educational

program. Included in the description of a child is a fetus that has attained viability. The action may be maintained by the mother or father jointly (or by one if the other is named as a co-defendant), the parent to whom custody of the child was awarded in the case of divorce or dissolution of marriage, or the guardian. The damages allowed are:

(1) for the loss of the child's services;
(2) for the loss of the child's love and companionship; and
(3) to pay the expenses of:

(A) health care and hospitalization necessitated by the wrongful act or omission that caused the child's death;

(B) the child's funeral and burial;

(C) the reasonable expense of psychiatric and psychological counseling incurred by a surviving parent or minor sibling of the child that is required because of the death of the child;

(D) uninsured debts of the child, including debts for which a parent is obligated on behalf of the child; and

(E) the administration of the child's estate, including reasonable attorney's fees.

The damages are further limited to a set duration as follows:

(g) Damages may be awarded under this section only with respect to the period of time from the death of the child until:

(1) the date that the child would have reached:

(A) twenty (20) years of age; or

(B) twenty-three (23) years of age, if the child was enrolled in a postsecondary educational institution or in a career and technical education school or program that is not a postsecondary educational program; or

(2) the date of the child's last surviving parent's death; whichever first occurs.

(h) Damages may be awarded under subsection (f)(2) only with respect to the period of time from the death of the child until the date of the child's last surviving parent's death.

Punitive damages are not allowed for a wrongful death action under Indiana case law. Andis v. Hawkins, 489 N.E.2d 78 (Ind.App. 1986); Durham ex rel. Estate of Wade v. U-Haul International, 745 N.E.2d 755 (Ind. 2001).

5. MEDICAL MALPRACTICE

Indiana has a Medical Malpractice Act which was enacted over thirty (30) years ago. It was passed primarily as a remedy to those professionals who were having difficulty procuring liability insurance. The Act is contained in Indiana Code Section 34-18-1-1, et sequitur, and applies to any claim occurring after July 1, 1975. The Act applies to any "healthcare provider" who has qualified by filing proof of financial responsibility and paying the surcharge assessed (Indiana Code Section 34-18-3-2). A healthcare provider is defined in Indiana Code Section 34-18-2-14 and generally covers all entities and individuals who provide healthcare.

Prior to commencing an action in a state court, a proposed complaint must be submitted to a Medical Review Panel (Indiana Code Section 34-18-8-4) (unless it is

less than $15,000.00) (Indiana Code Section 34-18-8-6). The panel is compiled of one (1) attorney and three (3) healthcare providers. (Indiana Code Section 34-18-10-3). The attorney is the chairman but a non-voting member. (*Id*.) The panel is supposed to render an opinion within one hundred eighty (30) days. (Indiana Code Section 34-18-10-22). The decision of the panel is admissible in court. (Indiana Code Section 34-18-10-23).

The Act also provides recovery limitations (Indiana Code Section 34-18-14-3). Initially the limit was $500,000.00. It is currently 1.25 million dollars for any act of malpractice. The individual healthcare provider is liable for up to $250,000.00 for an occurrence of malpractice. The remainder is to be paid by the patient's compensation fund under Indiana Code 34-18-15.

6. PRODUCTS LIABILITY REFORM

The Indiana Products Liability Act governs this area (Indiana Code Section 34-20-1-1). The Act applies to:

> "Applicability of article. – This article governs all actions that are:
> (1) brought by a user or consumer;
> (2) against a manufacturer or seller; and
> (3) for physical harm caused by a product;
> regardless of the substantive legal theory or theories upon which the action is brought."

A seller or distributor is generally not liable unless the court does not have jurisdiction over the manufacturer of the product (Indiana Code Section 34-20-2-3 and 4).

There is also a statute of limitations. An action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer (Indiana Code Section 34-20-3-1). (An asbestos exception is provided to an entity that mines or sold commercial asbestos or a fund results from bankruptcy proceedings (Indiana Code Section 34-20-3-2).

Joint and several liability has been eliminated in products liability actions. As such, a defendant is only responsible for the amount directly attributable to it (Indiana Code Section 34-20-7-1).

7. PUNITIVE DAMAGES

Indiana law on punitive damages is fairly favorable. Punitive damages are only awarded if one finds by a clear and convincing evidence that the defendant acted maliciously, fraudulently, willfully or wantonly with conscious disregard for probable injury or with gross negligence or oppressiveness that was not the result of mistake of fact or law, honest error or judgment overzealousness, mere negligence or other human failing. Orkin Exterminating Co., Inc. v. Traina, 486 N.E.2d 1019 (Ind. 1986).

Punitive damages are not allowed where the defendant may be liable both criminally and civilly. Glissman v. Rutt, 372 N.E.2d 1188 (1978).

In 1995 the state legislature passed a tort reform in this area under Indiana Code Section 34-51-3-4. Punitive damages are limited to the greater of three (3) times the amount of compensatory damages or $50,000.00. Of that award twenty-five percent (25%) is awarded to the person who had been injured with the remainder seventy-five percent (75%) going to the state for a victims compensation fund.

IOWA

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Introduction – History of Tort Reform in Iowa

Since 1986, the Iowa legislature has enacted a number of tort reform laws. That year, the legislature addressed punitive damages and periodic payment of future damages. In 1987, the legislature continued its reformation activities by permitting the admissibility of evidence of collateral source payments and by prohibiting the assessment of prejudgment interest for future damages while amending the burden of proof required to collect punitive or exemplary damages. In 1997, the legislature again acted and barred the rule of joint and several liability, addressed the statute of limitations in certain product liability cases, and reformed the method of calculation of prejudgment interest.

Recent attempts by the legislature to limit noneconomic damages have been unsuccessful and have led to intense debate over the constitutionality of the governor's line item veto power. Historically, the Iowa Supreme Court has been reluctant to overturn tort reform, and many of Iowa's statutes have not been challenged.

The Iowa Supreme Court, however, has not been as reluctant to making substantial changes to Iowa tort caselaw, such was the case in 2002, where the Iowa Supreme Court parted ways with the Restatement Second's handling of products liability and adopted the Restatement Third sections (1) and (2).[1]

1. Joint and Several Liability

Prior to 1982, Iowa followed the common law doctrine of "pure" contributory negligence, which prohibited a plaintiff who was even minimally at fault from recovering damages in a negligence action.[2] In 1982, the Iowa Supreme Court in *Goetzman v. Wichern* adopted the doctrine of comparative negligence.[3] In response to *Goetzman v. Wichern*, however, the Iowa legislature in 1984 enacted the Comparative Fault Act (CFA) of Iowa,[4] which provides a modified form of comparative fault, thereby replacing the pure comparative fault principles announced in *Goetzman v. Wichern*.[5] Under the CFA, "a plaintiff cannot recover damages if he or she is more than fifty percent at fault," [6] or more specifically, a

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[1] *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 169 (Iowa 2002).

[2] *See Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 111 (Iowa 2011) (citing *Goetzman v. Wichern*, 327 N.W.2d 742, 754 (Iowa 1982)).

[3] *Goetzman*, 327 N.W.2d at 754.

[4] *Slager v. HWA Corp.*, 435 N.W.2d 349, 350 (Iowa 1989).

[5] *Reilly v. Anderson*, 727 N.W.2d 102, 108 (Iowa 2006) (citing *Fox v. Interstate Power Co.,* 521 N.W.2d 762, 764 (Iowa Ct. App. 1994)).

[6] *Id.* (citing IOWA CODE § 668.3(1)).

claimant may not recover if that "claimant bears a *greater percentage of fault than the combined percentage* of fault attributed to the defendants, third-party defendants and persons who have been released pursuant to section 668.7."[7] The CFA further "provides that joint and several liability attaches only to those persons-excluding the plaintiff, of course-who are found fifty percent or more at fault."[8]

The Iowa legislature by enacting the CFA, "did not create any new causes of action. Rather, it created a set of rules under which the parties will try all tort actions when the action involved "fault" as defined by the statute. Therefore, chapter 668, [the CFA,] more closely resembles a statute that attempts to regulate private conduct and imposes requirements that do not implicate public policy concerns."[9]

The CFA created a right of contribution between two or more persons who are liable on the same indivisible claim whether or not judgment has been recovered against all or any of them.[10] It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligations, including the share of fault of a claimant, as determined by the jury or judge, in accordance with Iowa Code section 668.3.

In 2006, however, the Iowa Supreme Court held, as a matter of first impression, Iowa Code section 668.4, does not extinguish joint and several liability among concerted actors; that juries may apportion liability among concerted actors; and that tortfeasors acting in concert may be held joint and severally liable for both economic and non-economic damages.[11]

2. Damage Caps

In 2000, the Iowa legislature intensified the undertaking to enact noneconomic damage caps. House File 2525 proposed to add a prohibition against a motorist,

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[7] *See* IOWA CODE ANN. § 668.3(1) (2011), which specifically states, "Contributory fault shall not bar recovery . . . unless the claimant bears a *greater percentage of fault than the combined percentage* of fault attributed to the defendants, third-party defendants and persons who have been released pursuant to section 668.7, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the claimant" (emphasis added).

[8] *Id.* (citing IOWA CODE § 668.4).

[9] *Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 112 (Iowa 2011) (citing IOWA CODE §§ 668.1–.16).

[10] *See Kopsas v. Iowa Great Lakes Sanitary Dist. of Dickinson Cnty.*, 407 N.W.2d 339, 341 (Iowa 1987) (citing IOWA CODE § 668.7) (stating the "provision governing releases and settlements, Iowa Code section 668.7, explains the proper method for calculating judgments when the plaintiff has settled with fewer than all the defendants").

[11] *Reilly*, 727 N.W.2d at 106.

passenger, or pedestrian from collecting noneconomic damages for injuries sustained in an automobile accident that occurs during the commission of a felony.

In 2004, House File 2440, an attempt to cap non-economic damages against health care providers, was vetoed by Governor Vilsack. Recent attempts by the legislature to limit non-economic damages have been unsuccessful to date and have led to intense debate over the constitutionality of the governor's line item veto power. In 2006, an Iowa federal district court explained that the policy of Iowa law is to fully compensate tort victims, and placing caps on damages is inconsistent with that policy.[12]

3. Punitive Damages

In 1986, the Iowa legislature enacted Iowa Code chapter 668A. which governs punitive or exemplary damages. The statute was amended in 1987 to elevate the burden of proof from a "preponderance of the evidence" to a "preponderance of clear, convincing, and satisfactory evidence."

Pursuant to Iowa Code section 668A.1, a plaintiff must show the defendant acted with "willful and wanton disregard for the rights and safety of another."[13] In order to receive the entire punitive damage award, the plaintiff must also prove the defendant's conduct was directed specifically at the claimant.[14] Otherwise, the plaintiff receives an amount not to exceed twenty-five percent of the award with the remainder to be paid into a state civil reparations trust fund.[15]

4. Medical Malpractice Reform

The most significant pieces of legislation with regard to medical malpractice were passed in 1975 with only minor amendments to date. Most notable is the statute governing collateral sources.[16] This section, 147.136, allows a plaintiff in a medical malpractice action to recover damages only for those losses not replaced or indemnified by insurance or other benefit programs or from any source other than the assets of the claimant or his family, or benefits received under the medial assistance program under Iowa Code chapter 249A.

That same year, 1975, the legislature enacted Iowa Code section 147.138, which states in any action for personal injury or wrongful death against a health care

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[12] *Jones ex. Rel. Jones v. Winnebago Industries, Inc*, 460 F. Supp. 2d 953, 973 (N.D. Iowa 2006) (citing *State v. Ihde,* 532 N.W.2d 827, 829 (Iowa Ct. App. 1995)).

[13] IOWA CODE ANN. § 668A.1(1)(a) (2011).

[14] *Id.* § 668A.1(2)(a).

[15] *Id.* § 668A.1(2)(b).

[16] *Id.* § 147.136.

provider, the court is to determine the reasonableness of any contingent fee arrangement between the plaintiff and his attorney.[17]

The statute of limitations for claims arising out of patient care is two years after the date the claimant knew or should have known or received notice in writing of the existence of the injury for which damages are sought.[18] In no event, is an action allowed more than six years after the date of the act alleged in the action. The only exception to this rule is if the injury or death is caused by a foreign object left in the body.[19] In 1997, this section was amended to add the provision that a minor under age eight (8) must bring the claim no later than his tenth birthday or within the standard two-year limitation, whichever is later.

The Iowa legislature enacted several statutes which exempt healthcare providers from liability under certain circumstances. Iowa Code section 147A.10 protects healthcare providers and emergency medical personnel for orders given and executed in emergency medical situations unless their actions or omissions constitute recklessness. These providers are also exempt from liability for failure to obtain consent for emergency care when the patient is unable to give consent and no other person is available to legally consent to the treatment. Sections 144A.9 and 144B.9 exempt healthcare providers from liability for complying with patients' healthcare directives and do-not-resuscitate orders.

Finally, in 1986 the legislature enacted Iowa Code Annotated section 668.11 which sets forth expert witness requirements in professional liability cases, including medical malpractice actions. This statute requires the claimant to produce the name, qualifications and purpose of his expert within 180 days of the defendant's answer. The defendant is then required to produce the same within 90 days of the claimant's disclosure.

In 2004, the Iowa Supreme Court clarified the application of this statute as it relates to disclosure of the treating physician's own testimony on causation of the patient-plaintiff's injuries.[20] In *Hansen*, the court held in quoting a prior 1992 Iowa Supreme Court case, *Carson v. Webb*,

> [T]he paramount criterion is whether this evidence, irrespective of whether technically expert opinion testimony, relates to facts and opinions arrived at by a physician in treating a patient or whether it represents expert opinion testimony formulated for purposes of issues in pending or anticipated litigation.[21]

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[17] *Id.* § 147.138.

[18] *Id.* § 614.1A(9)(a).

[19] *Id.*

[20] *Hansen v. Central Iowa Hospital Corp.*, 686 N.W.2d 476 (Iowa 2004).

[21] *Id.* at 482 (quoting *Carson v. Webb,* 486 N.W.2d 278, 281 (Iowa 1992)).

5. Products Liability Reform

In 1986, the legislature enacted Iowa Code section 613.18 which limits strict liability actions to the assembler, designer, or manufacturer. The statute exempts wholesalers, retailers, distributors, or other types of sellers from strict liability for claims which arise solely from an alleged defect in the original design or manufacture of a product. In 1997 and again in 2002, the legislature amended Iowa Code section 614.1 to establish a fifteen-year statute of repose for product liability lawsuits, except in cases where the liable party's "actual fault caused a product to be defective," "if the manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of the product intentionally misrepresents facts about the product or fraudulently conceals information about the product and that conduct was a substantial cause of the claimant's harm," or against "the time period in which to discover a disease that is latent and caused by exposure to a harmful material"[22]

In 2002, the Iowa Supreme Court adopted the Restatement Third of Torts sections one (1) and two (2) for product defect cases.[23] Under these sections of the Restatement Third, "a plaintiff seeking to recover damages on the basis of a design defect must prove 'the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.'"[24]

6. Attorneys Fees

There are no recent reforms governing attorneys fees; Iowa Code section 625.22 has remained unchanged since 1987.

7. Special Issues

In 1986, the Iowa Legislature passed Senate Bill 2265 affecting the manner of payment of damages. Senate Bill 2265, codified as Iowa Code subsection 668.3(7), allows a party to petition the court for a determination of a method of payment of the judgment or award. The Court may order structured, periodic or other non-lump sum payments under certain circumstances.

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[22] IOWA CODE ANN. §§ 614(2A)(a) and (b) (2011).

[23] *Wright*, 652 N.W.2d at 169.

[24] *Id.* (quoting Rest. 3d Torts § 2(b) and citing *Hawkeye Bank v. State,* 515 N.W.2d 348, 352 (Iowa 1994) (requiring "proof of an alternative safer design that is practicable under the circumstances" in negligent design case) and Hillrichs *v. Avco Corp.*, 478 N.W.2d 70, 75 (Iowa 1991) (requiring "proof of an alternative safer design" under a theory of enhanced injury caused by a design defect)).

In 1987, Senate File 448, codified as Iowa Code section 668.14, was enacted permitting the admissibility of evidence of collateral source payments. Iowa code section 668.14 does not apply to actions governed by Iowa Code section 147.136 which covers actions for damages for personal injury against physicians and others in the health-related professions.

Kansas

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1. Introduction – History of Tort Reform in Kansas

In the 1987's the Kansas Tort Claims Act became effective creating an overhaul of Kansas tort law. Although no real substantive changes have been made to date, in recent years challenges have been made to both the Kansas Supreme Court and the United States Supreme Court concerning the constitutionality of the cap on punitive damages, as more fully discussed herein below.

2. Joint and Several Liability

Joint and several liability was all but abolished by Kansas's tort reform when the theory of comparative negligence was adopted; the comparative negligence statute, *Kan. Stat. tit.* 60, § 258a, provides in pertinent part:

> The contributory negligence of a party in a civil action does not bar that party or its legal representative from recovering damages for negligence resulting in death, personal injury, property damage or economic loss, if that party's negligence was less than the causal negligence of the party or parties against whom a claim is made, but the award of damages to that party must be reduced in proportion to the amount of negligence attributed to that party. If a party claims damages for a decedent's wrongful death, the negligence of the decedent, if any, must be imputed to that party.
>
> When the comparative negligence of the parties is an issue, the jury must return special verdicts, or in the absence of a jury, the court must make special findings, determining the percentage of negligence attributable to each party and the total amount of damages sustained by each claimant. The court must determine the appropriate judgment.
>
> On motion of any party against whom a claim is asserted for negligence resulting in death, personal injury, property damage or economic loss, any other person whose causal negligence is claimed to have contributed to the death, personal injury, property damage or economic loss, must be joined as an additional party.
>
> When the comparative negligence of the parties is an issue and recovery is permitted against more than one party, each party is liable for that portion of the total dollar amount awarded as damages to a claimant in the proportion that the amount of that party's causal negligence bears to the amount of the causal negligence attributed to all parties against whom recovery is permitted.

Subsection (d) of K.S.A. 60-258a "abolishes joint and several liability of multiple defendants in any comparative negligence case since the liability of each defendant must be compared and is limited to his portion of the total causal

negligence attributed to all parties against whom recovery is allowed." PIK Civ. 4th 105.01. *See* Wood v. Groh, 269 Kan. 420, 7 P.3d 1163 (2000). *See also* Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 788 (1980); Miles v. West, 224 Kan. 284, 580 P.2d 876 (1978). However, in intentional torts actions the common-law rule of joint and several liability for defendants still remains despite the theory of contributory negligence. PIK Civ. 4th 105.01. *See* Sieben v. Sieben, 231 Kan. 372, 379-380, 646 P.2d 1036 (1982).

Within the last ten years the Kansas Supreme Court has upheld the application of comparative negligence principles in medical malpractice cases involving both patient fault, and the negligence of a subsequent health care provider. *See Maunz v. Perales*, 276 Kan. 313, 76 P.3d 1027 (2003); *See also Puckett v. Mt. Carmel Regional Med. Center*, 290 Kan. 406, 228 P.3d 1048 (2010).

3. Damage Caps/Political Subdivisions

Kan. Stat. tit. 75, § 6105 controls the cap on damages allowed to be awarded in actions concerning political subdivisions, specifically for punitive and exemplary damages as follows:

> Subject to the provisions of K.S.A. 75-6111 and amendments thereto, the liability for claims within the scope of this act shall not exceed $ 500,000 for any number of claims arising out of a single occurrence or accident.
>
> When the amount awarded to or settled upon multiple claimants exceeds the limitations of this section, any party may apply to the district court which has jurisdiction of the cause to apportion to each claimant the proper share of the total amount limited herein. The share apportioned to each claimant shall be in the proportion that the ratio of the award or settlement made to the claimant bears to the aggregate awards and settlements for all claims arising out of the occurrence or accident.
>
> A governmental entity shall not be liable for punitive or exemplary damages or for interest prior to judgment. An employee acting within the scope of the employee's employment shall not be liable for punitive or exemplary damages or for interest prior to judgment, except for any act or omission of the employee because of actual fraud or actual malice.

Article 61 of *Kan. Stat. tit*. 75 is controlling regarding the Kansas Tort Claims Act and state departments, public officers and employees. This article touches on various topics such as sovereign immunities, indemnification, and procedural requirements in addition to the cap on punitive and exemplary damages. *Kan. Stat. tit.* 75, §§ 6101 *et. seq.*

4. <u>Damage Caps/Medical</u>

Kansas's tort reform also created caps on damages awarded in relation to personal injury and wrongful death actions. The limitation for damages on pain and suffering for personal injury actions is controlled by K.S.A. 60-19a01, providing in pertinent part:

> As used in this section, "personal injury action" means any action for damages for personal injury or death, except for medical malpractice liability actions.
>
> In any personal injury action, the total amount recoverable by each party from all defendants for all claims for pain and suffering shall not exceed a sum total of $250,000.
>
> If a personal injury action is tried to a jury, the court shall not instruct the jury on the limitations of this section. If the verdict results in an award for pain and suffering which exceeds the limit of this section, the court shall enter judgment for $250,000 for all the party's claims for pain and suffering. Such entry of judgment by the court shall occur after consideration of comparative negligence principles in K.S.A. 60-258a and amendments thereto.
>
> The provisions of this section shall not be construed to repeal or modify the limitation provided by K.S.A. 60-1903 and amendments thereto in wrongful death actions.
>
> The provisions of this section shall apply only to personal injury actions which are based on causes of action accruing on or after July 1, 1987, and before July 1, 1988.

Wrongful death award limitations are controlled by K.S.A. 60-1903, in pertinent part:

> In any wrongful death action, the court or jury may award such damages as are found to be fair and just under all the facts and circumstances, but the damages, other than pecuniary loss sustained by an heir at law, cannot exceed in the aggregate the sum of $250,000 and costs.
>
> If a wrongful death action is to a jury, the court shall not instruct the jury on the monetary limitation imposed by subsection (a) upon recovery of damages for nonpecuniary loss. If the jury verdict results in an award of damages for nonpecuniary loss which, after deduction of any amounts pursuant to K.S.A. 60-258a and amendments thereto,

> exceeds the limitation of subsection (a), the court shall enter judgment for damages of $250,000 for nonpecuniary loss.

The Kansas Medical Society has been pushing for the Kansas Supreme Court to strike down the state's $250,000 limit on non-economic damages, specifically in relation to personal injury and wrongful death lawsuits. The constitutionality of the cap on non-economic damages was upheld by the Kansas Supreme Court in the early 1990's, but in 2009 the constitutionality of the caps was brought into question again, and the court agreed to take a second look. The Kansas Supreme Court has had the case for over two years, and has yet to make a final ruling. Kansas Medical Society (2011), http://kmsonline.org/advocacy/legal-issues/liability-reform.

5. <u>Punitive Damages</u>

Kan. Stat. Tit. 60 § 3701 controls the considerations and maximum amounts allowed for punitive and exemplary damages for all other causes of action not otherwise limited by statute. The statute provides, in pertinent part:

> In any civil action in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted by the court to determine the amount of such damages to be awarded.
>
> At a proceeding to determine the amount of exemplary or punitive damages to be awarded under this section, the court may consider: (1) The likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct; (2) the degree of the defendant's awareness of that likelihood; (3) the profitability of the defendant's misconduct; (4) the duration of the misconduct and any intentional concealment of it; (5) the attitude and conduct of the defendant upon discovery of the misconduct; (6) the financial condition of the defendant; and (7) the total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, compensatory, exemplary and punitive damage awards to persons in situations similar to those of the claimant and the severity of the criminal penalties to which the defendant has been or may be subjected. At the conclusion of the proceeding, the court shall determine the amount of exemplary or punitive damages to be awarded and shall enter judgment for that amount.
>
> Except as provided by subsection (f), no award of exemplary or punitive damages pursuant to this section shall exceed the lesser of: (1) The annual gross income earned by the defendant, as determined by the court based upon the defendant's highest gross annual income earned for any one of the five years immediately before the act for which such damages are awarded; or (2) $5 million.

In lieu of the limitation provided by subsection (e), if the court finds that the profitability of the defendant's misconduct exceeds or is expected to exceed the limitation of subsection (e), the limitation on the amount of exemplary or punitive damages which the court may award shall be an amount equal to 1 1/2 times the amount of profit which the defendant gained or is expected to gain as a result of the defendant's misconduct.

Kentucky

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1. Introduction

In 1988 initial efforts were made by the Kentucky Legislature to reform the tort structure in the State of Kentucky. Along with the six provisions which were initially enacted on July 15, 1988 under House Bill 551, the Kentucky Legislature made other recommendations to the State's Supreme Court. Specifically, it was urged that the Court require plaintiffs and defendants to file a certificate of merit stating their claim or defense and stating that an expert witness will testify in support of their claim or defense. Additionally, the Legislature recommended that the Supreme Court amend Rule 68 directing that all costs be awarded against a party failing to accept a reasonable offer of settlement and that the Court amend Rule 59 to allow the Court to review and amend an award if it believes an award to be excessive or inadequate.

2. Joint and Several Liability

In 1988, the Kentucky General Assembly passed a statute, modeled after portions of the Uniform Comparative Fault Act, that provided for the allocation of fault in tort actions. KRS § 411.182 requires that the jury determine damages for each claimant disregarding contributory fault and determine the percentage of total fault allocated to each claimant, defendant, third-party defendant and person who has been release from liability. A release, covenant not to sue or similar agreement entered into by a claimant and a person liable, discharges that person from all liability for contribution, but is not a discharge of any other liable person and the claim of the releasing person against any other person is reduced by the amount of the released person's share of the obligation as determined by the jury.

3. Damages

In July 1988, Kentucky Revised Statute 65.2003, Claims against Local Governments, was enacted. This statute limits damages recoverable against a city. Specifically, the statute exempts cities from liability for the performance of or for the failure to perform legislative, quasi-legislative, judicial, and quasi-judicial functions. However, the statute does not protect a local government from liability for negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.

Also in 1988 the Kentucky Legislature enacted KRS § 411.188 which mandated that juries be advised of collateral source payments and subrogation rights of the collateral payers. However, in 1995, the Supreme Court of Kentucky ruled that the statute was unconstitutional in its operation in the case of *O'Byran v. Hedgespeth*. The court held that the statute was a violation of certain portions of the Kentucky Constitution which mandates the separation of powers doctrine. The Court found that the statute intruded on the responsibility assigned exclusively to the judicial branch of government. Because, as demonstrated by the *O'Bryan* case, it functions to confuse the jury regarding the factual issue rather than to assist the jury

in deciding the damages incurred. As such, the Court rejected any notion that it should be absorbed as judicial doctrine as a matter of comity. *O'Bryan v. Hedgespeth,* 892 S.W.2d 571 (Ky. 1995).

Kentucky Revised Statute § 271B.8-300 was also enacted in 1988 to limit the liability of corporate directors. The statute provides that any action taken as a director, or any failure to take any action as a director, shall not be the basis for monetary damages or injunctive relief unless the breach or failure to perform constitutes willful misconduct or wanton or reckless disregard for the best interests of the corporation and its shareholders. A person bringing an action for monetary damages under this section shall have the burden of proving by clear and convincing evidence that the director acted as set forth above, and shall have the burden of proving that the breach or failure to perform was the legal cause of damages suffered by the corporation. Section 271B.8-420 sets for the same limitations with respect to general officers of a corporation.

In October of 2009, the Kentucky Supreme Court, in the case of *Martin v. Ohio County Hospital Corporation,* 295 S.W.3d 104, expanded loss of consortium claims in the Commonwealth of Kentucky to include damages for the time following the death of the spouse. The statute on loss of consortium, KRS §411.145, passed in 1970, was silent as to whether these damages could be awarded after death, but common law had limited those damages to the time between injury and death. The holding of the *Martin* provided that in Kentucky a surviving spouse can sue for damages for loss of consortium both before and after the death of a husband or wife harmed intentionally or negligently by another person.

a. Punitive Damages

The Kentucky Legislature attempted to set parameters to establishing a claim for punitive damage by the enactment of KRS § 411.184. Subsection (2) requires that for the award of punitive damages, a plaintiff to show by "clear and convincing" evidence that a defendant acted with oppression, fraud or malice.

However, merely ten years after its enactment, the Supreme Court of Kentucky ruled that this limitation violated the "jural rights" provisions of the State Constitution, sections 14, 54, and 241. *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998). As such, with this ruling, the statute was declared unconstitutional and the Court re-instated the common-law rule allowing recovery for punitive damages based on gross negligence.

4. Medical Malpractice Reform

House Bill 505 was introduced on February 15, 2007 and proposed an amendment to the Constitution of Kentucky that would allow the General Assembly to create statutory provisions relating to medical malpractice. If passed, this Bill would have given the General Assembly the authority to (a) Require any party bringing a civil action subject to this section to submit the claim of that action to a

system of nonbinding alternative dispute resolution before seeking redress in any other forum or exercising his or her right to a jury trial; (b) Provide for a uniform statute of limitations or statutes of repose, or both, for any civil action subject to this section; (c) Establish an evidentiary privilege for a medical peer review process; (d) Establish standards for expert witnesses and a certification process as a condition precedent to the filing of a civil action; and (e) Provide for the admissibility of evidence relating to collateral source payments or benefits.

The Bill also proposed that the Constitution be amended to provide that the General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.

This bill died in committee.

5. Products Liability Reform

The legislature of Kentucky has not enacted legislation imposing limitations on Products Liability.

6. Attorneys Fees

Attorneys' fees are limited by KRS §342.320 in Workers Compensation actions to twenty percent (20%) of the first twenty-five thousand dollars ($25,000) of an award and fifteen percent (15%) of the next ten thousand dollars ($10,000) and five percent (%%) of the remainder of the award, not to exceed a maximum fee of twelve thousand dollars ($12,000).

7. Miscellaneous

a. Statute of Limitations

In 1998, the legislature revised the Statute of Limitations for property damage claims, which resulted in a reduction in the time period to file suit from five years to two years. KRS. § 413.125.

b. Food & Beverage Liability

In 2005 the Kentucky Legislature adopted what has become affectionately known as the "cheeseburger bill." Kentucky Revised Statute §411.610, Immunity from liability for conditions arising due to long-term consumption of food, created an exemption from civil liability for manufacturers, packers, distributors, carriers, holders, sellers, marketers, or advertisers of food, as defined in KRS §217.125, for claims arising out of weight gain, obesity, health conditions associated with weight gain or obesity, or other generally known conditions allegedly caused by or allegedly likely to result from long-term consumption of food. The liability

exemption does not apply if the claim is based on a material violation of state or federal adulteration or misbranding requirements. The liability exemption also does not apply for any other material violation of federal or state law applicable to the manufacturing, marketing, distribution, advertising, labeling or sale of food and the violation was committed knowingly and willfully.

Louisiana

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A HISTORY AND UPDATE ON DEVELOPMENTS

Louisiana has passed significant tort reform laws over the last couple of decades which have generally been successful in rendering the state more defense-oriented. In fact, tort reform continues to be both a high priority on many Louisiana politicians' "to-do" lists and a recurring theme in editorial and household discussions. The purpose of this article is to provide a general overview on some of the recent activity and cases involving tort reform efforts in Louisiana and use that overview as a frame of reference for anticipating what reforms may be coming soon.

The Tort Reform Background and Outlook in Louisiana

Louisiana's tort reform efforts have historically been directed at specific types of claims as opposed to enacting laws with broad, sweeping applicability. Some of the more notable examples of these efforts include Louisiana's Medical Malpractice Act (1975),[1] the Louisiana Oilfield Anti-Indemnity Act (1981),[2] the New Home Warranty Act (1986),[3] and the Louisiana Products Liability Act (1988).[4]

A major deviation from this claim-specific pattern occurred in 1996 with the passage of significant tort reform laws under then-Governor Mike Foster, who is noted for running a very pro-business administration. These broad reforms established a purely comparative fault regime in Louisiana, replacing the solidary liability rules of the past.[5]

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1 La. R.S. 40:1299.41, *et. seq*.
2 La. R.S. 9:2780.
3 La. R.S. 9:3141, *et seq*.
4 La. R.S. 9:2800.51, *et. seq*.
5 *See*, La. C.C. art. 2323.

Louisiana has returned in the last few years to the prior trend of claim-specific reforms by instituting changes in laws that impact oilfield contamination and Chinese Drywall claims. These reforms were, in part, the result of increased media attention that generated significant criticism regarding Louisiana's handling of oil exploration and production contamination claims (also known as "legacy suits") and Chinese drywall suits. If this scrutiny continues, it could potentially result in additional reforms in these areas during the coming years.

The 1996 Comparative Fault Reforms

Though there have been no significant, recent changes in Louisiana's comparative fault rules, the 1996 reforms remain a cornerstone victory for tort reform advocates and warrant specific consideration. In essence, Louisiana law now recognizes that more than one party can contribute to a plaintiff's alleged injuries, which constitutes a substantive shift from solidary liability to joint and several liability.[6] Therefore, a "pure comparative fault" system has now been established as part of these precepts.[7]

The primary code article dealing with fault allocation in Louisiana is La. C.C. art. 2323, which states:

> A. In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the

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[6] *Aucoin v. La. DOTD*, 97-1938 (La. 04/24/98), 712 So.2d 62, 67 (*superseded by statute on other grounds*).

[7] *Scott v. Pyles*, 99-1775 (La.App. 1 Cir. 10/25/00), 770 So.2d 492, 500 (citing *Campbell v. La. Dep't of Transp. & Dev.*, 94-1052 (La. 1/17/95), 648 So.2d 898, 902).

> provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.
>
> B. The provisions of Paragraph A shall apply to any claim for recovery of damages for injury, death, or loss asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability.
>
> C. Notwithstanding the provisions of Paragraphs A and B, if a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced.

In short, this article holds that a defendant may no longer be held liable for more than his/her own degree of fault for the damages at issue unless the defendant committed an intentional tort.[8]

In determining fault percentages, Louisiana courts must consider both the nature of each party's conduct and the extent of the causal connection between the conduct and the alleged damages.[9] With respect to the nature of the parties' conduct, certain primary factors (sometimes called the "*Watson* factors") may influence the degree of fault assigned, including:

> 1) Whether the conduct resulted from inadvertence or involved an awareness of the danger;
>
> 2) How great a risk was created by the conduct;
>
> 3) The significance of what was sought by the conduct;

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[8] *See also*, La. C.C. arts. 2324, 2324.1, and 2324.2. These articles supplement the comparative fault regime as established by article 2323.

[9] *Toston v. Pardon*, 03-1747 (La. 04/23/04), 874 So. 2d 791, 803 (quoting *Watson v. State Farm Fire & Cas. Ins. Co.*, 469 So. 2d 967, 974 (La. 1985)).

4) The capacities of the actor, whether superior or inferior; and

5) Any extenuating circumstances which might require the actor to proceed in haste without proper thought.[10]

Other concepts, such as who had the last clear chance to avoid the injury, the actual fault/negligent conduct, and the harm incurred by the plaintiff, may also be relevant considerations.[11]

The 1996 comparative fault reforms are now thoroughly ensconced in Louisiana's legal system and unlikely to be removed "whole-cloth" at any point in the future. Still, the plaintiffs' bar continues to voice general opposition to these laws because haling every potentially-responsible party into court is not always possible, which precludes injured plaintiffs from being fully compensated.

These criticisms have found new ground recently in the large number of Chinese Drywall claims being asserted in Louisiana because most of the drywall manufacturers are non-U.S. entities. Consistent with Louisiana's "claim-specific" approach to tort reform, though, many of the proposed solutions to this issue are trending more towards addressing Chinese Drywall claims in isolation rather than changing the comparative fault regime itself.

Louisiana's Medical Malpractice Act and Recent Caselaw

Another long-standing tort reform statute in Louisiana is the Louisiana Medical Malpractice Act ("MMA"). If a claim is covered by the MMA, damages will be capped at $500,000 plus past and future medical expenses, with an individual

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[10] *Toston*, 874 So. 2d at 803 (quoting *Watson*, 469 So. 2d at 974).

[11] *Id*.

liability cap of $100,000.[12] The $500,000 cap applies not only to all non-economic damages like pain and suffering but also to claims for lost wages. Damages in excess of the individual cap can be recovered from the Patients' Compensation Fund, to which all covered entities are required to contribute.

In addition to placing a cap of $500,000 on damages, the MMA also requires a claimant to file a request with the Louisiana Division of Administration to have the claim reviewed by a medical review panel before filing suit.[13] Failure to abide by this rule, or filing the request with the wrong state agency, can result in the plaintiff's case being dismissed as "premature".

The MMA was recently subjected to an attack on constitutional grounds, which resulted in the Louisiana Supreme Court reviewing the validity of the MMA in *Oliver v. Magnolia Clinic*.[14] There, a Louisiana appellate court found the MMA's $500,000 cap on damages was unconstitutional as it applied to nurse practitioners. The Louisiana Supreme Court, however, reversed that ruling and discussed the MMA in detail as part of an effort, "…to remind courts of this State of the last expression of law relative to the cap's constitutionality." Specifically, the Court found that, "…the right of malpractice victims to sue for damages is not a fundamental constitutional right," and that the MMA's damages cap was both constitutional and applicable to nurse practitioners.

That said, it is interesting to note that Justice Johnson, who concurred with the *Oliver* decision in part and dissented in part, complained that Louisiana's

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12 La. R.S. 40:1299.42.
13 La. R.S. 40:1299.47.
14 2011-C-2132 (La. 2012), 2012 Lexis 506.

$500,000 cap is "one of the most stringent in the nation." He added that, "[e]conomists agree that a $500,000.00 award for general damages in 1975 is comparable to less than $125,000.00 in today's dollars." The *Oliver* Court indirectly addressed Johnson's critique of the cap in its opinion:

> The effects of inflation and economic changes touch on the adequacy of the cap's amount, rather than its constitutionality. Our job, as a court tasked with reviewing laws, is to ensure statutes are free of constitutional infirmities. Once satisfied that legislation does not infringe upon constitutional rights, any other perceived infirmity is to be addressed by the legislature.

It remains to be seen whether Justice Johnson's observations, when coupled with the Court's understated challenge to the Louisiana Legislature, will generate any action to reassess the adequacy of the MMA's $500,000 cap. Nonetheless, it is still an area to watch in the future.

Legacy Lawsuits, Procedural Reforms, and Recent Scrutiny

Louisiana's economy and politics has, for generations, revolved around oil and manufacturing activity in the state. A high volume of litigation pertaining to these areas was a natural outgrowth of these business pursuits because they touched the lives of so many Louisiana citizens. Over the years, one problem that developed was how to address environmental contamination that sometimes occurred on private property caused by oil exploration and production activities. Because the property on which such long-term endeavors took place often changed hands over multiple generations, civil suits seeking recovery for property damages arising out of these activities became known as "legacy suits".

In 2006, the Louisiana Legislature attempted to reform the procedural aspects of these suits in response to cases which held that plaintiffs were not

required to use moneys recovered to clean up the contamination. Thus, it was felt the state's natural resources were being jeopardized and reform was needed. In response, the Legislature passed La. R.S. 30:29, which is also known as "Act 312". Act 312 essentially instituted procedural reforms and pre-requisites on legacy suits that required more involvement by the appropriate state agencies and oversight regarding clean-up of alleged environmental contamination.

There continues to be criticism that Act 312 does not go far enough to curtail the onslaught of legacy lawsuits that continue pouring into the state's courtrooms. Again, the state's economy and job growth continue to be heavily tied to oil and manufacturing industries. As a result, legacy lawsuits have been the subject of recent national and state media attention alleging that such suits stifle economic growth and job creation by deterring oil companies from investing exploration dollars in the state. This renewed attention and national criticism has fostered fresh discussion about legacy suits and could be a potential catalyst for further reforms in the years ahead.

Chinese Drywall and the Future

One topic that has garnered significant public attention in the last couple of years is "Chinese Drywall." The persistence and wide-spread nature of these claims has fostered demands for reform on both sides of the aisle. One of the loudest complaints from plaintiffs is that Louisiana's comparative fault regime precludes them from being "made whole" (as required by Louisiana's negligence law) because so many of the drywall manufacturers are foreign companies.

Again, Louisiana's "claim-specific" approach to tort reform appears to currently be the preferred course of action for handling these claims. In response to the large volume of press directed at this topic, Louisiana Governor Bobby Jindal signed a new law in July 2010 that prohibits insurance companies from dropping or failing to renew coverage on homeowners' policies due to the presence of Chinese Drywall imported prior to December 31, 2009.[15] However, this law expires in its entirety on July 31, 2013.[16]

It is worth noting the law prohibits insurers from raising premiums "based solely" on the presence of Chinese Drywall or the filing of claims related to Chinese Drywall. Thus, it is still expected that carriers can raise rates on Chinese-Drywall-affected homes if the increase is actuarially sound.

The ultimate impact of these claims is yet to be seen. Realistically, Louisiana law could be amended in favor of either plaintiffs or defendants. Still, reform-related discussions on this topic are ongoing, and it is possible further developments in this area are on the horizon.

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[15] La. R.S. 22:1338.

[16] *Id* at subparagraph (E).

Maine

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1. Introduction – History of Tort Reform in Maine

The Maine Legislature has yet to enact any sweeping statutory changes in the area of tort reform. In general, Maine juries may award damages they deem fair and reasonable in the vast majority of tort cases. However, over the course of many years, the Maine Legislature has enacted laws that fall within the scope of tort reform. These laws bar some tort claims entirely, limit liability of particular defendants, limit specified damages in particular actions, and/or limit contingent attorney fees in particular types of claims. Additionally, in cases involving multiparty defendants, the new rules provide incentive to settle before the claim ever reaches a jury.

2. Joint and Several Liability

In a case involving multiparty defendants, each defendant is jointly and severally liable to the plaintiff for the full amount of the plaintiff's damages. *14 M.R.S.A. §156.*
However, any defendant has a right through the use of special interrogatories to request of the jury the percentage of fault contributed by each defendant. *Id.* If a defendant is released by the plaintiff under an agreement that precludes the plaintiff from collecting against remaining parties that portion of any damages attributable to the released defendant's share of responsibility, then special rules apply.

These new rules have been in effect since 1999. The released defendant is entitled to be dismissed with prejudice from the case. The dismissal bars all related claims for contribution assertable by remaining parties against the released defendant. *14 M.R.S.A. §156(1).* Post dismissal, the trial court must preserve for the remaining parties a fair opportunity to adjudicate the liability of the released and dismissed defendant, who remains subject to discovery requests. At trial, evidentiary rules are invoked as if the released and dismissed defendant were still a party. *14 M.R.S.A. §156(2).* Ultimately, the responsibility as apportioned is binding on all parties to the suit, but has no binding effect in other actions relating to other damages. *14 M.R.S.A. §156(3).*

3. Damage Caps

With few exceptions, there are no damage caps in Maine. One exception involves wrongful death actions. In general, the jury may give such damages as it determines is fair and just compensation for pecuniary injuries resulting from the death to the persons for whose benefit the action is brought and in addition shall give such damages as will compensate the estate of the deceased person for reasonable expenses of medical, surgical and hospital care and treatment and for funeral expenses. In addition, it may give damages *not exceeding* $400,000 for the loss of comfort, society and companionship of the deceased, including any damages for emotional distress arising from the same facts as those constituting the underlying claim and in addition may give punitive damages *not exceeding* $75,000,

providing the action is commenced within 2 years after the decedent's death. *18-A M.R.S.A. §2-804.*

Under the Maine Human Rights Act, certain types of damages are capped depending upon the size of the employer defendant. *See 5. M.R.S.A. §4613.*

4. Punitive Damages See Section 3.

5. Medical Malpractice

Although the general rule in Maine is that all civil actions must commence within six years after the cause of action accrues, (*14 M.R.S.A. §752),* in cases of medical malpractice, the limitations period, with limited exception, is three years. *24 M.R.S.A. §2902.* In order to maintain a medical malpractice action, a plaintiff must first comply with the procedures set forth in the Maine Heath Security Act ("MHSA"). *24 M.R.S.A. §2501, et. seq.* The MHSA requires that all claims against medical care providers be preceded by a notice of claim and screening by a prelitigation panel. *24 M.R.S.A. §§ 2851-2859*, 2903. The Act further provides that no action for professional negligence may be commenced until such requirements are met. *24 M.R.S.A. § 2903(1)*. A failure to timely do so, will bar the claim.

While there are no limitations on damage awards, the judgment must now be reduced by collateral source payments. Although collateral source payments are not admissible at trial, before a judgment is entered on the verdict, and after notice and opportunity for evidentiary hearing, the court shall reduce the judgment by that portion which represents damages paid or payable by a collateral source, if the collateral source has not exercised its right to subrogation within specified time limits. *24 M.R.S.A. §2906.*

6. Products Liability Reform

The Maine Legislature has made no reform specific to products liability.

7. Attorneys Fees

While there are no limitations on damage awards in medical malpractice actions, there are limitations on contingent fees payable to plaintiff's attorney, depending on the amount of the recovery, unless a greater amount is permitted by the court upon petition of the plaintiff's attorney. *24 M.R.S.A. §2961.*

8. Practice Pointers

For all claims against medical care providers, it first must be determined whether they are subject to the MHSA. A failure to timely follow the procedures set forth in the MHSA will bar the claim. For example, a claim against a medical professional for negligent infliction of emotional distress ("NIED") is a type of professional negligence. *See Champagne v. Mid-Maine Medical Center*, 711 A.2d 842, 848 n3 (Me. 1998). As such, the NIED claim is governed by the MHSA.

9. Special Issues

While a cause of action may be recognized in Maine, the particular claim may be limited or barred by statute. As set forth by the following examples, which are not exhaustive, the trend in Maine has been to limit liability of particular classes of defendants or to bar entirely particular types of claims.

Since 1977, notwithstanding any inconsistent provisions of any public or private and special law, any person who voluntarily, without the expectation of monetary or other compensation, renders first aid, emergency treatment or rescue assistance, is immune from civil liability, unless the injury or death is caused willfully or recklessly or by gross negligence. *14 M.R.S.A. §164.*

Since 1981, donors of canned or perishable food and/or a bona fide charitable or not-for-profit distributor of such food is immune from civil liability arising from an injury or death due to the condition of the food, unless the injury or death is a direct result of the gross negligence, recklessness or intentional misconduct of the donor or the organization. *14 M.R.S.A. §166.*

Since 1985, claims for wrongful birth or life have been barred. *24 M.R.S.A. §2931.*

Since 1991, directors, officers and volunteers of charitable organizations, as defined, have been immune from civil liability for personal injury, death or property damage, including any monetary loss when the cause of action sounds in negligence and arises from an act or omission by the director, officer or volunteer which occurs within the scope of the activities of the charitable organization. *14 M.R.S.A. §158-A(2)* However, immunity is waived when the cause of action arises from the operation of a motor vehicle, vessel, aircraft or other vehicle for which the operator or owner of the vehicle, vessel, or aircraft is required to posses an operator's license or maintain insurance. *14 M.R.S.A. §158-A(3).*

Since 1997, a charitable organization, as defined, is not liable for a claim arising from death or injury to a person or damage to property caused by a juvenile participating in a supervised work program, performing community service or providing restitution, as defined, including a claim arising from the death or injury to the juvenile or damage to the juvenile's property. *14 M.R.S.A. §158-(B).*

Effective in 1979 and as amended through 2005, in general, there is no duty of care owed to keep the premises safe for entry or use by others for recreational or harvesting activities or to give warning of hazardous conditions, regardless or whether permission was given to pursue such activities on the premises. *14 M.R.S.A. §159-A.* Additionally, any owner, lessee, manager, holder of an easement or occupant who is found not liable pursuant to this section, shall be awarded any direct legal costs, including reasonable attorneys' fees. *Id.*

Since 2005, a manufacturer, distributor or seller of food products is not liable for personal injury or death to the extent the liability is based upon a person's weight gain or obesity resulting from the person's long term consumption of the food product, unless the manufacturer or distributor has failed to provide nutritional content information required by law. *14 M.R.S.A. §170.*

Maryland

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1. INTRODUCTION

In 1994 Maryland enacted its tort reform legislation to limit recoveries in personal injury and wrongful death actions. Maryland Courts have interpreted this reform legislation as an attempt by the General Assembly to abate the continuing escalation of liability insurance premiums in the State. *Cole v. Sullivan, 110 Md. App. 79, 676 A.2d 85 (1996).* These tort reform measures adopted by the legislature have been upheld by Maryland Courts which have reasoned that because the General Assembly has the power to create and abolish causes of action, and it necessarily must have the power to limit the recovery obtainable under them. *Simms v. Holiday Inns, Inc., 746 F. Supp. 596 (D. Md. 1990).*

2. JOINT AND SEVERAL LIABILITY AND CONTRIBUTORY NEGLIGENCE

Unlike most American jurisdictions, Maryland is a joint and several liability jurisdiction. Any defendant whose negligence, however slight, proximately causes plaintiff's injuries will be held responsible for all of any judgment. In addition, there is a right to contribution from joint tortfeasors in equal shares regardless of the relative fault.

The plaintiff's contributory negligence remains a complete defense to an action for negligence. Maryland courts have defined contributory negligence as that degree of reasonable and ordinary care that a plaintiff fails to undertake in the face of an appreciable risk which cooperates with the defendant's negligence in bringing about the plaintiff's harm. *Board of County Com'rs of Garrett County, MD v. Bell Atlantic-Maryland, Inc.* 346 Md. 160, 695 A.2d 171 (1997). Defendant must prove each element of contributory negligence by a preponderance of the evidence to bar a plaintiff's claim. *Id*.

If a plaintiff has acted contributorily negligent, they may still recover for damages under the doctrine of last clear chance. Under the doctrine of last clear chance, the plaintiff's negligence does not bar their recovery if defendant could have avoided the consequences of the plaintiff's negligence by the use of ordinary or reasonable care. *Baltimore & O.R. Co. v. Leasure,* 193 Md. 523, 69 A.2d 248 (1949). The rationale is that if the defendant has the last clear chance to avoid the harm, the plaintiff's negligence is not the proximate cause of the result. *Ritter v. Portera*, 59 Md. App. 65, 474 A.2d 556 (1984).

3. DAMAGES CAPS

Maryland Courts and Judicial Proceedings Code Ann. § 11-108 has adopted tort reform measures designed to limit the amount of noneconomic damages that can be awarded to plaintiffs in personal injury and wrongful death actions. One of the primary purposes in enacting this statutory limitation was to promote the availability and affordability of liability insurance in Maryland. *See Murphy v. Edmonds,* 325 Md. 342, 368, 601 A.2d 102 (1992).

In actions for personal injury, noneconomic damages include pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpercuniary injury. In wrongful death actions, noneconomic damages include mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, care, marital care, parental care, filial care, attention, advice, counsel, training, guidance, education, or other noneconomic damages.

The Maryland Torts Claim Act caps noneconomic damages for personal injury and wrongful death lawsuits at $500,000 for actions arising on or after October 1, 1994. The cap increases by $15,000 on October 1 of each ensuing year. For actions arising between October 1, 2011 and September 30, 2012, the cap is $755,000. The limit applies to each direct victim of tortious conduct, and all persons who claim injury by or through that victim. Maryland Courts have determined that the General Assembly intended for a single cap to apply to the individual claim of an injured person and a loss of consortium claim by the marital unit, which is derivative therefrom. *Oaks v. Connors*, 660 A.2d 423 (1995)

If there are two or more claimants as beneficiaries in a wrongful death action, the award may not exceed 150% of the statutory cap. The jury is not advised of this limitation.

a. Cap not applicable to intentional torts.

The conspicuous absence of any discussion in this section's legislative history concerning applicability to intentional injuries leads to the conclusion that the cap on economic damages does not apply to intentional torts, whether or not personal bodily injuries are involved. Maryland courts have recognized that this section was enacted and amended to stabilize the spiraling cost of liability insurance, and there was no intent to protect individuals from the economic consequences of intentional misconduct. *Cole v. Sullivan,* 110 Md. App. 79, 676 A.2d 85 (1996).

b. Cap not applicable to Punitive Damages.

Under Maryland's tort reform statute, noneconomic damages do not include punitive damages. This exclusion is clearly designated by the statute and is supported by Maryland case law. There are no statutory caps to the amount of punitive damages that can be awarded to a party. However, under Maryland law, punitive damages are not recoverable in claims for wrongful death brought under Maryland Courts and Judicial Proceedings Code Ann. § 3-904, its wrongful death statute. *Figgie Intern., Inc., Snorkel-Economy Div. v. Tognocchi*, 624 A.2d 1285, 96 Md.App. 228, *certiorari denied* 631 A.2d 451, 332 Md. 381. Local governments are also immune from punitive damages. Maryland Courts and Judicial Proceedings Code § 5-303.

4. PUNITIVE DAMAGES

In Maryland, punitive damages are recoverable in intentional and non-intentional torts. There must be a showing by clear and convincing evidence of actual malice, in the sense of conscious and deliberate wrongdoing, evil or wrongful motive, intent to injure, ill will, or fraud. *Ellen v. Fairfax Savings*, 652 A.2d (Md. 1995); *Owens-Illinois v. Zenobia*, 601 A.2d 633 (Md. 1992). Additionally, in vicarious liability actions, punitive damages may be awarded against an employer, even if the employer did not ratify or benefit from the employee's actions. *Thorne v. Contee*, 565 A.2d 102 (Md. 1989).

Under Md. Code, CJ §10-913, evidence of a defendant's financial condition cannot be introduced until the plaintiff has established liability and that punitive damages are supportable.

Massachusetts

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1. INTRODUCTION

Massachusetts has been slow in adopting tort reform but has made significant improvements in recent years. According to the Pacific Research Institute's *U.S. Tort Liability Index 2010,* Massachusetts is one of the states that has experienced the most significant improvements in ranking since 2008. The study notes that this improvement is attributable to lower tort costs and/or tort litigation risks relative to other states. The states were ranked according to their monetary tort losses, tort litigation risks, and tort rules and reforms on the books to reduce lawsuit abuse.
http://www.pacificresearch.org/docLib/20100525_Tort_Liability_Index_2010.pdf

Interestingly, in a separate study on tort liability reform, researchers observed the relationship between the number of lawyers in a state and their influence on tort-reform legislation in the state. The study found that the higher the number of attorneys in the state, the more power they have to influence the legal environment in ways which are more favorable to them, such as encouraging more litigation, higher awards, and less legal reform. Given the overall, significant improvement in tort reform in Massachusetts, it is interesting to note that the state still ranks on the high end in terms of the ratio between the number of attorneys in the state and tort reform. Whereas Massachusetts once ranked as low as forty-first amongst the fifty states for their state tort costs and litigation risks, it now ranks seventeenth.

This paper highlights some of the legislation enacted in Massachusetts to address tort reform – specifically in the areas of joint and several liability, medical liability reform, punitive damages, attorney contingent fee arrangements and products liability.

2. JOINT AND SEVERAL LIABILITY

Joint and several liability was narrowly addressed by the passage of House Bill 574 in 2001. MASS. GEN. LAWS ANN. Ch. 231B §§ 1-2. While the joint and several liability provisions normally do not consider "their relative degrees of fault," the legislature has carved out an exception for public accountants that bars recovery of damages in excess of the assigned degree of fault.

3. PUNITIVE DAMAGES

Massachusetts has consistently maintained that punitive damages are only allowable by statutory authorization and not by common law. As punitive damages are not favored in Massachusetts, the courts leave it to the legislature to authorize such damages. They have done so in the areas of: (1) Products liability – punitive damages not recoverable against manufacturers unless expressly authorized by statute; (2) Professional liability – punitive damages are recoverable against a professional in an action authorized under a specific statute; (3) General liability – statute addressing actions for death by negligence allows for punitive damages "in an amount of not less than five thousand dollars in such case as the decedent's death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant;" (4) Employment liability – punitive damages are allowed in gender discrimination claims against employers; and (5) Other – punitive damages allowed for claims alleging interference with a lawful taking of fish or wildlife and allowable where evidence warrants a finding of willful or knowing unfair and deceptive insurance practices.

Further, on October 5, 2009, the Massachusetts Supreme Judicial Court issued a decision in a case that provided employers clarification regarding the circumstances permitting punitive damage awards in employment discrimination actions under state law. The Court held that punitive damages in such employment cases are only permissible when the employer's conduct is especially offensive. The plaintiff in the case had to prove that the defendant's act was "outrageous, egregious, evil in motive, or undertaken with reckless indifference to the rights of others." *See Haddad v. Wal-Mart Stores, Inc.,* 455 Mass. 91, 107 (2009).

4. MEDICAL MALPRACTICE REFORM

In the area of medical malpractice reform, the Massachusetts legislature has been particularly active. Tort reform enacted in the state is primarily aimed at the medical liability arena and includes changes to the collateral sources, limits on noneconomic damages and contingent fee arrangements in medical liability cases.

Specifically, Chapter 231 § 60-G provides for medical liability awards to be offset by payments from collateral sources, less any premiums paid by the claimant to secure those benefits. MASS. GEN. LAWS ANN. Ch. 231 § 60-G. Chapter 231 § 60-H limits non economic damages in medical liability cases to $500,000, unless that claimant can show "a substantial or permanent loss or impairment of a bodily function or substantial disfigurement." MASS. GEN. LAWS ANN. Ch. § 60-H. Finally, Chapter 231 § 60-I addresses contingent fee arrangements in medical liability cases. The limits imposed are 40% of the first $150,000, 33.3% of the next $150,000 of recovery, 30% of the next $200,000 and 25% on any amount over $500,000.

5. PRODUCTS LIABILITY REFORM

In the realm of products liability, the legislature has made attempts to raise the burden on plaintiffs bringing product liability action, particularly negligent warning related claims. In 2011, the Senate enacted legislation to reform the state's product liability system. M.G.L. ch. 231, §85AA has been amended to state that a product supplier "shall not be liable in any product liability action for harm caused by failure to provide adequate warning or instruction, unless the plaintiff proves by a preponderance of the evidence that, at the time the product left the control of the supplier, and in light of the technical or scientific knowledge available to the supplier at the time the product left its control, the supplier knew or reasonably should have known the danger that caused the plaintiff's harm and failed to provide adequate instruction concerning such danger."

Additionally, the amendment provides that "a product supplier shall not be liable in any product liability action for harm caused by the design or formulation of a product, unless the plaintiff proves by a preponderance of the evidence that, at the time the product left the control of the supplier, an alternative design or formulation was commercially and technically feasible that would have prevented the harm for which the claimant seeks to recover compensatory damages without substantially impairing the utility of the product."

6. CONCLUSION

Massachusetts, while somewhat slow in adopting tort reform, has made significant progress since the 2008 *Tort Liability Index.* While the state used to rank as low as forty-first amongst the other states in terms of high monetary tort losses and tort litigation risks, it now ranks seventeenth overall. The significant improvement the state has made in the rankings indicates that Massachusetts is taking steps forward in the area of tort reform.

Michigan

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1. Introduction – History of Tort Reform in Michigan

Michigan was one of the first states in the country to pass tort reform legislation when it passed the Medical Malpractice Arbitration Act in 1975. While this Act was repealed by subsequent tort reform legislation, Michigan continues to be in the forefront of the tort reform movement.

The Michigan Legislature has enacted three sets of Tort Reform legislation. The first reform took effect in 1986. These reforms modified venue, imposed stringent criteria for medical expert witnesses in medical malpractice actions, and addressed joint and several liability concerns. These reforms did not address all of the concerns of the Michigan Legislature and, as a result, two more tort reform legislations were passed.

The 1993 tort reform legislation applied only to the area of medical malpractice and affected cases filed after April 1, 1994. The 1993 legislation placed a limit on non-economic damages, reduced the applicable statute of limitations for minors, stiffened the requirements of the affidavit of merit, and required all plaintiffs to file notice of their intent to file a lawsuit not less than 182 days before a complaint is filed.

The 1995 tort reform package overhauled Michigan's tort system. As discussed more thoroughly below, the Legislature enacted laws that abolished joint and several liability, imposed caps on non-economic damages, changed the standard for product liability cases, modified venue provisions, heightened the standard for expert witnesses and altered Michigan's No Fault Act. The 1995 tort reform package is set forth in 95 Pub. Act 161 and 95 Pub. Act 249 and applied to all cases filed after March 28, 1996.

2. Joint and Several Liability

Before tort reform was enacted in Michigan, Michigan law allowed for joint and several liability in tort actions. Joint and several liability recognizes that tortfeasors who act in concert – who independently contribute to a single, indivisible injury or who otherwise share responsibility for the wrongful act – can be held liable for the entirety of a plaintiff's damages. While joint and several liability was the law of the land in Michigan, an injured party could choose to sue only one of the multiple parties who had caused his injury and that individual defendant was liable for the entire amount of the judgment, regardless of the percentage of that individual defendant's fault.

The 1995 tort reform created "fair share liability" in Michigan. The 1995 legislation, in essence, eliminated joint and several liability in all actions seeking damages for personal injury, property damage, and wrongful death (with the exception of medical malpractice actions). The Act states that each defendant's liability for damages is several only and is not joint. As a result, under the new rule, each defendant's liability is directly proportioned to its percentage of fault, as determined by the trier of fact. Also, in determining the percentage of fault, the trier

of fact can now consider each party's fault, regardless of whether or not that party was actually named as a party to the action.

Joint and several liability still exists in Michigan. As previously stated and discussed more thoroughly below, the Michigan Legislature chose to retain joint and several liability in medical malpractice cases. Joint and several liability also exists by statute in personal injury, property damage, and wrongful death actions where a defendant's acts or omissions that caused the damages constitute a crime involving the use of alcohol or a controlled substance for which the defendant was convicted. Joint and several liability also applies where the acts or omissions that caused the damages constitute a crime where an element of the crime is gross negligence. MCL §600.6312.

3. Damage Caps

Both the 1993 and 1995 tort reform legislations placed caps on non-economic damages[1] in two specified tort actions – products liability and medical malpractice.

a.) Medical Malpractice

The 1993 legislation addressed damage caps in the area of medical malpractice. MCL §600.1483 limits the non-economic damages recoverable in a medical malpractice action to $280,000. However, in the event that the injured party is a hemiplegic, paraplegic, or quadriplegic due to an injury to the brain or spinal cord, the injured party may recover $500,000[2]. This $500,000 damage cap also applies in the event that an injured party suffered permanent impairment of his/her cognitive capacity or damage to a reproductive organ resulting in the inability to procreate.

b) Product Liability

The 1995 legislation addressed damage caps in the area of products liability. In a product liability action, the total amount of damages should not exceed $280,000, unless the defect in the product caused either a plaintiff's death or permanent loss of a vital bodily function; in which case the total damages for non-economic loss may not exceed $500,000. MCL §600.2946a. However, these damage caps do not apply if the trier of fact determines by a preponderance of the evidence that the death or loss was the result of the defendant's gross negligence.

Under both reforms, plaintiffs who are more than 50% at fault for their own injuries may still recover, but they cannot recover non-economic (pain and suffering, reduced life quality, etc.) damages. The jury may not be told about the

[1] "Non-economic loss" means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other non-economic loss. MCL§600.1483(3).

[2] Both limitations on damages are to be adjusted yearly by the state treasurer to amounts reflected by the annual percentage change in the consumer price index as provided by MCL§ 600.1483.

limitations on the amounts recoverable; the judge adjusts the jury verdict after it is rendered so that the cap is not exceeded. MCL§ 600.2946a(2).

4. Punitive Damages

The Michigan legislature has not passed any tort reform laws that attempt to cap or limit tort punitive damages. In *Casey v. Auto-Owners Ins. Co.,* 273 Mich. App. 388, (2006), this Court stated that "[p]unitive damages, which are designed to punish a party for misconduct, are generally not recoverable in Michigan." There is, however, an exception where punitive damages are authorized by statute. *Id.*

5. Medical Malpractice Reform

The Michigan Legislature enacted the 1993 tort reform package in response to a reported crisis in health care. The legislature's stated primary purpose was to guarantee that adequate and affordable health care was available to Michigan citizens. The legislature reasoned that the traditional medical liability system was threatening citizen's access to health care, at least partly through excessively large jury verdicts.

As a result, the 1993 tort reform legislation included stringent caps on non-economic damages in medical malpractice actions. These caps and their exceptions are set forth in more detail under section 3 above. The statute further mandated that no one was allowed to tell the jury about the cap and stated that application of exceptions to the cap was a question of law to be determined by the judge, not the jury. These new caps replaced a previous cap imposed by the 1986 tort reform package and eliminated the seven exceptions to the cap's application set forth in that package.

Before Michigan passed tort reform legislation**,** a victim alleging medical malpractice in Michigan could simply go to court and file a claim. Today, an injured party asserting a claim of medical malpractice must first notify any foreseeable defendant, with a written notice[3] of his/her intent to file a claim 182 days before

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[3] The written notice must contain a statement which includes the following information: The factual basis for the claim, the applicable standard of practice or care alleged by the claimant, the manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility, the alleged action that should have been taken to achieve compliance with the alleged standard of practice or care, the manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice, and the names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim. MCL§ 600.2912b(4).

commencing the action. After the 182 days has elapsed, the injured party may file his/her Complaint[4], however it must be accompanied by an Affidavit of Merit, signed by a medical expert who meets the 1993 tort reform's narrowly drawn criteria. MCL§ 600.2169.

The 1993 Legislation also set strict requirements for expert witnesses in medical malpractice actions. The statute requires that all expert witnesses must have been a specialist in the same specialty as the defendant at the time of the occurrence at issue. MCL§ 600.2169(1)(a). Also, for at least one year prior to the alleged malpractice, the expert must have spent most of his/her time in either the active clinical practice of the same specialty as the defendant, or in teaching students in the defendant's field of practice at an accredited professional school, residency, or clinical research program.

Despite the elimination of joint and several liability in most Michigan tort actions, joint and several liability for medical malpractice actions still exists in Michigan. In passing the 1995 tort reform, the legislature specifically excepted medical malpractice actions from the statutory provisions abolishing joint and several liability. As a result, a medical malpractice defendant is still liable for 100% of a plaintiff's damages, even if the trier of fact determines that he/she is only 10% at fault.

In the wake of the 1993 tort reform legislation, several plaintiff attorneys filed suits, questioning the constitutionality of the Legislation. In a suit to challenge the damage cap provisions, the Sixth Circuit Court of Appeals determined that the provisions survived rational-basis scrutiny.[5] The Court reasoned that controlling healthcare costs was a legitimate governmental purpose. The Court concluded that by limiting at least one component of health care costs, the non-economic damage limitation was rationally related to its intended purpose. The Sixth Circuit Court of Appeals also rejected a Seventh Amendment challenge to the damage cap provisions, holding that the limitation on non-economic damages did not implicate a protected jury right[6].

6. Products Liability Reform

As defined in Michigan, a product liability action is "an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product." MCL§ 600.2945(h).

Under the amended law, defendants are not liable for the failure to warn of risks that should be obvious to a reasonably prudent product user or that are matters of

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[4] A Complaint may be filed before the 182 day period elapses if: (a) after 154 passes from the date the notice was given and the noticed party fails to provide the required response under MCL§ 600.2912b(8), or (b) any time during the 182 days if the noticed party informs the claimant, in writing, that they do not intend to settle within the notice period. MCL§ 600.2912b(9)

[5] *Smith v Botsford Gen Hosp*., 419 F3d 513 (6th Cir. 2005).

[6] See Id.

common knowledge to persons in the same or similar position as the plaintiff. MCL§ 600.2948(2). In addition, manufacturers and sellers are not liable for (1) the failure to warn or to instruct unless the plaintiff can prove that the manufacturer knew or should have known of the risk of harm based on the scientific, technical, or medical information reasonably available when the product left its control, MCL §600.2948(3); or (2) the failure to provide a warning to a sophisticated user, unless a warning is required by state or federal statute or regulation, MCL§ 600.2947(4).[7]

The 1995 tort reform package also contained new venue provisions for product liability cases. The provisions limited venue primarily to the county where the injury occurred and where the manufacturer or seller conducted business. Other possible venue locations can only be used if the county in question does not satisfy the afore-mentioned criteria.

Also noteworthy was the effect of the 1995 tort reform on a manufacturer's duty to warn ordinary consumers of product dangers. Products having risks that are within common knowledge, or that are obvious, do not need to contain warnings about the product. This extends the "open and obvious" defense used in premises liability cases to product liability cases. The "open and obvious" issue now becomes a question of fact in any case in which a plaintiff asserts there was a duty to warn.

7. Attorneys Fees

The Michigan legislature has not passed any tort reform laws that attempt to address imposition of attorneys' fees in tort actions. Attorney fees are not usually available in tort actions except as sanctions authorized by court rule or statute.

8. Practice Pointers

A. Venue

The venue statute for tort actions, MCL §600.1629, was also amended for cases filed on or after March 28, 1996. Prior to the enactment of this Legislation, venue was proper in any county in which all or a part of the events giving rise to the cause of action occurred. The statute now provides that the first priority in determining where venue is proper is "[t]he county in which the original injury occurred." Under the amended MCL §600.1629(2), Motions for change of venue are allowed for reasons of hardship or inconvenience.

B. Expert Witnesses

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[7] The limitations contained in MCL§ 600.2947(4) and 600.2948 (2) do not apply if the court determines that the defendant willfully disregarded knowledge that the product was defective and that the defect was substantially likely to cause the injury. MCL§ 600.2949a.

The amendments to the Revised Judicature Act also affected expert witness qualifications in all tort actions. Before tort reform**,** expert testimony was allowed in Michigan whenever the court, guided by the Michigan Rules of Evidence and applicable case law, decided that an expert was competent to testify. This determination was made on the basis of whether a witness possessed knowledge that would assist the trier of fact in understanding the evidence or in determining a fact in issue.

Following the 1995 tort reform, a trial court must consider seven criteria before ruling upon the admissibility of expert testimony. A court must consider the following: whether the expert's opinion has been previously tested, whether the opinion has been subjected to peer review publication, whether the opinion is consistent with generally accepted standards, the known or potential error rate of the expert's opinion and its basis, whether the opinion has been generally accepted within the relevant expert community, whether the opinion is reliable and whether experts I the same field would rely on the same basis to reach the type of opinion being proffered, and whether the opinion has been relied upon outside the context of litigation. These requirements make it more difficult to introduce expert testimony. MCL§ 600.2955(1)(a)-(g).

C. No Fault

The 1995 tort reform also amended the Michigan no-fault act to prohibit an uninsured motorist from recovering non-economic damages in an action arising out of an automobile accident. The Act also stated that the question of whether or not an injury has resulted in a "serious impairment of body function" is now a question of law for the court, rather than one of fact for the jury. MCL§ 500.3135. Finally, a no-fault plaintiff under the new law cannot recover anything if the action for the death or injury of an individual is based on the Plaintiff's impaired ability to function due to the influence of intoxicating liquor or a controlled substance and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the impaired Plaintiff was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage. MCL § 600.2955a.

D. Actions under Michigan's Wrongful Death Act

According to the Michigan Supreme Court, the medical malpractice noneconomic damages cap applies in all medical malpractice actions, even those filed under Michigan's Wrongful Death Act.

9. <u>Special Issues</u>

A. Contribution

The elimination of joint and several liability has greatly reduced the role of contribution in Michigan, although, such claims have not been eliminated by the Act. A statutory right to contribution still exists under Michigan law. MCL§ 600.2925a - .2925d.

B. Asbestos Cases

On March 9, 2006, a new piece of tort reform legislation was introduced in the Michigan legislature. This bill, House Bill 5851, addresses civil actions that include asbestos and silica claims. The pertinent provisions of the bill would have the following effect:

- A person will not be allowed to assert an asbestos or silica claim unless the exposed person has a physical impairment to which asbestos or silica exposure was a substantial or contributing factor. "Substantial contributing factor" means:

    a) exposure is the predominant cause of the impairment

    b) exposure took place on a regular basis or over an extended time period

    c) a qualifying physician determines that the physical impairment would not have occurred but for the exposure

- Except in cases based on mesothelioma, a plaintiff must make certain prima facie showings in order to maintain an action.

- Limits total damages for non-economic loss to $ 250,000 (or three times the amount of damages).

- Limits total damages for non-economic damages based upon mesothelioma, the damage cap is $500,000 (or three times the amount of damages).

- Attorneys representing claimants could only receive 20 percent of the amount awarded by way of a settlement or judgment.

The Bill has passed the House of Representatives and was referred to the Committee on Judiciary in December of 2006.

Minnesota

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Minnesota has enacted tort reform legislation several times over the last few years. The current state of several of Minnesota's tort law principles are summarized below.

2. Comparative Fault and Joint and Several Liability.

Contributory fault does not bar recovery if the contributory fault was not greater than the fault of the person against whom recovery is sought. Minn. Stat. § 604.01, subd. 1. However, any damages allowed are diminished in proportion to the amount of fault attributable to the person recovering. *Id.* The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each party, and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering. *Id.*

A plaintiff may not recover from a defendant, however, when the plaintiff's fault is greater than that of said defendant. Minn. Stat. § 604.01, subd. 1. In order to determine whether a plaintiff's fault is greater than the fault of a defendant, the court must first consider whether the fault of multiple defendants is to be aggregated to then be compared to the plaintiff's percentage of fault.

> In the context of determining what party is more at fault, "aggregation of fault" means that the negligence of plaintiff should be compared to the combined negligence of the defendants rather than to the individual negligence attributed to each individual defendant. Minnesota law generally requires the plaintiff's fault to be compared against each defendant individually, and it does not permit aggregating fault of multiple defendants when applying the comparative fault statute, Minn.Stat. § 604.01, subd. 1. The exception to this rule is that aggregation of fault is permissible when the defendants are involved in a joint enterprise.

Tester v. Am. Standard, Inc., 590 N.W.2d 679, 681 (Minn. Ct. App. 1999).

In May 2003, the Minnesota legislature amended Minnesota's Comparative Fault Act so that joint and several liability does not apply to defendants found to be less than fifty (50) percent at fault. Minn. Stat. § 604.02, subd. 1. This reform applies to claims that arise from events that occur on or after August 1, 2003. The reformed legislation provides generally that, when two or more persons are severally liable (now the default), contributions shall be in proportion to the percentage of fault attributable to each person, except where (i) a person's fault is greater than 50%, (ii) two or more persons act in a common scheme or plan that results in injury; (iii) the tort is intentional, or (iv) the liability results from enumerated violations of several environmental or public health laws, in which cases each person shall be jointly and severally liable for the whole award. *Id.*

Appellate litigation in the case of *Staab v. Diocese of St. Cloud* is pending before the Minnesota Supreme Court on whether Minn. Stat. § 604.02, subd. 1's use of the term "person" implies that the default rule of several liability only applies if the "person" is a

party to the litigation. 780 N.W.2d 392 (Minn. Ct. App. 2010), *review granted* (May 26, 2010). The *Staab* Court of Appeals decision held that the word "person" must be broadly interpreted to include "not just a party to a lawsuit, but any tortfeasor 'whose fault has been submitted to the jury, or, in other words, parties to the transaction.'" *Id.* at 394. In *Staab*, because the jury found the appellate tortfeasor to be 50% negligent and a non-party to be 50% negligent, the court held that the tortfeasor was severally liable for only 50% of the plaintiff's injuries. *Id.* at 393-94.

In the event an amount is uncollectable from a party, the Court shall, upon a motion within one year, reallocate any uncollectible amount among the other parties, including an at-fault claimant, according to their respective percentages of fault. Minn. Stat. § 604.02, subd. 2.

As noted above, Minnesota's current Comparative Fault Act is the result of legislative amendments to the Act in 2003. Claims arising from events occurring prior to the enactments of the 2003 Amendments are analyzed under the following default "joint and several" liability rule:

> When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award. Except [that]…a person whose fault is 15 percent or less is liable for a percentage of the whole award no greater than four times the percentage of fault.

Minn. Stat. § 604.02, subd. 1 (2002) (amended 2003).

3. Damages Caps.

Minnesota does not have a statutory cap on damages, limiting tort claims against private defendants. Claims against government entities, however, are subject to the following statutory caps.

Municipalities. Tort claims against municipalities or political subdivisions are limited under Minn. Stat. § 466.04 and shall not exceed:

(1) $300,000 when the claim is one for death by wrongful act or omission and $300,000 to any claimant in any other case, for claims arising before January 1, 2008;

(2) $400,000 when the claim is one for death by wrongful act or omission and $400,000 to any claimant in any other case, for claims arising on or after January 1, 2008, and before July 1, 2009;

(3) $500,000 when the claim is one for death by wrongful act or omission and $500,000 to any claimant in any other case, for claims arising on or after July 1, 2009;

(4) $750,000 for any number of claims arising out of a single occurrence, for claims arising on or after January 1, 1998, and before January 1, 2000;

(5) $1,000,000 for any number of claims arising out of a single occurrence, for claims arising on or after January 1, 2000, and before January 1, 2008;

(6) $1,200,000 for any number of claims arising out of a single occurrence, for claims arising on or after January 1, 2008, and before July 1, 2009;

(7) $1,500,000 for any number of claims arising out of a single occurrence, for claims arising on or after July 1, 2009; or

(8) twice the limits provided in clauses (1) to (7) when the claim arises out of the release or threatened release of a hazardous substance.

State Entities. Tort claims against state entities and officers acting within the scope of their employment are limited under Minn. Stat. § 3.736 and shall not exceed:

(a) $300,000 when the claim is one for death by wrongful act or omission and $300,000 to any claimant in any other case, for claims arising before August 1, 2007;

(b) $400,000 when the claim is one for death by wrongful act or omission and $400,000 to any claimant in any other case, for claims arising on or after August 1, 2007, and before July 1, 2009;

(c) $500,000 when the claim is one for death by wrongful act or omission and $500,000 to any claimant in any other case, for claims arising on or after July 1, 2009;

(d) $750,000 for any number of claims arising out of a single occurrence, for claims arising on or after January 1, 1998, and before January 1, 2000;

(e) $1,000,000 for any number of claims arising out of a single occurrence, for claims arising on or after January 1, 2000, and before January 1, 2008;

(f) $1,200,000 for any number of claims arising out of a single occurrence, for claims arising on or after January 1, 2008, and before July 1, 2009; or

(g) $1,500,000 for any number of claims arising out of a single occurrence, for claims arising on or after July 1, 2009.

4. Punitive Damages.

In Minnesota, the procedure for claiming punitive damages is set out in Minn. Stat. § 549.191. A complaint may not seek punitive damages at commencement of an action. Minn. Stat. § 549.191. Rather, a party seeking punitive damages must make a motion to amend the pleadings, requesting leave of court to claim punitive damages. *Id.*

In a motion to amend a complaint to seek punitive damages, the plaintiff must set forth a prima facie case for punitive damages based on the standard established in Minn. Stat. § 549.20 or some other law (i.e., Minn. Stat. § 169A.76, which establishes the legal limit for alcohol consumption while operating a motor vehicle). *Id.* In general, under § 549.20, in order to allow a punitive damage action, the courts require clear and convincing evidence that the defendant acted with deliberate disregard for the rights or safety of others, which includes (1) acting with knowledge of facts or intentionally disregarding facts that create a high probability of injury to the rights or safety of others, and (2) deliberately proceeding to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others, or with indifference to the high probability of injury to the rights or safety of others. Minn. Stat. § 549.20, subd. 1. For example, operation of a motor vehicle with a blood alcohol concentration above .08 can be sufficient for the trier of fact to consider punitive damages. Minn. Stat. § 169A.76, subd. 1.

If a claim for punitive damages survives the initial motion, at the request of either party, the punitive damage claims may be bifurcated from the liability and compensatory damages phase of the trial. Minn. Stat. § 549.20, subd. 4. Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages are not admissible in the compensatory damage portion of the case. *Id.* After a determination has been made that compensatory damages are owed, the trier of fact shall, in a separate proceeding, determine whether and in what amount punitive damages will be awarded. *Id.*

Factors to be considered in an award of punitive damages include:

1. the seriousness of hazard to the public arising from the defendant's misconduct;

2. the profitability of the misconduct to the defendant;

3. the duration of the misconduct and any concealment of it;

4. the degree of the defendant's awareness of the hazard and of its excessiveness;

5. the attitude and conduct of the defendant upon discovery of the misconduct;

6. the number and level of employees involved in causing or concealing the misconduct;

7. the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons; and

8. the severity of any criminal penalty to which the defendant may be subject.

Minn. Stat. § 549.20, subd. 3. Courts must review any punitive damage award in light of the factors set forth in Minn. Stat. § 549.20, subd. 3 and make specific findings accordingly. Minn. Stat. § 549.20, subd. 5.

5. Medical Malpractice.

Minnesota law provides that an action by a patient or former patient against a health care provider alleging malpractice, error, mistake, or failure to cure, whether based on a contract or tort, must be commenced within four years from the date the cause of action accrued. Minn. Stat. § 541.076. Because expert testimony is generally necessary to establish a prima facie case in medical malpractice actions, Minnesota law requires that with the summons and complaint, a plaintiff must also serve an affidavit of expert review by his or her attorney stating:

> (a) the facts of the case have been reviewed by the plaintiff's attorney with an expert whose qualifications provide a reasonable expectation that the expert's opinions could be admissible at trial and that, in the opinion of this expert, one or more defendants deviated from the applicable standard of care and by that action caused injury to the plaintiff; or
>
> (b) the expert review required by paragraph (a) could not reasonably be obtained before the action was commenced because of the applicable statute of limitations. If an affidavit is executed pursuant to this paragraph, the affidavit in paragraph (a) must be served on defendant or the defendant's counsel within 90 days after service of the summons and complaint.

Minn. Stat. § 145.682, subds. 2 and 3. Within 180 days after commencement of the suit (which, under Rule 3.01 of the Minnesota Rules of Civil Procedure, occurs upon service of the summons and complaint on the defendant and not upon filing with the court), a plaintiff must serve upon the defendant an affidavit signed by each expert listed in the affidavit and by the plaintiff's attorney that states the identity of each person whom plaintiff expects to call as an expert witness at trial to testify with respect to the issues of malpractice or causation, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. Minn. Stat. § 145.682, subds. 2 and 4. Answers to interrogatories that provide the required information are sufficient if they are signed by the plaintiff's attorney and by each expert listed in the answers to interrogatories and served upon the defendant within 180 days after commencement of the suit against the defendant. *Id.*

To establish a *prima facie* case of medical malpractice for negligent treatment, a plaintiff must establish (1) the standard of care recognized by the medical community as applicable to the particular defendant's conduct; (2) that the defendant departed from that standard; (3) that the defendant's departure from that standard was a direct cause of the plaintiff's injuries; and (4) damages. *Reinhardt v. Colton*, 337 N.W.2d 88, 94-95 (Minn. 1983) (citing *Plutshack v. University of Minnesota Hospitals,* 316 N.W.2d 1, 5 (Minn. 1982)). In establishing this prima facie case, the plaintiff must introduce expert testimony to establish the standard of care, the defendant's departure from that standard, and causation, when these issues are not within the common knowledge of laymen. *Id.* at 95.

6. Products Liability.

Minnesota has adopted a three-part test to prove strict liability. The plaintiff must prove:

1. that the defendant's product was in a defective condition unreasonably dangerous for its intended use;

2. that the defect existed when the product left the defendant's control; and

3. that the defect was the proximate cause of the injury sustained.

Marcon v. Kmart Corp., 573 N.W.2d 728, 731 (Minn. Ct. App. 1998). Plaintiff must establish all three factors in order for defendant to be liable for the claimed product defect.

Minn. Stat. § 544.41 limits the liability of non-manufacturers under certain circumstances in the products liability context. If a non-manufacturer files an affidavit certifying the correct identity of the manufacturer, it is entitled to a dismissal of the strict liability claims asserted against it, so long as it did not (1) exercise significant control over the design or manufacture of the product or provide instructions or warnings to the manufacturer relative to the alleged defect, (2) have actual knowledge of the defect, or (3) create the defect. Minn. Stat. § 544.41, subds. 1-3. Generally, strict liability claims asserted against an innocent non-manufacturer will not be dismissed until a complaint is filed against the

manufacturer; further, the strict liability claim can be reinstated against an innocent non-manufacturer at any time that the injured party "cannot maintain an action against the manufacturer because the manufacturer no longer exists, is insolvent, is not subject to jurisdiction, or cannot be sued." *Id.* Notwithstanding the general rule, "it may be within the court's discretion to dismiss before completion of these procedures; for instance, when a plaintiff fails to demonstrate due diligence in filing a complaint against the certified manufacturer." *See In re Shigellosis Litigation*, 647 N.W.2d 1, 6-7 (Minn. Ct. App. 2002). The statute shall not be construed "to affect the right of any person to seek and obtain indemnity or contribution." Minn. Stat. § 544.41, subd. 4.

In the products liability context, comparative fault, joint and several liability, and apportionment of damages are also governed by the Minnesota Comparative Fault Act, codified at Minn. Stat. §§ 604.01-604.02. In the context of product liability, however, the Minnesota Comparative Fault Act additionally provides that in the event an amount is uncollectable from a person in the "chain of manufacture and distribution," the uncollectable amount is reallocated among all other persons in the chain of manufacture and distribution, but not among the claimant or others outside of the chain. Minn. Stat. § 604.02, subd. 3.

> **Product liability; reallocation of uncollectible amounts.**
> In the case of a claim arising from the manufacture, sale, use or consumption of a product, an amount uncollectible from any person in the chain of manufacture and distribution shall be reallocated among all other persons in the chain of manufacture and distribution but not among the claimant or others at fault who are not in the chain of manufacture or distribution of the product. Provided, however, that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to the person whose fault is less

Id.

However, if the fault originally allocated to a party is less than the plaintiff's fault, then the party becomes liable for only the percentage of fault initially allocated. *Id.*; *see* 27 Minn. Prac., Products Liability Law § 7.14 (2011) ("[Subdivision 3] provides that if the fault of a person in the chain is less than the fault of the plaintiff, that person's liability should be limited to its percentage of fault. Application of the rule would make defendants in the chain who are less at fault than the plaintiff liable to the plaintiff, although their liability would be limited to their percentage of fault.").

The above principles are illustrated in *Marcon v. Kmart Corp.*, 573 N.W.2d 728, 732 (Minn. Ct. App. 1998). In *Marcon*, the court found the manufacturer of a sled 100% at fault, the retailer 0% at fault and the claimant 0% at fault for injuries stemming from inadequate warnings or instructions on a sled. *Id.* at 729-30. Because the manufacturer was bankrupt, the retailer was held liable for 100% of the plaintiff's damages because its fault was not less than that of the claimants. *Id.* at 731.

> Although a non-manufacturer defendant in a strict liability action can be absolved of its strict liability for injuries caused by a product defect over which it had no control, it cannot be absolved (and therefore remains strictly liable) if the manufacturer of that defective product is unable to satisfy the judgment [and its liability is not less than the claimants].

Id.; *see also* Minn. Stat. 604.02, subd. 3 (providing that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to the person whose fault is less). Because the retailer's fault in *Marcon* was equal to the claimants, and not less, it was held liable for the entire award based on the manufacturer's bankruptcy and reallocation.

7. Attorneys Fees.

Generally speaking, in Minnesota each party to a civil action is responsible for paying its own attorney fees, unless a statutory or contractual provision provides otherwise. *Fownes v. Hubbard Broadcasting, Inc.,* 246 N.W.2d 700, 702 (Minn. 1976). This principle is known as the "American Rule." Attorney fee statutes are an exception to the common law American Rule that every litigant pays his or her own fees. It has been increasingly common for statutory causes of action, regulatory enforcement proceedings, and defenses to provide for an award of attorney fees.

Numerous Minnesota statutes provide for attorney fee awards. Some statutes permit the court to award fees while others mandate that the court award fees. A statute is considered "permissive" if it grants the court discretion to determine on a case-by-case basis whether an award of fees is appropriate. A statute is considered to "mandate" an award if the text directs a court to award fees or indicates that a party is entitled to fees.

Beyond various statutory provisions for attorney fees, some statutes and Minnesota Rules of Civil Procedure allow for the recovery of attorney costs in certain situations.

First, according to Rule 68 of the Minnesota Rules of Civil Procedure, at any time more than ten days before trial, any party may serve a written damages-only or total-obligation offer of judgment or settlement. Within ten days, the recipient must accept or reject the offer, or else it will be deemed withdrawn. If the offer is rejected, there are two potential results: (1) if an offeror defendant prevails or the plaintiff's relief is less than the offer, the plaintiff must pay the defendant's costs and disbursements incurred following the offer; and (2) if an offeror plaintiff's relief is less favorable to the defendant than the offer, the defendant must pay plaintiff's costs and disbursements following offer in addition to costs and disbursements already owing.

On August 1, 2008, the Minnesota Legislature passed a statute, Minn. Stat. § 604.18, allowing for first-party bad faith recoveries in limited situations. The Court can award taxable costs to an insured against an insurer if the insured can show: (1) the absence of a reasonable basis for denying the benefits of the insurance policy; and (2) that the insurer

knew of the lack of a reasonable basis for denying the benefits of the insurance policy or acted in reckless disregard of the lack of a reasonable basis for denying the benefits of the insurance policy. Taxable costs include an amount equal to one-half of the proceeds awarded that are in excess of an amount offered by the insurer at least ten days before the trial begins or $250,000, whichever is less; and reasonable attorney fees (not to exceed $100,000) actually incurred to establish the insurer's violation of this section. Note: similar to a claim for punitive damages, an insured must not seek a recovery for bad-faith in the original complaint but rather must move to amend the pleadings after the claim is filed. However, the statute does not apply to all first party coverage, and the statute lists the specifically excluded claims. Careful review of the statutory language is recommended to confirm what types of claims may be applicable.

8. Collateral Source Payments.

In 1986 the Minnesota legislature revised its position on collateral source payments by enacting a statute to govern collateral source calculations. *See* Minn. Stat. § 548.251 (formally located at § 548.36). The statute withstood constitutional challenge in 1987 in *Johnson v. Farmers Union Central Exchange, Inc.*, 414 N.W.2d 4 (Minn. Ct. App.), over a challenge on grounds of vagueness, due process, equal protection, and right to remedy. When liability is admitted or is determined by the trier of fact, and when damages include an award to compensate the plaintiff for losses available to the date of the verdict by collateral sources, a party may file a motion within ten days of the date of entry of the verdict requesting determination of collateral sources. Minn. Stat. § 548.251, subd. 2. Collateral sources means payments related to the injury or disability in question made to the plaintiff, or on the plaintiff's behalf up to the date of the verdict, by or pursuant to:

> (1) a federal, state, or local income disability or Workers' Compensation Act; or other public program providing medical expenses, disability payments, or similar benefits;
>
> (2) health, accident and sickness, or automobile accident insurance or liability insurance that provides health benefits or income disability coverage; except life insurance benefits available to the plaintiff, whether purchased by the plaintiff or provided by others, payments made pursuant to the United States Social Security Act, or pension payments;
>
> (3) a contract or agreement of a group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental or other health care services; or
>
> (4) a contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability, except benefits received from a private disability insurance policy where the premiums were wholly paid for by the plaintiff.

Minn. Stat. § 548.251, subd. 1. In 2010, the Minnesota Supreme Court held in *Swanson v. Brewster* that discounts negotiated by a plaintiff's health insurer with a health care provider constitute a collateral source for the purposes of Minn. Stat. § 548.251, and thus, any reduction in an award of damages must include the amount of such discounts. 784 N.W.2d 264.

The Court shall then reduce an award of damages by the amount of collateral sources paid for the benefit of or otherwise made available to the plaintiff as a result of the injury or disability in question, except those for which a subrogation right is asserted, offset by the amount paid, contributed, or forfeited for the previous two years to secure the right to the collateral source benefits. Minn. Stat. § 548.251, subd. 2-3. Any reduction for the claimant's fault must be done before reduction for collateral sources. Minn. Stat. § 548.251, subd. 3(c). Any awards of attorney fees must be based on the adjusted award. Minn. Stat. § 548.251, subd. 4. The jury shall not be informed of the existence of collateral sources or any future benefits which may or may not be payable to the plaintiff. Minn. Stat. § 548.251, subd. 5.

9. Special Issues.

Statutes of Limitations: In Minnesota, the statute of limitations for a negligence action and most contract actions is six years. Minn. Stat. § 541.05, subd.1. For other torts, such as actions for libel, slander, assault, battery, or false imprisonment, a two-year statute of limitation applies. Minn. Stat. § 541.07, subd 1. The statute of limitations for medical malpractice claims is four-years. Minn. Stat. § 541.076.

Commencement of Suit: In Minnesota, a civil action is commenced not when the summons and complaint are filed with the court, but rather when they are served upon the defendant. Minn. R Civ. P. 3.01 and 3.02.

No-Fault Automobile Insurance: Minnesota remains one of the few states requiring no-fault automobile insurance. While it seems that attempts are made during every legislative session to either eliminate or expand the statute, the Minnesota No-Fault Automobile Insurance Act (the "Act"), located at Minn. Stat. §§ 65B.41 - .71, has gone largely unchanged since its inception in the 1970's.

The Act requires all vehicles in Minnesota to be covered by no-fault automobile insurance, Minn. Stat. § 65B.48, subd. 1, and requires basic economic loss benefits for loss suffered through injury arising out of the maintenance or use of a motor vehicle, without regard to fault, in the amount of $20,000 for medical expenses and $20,000 for income or similar loss. Minn. Stat. § 65B.44, subd. 3. Individuals may purchase higher limits. Minn. Stat. § 65B.47, subd. 7. Out-of-state insurance policies may have to be reformed to comply with the Act, including the provision of its minimum requirements, if the insurer writes policies in Minnesota and at least one insured vehicle is in Minnesota at the time of the accident. Minn. Stat. § 65B.50; *see also*, *Western National Mut. Ins. Co. v. State Farm Mut. Ins. Co.*, 374 N.W.2d 441 (Minn. 1985).

"Maintenance or use of a motor vehicle" includes acts which are incidental to the maintenance or use of such vehicle, including occupying, entering into and alighting from such vehicle. *Id.* at subd. 3; *see also North River Ins. Co. v Dairyland Ins. Co.,* 346 N.W.2d 109, 114 (Minn. 1984). "Basic economic loss benefits" include most medical expenses causally related to the accident, but do not include benefits for physical damage done to property including motor vehicles and their contents. Minn. Stat. § 65B.44, subd. 8. The Act does not cover motorcycles, unless specific coverage is purchased, Minn. Stat. § 65B.43, subd. 2, intentional injuries, Minn. Stat. § 65B.60, or injuries in official racing event. Minn. Stat. § 65B.59.

Priority for the provision of basic economic loss benefits is contained at Minn. Stat. § 65B.47. Generally, an injured person first seeks benefits from the occupied commercial or employer-furnished vehicle. *Id.* at subds. 1-3. Otherwise, if the injured person is occupying a private vehicle, the first priority is any policy where the injured person is either a named insured or otherwise qualifies as an insured. *Id.* subd. 4. If a person is injured during the course and scope of his or her employment, the applicable workers compensation coverage is primary over any available no-fault benefits. Minn. Stat. § 65B.61. If the applicable workers' compensation benefits are denied, no-fault should apply. *Klinefelter v. Crum and Forster Ins. Co.*, 675 N.W.2d 330 (Minn. Ct. App. 2004).

An insurer may require an insured to provide notice in any reasonable fashion of the accident and the possibility of a claim for economic loss benefits within six months of the accident. Minn. Stat. § 65B.55, subd. 1. Benefits must be paid to an insured within 30 days of presentation to the insurer. Overdue payments are subject to interest at the rate of 15%. Minn. Stat. § 65B.54, subds. 1-2. If a claim is rejected, the insurer shall give to the claimant prompt written notice of the rejection, specifying the reason. Minn. Stat. § 65B.54, subd. 5. The Act requires an injured person to submit to a medical examination at the insurance carrier's request. Minn. Stat. § 65B.56, subd. 1. If an insurer terminates benefits, the insured has a right to file a claim for mandatory arbitration if the amount of the claim is $10,000.00 or less at the time of the filing of the arbitration. Minn. Stat. § 65B.525, subd. 1. If the claim totals over $10,000.00 at the time the arbitration petition is filed, the claimant is required to either bring a direct action in district court for the benefits claimed or waive a portion of the claim to meet the $10,000 jurisdictional limit for arbitration.

Tort Thresholds: The No-Fault Act also establishes personal injury tort thresholds. In order to have a right to bring a claim against the party who caused their injuries in the motor vehicle accident, an injured party must establish one of four requirements: (1) medical or chiropractic expenses in excess of $4,000.00, (2) permanent injury, disfigurement, or death, (3) permanent disability, or (4) disability for more than 60 days. Minn. Stat. § 65B.51, subd. 3. Otherwise, the injured party is limited to the reasonable, necessary and causally related no-fault basic economic loss benefits. With respect to a cause of action in negligence, the court shall deduct from any recovery the value of basic or optional economic loss benefits paid or payable, or which would be payable but for any applicable deductible. Minn. Stat. § 65B.51, subd. 1.

Uninsured/Underinsured Automobile Insurance: The No-Fault Act also mandates Uninsured Motorist (UM) and Underinsured Motorist (UIM) coverage. Minn. Stat. § 65B.49, subd. 3a(2). UM coverage provides for the protection of persons insured under that coverage who are legally entitled to recover damages for bodily injury from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles. Minn. Stat. § 65B.43, subd. 18. UIM coverage provides for the protection of persons insured under that coverage who are legally entitled to recover damages for bodily injury from owners or operators of motor vehicles or motorcycles to which a bodily injury liability policy applies at the time of the accident but its limit for bodily injury liability is less than the amount needed to compensate the insured for actual damages. Minn. Stat. § 65B.43, subds. 17, 19. The Act requires that insurers offer a minimum of $25,000 per person and $50,000 per accident in UM and UIM benefits. Minn. Stat. § 65B.49, subd. 3a(1).

The first priority for UM or UIM benefits is the policy covering the vehicle the injured party was occupying at the time of the accident. Minn. Stat. § 65B.49, subd. 3a(5). If the available UM or UIM benefits from the policy covering the occupied vehicle are not sufficient to fully compensate the injured person, the injured person may claim excess UM or UIM benefits from another policy where the injured person is named or otherwise qualifies as an insured. *Id.*

Mississippi

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1. Introduction

Prior to 2004, Mississippi had long been notorious as an "anything goes" jurisdiction. It was considered a jurisdiction in which jury verdicts were unpredictable and often exceeded what most people considered to be just. Furthermore, it was a jurisdiction in which forum shopping was seemingly encouraged by way of a venue statute that was open to interpretation and was interpreted "loosely" by many of its courts.

However, the enactment of certain legislation in both 2003 and 2004 had a significant impact on civil litigation in the state. As a result, Mississippi has become a much more business-friendly jurisdiction.

SUMMARY OF TORT REFORM LEGISLATION

2. Venue & Joinder

A. Mississippi's General Venue Statute

Prior to January 1, 2003, Mississippi's General Venue Statute provided, in part, as follows:

> Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or any of them may be found or in the county where the cause of action may occur or accrue and, if the defendant is a domestic corporation, in the county in which said corporation is domiciled or in the county where the cause of action may occur or accrue, except where otherwise provided...

Miss. Code Ann. § 11-11-3 (1972).

Additionally, Miss. Code Ann. § 11-11-11 (1972) provided that:

> All civil actions for the recovery of damages brought against a nonresident or the representative of a nonresident in the state of Mississippi may be commenced in the county in which the action accrued *or where the plaintiff then resides or is domiciled,* except as otherwise provided by law.

(*emphasis added*).

Therefore, under the prior venue statutes, a plaintiff could easily establish venue in his county of residence, simply by joining a nonresident defendant. *See, e.g., Senatobia Comm. Hosp. v. Orr,* 607 So. 2d 1224 (Miss. 1992) (resident plaintiff may sue in county of his or her residence when suing both nonresident and resident defendants).

However, beginning in 2002 and continuing through 2004, Mississippi's legislature significantly altered Mississippi law with respect to venue. Miss. Code Ann. § 11-11-3 currently provides, in part, as follows:

> (1)(a)(i) Civil actions of which the circuit court has original jurisdiction shall be commenced in the county where the defendant resides, or, if a corporation, in the county of its principal place of business, or in the county where a substantial alleged act or omission occurred or where a substantial event that caused the injury occurred.
>
> (ii) Civil actions alleging a defective product may also be commenced in the county where the plaintiff obtained the product.
>
> (b) If venue in a civil action against a nonresident defendant cannot be asserted under paragraph (a) of this subsection (1), a civil action against a nonresident may be commenced in the county where the plaintiff resides or is domiciled.
>
> (2) In any civil action where more than one (1) plaintiff is joined, each plaintiff shall independently establish proper venue; it is not sufficient that venue is proper for any other plaintiff joined in the civil action.

See Laws 2002, 3rd Ex. Sess., Ch. 2, § 1, eff. January 1, 2003 (H.B. 2); Laws 2004, 1st Ex. Sess., Ch. 1, § 1, eff. September 1, 2004 (H.B. 13). Furthermore, Miss. Code Ann. § 11-11-11 was repealed. *See* Laws 2002, 3rd Ex. Sess., Ch. 4, § 1, eff. January 1, 2003 (H.B. 19).

B. Venue as to Medical Providers

In addition to its reform to Mississippi law with respect to venue generally, the Mississippi Legislature adopted a special venue provision for actions against medical providers, which provides as follows:

> (3) Notwithstanding subsection (1) of this section, any action against a licensed physician, osteopath, dentist, nurse, nurse-practitioner, physician assistant, psychologist, pharmacist, podiatrist, optometrist, chiropractor, institution for the aged or infirm, hospital or licensed pharmacy, including any legal entity which may be liable for their acts or omissions, for malpractice, negligence, error, omission, mistake, breach of standard of care or the unauthorized rendering of professional services shall be brought only in the county in which the alleged act or omission occurred.

Miss. Code Ann. § 11-11-3(3).

The special venue provision with respect to medical providers has proven to be even more significant than previously anticipated. This is due to the fact that Miss. Code Ann. § 11-11-3(3) has been held to be preemptive in circumstances

where the plaintiff joins claims against a medical provider with claims against non-medical providers. *See, e.g., Adams v. Baptist Memorial Hospital-DeSoto, Inc.,* 965 So. 2d 652 (venue for wrongful death action brought against casino, hospital, and treating physicians was in county where alleged medical malpractice occurred).

C. "Bootstrapping" of Venue No Longer Allowed

Possibly the most significant change in Mississippi's general venue provision is the adoption of Miss. Code Ann. § 11-11-3(2), "In any civil action where more than one (1) plaintiff is joined, each plaintiff shall independently establish proper venue; it is not sufficient that venue is proper for any other plaintiff joined in the civil action." Consequently, a plaintiff may no longer "bootstrap" venue that is proper to one plaintiff to another, improperly joined plaintiff. *See, e.g., Creel v. Bridgestone/Firestone North American Tire, LLC,* 950 So. 2d 1024 (Miss. 2007) (citing *Janssen Pharmaceutica, Inc. v. Armond,* 866 So. 2d 1092 (Miss. 2004)).

D. Forum *Non Conveniens*

The General Venue Statute was amended to codify the recent adoption of Mississippi Rule of Civil Procedure 82(e) regarding transfer of actions based on forum *non conveniens*. The amendment provides that the court, upon proper motion and for the convenience of the parties and witnesses, "shall decline to adjudicate the matter under the doctrine of forum non conveniens." In deciding whether to transfer the action, the court shall consider the following factors: (1) ease of access to sources of proof; (2) availability and cost of compulsory process for attendance of unwilling witnesses; (3) possibility of viewing of the premises, if viewing would be appropriate; (4) unnecessary expense or trouble to the defendant not necessary to the plaintiff's own right to pursue his remedy; (5) administrative difficulties of the forum courts; (6) existence of local interest in deciding the case close to home; and (7) traditional deference given to a plaintiff's choice of forum. The amendment allows for the transfer of actions <u>intrastate</u> (from one county to another county), as well as, for the dismissal of an action if it would be more appropriately brought in another state. In the latter circumstance, the court will not dismiss an action unless the defendant files with the court a written stipulation that he or she will not assert a statute of limitations defense if the action is re-filed in another state.

3. <u>Damage Caps</u>

A. Non-Economic Damages

Effective September 1, 2004, the *Mississippi Code* was revised in order to cap a plaintiff's recovery of non-economic damages as follows:

- A $500,000 cap on non-economic damages in actions filed on or after September 1, 2004, for injuries based on medical malpractice or breach of

standard of care against a provider of health care, including institutions for the aged or infirm.

- A $1,000,000 cap on non-economic damages in all other actions filed on or after September 1, 2004.

Miss. Code Ann. § 11-1-60(2) (Supp. 2010).[1]

B. Punitive Damages

Effective September 1, 2004, for all causes of action filed on or after that date, Miss. Code Ann. § 11-1-65(3) was revised in order to reduce the statutory cap on punitive damages as follows:

- A $5,000,000 cap for a defendant with a net worth of more than $500,000,000 but not more than $750,000,000.

- A $3,750,000 cap for a defendant with a net worth of more than $100,000,000, but not more than $500,000,000.

- A $2,500,000 cap for a defendant with a net worth of more than $50,000,000, but not more than $100,000,000.

- Two percent (2%) of a defendant's net worth for a defendant with a net worth of $50,000,000 or less.

Miss. Code Ann. § 11-1-65 (Rev. 2004).

NOTE: The amendments adopt caps on non-economic damages for the first time and lower the caps on punitive damages, as follows:

CORPORATION'S WORTH	OLD LAW	NEW LAW
$1 Billion +	$20M	$20M
$750M-$1B	$15M	$15M
$500M-$750M	$10M	$5M
$100M-$500M	$7.5M	$3.75M
$50M-$100M	$5M	$2.5M
$50M or less	4%	2%

4. **Innocent Seller Exception - (Products Liability Act)**

The Mississippi Products Liability Act was amended to add an innocent seller exception. In an action alleging that a product is defective, the seller of a product

[1] Statutory cap on non-economic damages in medical malpractice action applies to all wrongful death beneficiaries (in the aggregate), not each beneficiary-plaintiff independently. *See Estate of Klaus ex rel. Klaus v. Vicksburg Healthcare, LLC,* 972 So. 2d 555 (Miss. 2007).

shall not be liable unless (1) the seller "exercised substantial control over that aspect of the design, testing, manufacturer, packing or labeling of the product that caused the harm for which recovery of damages is sought"; (2) "the seller altered or modified the product and that alteration or modification was a substantial factor causing the harm"; or (3) "the seller had actual or constructive knowledge of the defective condition of the product at the time he supplied the product." The amendment goes on to state that it is the "intent of this section to immunize innocent sellers who are not actively negligent, but instead are mere conduits of a product."

NOTE: The legislature "repealed" the prior innocent seller exception contained in Miss. Code § 11-1-64. In addition to addressing the same issues as the prior statute, the amendment adds a new limitation to the innocent seller exception in circumstances where the seller had "actual or constructive knowledge of the defective condition of the product at the time he supplied the product." The limitation introduces a subjective element into the analysis and has the potential to create questions of fact to be resolved by the jury.

EFFECTIVE DATE: All causes of action filed on or after September 1, 2004.

5. Allocation of Fault - (Joint Tortfeasors)

In any civil action based on "fault"[2] the liability for damages caused by two or more persons shall be several only, and not joint and several, and a joint tortfeasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault. The trier of fact shall allocate fault to each joint tortfeasor regardless of whether one or more of the joint tortfeasors are immune from liability. Additionally, any liability assigned to a joint tortfeasor who is immune shall **NOT** be reallocated to any other tortfeasors. **LIMITATIONS:** The provision will not apply if the joint tortfeasors acted "consciously and deliberately" in pursuit of a common plan or design to commit a tortuous act, or actively take part in it. Under such circumstances, liability shall be joint and several.

NOTE: This is a significant change in the law. Under the old law (Miss. Code § 85-5-7), the liability of joint tortfeasors was joint and several to the extent necessary for the person suffering injury, death or loss to recover 50% of his or her recoverable damages. Additionally, because liability is now several, the right of contribution of a tortfeasor against his/her fellow joint tortfeasors has been removed from the statute.

[2] " Fault" is defined as "an act or omission of a person which is the proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including, but not limited to, negligence, malpractice, strict liability, absolute liability or failure to warn."

EFFECTIVE DATE: All causes of action filed on or after September 1, 2004.

6. Premises Liability

No owner, occupant, lessee or managing agent of property shall be liable for the "death or injury of an independent contractor or the independent contractor's employees resulting from danger of which the contractor knew or reasonably should have known."

EFFECTIVE DATE: All causes of action filed on or after September 1, 2004.

7. Jury Service

All qualified persons shall be liable to serve as a juror, unless excused by the court for one of the following causes:

- The juror is ill and on account of this illness in incapable of performing jury service; or

- The juror's attendance would cause undue or extreme physical harm or financial hardship to the prospective juror or a person under his or her supervision.

An excuse of illness must be supported by a certificate of a licensed physician, or a judge of the court for which the individual was called to serve, who shall decide whether to excuse the juror. An excuse of undue or extreme physical harm or financial hardship requires a showing of one or more of the following; (1) the individual would be required to abandon a person under his care; (2) the individual would incur costs that would have a substantial adverse impact on the payment of the individual's necessary daily living expenses or those under his or her care; or (3) the individual would suffer physical hardship that would result in illness or death. After two years, a person excused from jury services shall become eligible once again for qualification as a juror, unless the person was excused from service permanently.

Any member of the Mississippi National Guard on active duty shall be exempt from jury duty upon written presentation of a current written statement from his superior officer that such jury service will likely interfere with his military duties.

If a person summoned for jury services fails to appear or fails to complete the jury service as directed, he shall be ordered by the court to appear and show cause for his failure to comply. If he fails to show good cause for noncompliance, he is in civil contempt of court and may be fined not more that $500 or imprisoned not more than three days. In lieu of the fine or imprisonment, the court may order that the person complete a period of community service.

Notwithstanding these provisions, any individual scheduled to appear for jury services has the right to postpone the date of their initial appearance for jury service once every two years. Prior to the grant of postponement, the prospective juror must contact the clerk of court and fix a date certain to appear for jury service not more that six months or two terms of the court after the date on which the prospective juror originally was called to serve.

The Administrative Office of the Court shall promulgate rules to establish a Lengthy Trial Fund to be used to provide full or partial wage replacement to jurors who serve as petit jurors in a civil case for more than ten days.

It shall be unlawful for any employer or other person to (1) persuade or attempt to persuade any juror to avoid jury service; (2) intimidate or threaten any juror in that respect; (3) remove or otherwise subject an employee to adverse employment action as a result of jury service, if the employee notifies his employer that he or she has been summoned to serve as a juror within a reasonable period of time after receipt of the summons. It shall be unlawful for any employer to require or request an employee to use annual, vacation or sick leave for time spent responding to a summons for jury duty, time spent participating in jury selection, or time spent actually serving on a jury. Any violation shall be deemed an interference with the administration of justice and a contempt of court and punishable as such.

EFFECTIVE DATE: Shall take effect and be in force from and after January 1, 2007.

8. Proceedings before Mississippi State Board of Medical Licensure

Any patient who has both filed a complaint with the Board of Medical Licensure against a licentiate and suffered harm to his person that is alleged in the complaint shall have the right to attend any proceedings that determine substantive rights of a licentiate conducted by the Board for disciplinary purposed regarding the licentiate as to that patient's treatment. Notice of such a hearing before the Board shall be provided to the patient at the same time and in the same manner provided to the licentiate. Whether the patient has suffered harm shall be decided by the Board.

EFFECTIVE DATE: This section "shall take effect and be in force from and after September 1, 2004."

9. Right to a Speedy Bench Trial

If the parties to cause of action agree, any claim filed alleging damages may receive a bench trial which shall be conducted in 270 days or less after the cause of action has been filed. The cause of action shall be a priority item on the court's docket.

EFFECTIVE DATE: This section "shall take effect and be in force from and after September 1, 2004."

10. Waiver of Medical Privilege

"In a medical malpractice action with multiple defendants, the medical privilege shall be considered waived by and between all defendants."

NOTE: It appears that this statue is intended to allow co-defendants to exchange medical records without the need to obtain prior approval of the plaintiff or the court. While it is clear that the legislature may redefine the contours of the physician-patient privilege under state law, this provision may run afoul of Federal law, specifically HIPAA. Absent exigent circumstances, the most prudent course is for defendants to attempt to obtain the consent of the plaintiff or the approval of the court prior to exchanging plaintiff's medical records or information relating to plaintiff's medical history.

EFFECTIVE DATE: This section "shall take effect and be in force from and after September 1, 2004."

Missouri

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1. INTRODUCTION – HISTORY OF TORT REFORM IN MISSOURI

In 2005, the Missouri General Assembly enacted House Bill 393; commonly referred to as the Tort Reform Act. That law effects all cases filed after August 28, 2005 and is not retroactive. Therefore, changes do not apply to any actions pending prior on or before August 28, 2005. It has been called one of United States' toughest.

2. JOINT AND SEVERAL LIABILITY[1]

Old Law

Prior to the Act, Missouri courts recognize a system of pure comparative fault with joint and several liability. That is, a defendant who is found to be 1% at fault, who has funds, can be forced to pay the entire judgment and seek contribution from those parties who had the other 99% of the fault, regardless of their solvency.

New Law

The Act does not abandon joint and several liability. However, pursuant to section537.067, a defendant is jointly and severally liable if, and only if, that defendant is found to be 51% or more at fault. If any defendant is less than 51% at fault, that defendant is responsible only for its own share of fault. The two exceptions to this rule are: (1) where both an employer and an employee are sued, their fault will be combined for purposes of determining whether or not there is 51% fault; and (2) this statute does not apply to Federal Employer Liability Act cases.

The Act specifically states that the impact of the law may not be disclosed to the jury. Further, a defendant shall only be severally liable for the percentage of punitive damages for which fault is attributed to such defendant by the trier of fact.

Because the court makes no distinction as to the joint and several rule when a plaintiff is found to be at fault, presumably if the fault is allocated 10% to plaintiff and 45% each to two defendants, neither defendant will be jointly and severally liable for the damage to the plaintiff. We expect the plaintiffs' bar to contest this issue, however.

III. Analysis

[1] *See* Robert H. Dierker and Richard J. Mehan, 34 Mo. Prac., Personal Injury and Torts Handbook §2:15 (2011 ed.)

We anticipate more cases where plaintiffs name multiple parties, but settle very late with those who do not have significant assets, then proceed to trial only against those who are solvent. Plaintiffs will likely focus discovery to attempt to uncover any basis for the jury to find against more solvent defendants. Defendants should have more "empty chair opportunities" and presumably increase their chances of getting a defense verdict where a party defendant is only minimally responsible. We also expect plaintiffs to proceed against both the employee and employer more frequently to take advantage of the combined fault percentage.

3. VENUE[2]

Old Law

Prior to its amendment, section 508.010 determined venue primarily based on the residence of the defendant. Therefore, under the old Missouri venue statues, it was often possible to obtain venue in Jackson County, Kansas City, Missouri or the City of St. Louis because of the numerous conflicts in venue statutes that allowed for a multitude of avenues to gain venue over a particular defendant. While the *State Ex rel*. *Linthicum v. Calvin* case decided in 2001 changed some venue rules, the new statute does significantly more to alter tort venue.

New Law

"Residence" of an individual is defined as the county where defendant primarily resides. For a corporation, residence can be determined by the location of the corporation's registered agents.

In all tort cases in which the tort occurs in Missouri, venue is in the county where the tort occurred. The site of occurrence is determined as of the date the plaintiff is first injured. In any wrongful death case, venue is determined where the plaintiff was first injured, leading to the death. First injury is determined by initial trauma, not where the symptoms leading to the death first occurred.

If a tort occurs outside the state of Missouri, but a suit is filed within the state, venue is determined as follows: (a) as to a corporation, where its registered agent is; or (b) where an individual defendant's residence is, or (c) where the plaintiff's residence is.

Motions to dismiss based on improper venue are deemed granted if not denied within 90 days of filing the motion. The proper remedy for a mis-venued case is not dismissal, but rather, transfer of venue to the proper venue.

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[2] *See also* Jeffrey A. Burns, 2 Mo. Prac., Methods of Prac.: Litigation Guide §3.13 (4th ed.) (2011)

Analysis

This is a significant change in Missouri law. More and more cases will be filed "out state" rural Missouri. In rural Missouri, many judges are assigned to several counties and travel between them. Usually they do not have a law clerk. We expect many pretrial dispositive motions and motions for summary judgment will be denied or taken with the case at trial. On the other hand, discovery motions are heard and trial settings are obtained by filing a motion and setting the motion for hearing on a law day. Thus, more cases may move to trial much sooner than in urban venues. For instance, Jackson County local rules do not allow for disposition of a motion by notice of hearing. The court hears motions, without argument, on its own schedule.

While some "out state" counties are considered to be quite conservative, in the past few years there have been a number of large verdicts, particularly in Southern Missouri. In all "out state" cases, the parties' reputations in the community will be of paramount importance.

In Missouri each "side" has a right to a change of judge. All of the out state counties are subject to an automatic change of venue as well. Nonetheless, it should be anticipated that there will continue to be some judge and forum shopping.

4. DAMAGES

The 2005 Tort Reform Act made numerous changes to many aspects of the damage laws in Missouri. Presently, the law of damages incorporates both statutory and common-law principles, but is subject to very few bright line restrictions. Conversely, the new rules include certain limitations and guidelines that will affect the value of future claims.

Medical Special Damages

According to the pre-Tort Reform Act laws, a plaintiff was required to adduce evidence that the amount of medical expenses incurred by an injured party was "reasonable and necessary" and proximately caused by the defendant's negligence. However, the "collateral source" rule precluded the introduction of evidence that a health care provider agreed to accept less than the amount charged for medical services.

After the enactment of the Tort Reform Act there was a rebuttable presumption that the amount necessary to satisfy the financial obligation to the health care provider represents the value of the medical treatment rendered. Upon motion, the court may consider additional evidence outside the hearing of the jury regarding the value of the medical treatment including the amount of charges, before write-off, and the amount or estimate of the amount of medical bills which were unpaid, but which the Plaintiff is obligated to pay to any entity in the event of a recovery.

This new law should effectively reduce medical special damages in all cases filed after August 28, 2005. Medical bills are commonly reduced by fifty percent or more in accordance with H.M.O. or P.P.O. contracts. Defendants have now gained the presumption that these negotiated rates are more representative of the true "reasonable and necessary" value of the medical expenses than the initial charge by the provider.

In *Deck v. Teasley*, 322 S.W.3d 536 (Mo. banc 2010), the Supreme examined the procedure regarding the presumption in §490.715.5 regarding sums paid for medical treatment by an insurer in a motor vehicle collision case. In this matter, the Plaintiff was billed approximately $30,000.00 for medical treatment. Nonetheless, the amount actually paid by her medical insurers was approximately $10,000.00. The trial court held a hearing on the reasonableness of the medical bills under §490.715.5 and determined that the plaintiff failed to rebut the presumption that the amount actually paid was the reasonable value of medical services. The Supreme Court went onto to hold that when presumption is rebutted, the trial court must allow the evidence of the amount billed as the reasonable value of the services, as well as the other party's evidence of the amount paid to satisfy the financial obligations. The Court also held that §490.715.5(2) was not intended to take the issue of value of medical treatment away from the jury and place it in the hands of the trial judge.[3] Therefore, post *Deck,* the trial court's role appears to be limited to ascertaining whether substantial evidence was presented to rebut the §490.715.5 presumption as to amounts paid. Thereafter, it then becomes the role of the jury to weigh conflicting evidence of the value of medical treatment in arriving at a verdict.

Punitive Damages

In all cases in which punitive damages are requested, a bifurcation of the punitive damage issues shall be granted if requested by either party. If the punitive damages are tried in a bifurcated setting, no evidence of the defendant's net worth shall be presented during the first portion of the trial. The jury will first determine liability only for punitive damages and all punitive damages issues will be tried in the second portion. To make a submissible case for punitive damages, the evidence, and the inferences drawn therefrom, must allow for a reasonable juror to conclude that the plaintiff established with "convincing clarity" that the conduct by the defendant "was outrageous because of evil motive or reckless indifference."[4]

Discovery of an individual's net worth shall be allowed if, and only if, the plaintiff shows that it is more likely than not that the plaintiff will make a submissible punitive damage case. That is, no discovery of net worth will occur until after a hearing on the punitive issue before the court, at which time evidence of

[3] The Court also noted that §490.715.5 expressly prohibits evidence of collateral sources.
[4] *See also* Robert H. Dierker and Richard J. Mehan, 34 Mo. Prac., Personal Injury and Torts Handbook §5:5 (2011 ed.)

that the punitive damage case "more likely than not" will survive dispositive motion must be presented by the plaintiff.

Punitive damages are now limited to $500,000, or five times the net compensatory judgment against the defendant, whichever is greater.[5] The net judgment is the remaining amount after reduction for any prior settlement, or percentage of fault on the plaintiff. The $500,000 or five times the compensatory judgment limitation does not apply if a felony, such a vehicular manslaughter, is involved. These limitations do not apply to actions brought by the State of Missouri, where the State requests punitive damages, or when a defendant pleads guilty to or is convicted of a felony arising out of the acts or omissions pled by plaintiff.

In addition, upon motion, a defendant may request a credit for amounts previously paid as punitive damages by the defendant for the same conduct. The court may decline to give that credit if the defendant unreasonably continued its conduct or the law of the state where punitive damages were awarded is so different that it should not apply. Credit generally does not apply to intentional torts.

Wrongful Death Damages[6]

There is a section in the new law which provides that if a decedent was not employed full time but was at least 50% responsible for the care of one or more minors or persons over 65 years of age, there is a rebuttable presumption the value of the care provided is equal to 110% of the state average weekly wage.

It also provides that if the decedent is under the age of 18, there is a rebuttable presumption that the annual pecuniary loss suffered by reason of the death is calculated based on the annual income of the decedent's parents, a fact that allows for those parents with higher incomes to recover more for the loss of their child than a family with less income.

Pre-Judgment Interest[7]

Prior to the passing of the Tort Reform Act, the previous law in the State of Missouri allowed for pre-judgment and post-judgment interest to be calculated at 9%. The new law has changed post-judgment interest in Missouri to the Federal Funds interest rate plus 5%. The interest rate will not vary, once entered by the Court.

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[5] *See* MO. REV. STAT § 510.265 (2005)
[6] *See also* Robert H. Dierker and Richard J. Mehan, 34 Mo. Prac., Personal Injury and Torts Handbook §55:11 (2011 ed.)
[7] *See* MO. REV. STAT § 408.040 (2005)

As for pre-judgment interest, the statute has been changed entirely. Now a demand must be made to a party or a party's representative and the insurance company, if known to the claimant, for a particular dollar amount. The demand must be in writing and must be sent by certified mail, return receipt requested. It must include an affidavit from the claimant concerning the nature of the claim, the nature of the injuries, and categories of damages being claimed, together with supporting documentation. In addition, the names of all medical providers, and employers if lost wages are being claimed, must be provided together with authorizations to allow for the obtaining of the aforementioned records.

The demand must be left open for 90 days. The Plaintiff must file a petition upon which that claim is made within 120 days after receipt by the claimant and/or insurance company. If the plaintiff obtains an award in excess of the demand in the certified letter, they are entitled to pre-judgment interest from the date of expiration of the pre-judgment interest demand at the Federal Funds interest rate plus 3%. Again, the amount will not vary once entered.

Pre-Judgment Interest Analysis

The new prejudgment interest procedure appears to alleviate a number of problems we have had in the past with claimants not providing information necessary to evaluate a claim. Occasionally, bad faith claims resulted from "set-ups" disguised as prejudgment interest demands. There is still a potential trap under the new law, however. If a claimant provides all of the information required by the statute; it is clear that the value of the claim is in excess of the policy; payment is not made; and an excess verdict results, there will be less room to maneuver on the defense of the inevitable bad faith claim.

Additionally, Plaintiff attorneys seeking to "set up" insurance companies for "bad faith" may provide some of the information necessary to evaluate the claim, but leave out a required component of a qualifying prejudgment interest demand, such as an authorization. When the company then does not respond within 90 days, knowing they are not subject to prejudgment interest because the demand is defective, the plaintiff will withdraw the demand, go to trial and seek to obtain an "excess" judgment. Then, the claimant will attempt to take an assignment or make some other arrangement to sue for bad faith, claiming that all of the information necessary to evaluate the claim was provided, albeit outside the prejudgment interest rules. In other words, we expect bad faith "set up" artists may try to disguise policy limit settlement demands as in artful prejudgment interest demands.

5. MEDICAL MALPRACTICE

The new law provides for a number of changes in the various medical negligence statutes. The statutes apply to a wide variety of "healthcare" providers. For example:

a. A minor must now file a medical negligence claim within two years after turning age eighteen.

b. Peer Review investigations, findings and all indicia thereof, even the mere existence, such investigations are not discoverable.

c. Nursing home liability cases are covered under the Tort Reform Act.

d. The new statute limits non-economic damages, including pain and suffering, mental anguish, inconvenience, physical impairment, disfigurement, and loss of capacity to enjoy, to $350,000.[8] The statute is clear that the limit applies regardless of the number of occurrences or the number of defendants. All consortium claims are subsumed in the $350,000 limit.

e. The new law requires that on motion by any defendant an award be satisfied by periodic payments to the plaintiff pursuant to a variety of requirements in the statute. The two important ones are (1) the periodic payments are for the life expectancy of the plaintiff based on the evidence presented on that issue by plaintiff at trial; and (2) interest is at the 52 week US Treasury bill rate.

f. A Plaintiff's attorney must file an affidavit within 90 days of filing the case stating that he has a written opinion from a qualified medical provider that each Defendant has failed to use the requisite standard of care in the treatment of the Plaintiff, and that such deviation from that standard caused Plaintiff's damage.[9] The affidavit must include the name, address and qualifications of the provider. The opinion must be from a professional who is in active practice, or who has been in the active practice within the last 5 years, in "substantially the same specialty as the defendant."[10] There must be an affidavit for each defendant.

g. The defendant may, within 180 days from the filing of the lawsuit, file a motion to have the court examine the opinion of the qualified medical provider. There may then be a hearing on whether there is probable cause to go forward with the claim. If the court determines that there is no probable cause, not only will the action be dismissed, the plaintiff is subject to an assessment of attorneys' fees and costs.

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[8] *See Klotz c. St. Anthony's Medical Center*, 311 S.W.3d 752 (Mo. banc 2010).

[9] See J.K.M. v. *Dempsey*, 317 S.W.3d 621 (Mo. App. Ct. 2010) (holding that the trial court is required to dismiss an action against a healthcare provider without prejudice where the affidavit is not timely filed).

[10] *See Spradling v. SSM Health Care St. Louis*, 313 S.W.3d 683 (Mo. banc 2010) (holding that the requirement for a healthcare affidavit under section 538.225.2, requiring an opinion by a "legally qualified healthcare provider" actively practicing in "substantially the same specialty" as the defendant does not require that the expert have the same board certification as the defendant).

h. The venue for any such medical claim is where the plaintiff first received treatment by a defendant for the medical condition at issue in the case.

i. The Tort Reform Act also contains an evidentiary limitation. All statements of sympathy, benevolent gestures or general benevolence as to pain, suffering, death, etc. are inadmissible in any civil action. This does not preclude introducing evidence of a direct admission of fault.

Analysis

The $350,000 non-economic cap applies regardless of the number of occurrences or defendants. This will play a significant role in any evaluation of these cases. This is especially true in nursing home cases where there is often little economic loss. We can expect plaintiffs' attorneys to be even more creative as to what is an economic loss.

The new law puts real teeth in the medical affidavit requirement. We would expect these to be challenged in any case where the alleged negligence is not clear. There is no specific procedure for the court's review, but we may want to suggest the court employ a qualified expert to review some of these motions.

6. ATTORNEYS' FEES & THE "BRITISH RULE"

Proposed House Bill 1342

In 2011, sponsors of the proposed bill, House Bill 1342, sought to supplement the Tort Reform Act of 2005 by implementing a mechanism that would mandate that the losing party pay the attorneys' fees of the opponent. Sponsors of this proposed legislation have argued that the Bill has become necessary to discourage frivolous lawsuits which would therefore reduce the high cost of litigation to the local governments and cities of Missouri and lower insurance premiums.

Those that argue against the passage of the aforementioned legislation argue that Missouri currently has in place mechanisms to identify frivolous lawsuits, dismiss them from court, and award attorneys' fees to the prevailing party (*see* MO. REV. STAT § 514.205).[11] Likewise, others have argued that the institution of proposed House Bill 1342 is analogous to the adoption of the "British Rule".[12] As such, arguments have been made that the adoption of the "British Rule" would lead to escalating legal expenses and make settlements less likely. Moreover, as of this writing, the proposed legislation would permit defendants to invoke the "British

[11] *See also* Missouri Supreme Court Rule 55.03(d) (permitting the recovery of costs and attorneys' fees as sanctions for the commencement of a frivolous claim or raising a frivolous defense).
[12] *see* John Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice* (discussing the failed attempt to apply the "British Rule" in Florida from 1980-1985).

Rule" but prevent plaintiffs from doing so even if the defendant acted with bad faith to delay a resolution or refused to negotiate a reasonable settlement. Lastly, in specific circumstances, the proposed bill also provides that the *winning party* pay the attorneys' fees of the opponent.[13]

Analysis

It is to be expected that this proposed bill will meet stiff opposition from the Plaintiffs' Bar of the State of Missouri. Likewise, it is clear that Plaintiffs of limited financial resources would be limited in their access to legal remedies.

[13] Proposed section 511.806 requires the prevailing party to pay attorneys' fees and costs to their adversary if the amount of the verdict was 50% of the last certified settlement offer.

Montana

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1. Introduction

Lawmakers have made fairly regular changes to the Montana general liability and medical malpractice laws since the 1970s. Sue O'Connell, *SJR: Study of Health Care*, Prepared for the Children, Families, Health, and Human Services Interim Committee, p. 1, January 2010 < http://leg.mt.gov/content/Committees/Interim/2009_2010/Children_Family/Assigned_Studies/SJR_35/sjr35-montana-medical-liability-laws-jan-2010.pdf>. In addition, interim studies conducted periodically since 1986 have reviewed these issues and resulted in legislative proposals, many of which were adopted. *Id*. The first interim study in 1986 was in response to lawmakers' inability to pass certain constitutional amendments regarding liability. *Id*. The study resulted in the passage of many of the current Montana statutes in this area.

The 1993 study focused on community issues in recruiting and retaining health care professionals. The study resulted in a change to the statute of limitations for a medical malpractice action. See, Mont. Code Ann. ("MCA") § 27-2-205. Significantly, the final report noted that the committee did not find evidence of a malpractice crisis or that tort reform would lead to health care cost savings. *Id*.

The 2003 study focused on medical liability issues, and resulted in the approval of four bills in 2005. However, the report noted that "it is debatable whether additional tort reforms can or will visibly affect (medical malpractice liability insurance) premiums in Montana." *Id*.

A study has been approved for the 2011 interim session, and will focus on Medicaid reform and childhood hunger.

Since the 1970s, Montana has enacted tort reform measures in several areas, including joint and several liability, damage caps, medical malpractice and punitive damages. In addition, several bills were discussed in the past legislative session that could signal a trend toward more tort reform in Montana.

2. Joint and Several Liability

Montana has not significantly changed its statutes on joint and several liability since 1997, when the legislature declared its intent to substitute several liability for the prior law of joint and several liability, except in certain actions. MCA § 27-1-705(1) (1997). This is intended to allocate responsibility based on fault to all parties to an occurrence, rather than just to the parties to the litigation and to ensure that liability is allocated to each party in direct proportion to that party's fault. *Id*. "Fault" is defined as "negligence in any of its degrees, contributory negligence, strict liability, and products liability." MCA § 27-1-705(9).

In determining the percentage of fault for each party to the action, the trier of fact shall consider the fault of nonparties based on admissible evidence of those nonparties' fault. MCA § 27-1-705(3). However, assessment of fault against a nonparty does not subject the nonparty to liability in that case, nor can it be used as evidence of fault in any other action. *Id*. If the trier of fact finds a nonparty responsible for a percentage of the fault, the total percentage of liabilities of the parties may be less than 100%. MCA § 27-1-705(4). The trier of fact is required to

make a separate finding regarding the percentage of fault of each party and the total amount of damages sustained by the plaintiff. MCA § 27-1-705(5). Parties whose liability is based on acts or omissions in concert or arising from an agency or employment relationship should be treated as a single party for the purpose of apportioning fault. MCA §27-1-705(8).

In certain instances, however, joint and several liability still applies. For example, Section 705 does not apply to an action arising from an act or omission that violates a state environmental law relating to hazardous substances. MCA §27-1-705(7). Thus, liability for damages in those cases remains joint and several. Also, a defendant in a case based on negligence is jointly and severally liable for the amount that may be awarded to a plaintiff if the defendant's negligence is found to be more than 50% of the combined negligence of all responsible parties. MCA § 27-1-703(2) (1997). In addition, a party may be jointly liable for all damages caused by the negligence of another if both acted in concert or if one party was an agent of the other. MCA §27-1-703(3).

Where a defendant wishes to allege comparative fault, the defendant must identify in the answer, or in a reasonable time, all persons who the defendant alleges are at fault. MCA § 27-1-705(6)(1997). A defendant who pleads comparative fault has the burden of proof. *Id*.; see also, MCA §27-1-703(4), (6) (discussing the procedure for a defendant to assert negligence of nonparties as a defense).

3. Damage Caps

A. Economic Damages

Montana has not passed legislation limiting economic damages. Generally, "[e]very person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages." MCA § 27-1-202 (1947). A detriment is defined as "a loss or harm suffered in person or property." MCA § 27-1-201 (1947).

B. Non-Economic Damages

Under Montana law, "noneconomic loss" means subjective, non-monetary loss. Including but not limited to:

(a) physical and mental pain or suffering;
(b) emotional distress;
(c) inconvenience;
(d) subjective, nonmonetary loss arising from physical impairment or disfigurement;
(e) loss of society, companionship, and consortium, other than household services;
(f) injury to reputation; and
(g) humiliation.

MCA § 25-9-411 (1997).

1. Limits on Non-Economic Damages in Medical Malpractice Cases

In 1995, the Montana legislature placed a cap on awards of non-economic damages in medical malpractice cases, providing as follows:

> In a malpractice claim or claims against one or more health care providers based on a single incident of malpractice, an award for past and future damages for noneconomic loss may not exceed $250,000. All claims for noneconomic loss deriving from injuries to a patient are subject to an award not to exceed $ 250,000.

MCA § 25-9-411(1)(a) (1995). The limitation applies whether based on the same act or a series of acts out of which the action arises. MCA § 25-9-411(1)(a)(i). It also applies if the acts were by "one or more health care providers." MCA § 25-9-411(1)(a)(ii). In addition, if a single incident of malpractice injures multiple, unrelated patients, the limit applies separately to each patient and his or her claims. MCA § 25-9-411(1)(ii)(b). If separate injuries are alleged, the burden is on the plaintiff to show how each arose from a different act, but the maximum recovery for non-economic damages for multiple acts of medical malpractice remains $250,000. MCA § 25-9-411(2). The award must also be reduced if the plaintiff is found to be comparatively negligent or if the defendant is entitled to a setoff or credits. MCA § 25-9-411(2)(b) (1997). An award of future damages for noneconomic loss may not be discounted to present value. MCA § 25-9-411(3). Moreover, the $250,000 limit may not be disclosed to a jury. MCA § 25-9-411(4).

2. Montana Limits Non-Economic Damages in Alcohol Consumption Cases

Montana has also enacted a statute to govern "the liability of a person or entity that furnishes an alcoholic beverage for injury or damage arising from an event involving the person who consumed the beverage." MCA § 27-1-710 (2003). This type of case is sometimes referred to as a "dram shop" action. In Montana, the total liability for noneconomic damages in such a case may not exceed $250,000.00. MCA § 27-1-710(7).

3. Limits on Damages in Actions Against Governmental Entities

While not limited specifically to noneconomic damages, Montana, like most other states, places limits the damages recoverable in a tort action against the state, a county, municipality, taxing district, or any other political subdivision of the state. Such recovery cannot exceed $750,000.00 for each claim and $1.5 million for each occurrence. MCA § 2-9-108 (1997).

4. Punitive Damages

A. Punitive Damages are Available under Montana Law

"Reasonable" punitive damages are available in Montana when the defendant has been found "guilty of actual fraud or actual malice." MCA § 27-1-221(1) (2003). The damages are awarded "for the sake of example and for the purpose of punishing a defendant." MCA § 27-1-220(1) (2003). "Actual malice" is found if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and the defendant:

> (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or
> (b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.

MCA § 27-1-221(2). A defendant is guilty of actual fraud if the defendant:

> (a) makes a representation with knowledge of its falsity; or
> (b) conceals a material fact with the purpose of depriving the plaintiff of property or legal rights or otherwise causing injury.

MCA § 27-1-221(3). "Actual fraud exists only when the plaintiff has a right to rely upon the representation of the defendant and suffers injury as a result of that reliance." MCA § 27-1-221(4). The plaintiff must prove the elements of the claim for punitive damages by clear and convincing evidence. MCA § 27-1-221(5). Clear and convincing evidence is defined in the statute as "evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence but less than beyond a reasonable doubt." *Id*. Liability for punitive damages must be determined by the trier of fact, whether judge or jury. MCA § 27-1-221(6).

B. Limits on Punitive Damages

In 2003, the Montana legislature amended the punitive damages statute to provide "[a]n award for punitive damages may not exceed $10 million or 3% of a defendant's net worth, whichever is less." MCA § 27-1-220(3). This subsection excludes class action suits from the punitive damages cap. *Id*. However, the Montana Supreme Court has held that "where it appears that such an award has resulted from passion or prejudice, rather than from the [sic] reason and justice, the Court must not permit such an award to stand." *Safeco Ins. Co. v. Ellinghouse*, 725 P.2d 217, 227 (Mont. 1986). Punitive damages are not available for actions arising from contract or breach of contract claims. MCA 27-1-220(2)(a). This subsection is not intended to prevent the recovery of punitive damages in a products liability action, or an action arising under 33-18-201 (Unfair Trade Practices). MCA 27-1-220(2)(b).

Montana also limits punitive damages in "dram shop" cases, discussed above, to $250,000.00. MCA § 27-1-710(8). Punitive damages are prohibited completely in cases where a minor or "person of unsound mind" is found civilly liable, unless at the time of the act the person was capable of knowing that it was wrongful. MCA § 27-1-711 (2009).

Montana law makes the jury an important part of determining punitive damages, and the state constitution requires only a two-thirds majority of the jury to make the award. *Finstad v. W.R. Grace & Co*., 8 P.3d 778 (Mont. 2000) (upholding the trial court's decision that the previous version of the punitive damages statute, which required unanimity, was unconstitutional). The jury must conduct an "immediate, separate" proceeding to determine liability and the amount of any punitive award. MCA § 27-1-221(7)(a). Evidence regarding a defendant's financial affairs, financial condition, and net worth is not admissible in a trial to determine whether a defendant is liable for punitive damages. *Id*. However, the defendant's financial affairs, financial condition, and net worth must be considered in determining the amount of the punitive damages. *Id*. The defendant's financial condition is significant because Section 27-1-220(3) "prohibits punitive damages awards in excess of 3% of defendant's net worth only if the defendant first meets his burden of demonstrating an accurate calculation of his net worth." *Blue Ridge Homes, Inc. v. Thein*, 191 P.3d 374, 387 (Mont. 2008).

The judge must state the reasons for making the award in findings of fact and conclusions of law. MCA § 27-1-221(7)(b). In addition, a judge, either in awarding punitive damages or assessing the award given by the jury, must consider: (1) the nature and reprehensibility of the defendant's wrongdoing; (2) the extent of the defendant's wrongdoing; (3) the defendant's intent in committing the wrong; (4) the profitability of the defendant's wrongdoing, if applicable; (5) the amount of actual damages awarded; (6) the defendant's net worth; (7) previous awards of punitive or exemplary damages against the defendant based on the same wrongful act; (8) potential or prior criminal sanctions against the defendant based upon the same wrongful act; and (9) any other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages. MCA § 27-1-221(7)(b). Information about a defendant's financial affairs is still subject to Montana's discovery rules. MCA § 27-1-221(8). After a jury submits the punitive damage award to the judge, the judge must review the jury's award and may increase or decrease the award based on his or her review. MCA § 27-1-221(7)(c). The judge must clearly state the reasons for either changing or preserving the jury's punitive damage award, demonstrating consideration of each of the listed factors. *Id*.

5. **Medical Malpractice Reform**

Medical malpractice litigation has seen by far the most tort reform of any area of law in Montana. In addition to the limitation on noneconomic damages discussed above, the Montana legislature has enacted several laws related to medical malpractice cases, including the following:

A. Montana Medical Legal Panel

In 1977, the Montana Medical Legal Panel Act was enacted with the stated purpose to "prevent where possible the filing in court of actions against health care providers and their employees for professional liability in situations where the facts do not permit at least a reasonable inference of malpractice and to make possible the fair and equitable disposition of such claims against health care providers as are or reasonably may be well founded." MCA § 27-6-102 (1977). The panel itself is composed of three health care providers and three attorneys (all of whom must be residents of Montana), and it is required to review any medical malpractice claim before it is filed in court. MCA § 27-6-401; and MCA § 27-6-701. The panel's decision is based on a majority vote of the members and must be communicated in writing. MCA § 27-6-604 (1977). While the submission of a claim to the panel is a prerequisite to filing a medical malpractice action in court, the panel's decision is without administrative or judicial authority and is not binding upon any party. MCA § 27-6-606 (1977).

B. Statements of Apology Not Admissible as Evidence of Liability

One of the statutes resulting from the 2003 interim study was MCA § 26-1-814 (2005), which makes a "statement, affirmation, gesture, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence relating to the pain, suffering, or death of a person that is made to the person" or their family or friends inadmissible for any purpose in a civil action for medical malpractice. *Id*.

C. Statute of Repose

An action in tort or contract for injury or death against a health care professional, including hospital administrators, licensed medical professional corporations, and veterinarians, must be commenced within three (3) years of the date of the injury or within three (3) years after the plaintiff discovers or should have discovered the injury. MCA § 27-2-205 (1995). In no event, may an action be commenced after five (5) years from the date of the injury. *Id*. This time limitation is tolled by a defendant's failure to disclose any act, error, or omission upon which an action is based that is known or should be known to the defendant. *Id*. Also, the time limitation is tolled in a case involving an injury to a minor under four (4) years of age. In such a case, the time limit begins to run when the child reaches his or her eighth (8th) birthday or dies, whichever occurs first, and the time limit is tolled during any period the child does not live with a parent or guardian. *Id*.

D. Medical Malpractice Expert Witness Qualifications

Expert witnesses wishing to testify in a medical malpractice case must meet several criteria. The witness must: (1) be licensed as a health care provider in at least one state; (2) routinely provide the type of treatment at issue in the case or be an instructor in an accredited program relating to the type of treatment at issue; and (3) show by competent evidence that the witness, as a result of education, training,

knowledge, and expertise, is thoroughly familiar with the standards of care and practice at issue in the case. MCA § 26-2-601 (2005). If the malpractice claim is based on the treatment or advice of a physician (as that term is defined in MCA § 37-3-102), the expert must also be a physician. *Id*. Finally, a medical expert in one field or specialty is not qualified to testify regarding another area of practice unless there is a showing that the fields or specialties are substantially similar. *Id*.

E. Payment of Future Damages

A party may request payment of future damages in excess of $100,000 to be paid in whole or in part by periodic rather than lump-sum payments, except in medical malpractice cases. MCA § 25-9-403 (1987). In a medical malpractice case, the base award of future damages is reduced to $50,000. MCA § 25-9-412(1) (1995). The total amount of the periodic payments must equal the total amount of the future damages without a reduction to present value. *Id*.

F. Limitations on Volunteer Liability in Emergency Situations

Montana also limits liability for emergency care rendered by any physician, volunteer firefighter, officer of any nonprofit volunteer fire company, or any other person who in good faith attempts to render emergency care or assistance at the scene of an emergency or accident without compensation. MCA § 27-1-714 (2009). In such cases, a volunteer is not liable for civil damages other than those caused by gross negligence or by willful or wanton acts or omissions by the person rendering the emergency care or assistance. *Id*. Also, physicians, nurses, and hospitals rendering care or assistance in good faith to a patient of a direct-entry midwife in an emergency situation is liable for civil damages for acts or omissions committed in providing such care only to the extent that the damages are caused by gross negligence or by willful or wanton acts or omissions. MCA § 27-1-734 (1991).

6. **Products Liability Reform**

Montana has seen no significant tort reform in the area of products liability in recent years. The statute governing products liability actions in Montana provides that a seller, manufacturer, wholesaler, or retailer who sells a product in a defective condition that is unreasonably dangerous to a consumer is strictly liable for harm caused thereby, if the seller is engaged in the business of selling the product, and the product is expected to and does reach the user or consumer without substantial change in the condition in which it was sold. MCA § 27-1-719 (2009). Contributory negligence is not a defense to the liability of a seller, manufacturer, wholesaler, or retailer in an action based on strict liability for injury to person or property caused by a defective product. *Id*. However, the seller may assert as an affirmative defense that the user or consumer discovered or should have discovered the defect and unreasonably used the product anyway, or that the product was unreasonably misused by the user or consumer. *Id*. Products liability

actions are subject to a three-year statute of limitations under Montana law. MCA § 27-2-204 (2007); *see also*, *Buhl v. Biosearch Medical Products, Inc*., 635 F. Supp. 956 (D. Mont. 1985).

7. **Attorney Fees**

There has been no significant tort reform related to Montana's handling of attorney fees in recent years. Montana generally follows the American Rule in relation to attorney fees, which states that each party pays their own attorney fees absent a specific contractual provision or statutory grant. *Sampson v. Nat'l Farmers Union Property and Cas. Co.*, 144 P.3d 797, 799-801 (Mont. 2006), *see also*, *Cook v. Harrington*, 661 P.2d 1287, 1288 (Mont. 1983) (holding that recoverable costs are listed in Section 25-10-201 of the Montana Code, and they do not include attorney fees). Examples of statutory grants allowing the recovery of attorneys fees include: (1) MCA § 33-25-402(2) (1985) (allowing recovery of attorney fees to prevailing party in case based on Montana Title Insurance Act); (2) MCA § 25-9-404 (2009) (requiring a judgment to order payment of attorney fees and litigation expenses separately from an order for periodic payments for future damages); (3) MCA § 30-4A-305(5) (allowing recovery of reasonable attorney fees if demand for compensation is made and refused under Uniform Commercial Code sections regarding execution of payment order by receiving bank) (2009); and (4) MCA § 27-1-719 (2009) (allowing recovery of reasonable attorney fee by prevailing party in action under Montana's Library Records Confidentiality Act).

8. **Special Issues**

In its previous session, the Montana Legislature was active in considering several additional tort reform measures. The list below may provide some information regarding future trends in Montana tort reform:

HB 464 (2011): Provide Medical Liability Protection for Hard-To-Recruit Subspecialists
Result: Vetoed by Governor

HB 405 (2011): Reduction of Defensive Medicine Act
Result: Vetoed by Governor

HB 408 (2011): Reduction of Statute of Limitations from 3 years to 2 years
Result: Vetoed by Governor

HB 531 (2011): Revise Civil Liability for Multiple Defendants
Result: Vetoed by Governor

HB 396 (2012): Health Care Professional Transparency
Result: Failed to Gain Sufficient Support

LC0321 (2011): Limit contingent fees for punitive damages cases

Result: Draft Died in Process

LC0570 (2011): Reduce Defensive Medicine
Result: Draft Died in Process

Nebraska

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1. Introduction – History of Tort Reform in Nebraska

In 1976, Nebraska's medical and insurance lobbies argued that establishing "caps" or severe overall limits on compensation from any and all health care providers to injured patients was the only way to reduce periodically high malpractice insurance rates and keep doctors practicing. As a result of this lobbying, Nebraska succumbed to political pressure and enacted an overall "cap" on compensation from any and all health care providers for injured patients. But unlike the law in almost every other state, Nebraska's cap, now at $1,750,000, is the total limit that any family may recover – even when a catastrophically injured child needing a lifetime of care is involved. This "one- size-fits-all" cap applies no matter how much merit a case has; or, the extent of the misconduct by the hospital, doctor or HMO; or, the severity of an injury.

There has been limited tort reform in the State of Nebraska since 1976 and there is not expected to be any in the near future. Therefore, there is little to comment upon in this regard.

2. Joint and Several Liability

Neb. Rev. Stat. § 25-21, 185.10, Civil actions to which contributory negligence is a defense; multiple defendants; joint and several liability:

In an action involving more than one defendant when two or more defendants as part of a common enterprise or plan act in concert and cause harm, the liability of each such defendant for economic and noneconomic damages shall be joint and several.

In any other action involving more than one defendant, the liability of each defendant for economic damages shall be joint and several and the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of negligence, and a separate judgment shall be rendered against that defendant for that amount.

This section contemplates a process by which the finder of fact determines the total noneconomic damages suffered by the plaintiff as the result of injuries proximately caused by the negligence of multiple defendants; then, it allocates a portion of the total to each defendant "in direct proportion to that defendant's percentage of negligence." *Sinsel v. Olsen*, 279 Neb. 38, 777 N.W.2d 54 (2009).

This section provides for allocation of damages among negligent tort-feasors only and does not provide for such allocation due to the acts of intentional tort-feasors. *Brandon ex rel. Estate of Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d

604 (2001).

Under tort law, where joint tort-feasors do not act as part of a common enterprise or plan, this section alters the common law by limiting a plaintiff's recovery of noneconomic damages from any one tort-feasor to that tort-feasor's proportionate liability in an action involving more than one defendant. *Genetti v. Caterpillar, Inc*., 261 Neb. 98, 621 N.W.2d 529 (2001).

3. Contributory Negligence.

Neb. Rev. Stat. § 25-21,185.09, Civil actions to which contributory negligence is a defense; effect on recovery:

Any contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery. The jury shall be instructed on the effects of the allocation of negligence.

The language of this section allows a jury to compare a plaintiff's contributory negligence to the negligence of a defendant or defendants. It does not provide that the plaintiff's negligence may be applied in the plaintiff's cause of action based upon strict liability in tort. *Shipler v. General Motors Corp*., 271 Neb. 194, 710 N.W.2d 807 (2006).

4. Damage Caps/ Medical

Neb. Rev. Stat. § 44-2825, Action for injury or death; maximum amount recoverable; settlement; manner:

(1) The total amount recoverable under the Nebraska Hospital-Medical Liability Act from any and all health care providers and the Excess Liability Fund for any occurrence resulting in any injury or death of a patient may not exceed (a) five hundred thousand dollars for any occurrence on or before December 31, 1984, (b) one million dollars for any occurrence after December 31, 1984, and on or before December 31, 1992, (c) one million two hundred fifty thousand dollars for any occurrence after December 31, 1992, and on or before December 31, 2003, and (d) one million seven hundred fifty thousand dollars for any occurrence after December 31, 2003.

(2) A health care provider qualified under the act shall not be liable to any patient or his or her representative who is covered by the act for an amount in excess of five hundred thousand dollars for all claims or causes of action arising from any occurrence during the period that the act is effective with reference to such patient.

(3) Subject to the overall limits from all sources as provided in subsection (1) of this section, any amount due from a judgment or settlement which is in excess of the total liability of all liable health care providers shall be paid from the Excess Liability Fund pursuant to sections 44-2831 to 44- 2833.

The cap on damages in subsection (1) of this section does not violate principles of special legislation, equal protection, the open courts provision, the right to a remedy, the right to a jury trial, the taking of property, and the separation of powers. *Gourley v. Nebraska Methodist Health Sys*., 265 Neb. 918, 663 N.W.2d 43 (2003).

Neb. Rev. Stat. § 44-2819, Bodily injuries or wrongful death actions; evidence of medical reimbursement insurance inadmissible; credit against judgment; damages recoverable:

(1) In any action for damages for bodily injuries or for wrongful death when it is alleged that the claimant suffered damages for the cost of medical care, custodial care or rehabilitation services, evidence which tends to establish that the claimant or another person so damaged has been or shall be reimbursed or paid for any such item of damage, cost, or expense, in whole or in part, by any nonrefundable medical reimbursement insurance shall not be admissible in evidence or brought to the attention of the jury, but such nonrefundable medical reimbursement insurance benefits, less all premiums paid by or for the claimant, may be taken as a credit against any judgment rendered. The matter of any credit to be deducted from a judgment shall be determined by the court in a separate hearing or upon the stipulation of the parties.

(2) Damages recoverable in any action shall be those losses which have been or shall be sustained by the claimant as a direct and proximate result of the defendant's wrongful acts as established by a preponderance of the evidence. In wrongful death actions, pecuniary loss to a widow or widower, any dependent, or next of kin shall be subject to all of the terms and provisions of sections 44-2801 to 44-2855.

5. Damage Caps/ Political Subdivisions

Neb. Rev. Stat. § 13-926, Recovery under act; limitation; additional sources for recovery:

The total amount recoverable under the Political Subdivisions Tort Claims Act for claims arising out of an occurrence after November 16, 1985, shall be limited to:

(1) One million dollars for any person for any number of claims arising out of a single occurrence; and

(2) Five million dollars for all claims arising out of a single occurrence. If the damages sustained by an innocent third party pursuant to section 13- 911 are not

fully recoverable from one or more political subdivisions due to the limitations in this section, additional sources for recovery shall be as follows: First, any offsetting payments specified in subsection (3) of section 13-911 shall be reduced to the extent necessary to fully compensate the innocent third party; and second, if such reduction is insufficient to fully compensate the innocent third party, the right of reimbursement granted to the political subdivision in subsection (2) of section 13-911 shall be reduced to the extent necessary to fully compensate the innocent third party.

The damage cap embodied in this section applies to all political subdivisions of the State of Nebraska, which together create a single class of tort-feasors to which the Legislature has chosen to apply uniform rules and procedures governing tort liability. By limiting the tort liability exposure of all political subdivisions in exactly the same manner, the Legislature has enacted a general law which does not contravene the constitutional prohibition of special legislation. *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006).

6. Pre-Judgment Interest

Neb. Rev. Stat. § 45-103, Interest; judgments; decrees; rate; exceptions:

For decrees and judgments rendered before July 20, 2002, interest on decrees and judgments for the payment of money shall be fixed at a rate equal to one percentage point above the bond equivalent yield, as published by the Secretary of the Treasury of the United States, of the average accepted auction price for the last auction of fifty-two-week United States Treasury bills in effect on the date of entry of the judgment. For decrees and judgments rendered on and after July 20, 2002, interest on decrees and judgments for the payment of money shall be fixed at a rate equal to two percentage points above the bond investment yield, as published by the Secretary of the Treasury of the United States, of the average accepted auction price for the first auction of each annual quarter of the twenty-six-week United States Treasury bills in effect on the date of entry of the judgment. The State Court Administrator shall distribute notice of such rate and any changes to it to all Nebraska judges to be in effect two weeks after the date the auction price is published by the Secretary of the Treasury of the United States. This interest rate shall not apply to:

(1) An action in which the interest rate is specifically provided by law; or

(2) An action founded upon an oral or written contract in which the parties have agreed to a rate of interest other than that specified in this section.

7. Punitive Damages

Punitive damages are unconstitutional under Nebraska law. *Neb. Const. Art. VII* § 5; *see also Enron Corp. v. Lawyers Title Ins. Corp.*, 940 F.2d 307 (8th Cir. 1991); *Distinctive Printing & Packaging Co. v. Cox*, 443 N.W.2d 566 (Neb. 1989) (punitive,

vindictive or exemplary damages contravene state constitutional provision).

8. Products Liability Reform

Neb. Rev. Stat. § 25-224, Actions on product liability:

(1) All product liability actions, except one governed by subsection (5) of this section, shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs.

(2) (a) Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed by section 2-725, Uniform Commercial Code or by subsection (5) of this section, shall be commenced as follows:

(i) For products manufactured in Nebraska, within ten years after the date the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption; or

(ii) For products manufactured outside Nebraska, within the time allowed by the applicable statute of repose, if any, of the state or country where the product was manufactured, but in no event less than ten years. If the state or country where the product was manufactured does not have an applicable statute of repose, then the only limitation upon the commencement of an action for product liability shall be as set forth in subsection (1) of this section.

(b) If the changes made to this subsection by Laws 2001, LB 489, are declared invalid or unconstitutional, this subsection as it existed prior to September 1, 2001, shall be deemed in full force and effect and shall apply to all claims in which a final order has not been entered.

(3) The limitations contained in subsection (1), (2), or (5) of this section shall not be applicable to indemnity or contribution actions brought by a manufacturer or seller of a product against a person who is or may be liable to such manufacturer or seller for all or any portion of any judgment rendered against a manufacturer or seller.

(4) Notwithstanding the provisions of subsections (1) and (2) of this section, any cause of action or claim which any person may have on July 22, 1978, may be brought not later than two years following such date.

(5) Any action to recover damages based on injury allegedly resulting from exposure to asbestos composed of chrysotile, amosite, crocidolite, tremolite, anthrophyllite, actinolite, or any combination thereof, shall be commenced within four years after the injured person has been informed of discovery of the injury by competent medical authority and that such injury was caused by exposure to asbestos as described herein, or within four years after the discovery of facts which would reasonably lead to such discovery, whichever is earlier. No action

commenced under this subsection based on the doctrine of strict liability in tort shall be commenced or maintained against any seller of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless such seller is also the manufacturer of such product or the manufacturer of the part thereof claimed to be defective. Nothing in this subsection shall be construed to permit an action to be brought based on an injury described in this subsection discovered more than two years prior to August 30, 1981.

Nebraska's products liability 10-year statute of repose does not violate the Due Process or Equal Protection Clauses of the Nebraska or U.S. Constitutions and does not violate the open courts provision of the Nebraska Constitution. *Radke v. H.C. Davis Sons' Mfg. Co*., 241 Neb. 21, 486 N.W.2d 204 (1992).

9. Statute of Limitation

Neb. Rev. Stat. § 25-222, Actions on Professional Negligence:

Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided,* if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further,* that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

Neb. Rev. Stat. § 44-2828, Actions to recover damages; limitation of action:

Except as provided in section 25-213, any action to recover damages based on alleged malpractice or professional negligence or upon alleged breach of warranty in rendering or failing to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failing to render professional services providing the basis for such action, except that if the cause of action is not discovered and could not be reasonably discovered within such two-year period, the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. In no event may any action be commenced to recover damages for malpractice or professional negligence or breach of warranty in rendering or failing to render professional services more than ten years after the date of rendering or failing to render such professional service which provides the basis for the cause of action.

Neb. Rev. Stat. § 13-919, Claims; Limitation of action:

(1) Every claim against a political subdivision permitted under the Political Subdivisions Tort Claims Act shall be forever barred unless within one year after such claim accrued the claim is made in writing to the governing body. Except as otherwise provided in this section, all suits permitted by the act shall be forever barred unless begun within two years after such claim accrued. The time to begin a suit shall be extended for a period of six months from the date of mailing of notice to the claimant by the governing body as to the final disposition of the claim or from the date of withdrawal of the claim from the governing body under section 13-906 if the time to begin suit would otherwise expire before the end of such period.

(2) If a claim is made or filed under any other law of this state and a determination is made by a political subdivision or court that the act provides the exclusive remedy for the claim, the time to make a claim and to begin suit under the act shall be extended for a period of six months from the date of the court order making such determination or the date of mailing of notice to the claimant of such determination by the political subdivision if the time to make the claim and to begin suit under the act would otherwise expire before the end of such period. The time to begin suit may be further extended as provided in subsection (1) of this section.

(3) If a claim is made or a suit is begun under the act and a determination is made by the political subdivision or by the court that the claim or suit is not permitted under the act for any other reason than lapse of time, the time to make a claim or to begin a suit under any other applicable law of this state shall be extended for a period of six months from the date of the court order making such determination or the date of mailing of notice to the claimant of such determination by the political subdivision if the time to make the claim or begin the suit under such other law would otherwise expire before the end of such period.

(4) If a claim is brought under the Nebraska Hospital-Medical Liability Act, the filing of a request for review under section 44-2840 shall extend the time to begin suit under the Political Subdivisions Tort Claims Act an additional ninety days following the issuance of the opinion by the medical review panel if the time to begin suit under the Political Subdivisions Tort Claims Act would otherwise expire before the end of such ninety-day period.

(5) This section and section 25-213 shall be the only statutes of limitations applicable to tort claims as defined in the act.

Neb. Rev. Stat. § 81-8,227, Tort claim; limitation of action:

(1) Except as provided in subsection (2) of this section, every tort claim permitted under the State Tort Claims Act shall be forever barred unless within two years after such claim accrued the claim is made in writing to the Risk Manager in the manner provided by such act. The time to begin suit under such act shall be extended for a period of six months from the date of mailing of notice to the claimant by the Risk Manager or State Claims Board as to the final disposition of the claim or from the

date of withdrawal of the claim under section 81-8,213 if the time to begin suit would otherwise expire before the end of such period.

(2) The date of a qualifying pardon from the Board of Pardons, a final order by a court vacating a conviction, or a conviction that was reversed and remanded for a new trial and no subsequent conviction was obtained, whichever is later, shall be the date the claimant's claim shall accrue under the Nebraska Claims for Wrongful Conviction and Imprisonment Act for purposes of complying with the notice and filing requirements of the State Tort Claims Act. The Nebraska Claims for Wrongful Conviction and Imprisonment Act applies to a claimant who would have had a claim if the act had been in effect before August 30, 2009, or who has a claim on or after such date. If a claimant had a qualifying pardon from the Board of Pardons, a final order by a court vacating a conviction, or a conviction that was reversed and remanded for a new trial and no subsequent conviction was obtained, before August 30, 2009, the claimant's claim shall accrue under the Nebraska Claims for Wrongful Conviction and Imprisonment Act on August 30, 2009, for purposes of complying with the notice and filing requirements of the State Tort Claims Act.

(3) If a claim is made or filed under any other law of this state and a determination is made by a state agency or court that the State Tort Claims Act provides the exclusive remedy for the claim, the time to make a claim and begin suit under such act shall be extended for a period of six months from the date of the court order making such determination or the date of mailing of notice to the claimant of such determination by a state agency if the time to make the claim and to begin suit under such act would otherwise expire before the end of such period. The time to begin a suit under such act may be further extended as provided in subsection (1) of this section.

(4) If a claim is brought under the Nebraska Hospital-Medical Liability Act, the filing of a request for review under section 44-2840 shall extend the time to begin suit under the State Tort Claims Act an additional ninety days following the issuance of the opinion by the medical review panel if the time to begin suit under the State Tort Claims Act would otherwise expire before the end of such ninety-day period.

(5) This section and section 25-213 shall constitute the only statutes of limitations applicable to the State Tort Claims Act.

Neb. Rev. Stat. § 25-213, Tolling statutes of limitations:

Except as provided in sections 76-288 to 76-298, if a person entitled to bring any action mentioned in Chapter 25, the Political Subdivisions Tort Claims Act, the Nebraska Hospital-Medical Liability Act, the State Contract Claims Act, the State Tort Claims Act, or the State Miscellaneous Claims Act, except for a penalty or forfeiture, for the recovery of the title or possession of lands, tenements, or hereditaments, or for the foreclosure of mortgages thereon, is, at the time the cause of action accrued, within the age of twenty years, a person with a mental disorder, or imprisoned,

every such person shall be entitled to bring such action within the respective times limited by Chapter 25 after such disability is removed. For the recovery of the title or possession of lands, tenements, or hereditaments or for the foreclosure of mortgages thereon, every such person shall be entitled to bring such action within twenty years from the accrual thereof but in no case longer than ten years after the termination of such disability. Absence from the state, death, or other disability shall not operate to extend the period within which actions in rem are to be commenced by and against a nonresident or his or her representative.

Neb. Rev. Stat. § 30-810, Wrongful death action; limitations:

Every such action, as described in section 30-809, shall be commenced within two years after the death of such person. It shall be brought by and in the name of the person's personal representative for the exclusive benefit of the widow or widower and next of kin. The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained. The avails thereof shall be paid to and distributed among the widow or widower and next of kin in the proportion that the pecuniary loss suffered by each bears to the total pecuniary loss suffered by all such persons. A personal representative shall not compromise or settle a claim for damages hereunder until the court by which he or she was appointed shall first have consented to and approved the terms thereof. The amount so received in settlement or recovered by judgment shall be reported to and, if so ordered, paid into such court for distribution, subject to the order of such court, to the persons entitled thereto after a hearing thereon and after notice of such hearing and of the time and place thereof has been given to all persons interested by publication three successive weeks in a legal newspaper published within the county or, if no legal newspaper is published within the county, then in a legal newspaper published in an adjoining county, except that the court for good cause shown may provide for a different method or time of giving notice and a person, including a guardian ad litem, conservator, or other fiduciary, may waive notice or any other requirement for the mailing or receipt of instruments by a writing signed by him or her and filed in the proceeding. Such amount shall not be subject to any claims against the estate of such decedent. When the amount of such settlement or judgment is ordered to be paid into the court and is five thousand dollars or more, the county court shall forthwith upon such settlement or payment of such judgment place such amount in interest-bearing certificates of deposit or a savings account in a banking institution pending the entry of an order of distribution by the court, and such interest that may accumulate pending the entry of such order shall be distributed in the same proportions as the settlement or judgment. The hearing to approve the terms of the compromise or settlement and the hearing for distribution of the amount so received in settlement or recovered by judgment may be combined into one hearing.

10. Attorneys' Fees

Neb. Rev. Stat. § 44-2834, Cause of action; attorney's fees; court costs; loss of

earnings; when payable:

(1) In all cases against a health care provider for malpractice or professional negligence, upon motion of either party the court shall review the attorney's fees incurred by that party and allow such compensation as the court shall deem reasonable.

(2) In all cases against health care providers for malpractice or professional negligence, the court may, upon application by the prevailing party, in its discretion and in an amount determined in its discretion tax as costs payable to the prevailing party the reasonable costs of preparation and trial including reasonable attorney's fees and the reasonable loss of earnings by the prevailing party occasioned by the trial if the court finds that the losing party did not have a reasonable chance of recovery or a reasonable chance of a successful defense.

(3) A patient shall have the right to agree with his attorney to pay for the attorney's services on a mutually satisfactory per diem basis. Such election shall be exercised in written form at the time of employment or by written agreement thereafter entered into with his attorney.

11. Practice Pointers

Neb. Rev. Stat. § 44-2840, Medical review panels; review claims; procedure; waiver:

(1) Provision is hereby made for the establishment of medical review panels to review all malpractice claims against health care providers covered by the Nebraska Hospital-Medical Liability Act in advance of filing such actions.

(2) No action against a health care provider may be commenced in any court of this state before the claimant's proposed complaint has been presented to a medical review panel established pursuant to section 44- 2841 and an opinion has been rendered by the panel.

(3) The proceedings for action by the medical review panel shall be initiated by the patient or his or her representative by notice in writing with copy of a proposed complaint served upon the director personally or by registered or certified mail. Such notice shall designate the claimant's choice of the physician to serve on the panel, claimant's suggestion of an attorney to serve, and the court where the action shall be filed, if necessary.

(4) The claimant may affirmatively waive his or her right to a panel review, and in such case the claimant may proceed to file his or her action directly in court. If the claimant waives the panel review, the claimant shall serve a copy of the complaint upon the director personally or by registered or certified mail at the time the action is filed in court.

Nevada

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1. Introduction – Recent History of Tort Reform in Nevada

Over the last decade, the Nevada legislature, following a growing trend in this country, has chosen tort reform to address the state's ever expanding court dockets. While tort reform continues in all areas of litigation, the great majority of Nevada's legislative enactments have specifically targeted medical malpractice claims. Beginning in 2002, the Nevada Legislature has enacted a series of new laws aimed at both limiting the number of medical malpractice claims filed as well as curbing excessive verdict awards arising out of such lawsuits.

2. Joint and Several Liability

In 1987 the Nevada legislature limited the application of joint and several liability to cases involving strict liability, intentional torts, emission, disposal or spillage of toxic or hazardous substances, concerted action by co-defendants, or products liability so long as comparative negligence is asserted as a defense. NRS § 41.141(5). Thus, in cases where a colorable claim of comparative negligence has been raised each defendant is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to him. NRS § 41.141(4).

In 2004 the Nevada Legislature further limited the application of joint and several liability in medical malpractice cases. NRS § 41A.045(1) provides that in an action for injury or death against a provider of health care[1] based upon professional negligence,[2] each defendant is liable to the plaintiff for both economic damages[3] and non-economic damages[4] severally only. This is a departure from prior medical malpractice statutes which provided several liability with respect to non-economic damages only. NRS § 41A.045(2) further provides that statute is intended to abrogate joint and several liability of a provider of health care in an action for injury or death against the provider of health care based upon professional negligence.

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[1] As used in this Chapter, "[p]rovider of health care" means a physician licensed under chapter 630 or 633 of NRS, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, medical laboratory director or technician, or a licensed hospital and its employees. NRS § 41A.017.

[2] As used in this Chapter, "[p]rofessional negligence" means a negligent act or omission to act by a provider of health care in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death. The term does not include services that are outside the scope of services for which the provider of health care is licensed or services for which any restriction has been imposed by the applicable regulatory board or health care facility. NRS § 41A.015.

[3] As used in this Chapter, "[e]conomic damages" includes damages for medical treatment, care or custody, loss of earnings and loss of earning capacity. NRS § 41A.007.

[4] As used in this Chapter, "[n]oneconomic damages" includes damages to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damages. NRS § 41A.011.

3. Damage Caps

a. Court Annexed Alternative Dispute Resolution

To further address expanding court dockets, Nevada has enacted multiple court sponsored alternative dispute resolution programs designed to resolve civil disputes outside the district court forum.

1. Arbitration

In 1992, to provide a simplified procedure for obtaining a prompt, economical and equitable resolution of certain civil cases, the Nevada Supreme Court created a mandatory court annexed non-binding arbitration program for cases commenced in judicial districts having populations of at least 100,000. Districts with smaller populations may voluntarily elect to participate in the program. NAR 1 & 2. Subject to certain exceptions, all civil cases commenced in Nevada District Court that have a probable jury award value not in excess of $50,000 are subject to this program. NAR 3(A). This form of alternative dispute resolution allows litigants to obtain relief outside the formal court setting and tends to expedite resolution.

Nevada'a arbitration rules permit a party to request a trial *de novo* within thirty (30) of an arbitrator's award. NAR 18. However, where a party seeking a trial *de novo* fails to obtain a more favorable award, the non-requesting party is entitled to its attorney's fees and costs associated with the proceedings following the request for a trial *de novo*.

2. Mediation

Alternatively, any matter otherwise subject to the aforementioned arbitration program may be diverted to the Court Annexed Mediation Program upon stipulation of the parties. NMR 2. The Mediation Program is similarly designed to provide parties with a prompt, equitable, and inexpensive method of dispute resolution. NMR 1. Parties may choose from a randomly selected list of court approved mediators or stipulate to the use of a private mediator. NMR 3.

3. Short Trial Program

Any matter not resolved in arbitration automatically enters the Short Trial Program subject to a party's timely right to file a request to remove the case from the program and return it to the District Court trial docket. Alternatively, parties may agree to bypass arbitration altogether and enter the Short Trial Program directly. NSTR 4. The Short Trial Program expedites civil jury trials through procedures designed to control the length of the

trial, including restrictions on discovery, the use of smaller juries, and time limits for presentation of evidence. NSTR 1(a). The parties may stipulate that the results obtained through the Short Trial Program are binding. NSTR 32.

4. Punitive Damages

Nevada has also limited recovery of punitive damages. NRS § 42.005, enacted in 1989, provides that an award of exemplary or punitive damages may not exceed three times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is $100,000 or more or three hundred thousand dollars if the amount of compensatory damages awarded to the plaintiff is less than $100,000.

The limitations on the amount of a punitive damage award do not apply, however, to cases involving products liability, insurance bad faith, federal or state discrimination statutes with punitive damage provisions, toxic waste, or defamation.

5. Medical Malpractice Reform

Nevada made national headlines in the summer of 2002 when the Trauma Center at the University Medical Center (UMC) of Southern Nevada, the only level one trauma center in the area, closed for ten (10) days due to the unavailability of surgeons, which is believed to have been brought on by rising malpractice insurance premiums. This prompted the governor to call a special session of the legislature, and during this special session in 2002, the Nevada legislature passed a tort reform bill. In 2004, additional reforms were made to remove exceptions to the cap on non-economic damages.

a. Caps to Non-Economic Damages

In 2004, Nevada limited the amount of non-economic damages recoverable in medical malpractice actions. NRS § 41A.035 provides that in an action for injury or death against a provider of health care based upon professional negligence, the injured plaintiff may recover non-economic damages not to exceed $350,000.

b. Emergency Room Negligence

Enacted in 2002, NRS § 41.503 limits the liability of an individual who, in good faith, renders care or assistance in an emergency room setting. Any civil damage award arising out of any act or omission in rendering such care or assistance is capped at a maximum of $50,000. This limitation does not apply, however, to cases involving gross negligence or reckless, willful or wanton conduct, or for acts or omissions which occur after a patient has been stabilized and is capable of receiving non-emergency treatment.

c. Other Limitations on Medical Malpractice Claims

1. Affidavit Requirement

In 2002, the Nevada Legislature did away with the screening panel formerly charged with evaluating the viability of medical malpractice cases prior to filing. This screening process was replaced with a requirement that complaints in all such cases include an affidavit verifying the allegations contained therein. NRS § 41A.071 directs the district court to dismiss without prejudice any medical or dental malpractice action filed without an affidavit supporting the allegations contained in the complaint. This affidavit must be executed by a medical expert who practices or has practiced in an area of medicine that is "substantially similar to the type of practice engaged in at the time of the alleged malpractice."

2. Evidence of Collateral Source in Medical Malpractice

In 2004, Nevada voters approved an initiative petition which gave rise to NRS § 42.021, providing that defendants in medical malpractice actions may introduce evidence of any related collateral source payments including Social Security benefits, state or federal worker's compensation benefits, insurance benefits, or group medical benefits. If the defendant elects to introduce such evidence, however, the plaintiff may introduce evidence of any payments made to secure his right to any insurance benefits which the defendant has introduced into evidence.

6. Product Liability Reform

Nevada has not implemented any tort reform related to product liability. In fact, as described in section 4 above, the Nevada statute related to limiting exemplary and punitive damages specifically does not apply to cases involving product liability.

7. Attorneys Fees

a. Cases Where Prevailing Party has Recovered less that $20,000

In Nevada the Court has discretion to award attorney's fees in cases where the prevailing party has not recovered over $20,000. NRS § 18.010.

b. Offers of Judgment

Nevada has both a statute and rule of civil procedure allowing offers of judgment. In Nevada an offer of Judgment can be made by Plaintiff or Defendant, and post-offer costs are awarded to an offeror when the offeree rejects an offer and fails to obtain a more favorable judgment. NRS § 17.115;

NRCP 68. In addition, NRCP 68 provides that an offeree can also be awarded attorney's fees in certain situations. In determining whether attorney's fees will be awarded, a court reviews the following factors: (1) whether the plaintiff brought the claim in good faith, (2) whether the defendants' offer of judgment was reasonable and brought in good faith in both its amount and timing, (3) whether it was grossly unreasonable or an act in bad faith for the plaintiff to reject the offer and proceed to trial, and (4) whether the fees sought are reasonable and justifiable in amount. *Beattie v. Thomas,* 99 Nev. at 579, 588-89, 668 P.2d 268, 274 (1983).

8. Practice Pointers

a. Mandatory Pretrial Conference

NRCP 16 provides to the Court discretion to direct attorneys and parties to appear before it for a conference. In the last several years many departments have incorporated this practice into their standard scheduling order and some require the event to occur very early in the litigation. It is not unusual to require the attendance of a party representative and/or insurer representative with complete settlement authority and many departments require that telephonic attendance or non-attendance be excused in writing and sanctions can and are often leveled for failure to comply.

b. Trial Brief in Clark County

As a consequence of a former local rule (EJDCR 7.27) unique to Clark County, a civil trial memoranda could formerly be submitted to the court prior to the commencement of trial without filing the same or serving the pleading upon opposing counsel at that time. This rule was amended effective July 29, 2011 to require the trial memoranda to be served on opposing counsel by the time of submission to the court. *See* EJDCR 7.27.

9. Special Issues

a. Amendments to the Nevada Rules of Civil Procedure

In 2004, the Nevada Supreme Court issued an order amending the Nevada Rules of Civil Procedure. Effective January 1, 2005, these amendments were designed to bring the Nevada rules closer to their federal counterparts, although many differences still exist. Regardless, these amendments, specifically those addressing discovery, have had a notable impact on the way tort cases are litigated in this state.

1. NRCP 16.1

NRCP 16.1 addressing mandatory discovery requirements contains many revisions. Most significantly, the Rule imposes an affirmative duty to disclose certain basic information without a formal discovery request. Additionally, the new rule requires the disclosure of information regarding expert testimony, including a written report delineating all opinions to be advanced at trial.

2. NRCP 30

Key revisions to NRCP 30 governing the noticing and taking of depositions include a provision allowing parties to choose the method of recording including nonstenographic means. Parties should be aware of the possibility that deposition testimony may be videotaped and advise their clients accordingly. A party can also instruct a deponent not to answer a question under three circumstances: (1) to protect a privileged matter; (2) to enforce a court-directed limitation; or (3) to present a motion that the deposition is being taken in bad faith. NRCP 30(d)(1).

3. NRCP 37

Rule 37, governing the imposition of discovery sanctions, provides for the enforcement of new discovery requirements under NRCP 16.1 and NRCP 26. Rule 37 is also now the exclusive source for discovery sanctions in Nevada district court up to and including dismissal or default.

New Jersey

1. INTRODUCTION

New Jersey has been slow in its development of meaningful tort reform legislation. The last significant change in New Jersey's tort law came in June of 1995 when then Governor Christie Whitman signed several tort reform measures into law. These measures stretch into various areas of the law and with the exception of punitive damage awards, no caps on jury awards were established. Instead, several procedural and substantive changes aimed at reducing the amounts of suits that are filed and the potential liability of culpable defendants.

2. PROFESSIONAL MALPRACTICE

One of the new laws was NJSA N.J.S.A. 2A:53A-29, commonly referred to as the Affidavit of Merit Statute. The Affidavit of Merit Statute created a new requirement for plaintiffs who seek to bring malpractice actions against licensed professionals. Now a plaintiff who wishes to bring a negligence or malpractice action against any licensed person must obtain an affidavit within sixty days of suit from a neutral licensed person stating that the services rendered were unacceptable. The statute requires that the person providing the affidavit be a qualified expert in the same field of specialty as the potential defendant. If the plaintiff fails to produce an affidavit of merit the court must find that the plaintiff has failed to state a cause of action and the complaint will be dismissed with prejudice.

Reforms to Joint and Several Liability

New Jersey's joint and several liability laws were modified by the enactment of NJSA 2A:15-5.2. Prior to the enactment of this law New Jersey had a modified form of joint and several liability. The previous law stated that a defendant who was 60% or more liable for the injury could be held 100% liable for total damages. The former statute also provided that defendants who were greater than 20% liable, but less than 60% liable could be held completely responsible only for economic damages.

The new law, eliminated the economic/non-economic losses distinction. Under New Jersey's current law, a defendant in a negligence or strict liability action will be held responsible for the amount of damages for which he/she is liable. However, if a defendant's liability is greater than 60%, he/she may be held responsible for all damages.

The current law also effects environmental actions. Under this statute a defendant will only be liable for a percentage of her fault. However, if one of the negligent parties is insolvent, the solvent wrongdoers will assume a percentage of the insolvent defendant's liability equal to the percentage of their own fault. The

law also states that any defendant in an environmental action who is five percent or less responsible for plaintiff's damages he/she will only be required to pay his/her apportioned share.

3. PUNITIVE DAMAGES CAPS

The Punitive Damages Act NJSA 2A:15-514 was also enacted in 1995 and limits the amount of punitive damages and establishes standards for the award of punitive damages. The Punitive Damages Act requires that a plaintiff specifically request punitive damages in the complaint. The statute also permits a defendant to request a bifurcated trial, the first part is dedicated to the determination of liability and compensatory damages, and the second part is dedicated to the determination of punitive damages. The issue of punitive damages will only be reached if there is an award of compensatory damages that is greater than nominal damages. The act applies to all tort actions.

The law also establishes standards for the amount of punitive damages to be awarded in all tort cases. The new law also provides that in a case in which there is an award of punitive damages and there is more than one defendant, the damage amount must be specific as to each one. The Punitive Damages Act places a cap on awards of punitive damages. Under the current law, the defendant's maximum liability for punitive damages is five times his/her liability for compensatory damages or $ 350,000, whichever is greater. However, the cap will not apply to certain abhorrent offenses that include bias crimes, discrimination, AIDs testing disclosure, sex abuse and drunk driving cases.

New Mexico

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1. Introduction - History of Tort Reform in New Mexico

New Mexico is behind other states in implementing tort reform measures. There have not been many "tort reform" measures implemented in New Mexico. In fact, a recent study conducted by Pacific Research Institute shows that New Mexico is ranked 44th in tort reform laws but has the sixth lowest costs. There have been no significant tort reforms in New Mexico since 2005.

2. Joint and Several Liability

In 1987, the New Mexico Legislature passed SB 164. This bill created N.M. Stat. Ann. § 41-3A-1. The statute bars the application of the rule of joint and several liability in the recovery of all damages, except in the following cases:

(a) to persons who acted with the intention of inflicting injury or damage on another;

(b) to any persons whose relationship to each other would make one person vicariously liable for the acts of the other, but only to that portion of the total liability attributed to those persons;

(c) to any persons strictly liable for the manufacture and sale of a defective product, but only to that portion of the total liability attributed to those persons; or

(d) to situations not covered by any of the foregoing and having a sound basis in public policy.

3. Damage Caps and Medical Malpractice Reform

In 1987, the Legislature created N.M. Stat. Ann. § 41-5-6 and § 41-5-7.

Section 41-5-6 limits total damages in medical liability cases to $600,000, except for punitive damages and medical care and related benefits. The statute provides the following:

> A. **Except for punitive damages and medical care and related benefits, the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice shall not exceed six hundred thousand dollars ($600,000) per occurrence.** In jury cases, the jury shall not be given any instructions dealing with this limitation.
>
> B. The value of accrued medical care and related benefits shall not be subject to the six hundred thousand dollar ($600,000) limitation.

C. Monetary damages shall not be awarded for future medical expenses in malpractice claims.

D. **A health care provider's personal liability is limited to two hundred thousand dollars ($200,000) for monetary damages and medical care and related benefits as provided in Section 41-5-7 NMSA 1978.** Any amount due from a judgment or settlement in excess of two hundred thousand dollars ($200,000) shall be paid from the patient's compensation fund, as provided in Section 41-5-25 NMSA 1978.

E. For the purposes of Subsections A and B of this section, the six hundred thousand dollar ($600,000) aggregate amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice shall apply only to malpractice occurring on or after April 1, 1995.

Section 41-5-7 requires juries in medical liability cases to be given a special interrogatory asking if damages are for future medical care. It also requires patients to be furnished with medical care as necessary. The statute provides the following regarding future medical expenses:

A. In all malpractice claims where liability is established, the jury shall be given a special interrogatory asking if the patient is in need of future medical care and related benefits. No inquiry shall be made concerning the value of future medical care and related benefits, and evidence relating to the value of future medical care shall not be admissible. In actions upon malpractice claims tried to the court, where liability is found, the court's findings shall include a recitation that the patient is or is not in need of future medical care and related benefits.

B. Except as provided in Section 41-5-10 NMSA 1978, once a judgment is entered in favor of a patient who is found to be in need of future medical care and related benefits or a settlement is reached between a patient and health care provider in which the provision of medical care and related benefits is agreed upon, and continuing as long as medical or surgical attention is reasonably necessary, the patient shall be furnished with all medical care and related benefits directly or indirectly made necessary by the health care provider's malpractice, subject to a semi-private room limitation in the event of hospitalization, unless the patient refuses to allow them to be so furnished.

C. **Awards of future medical care and related benefits shall not be subject to the six hundred thousand dollar ($600,000) limitation imposed in Section 41-5-6 NMSA 1978.**

D. Payment for medical care and related benefits shall be made as expenses are incurred.

E. **The health care provider shall be liable for all medical care and related benefit payments until the total payments made by or on behalf of it for monetary damages and medical care and related benefits combined equals two hundred thousand dollars ($200,000), after which the payments shall be made by the patient's compensation fund.**

F. This section shall not be construed to prevent a patient and a health care provider from entering into a settlement agreement whereby medical care and related benefits shall be provided for a limited period of time only or to a limited degree.

G. The court in a supplemental proceeding shall estimate the value of the future medical care and related benefits reasonably due the patient on the basis of evidence presented to it. That figure shall not be included in any award or judgment but shall be included in the record as a separate court finding.

H. A judgment of punitive damages against a health care provider shall be the personal liability of the health care provider. Punitive damages shall not be paid from the patient's compensation fund or from the proceeds of the health care provider's insurance contract unless the contract expressly provides coverage. Nothing in Section 41-5-6 NMSA 1978 precludes the award of punitive damages to a patient. Nothing in this subsection authorizes the imposition of liability for punitive damages on a derivative basis where that imposition would not be otherwise authorized by law.

There is no New Mexico statute limiting attorneys' fees in medical malpractice actions.

4. Punitive Damages

No reform action.

5. Products Liability Reform

No reform action.

6. Attorneys Fees

No reform action.

7. Jury Service Reform

Since July 1, 2005, New Mexico has had reform in its jury selection process. The new provisions of the jury statutes are as follows:

a) Section 38-5-10.1A provides all summoned jurors with the ability to automatically postpone and reschedule service to a date within six months one-time. Subsequent postponements would be available in the case of an emergency.

b) Section 38-5-10.1C allows the court to also postpone and reschedule jury service for employees of a small businesses (those with less than 5 full-time employees) if

(1) another employee of that business is serving on a jury during the same period OR
(2) when the person summoned is the only person performing particular services for a business, commercial or agricultural enterprise and whose services are so essential to the operations of the business, commercial or agricultural enterprise that the enterprise must close or cease to function if the person is required to perform jury duty.

c) Section 38-5-18 prohibits employers from requiring employees to use leave time during jury service.

d) Section 38-5-2F provides more guidance to judges and jurors as to the grounds to obtain a hardship excuse. It permits the court to excuse a juror for undue or extreme physical or financial hardship, an emergency, or other satisfactory evidence. "Undue or extreme physical or financial hardship" is defined as circumstances in which a person would

(1) be required to abandon another person under the person's care or supervision due to the extreme difficulty of obtaining an appropriate substitute caregiver during the period of jury service;

(2) incur costs that would have a substantial adverse impact on the payment of necessary daily living expenses of the person or the person's dependent; or

(3) suffer physical hardship that would result in illness or disease.

Hardship would not exist solely because a prospective juror will be absent from employment.

e) Section 38-5-2F provides that the juror source lists will include income tax filers in addition to persons who are registered voters and persons who have a driver’s license.

New York

1. Introduction

To date, the New York legislature has passed minimal tort reform legislation although many bills have been introduced, including the Medical Liability Reform Act, which is discussed more fully in Section Five below. In 1986, the legislature enacted Article 16 of the N.Y. C.P.L.R., which modifies the common law rule of joint and several liability that each tortfeasor is jointly and severally liable to the plaintiff for the full amount of plaintiff's damages without regard to the tortfeasor's particular degree of culpability (see Section Two below). As part of the same legislative package, N.Y. C.P.L.R. §8303-a provides for an award of costs and attorney's fees not to exceed $10,000 for frivolous claims and counterclaims filed in actions to recover for personal injury or wrongful death (see Section Seven below).

2. Joint and Several Liability

Article 16 of the C.P.L.R. was adopted as part of New York's 1986 tort reform legislation. The purpose of Article 16 is to modify the traditional rule that each tortfeasor is jointly and severally liable to the plaintiff for the full amount of plaintiff's damages without regard to the tortfeasor's particular degree of culpability. Under C.P.L.R. §1601, the joint liability of a tortfeasor with fifty percent or less relative culpability for *non-economic loss* is limited to that tortfeasor's judicially determined share of the judgment. This replaces the common law rule of joint and several liability under which an assessment of one percent culpability against a defendant made it possible to collect the full non-economic loss judgment against that "deep pocket" defendant.

Article 16 of the C.P.L.R. is subject to a number of exceptions, which are included in §1602. Among the torts exempted from the statutory scheme are those in which liability arises out of the use or operation of a motor vehicle or motorcycle; intentional torts; tort liability arising out of the tortfeasor's reckless disregard for the safety of others; or claims under the worker's compensation law.

N.Y. C.P.L.R. §1601 applies only to actions for personal injury, and only to non-economic items of damage. As defined by C.P.L.R. §1600, non-economic loss includes, but is not limited to, pain and suffering, mental anguish, and loss of consortium. Claims for wrongful death, lost wages, property damage and other types of economic loss remain governed by the common law rule of joint and several liability. Finally, as stated in the comment to the statute, C.P.L.R. §1601 does not implement a system of pure equitable-share or several-only liability. A defendant whose percentage of fault exceeds fifty percent is liable as a joint and several tortfeasor in accordance with the common law rule.

3. Damages Caps

The New York legislature has not passed any tort reform laws which attempt to cap compensatory awards although many tort reform bills have been introduced. Damages are recoverable for past and future medical expenses, lost earnings,

impairment of future earning ability, custodial care, rehabilitation services, and pain and suffering, including loss of enjoyment of life. Damages are also recoverable for emotional injuries, such as shock or mental instability. *Baker v. Dorfman*, 239 F.3d 415 (2d. Cir. 2000); *Colon v. BIC USA, Inc.*, 199 F.Supp.2d 53 (S.D.N.Y. 2001); *Howard v. Lechner*, 42 N.Y.2d 109, (1977).

Derivative claims are available for loss of society and companionship, as well as economic loss, including the value of household services. Damages are also recoverable for wrongful death pursuant to N.Y. E.P.T.L. §5-4.3. New York's wrongful death statute requires that entitlement to damages turn on a showing of the claimant's dependency on the decedent for economic support. Other damages that are allowed for wrongful death include the cost of medical treatment prior to death, funeral expenses, and interest from the date of death.

4. <u>Punitive Damages</u>

In New York, there is no statutory cap on the recovery of punitive damages in either a personal injury or wrongful death action. Punitive damages were barred by statute in wrongful death actions until 1982. Punitive damages are now recoverable in a wrongful death action. *See* N.Y. E.P.T.L. §5-4.1 (1999). *See* N.Y. E.P.T.L. §5-4.3(b). New York permits punitive or exemplary damages to be awarded in order to punish a defendant for the wrong in a particular case, to protect the public from similar acts, and to deter the defendant and others from similar acts. *Home Ins. Co. v. American Home Prods. Corp.*, 75 N.Y.2d 196 (1990). In negligence actions, punitive damages are awarded where the defendant is found to have engaged in misconduct involving malice, oppression, insult, wanton or reckless disregard of the plaintiff's rights, or other egregious circumstances. *Id.* at 204.

The courts in New York have held that the amount of punitive damages awarded should bear some relationship to the plaintiff's actual damages. In *Manolas v. 303 West 42nd Street Entersl, Inc.*, the court set aside a punitive damages award that was almost eighty times the amount awarded for compensatory damages. 173 A.D.2d 316 (1st Dep't 1991). The courts have the power to reduce the jury's verdict if the award is based on prejudice or partiality, or if the amount awarded is so unreasonable as to "shock the judicial conscience." *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992).

There is no separate cause of action in New York for punitive damages. *See Staudacher v. City of Buffalo*, 155 A.D.2d 956 (4th Dep't 1989). To justify punitive damages, there must be a showing of actual injury that justifies an award of compensatory damages, although punitive damages can be awarded in connection with nominal damages. *Chlystun v. Kent*, 185 A.D.2d 525 (3d Dep't 1992) (affirming punitive damages award of $15,000 where compensatory damages were $1). Punitive damages have also been awarded in New York where equitable relief was sought. *See I.H.P. Corp. v. 210 Central Park South Corp.*, 16 A.D.2d 461 (1st Dep't 1962).

Factors that may be considered in determining an award of punitive damages include the defendant's financial assets or wealth as well as his or her conduct and state of mind. *Rupert v. Sellers* , 48 A.D.2d 265 (4th Dep't 1975); *Boguslavsky v. Kaplan*, 159 F.3d 715 (2d Cir. 1998). Punitive damages must be assessed against the actual tortfeasor and may not be imposed where liability is vicarious. *Commonwealth Assocs. v. Letsos*, 40 F. Supp. 2d 170 (S.D.N.Y. 1999).

5. Medical Malpractice Reform

In New York, there is no statutory cap on the recovery of damages in a medical malpractice action. Several versions of the "Medical Liability Reform Act" have been considered by the State legislature; however, with the exception of the section of the Act discussed in the next paragraph, the legislature has not passed this Act. The stated purpose of the proposed Act is to reform New York's Civil Practice Law and Rules in regards to medical liability. The Act was first presented during the 2003-2004 session, and the State Senate last considered the bill in February 2007. The Act would modify the limited liability of persons jointly liable, and limit non-economic damages in medical malpractice cases to $250,000. The Act would further require each party to provide enhanced and comprehensive expert disclosures in medical malpractice cases, including a complete statement of all opinions to be expressed by the experts, the basis and reasons for their opinions; the data or other information considered by the experts in forming their opinions; any exhibits to be used as a summary of or support for the experts' opinions; the qualifications of the experts, including a list of all publications authored by the experts during the preceding ten years; the compensation to be paid for the expert's consideration of data or other information and for his or her testimony; and a listing of any other cases in which the person has testified as an expert at trial or by oral deposition within the preceding four years. Additionally, the bill would require the parties to produce the experts for deposition. A party's failure to produce an expert for deposition would preclude the party from offering the expert's testimony at trial.

One section of the Act has been enacted. N.Y. C.P.L.R. §3012-a requires a plaintiff in a medical, dental or podiatric malpractice case to include with the complaint a certificate of merit and an affidavit of an appropriate medical professional licensed in the state stating that there is a reasonable basis for the malpractice action. The failure to comply with this provision will result in the dismissal of the complaint unless the plaintiff demonstrates a reasonable excuse for the delay and provides an affidavit from a medical expert. *See Defelice v. New York Eye and Ear Infirmary*, 799 N.Y.S.2d 159 (2004).

N.Y. C.P.L.R. §3406 requires that in a medical malpractice action the plaintiff must file a notice describing the action within 60 days after the joinder of issue. The notice triggers the scheduling of a pretrial conference designed to expedite the action. In *Tewari v. Tsoutsouras*, the Court of Appeals held that the plaintiff's omission to serve a timely notice under §3406 cannot be punished with a dismissal (although a money sanction is permissible). 549 N.E. 2d 1143 (1989).

6. Products Liability Reform

The New York legislature has not passed any tort reform legislation in the field of products liability. Punitive damages are permitted under New York law in actions based on negligence. Punitive damages are similarly allowed in the strict products liability context. There is no statutory cap on the recovery of punitive damages in either a personal injury or wrongful death action.

7. Attorneys Fees

N.Y. C.P.L.R. §8303-a provides for an award of costs and attorney's fees not to exceed $10,000 for frivolous claims and counterclaims filed in actions to recover for personal injury or wrongful death. The court may require payment of the costs and expenses by the offending party, the party's attorney, or both, as appropriate to the circumstances of the case. Based on the language of the statute ("the court shall award"), the imposition of costs has been held to be mandatory upon a finding of frivolousness. The statute was part of a legislative package of several insurance and tort reform measures. The obvious purpose of the statute is to discourage frivolous tort litigation by authorizing monetary sanctions for frivolous claims and defenses in such cases.

8. Practice Pointers

N.Y. C.P.L.R. §3012-a requires a plaintiff in a medical, dental or podiatric malpractice case to include with the complaint a certificate of merit and an affidavit of an appropriate medical professional licensed in the state stating that there is a reasonable basis for the malpractice action. The failure to comply with this provision will result in the dismissal of the complaint unless the plaintiff demonstrates a reasonable excuse for the delay and provides an affidavit from a medical expert. *See Defelice v. New York Eye and Ear Infirmary*, 799 N.Y.S.2d 159 (2004). Defense counsel should consider filing a motion to dismiss if plaintiff's counsel fails to comply with this statute.

N.Y. C.P.L.R. §3012-a should be read in conjunction with N.Y. C.P.L.R. §8303-a, which provides for an award of costs and attorney's fees not to exceed $10,000 for frivolous claims and counterclaims filed in actions to recover for personal injury or wrongful death. If plaintiff's counsel fails to include a certificate of merit with the complaint stating that there is a reasonable basis for the malpractice action, the court could find that the claim is frivolous and award sanctions including costs and attorney's fees.

9. Special Issues

A. Mass Tort Claims

Although the tort reform legislation passed by the New York legislature has been minimal, New York recently adopted rules that mirror the federal system allowing mass tort cases to be handled by a single judge for pretrial purposes. Under the new rules, a four-judge panel is being established to decide which lawsuits should be assigned to one or more judges where those cases present common facts and parties. *See* N.Y. Unif. Rules, Trial, Cts. 202.69 (2003).

B. Collateral Source Payments

In 1975, the legislature abrogated New York's common-law collateral source rule by requiring the offset of collateral source payments against past economic loss awards in medical malpractice cases. Since that time, the legislature has expanded the reach of the statute to require offsets against future losses, and to apply to personal injury, property damage and wrongful death claims as well as other malpractice claims. *See* N.Y. C.P.L.R. §4545.

North Carolina

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There were two significant tort law updates passed into law in North Carolina in 2011. The first was House Bill 542, signed into law on June 24, 2011 and titled "An Act to Provide Tort Reform for North Carolina Citizens and Businesses" (hereinafter the "Tort Reform Act"). The Tort Reform Act vastly changes some of the long-standing laws regarding tort claims in North Carolina. The second piece of legislation, titled the "Medical Liability Reforms Act," was passed into law in July 25, 2011, following the legislative override vote of Governor Perdue's prior veto. Part I of this article addresses the substantive changes included in the Tort Reform Act and Part II addresses the Medical Liability Reforms Act.

1. TORT REFORM ACT OF 2011

The Tort Reform Act is possibly the broadest tort reform act in the past decade. The full version of the Act is available for reference on the North Carolina General Assemble website at the following:
http://www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H542v7.pdf
The most significant changes to existing law are divided into the categories listed below. Unless otherwise noted, the new law applies to all actions commenced on or after October 1, 2011.

i. Admission of Expert Witness Testimony

The Tort Reform Act has re-written N.C. Gen. Stat. § 8C-702(a), which controls the admissibility of expert witness testimony. The Act has added several requirements that must be satisfied in order for an expert to be allowed to provide opinion testimony at trial. See N.C. Gen. Stat. § 8C-702(a) (2011). The new statute now essentially follows the federal rule for admissibility of expert testimony and incorporates the well-established *Daubert* Standard factors into the statute. Id. The apparent intent of the legislature is to replace applicable North Carolina case law regulating expert opinion testimony with more concise statutory requirements. North Carolina courts, at least initially, may seek guidance from case law interpreting the *Daubert* Standard from federal courts and other *Daubert* Standard jurisdictions when ruling on the admissibility of an expert's opinion testimony.

ii. Attorney's Fees

The Tort Reform Act also revises N.C. Gen. Stat. § 6-21.1, which provides for the award of attorney fees as costs in cases where the court finds there has been an unwarranted refusal to negotiate or settle a claim. See N.C. Gen. Stat. § 6-21.1 (2011). The Tort Reform Act expands the statute by making it applicable to cases in which the damages award is $20,000 or less. Id. Previously, the statute was only applicable to cases in which the damages award was $10,000 or less. Furthermore, the Act limits courts to issue a maximum award of $10,000 in attorney's fees to the prevailing party. Id. In determining whether a case meets the threshold amount of $20,000, the revisions now limit the calculation to include only the "amount of damages recovered." Id. Previously, the statute allowed the consideration of damages awarded and associated costs in determining whether a case met the threshold amount.

The Tort Reform Act further adds a time requirement to § 6-21.1. Only offers made by a defendant ninety days or more prior to trial will be considered for purposes of the statute. Id. In order for a plaintiff to have the option of recovering attorney's fees, the plaintiff's damages award must exceed the amount of the highest offer made ninety days prior to trial. Id. All defendant offers made within ninety days of trial are now deemed untimely. Id.

Finally, the new law requires the presiding judge to issue a written order with findings of fact setting forth the basis of a finding of an unwarranted refusal by the defendant to negotiate or pay the claim, and justifying the amount of attorneys' fees awarded. Id. It is unknown whether the amended statute will lessen the importance of the factors set forth in North Carolina case law when determining whether to make an award of attorney's fees.

iii. Medical Expenses Evidence

The Tort Reform Act amends the North Carolina Rules of Evidence by creating Rule 414, Evidence of Medical Expenses. The Rule provides as follows:

> Evidence 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 the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied. This rule does not impose upon any party an affirmative duty to seek a reduction in billed charges to which the party is not contractually entitled.

N.C. Gen. Stat. § 8C-1, Rule 414 (2011). This is a notable change since previously only the full amount of the charges for the medical bills was allowed to be admitted into evidence. In cases where medical providers have agreed to accept a reduced amount in satisfaction of a bill, juries will now receive evidence of the amount of these actual costs, compared to the amount originally billed. See id.

Another implication to Rule 414 is the situation where part of the medical bill was paid from another source. For instance, where a health insurance carrier pays a portion of an outstanding medical bill, the jury will now be presented with evidence of the discounted amount compared to the full amounts originally billed from the medical provider. Nevertheless, the evidentiary restrictions concerning the existence of insurance are presumably still applicable.

iv. Testimony concerning amount of medical charges

The Tort Reform Act has revised North Carolina Gen. Stat. § 8-58.1. This statute permits an injured party to testify concerning the amount of medical charges. N.C. Gen. Stat. § 8-58.1 (2011). The revision allows the admission of evidence regarding the amount

paid or required to be paid in satisfaction of a medical bill, rather than the amount of the medical bill. See id. This revision incorporates the changes to Rule 414 of the North Carolina Rules of Evidence. Furthermore, the revised statute also now provides that if a provider of a hospital, medical, dental, pharmaceutical or funeral services testifies that a lesser amount will be accepted in satisfaction of a medical bill, then a rebuttable presumption is established that the lesser satisfaction amount is the reasonable amount of the charges for that testifying provider's services. Id.

v. The Trespasser Responsibility Act

The same legislation adopting the Tort Reform Act includes the new Trespasser Responsibility Act, which codifies the general common law rule that a possessor of land does not owe a duty of care to a trespasser and is not subject to liability for any injury to the trespasser. See N.C. Gen. Stat. § 38B-3 (2011). The Trespasser Responsibility Act also sets forth certain exceptions:

> (1) Intentional harms.--A possessor may be subject to liability if the trespasser's bodily injury or death resulted from the possessor's willful or wanton conduct, or was intentionally caused by the possessor, except that a possessor may use reasonable force to repel a trespasser who has entered the land or a building with the intent to commit a crime.
> (2) Harms to trespassing children caused by artificial condition.--A possessor may be subject to liability for bodily injury or death to a child trespasser resulting from an artificial condition on the land if all of the following apply:
> a. The possessor knew or had reason to know that children were likely to trespass at the location of the condition.
> b. The condition is one the possessor knew or reasonably should have known involved an unreasonable risk of serious bodily injury or death to such children.
> c. The injured child did not discover the condition or realize the risk involved in the condition or in coming within the area made dangerous by it.
> d. The utility to the possessor of maintaining the condition and the burden of eliminating the danger were slight as compared with the risk to the child involved.
> e. The possessor failed to exercise reasonable care to eliminate the danger or otherwise protect the injured child.
> (3) Position of peril.--A possessor may be subject to liability for physical injury or death to a trespasser if the possessor discovered the trespasser in a position of peril or helplessness on the property and failed to exercise ordinary care not to injure the trespasser.

N.C. Gen. Stat. § 38B-3. According to the new law, a child trespasser is defined as someone "who is less than 14 years of age or who has the level of mental development found in a

person less than 14 years of age." Id. The Trespasser Responsibility Act applies to any causes of action arising on or after October 1, 2011. Id.

2. MEDICAL LIABILITY REFORMS ACT OF 2011

The Medical Liability Reforms Act of 2011 incorporates several measures in limiting medical malpractice actions and damage awards in such actions. Similar to the Tort Reforms Act, the Medical Liability Reforms Act applies to all causes of action arising on or after October 1, 2011. The most notable revisions are as follows:

i. Limitation of Liability for Medical Providers

N.C. Gen. Stat. § 90-21.12, which addresses the standard of health care, has been re-written to limit liability for medical providers. Previously, a plaintiff had to establish more likely than not a health care provider did not meet the standards of practice among members of the same health care profession with similar training and experience in the same or similar communities. The revision now provides that the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the action or inaction of such health care provider was not in accordance with the standards of practice among similar health care providers situated in the same or similar communities *under the same or similar circumstances* at the time of the alleged act giving rise to the cause of action. N.C. Gen. Stat. § 90-21.12(a) (2011) (emphasis added). A new Section (b) further provides:

> (b) In any medical malpractice action arising out of the furnishing or the failure to furnish professional services in the treatment of an emergency medical condition, as the term "emergency medical condition" is defined in 42 U.S.C. 1395dd(e)(1)(A), the claimant must prove a violation of the standards of practice set forth in subsection (a) of this section by clear and convincing evidence.

N.C. Gen. Stat. § 90-21.12(b). "Emergency services" is defined as medical care needed to screen for or treat an emergency medical condition, including services in an emergency department. See 42 U.S.C. 1395dd(e)(1)(A).

ii. Liability Limit on Noneconomic Damages

The Medical Liability Reforms Act includes the new § 90-12.19, which implements an upward cap of $500,000 for noneconomic damages such as pain, suffering, and emotional distress. See N.C. Gen. Stat. § 90-21.19 (2011). The cap does not apply where a defendant is found to be grossly negligent, or acts with malice or reckless disregard, and the malpractice results in an individual's death, disfigurement, permanent injury, or loss of a body part. Id. The new statute also provides that on January 1st of every third year, beginning with January 1, 2014, the Administrative Office of the Courts shall reset the limitation on damages for noneconomic loss to be equal to $500,000 multiplied by the ratio

of the Consumer Price Index for November of the prior year to the Consumer Price Index for November 2011. Id.

iii. Medical Malpractice Action Pleading and Verdict Form Requirements

A new revision from the Medical Liability Reforms Act requires that a medical malpractice action plaintiff has had all medical records reasonably available to plaintiff reviewed by an expert witness in order to avoid dismissal. The relevant amendments state:

> (j) Medical malpractice.--Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
> (1) The pleading specifically asserts that the medical care *and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry* have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
> (2) The pleading specifically asserts that the medical care *and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry* have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitor.

N.C. Gen. Stat. Ann. § 1A-1, Rule 9 (2011) (amendment in emphasis).

Finally, presumably in collaboration with the new noneconomic damages cap, any verdict or award of damages in a medical malpractice action shall now indicate what amount, if any, is awarded for noneconomic damages specifically. N.C. Gen. Stat. Ann. § 90-21.19B (2011).

North Dakota

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1. Statute of Limitations

Statute of limitations establish the time-period during which a potential litigant must file a lawsuit to preserve his or her claim. The statute of limitations normally begins to run from the date of the accident or injury or from the date the individual or entity discovered or should have discovered the existence of a potential claim. The following limitation periods apply to tort actions brought in North Dakota:

2-Year Statute of Limitations
(N.D. Cent. Code. § 28-01-18)

- Personal Injury in case of Death
- Malpractice
- Libel
- Slander
- Assault
- Battery
- False Imprisonment

6-Year Statute of Limitations
(N.D. Cent. Code. § 28-01-16)

- Products Liability
- Negligence
- Fraud
- Action on Statutory Claim

2. Limitations on Liability

A. Comparative Fault

North Dakota has adopted the modified comparative fault approach. Under this system, the Plaintiff's own contributory fault does not bar recovery unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering. N.D. Cent. Code § 32-03.2-02.

The court may, and when requested by any party, shall direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party, who contributed to the injury. The court shall then reduce the amount of such damages in proportion to the amount of fault attributable to the person recovering. N.D. Cent. Code § 32-03.2-02.

B. Several Liability

When two or more parties are found to have contributed to the injury, the liability of each party is several only, and is not joint, and each party is liable only for the amount of damages attributable to the percentage of fault of that party. Persons who act in concert in committing a tortious act or who aid or encourage the act, or ratify or adopt the act for their benefit, are jointly liable for all damages attributable to their combined percentage of fault. N.D. Cent. Code § 32-03.2-02.

Fault, as used in the determination of comparative fault and several liability includes negligence, malpractice, absolute liability, dram shop liability, failure to warn, reckless or willful

conduct, assumption of risk, misuse of product, failure to avoid injury, and product liability, including product liability involving negligence or strict liability or breach of warranty for product defect. N.D. Cent. Code § 32-03.2-02.

C. Expert Opinion in Medical Malpractice Action

Any action for injury or death alleging professional negligence by a physician, nurse, hospital, or nursing, basic, or assisted living facility licensed by this state or by any other health care organization, including an ambulatory surgery center or group of physicians operating a clinic or outpatient care facility, must be dismissed without prejudice on motion unless the plaintiff serves upon the defendant an affidavit containing an admissible expert opinion to support a prima facie case of professional negligence within three months of the commencement of the action. N.D. Cent. Code § 28-01-46.

The court may set a later date for serving the affidavit for good cause shown by the plaintiff. The expert's affidavit must identify the name and business address of the expert, indicate the expert's field of expertise, and contain a brief summary of the basis for the expert's opinion. This section does not apply to unintentional failure to remove a foreign substance from within the body of a patient, or performance of a medical procedure upon the wrong patient, organ, limb, or other part of the patient's body, or other obvious occurrence. N.D. Cent. Code § 28-01-46.

D. Governmental Immunities

Each political subdivision is liable for money damages for injuries when the injuries are proximately caused by the negligence or wrongful act or omission of any employee acting within the scope of the employee's employment or office under circumstances in which the employee would be personally liable to a claimant in accordance with North Dakota law, or injury caused from some condition or use of tangible property, real or personal, under circumstances in which the political subdivision, if a private person, would be liable to the claimant. The enactment of a law, rule, regulation, or ordinance to protect any person's health, safety, property, or welfare does not create a duty of care on the part of the political subdivision, its employees, or its agents, if that duty would not otherwise exist. N.D. Cent. Code § 32-12.1-03.

Discretionary Function Immunity

A political subdivision or a political subdivision employee may not be held liable under this chapter for any of the following claims:

a. A claim based upon an act or omission of a political subdivision employee exercising due care in the execution of a valid or invalid statute or regulation.

b. The decision to undertake or the refusal to undertake any legislative or quasi-legislative act, including the decision to adopt or the refusal to adopt any statute, charter, ordinance, order, regulation, resolution, or resolve.

c. The decision to undertake or the refusal to undertake any judicial or quasi-judicial act, including the decision to grant, to grant with conditions, to refuse to grant, or to revoke any license, permit, order, or other administrative approval or denial.

d. The decision to perform or the refusal to exercise or perform a discretionary function or duty, whether or not such discretion is abused and whether or not the statute, charter, ordinance, order, resolution, regulation, or resolve under which the discretionary function or duty is performed is valid or invalid.

e. Injury directly or indirectly caused by a person who is not employed by the political subdivision.

f. A claim relating to injury directly or indirectly caused by the performance or nonperformance of a public duty, including:

(1) Inspecting, licensing, approving, mitigating, warning, abating, or failing to so act regarding compliance with or the violation of any law, rule, regulation, or any condition affecting health or safety.

(2) Enforcing, monitoring, or failing to enforce or monitor conditions of sentencing, parole, probation, or juvenile supervision.

(3) Providing or failing to provide law enforcement services in the ordinary course of a political subdivision's law enforcement operations.

(4) Providing or failing to provide fire protection services in the ordinary course of a political subdivision's fire protection operations.

g. “Public duty” does not include action of the political subdivision or a political subdivision employee under circumstances in which a special relationship can be established between the political subdivision and the injured party. A special relationship is demonstrated if all of the following elements exist:

(1) Direct contact between the political subdivision and the injured party.

(2) An assumption by the political subdivision, by means of promises or actions, of an affirmative duty to act on behalf of the party who allegedly was injured.

(3) Knowledge on the part of the political subdivision that inaction of the political subdivision could lead to harm.

(4) The injured party's justifiable reliance on the political subdivision's affirmative undertaking, occurrence of the injury while the injured party was under the direct control of the political subdivision, or the political subdivision action increases the risk of harm.

N.D. Cent. Code § 32-12.1-03.

3. Limitations on Damages

A. Noneconomic Damages Defined

Non-economic damages in North Dakota are defined as those arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, fear of injury, loss or illness, loss of society and companionship, loss of consortium, injury to reputation, humiliation, and other non-pecuniary damage. N.D. Cent. Code, § 32-03.2-04.

B. Limitation on Noneconomic Damages in Medical Malpractice Claims

With respect to a health care malpractice action or claim, the total amount of compensation that may be awarded to a claimant or members of the claimant's family for noneconomic damage resulting from an injury may not exceed five hundred thousand dollars. This limit is imposed regardless of the number of health care providers and other defendants against whom the action or claim is brought or the number of actions or claims brought with respect to the injury. N.D. Cent. Code § 32-42-02.

With respect to actions heard by a jury, the jury may not be informed of the limitation contained in this section. If necessary, the court shall reduce the damages awarded by a jury to comply with the limitation in this section. N.D. Cent. Code § 32-42-02.

C. Reduction for collateral source payments

After an award of economic damages, the party responsible for the payment thereof is entitled to and may apply to the court for a reduction of the economic damages to the extent that the economic losses presented to the trier of fact are covered by payment from a collateral source. A "collateral source" payment is any sum from any other source paid or to be paid to cover an economic loss which need not be repaid by the party recovering economic damages, but does not include life insurance, other death or retirement benefits, or any insurance or benefit purchased by the party recovering economic damages. N.D. Cent. Code § 32-03.2-06.

The jury may not be informed of the potential for the reduction of economic damages because of payments from collateral sources. N.D. Cent. Code § 32-03.2-10.

D. Statutory Cap on Governmental Liability

The liability of political subdivisions is limited to a total of $250,000 per person and $500,000 for injury to three or more persons during any single occurrence regardless of the number of political subdivisions, or employees of such political subdivisions, which are involved in that occurrence. A political subdivision may not be held liable, or be ordered to indemnify an employee held liable, for punitive or exemplary damages. N.D. Cent. Code § 32-12.1-03.

E. Limitation on Punitive Damages

If the trier of fact determines that exemplary damages are to be awarded, the amount of exemplary damages may not exceed two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater. No award of exemplary damages may be made, however, if the claimant is not entitled to compensatory damages. N.D. Cent. Code § 32-03.2-11.

In a jury trial, the jury may not be informed of the limit on damages contained in this subsection. Any jury award in excess of this limit must be reduced by the court. N.D. Cent. Code § 32-03.2-11.

F. Judicial Review of Economic Damage Awards

In addition to any other remedy provided by law and after a jury award of economic damages, any party responsible for the payment of any part thereof may request a review of the reasonableness of the award by the court as follows:

1. Awards in excess of two hundred fifty thousand dollars before reduction for contributory fault and collateral source payments are subject to review for reasonableness under this chapter.

2. The burden is on the moving party to establish that the amount of economic damage awarded was not reasonable in that it does not bear a reasonable relation to the economic damage incurred and to be incurred as proven by the party recovering the award.

3. If the court finds that the jury award of economic damages is unreasonable, the court shall reduce the award to reasonable economic damages.

N.D. Cent. Code § 32-03.2-08.

Ohio

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1. Introduction - History of Tort Reform in Ohio

Since 2003, the Ohio Legislature has enacted a series of new laws aimed at curbing excessive verdict awards arising out of tort claims. Senate Bill 281, which became effective on April 10, 2003, applies to claims arising after that date against hospitals, physicians, dentists, optometrists, chiropractors, podiatrists, nurses, physicians assistants, physical therapists and emergency medical technicians. Senate Bill 120, also applicable to claims arising after April 10, 2003, reformed joint and several liability law in Ohio. Two years later, on April 6, 2005, the Legislature enacted Senate Bill 80, applicable to tort actions generally, and imposing additional reforms.

2. Joint and Several Liability

Prior to the enactment of Senate Bill 120 in April, 2003, each joint tortfeasor in Ohio was responsible for the entirety of a plaintiff's damages. There was no proportional liability. Accordingly, a defendant who was responsible for only ten (10%) of a plaintiff's injuries could be compelled to pay one hundred (100%) of a verdict, if the other defendants were unable or unwilling to satisfy the judgment. Although a defendant could seek post-verdict contribution or indemnification from the other tortfeasors, this procedure was impractical and time-consuming, primarily because the more culpable parties might be judgment proof.

Under the new rule, Ohio's Legislature has distinguished between "non-economic" and "economic" damages. [1] "Non-economic" damages now will be assessed on a purely proportional basis in all tort actions. In other words, a defendant should only pay such percentage of "non-economic" damages attributable to that defendant's fault. With regard to "economic" damages, these will be assessed on a purely proportional basis in all tort actions so long as the defendant is found to be fifty (50%) or less responsible for the damages. Joint and several liability still exists as to any defendant found to be more than fifty (50%) responsible with respect to "economic" damages.

Juries also may now consider the fault of all defendants, including absent third parties, in deciding percentages of fault.

This legislation applies only to causes of action that accrue on or after the effective date of the Bill – April 8, 2003. There is no indication that the new law will have any retroactive applicability whatsoever. Although juries will now separately assess "econon s and allocate fault by percentages in their verdict fo ed that joint and several liability only attaches to the defendant(s) found to be more than fifty (50%) responsible.

[1] "Non-economic" damages include pain and suffering, loss of consortium and other intangible losses, and "economic" damages include wages/salaries, medical bills, property damage, etc. R.C. § 2307.011.

Certain exceptions are spelled out within the new law. Senate Bill 120 does not affect joint and several liability that is not based in tort. Additionally, it does not affect any statute that expressly provides for joint and several liability. Finally, Senate Bill 120 does not affect the operation of vicarious liability or *respondeat superior*.

For example, in intentional tort cases, intentional tortfeasors still remain jointly and severally liable for all "economic" damages, even if they are responsible for fifty (50%) or less of the injury. Intentional tortfeasors are not, however, responsible for more than their proportionate share of "non-economic" damages. It should be noted, however, that "intentional tort claims have been defined to exclude employee claims against employers where the intentional tort occurs on premises owned, leased, or supervised by the employer." Therefore, so long as the employer is no more than fifty (50%) at fault, joint and several liability has been abolished.

Prior to trial, a defendant must disclose the identity of any absent third party that the defendant intends to claim is responsible for some percentage of the plaintiff's injuries. The fact that a defendant intends to "point the finger" at an absent third party must be raised, however, as an affirmative defense in a responsive pleading, and the defendant raising the defense has the burden of proof to show the specific percentage of the tortious conduct attributable to the absent third party or parties.

Senate Bill 120 also provides that a non-settling defendant is entitled to a setoff in the amount paid by a settling defendant without having to prove that the settling defendant was liable in tort.

3. Damage Caps/Punitive Damages

Damage caps in tort actions, with the exception of medical claims and wrongful death actions, were enacted as part of Senate Bill 80, effective April 6, 2005. (R.C. § 2315.18) Damage caps in medical and other malpractice claims were enacted as part of House Bill 281, enacted in 2003 and discussed below. None of the damages caps enacted by the Ohio Legislature apply to wrongful death actions, as such damage caps are explicitly prohibited by Article I, Section 19 of the Ohio Constitution. The caps arguably would apply, however, to any survivorship claim that accompanied a wrongful death case.

Senate Bill 80 does not specifically state one way or another whether the caps apply to UM/UIM claims. But since the UM/UIM plaintiff must establish that he is "legally entitled to recover from" the uninsured or underinsured motorists, we believe that these non-economic damages caps will probably apply to UM/UIM cases. However, this issue will undoubtedly be litigated in the future.

The damage caps also only apply to "non-economic" damages. There are no limits imposed with regard to economic, compensatory damages. We can anticipate further use by the plaintiffs' bar of economists and "grief counselors" to attempt to establish how non-economic damages translate into economic damages.

Non-economic damages are capped at the greater of $250,000 per plaintiff or three (3) times the economic loss, up to $350,000 per plaintiff. Additionally, the per plaintiff amount is limited by an overall "occurrence limit" of $500,000. "Occurrence" means all claims resulting from or arising out of any one person's bodily injury. For example, all claims resulting from injury to a parent, including the parent's own pain and suffering, the loss of consortium claim for his spouse, and the loss of consortium claim for a minor child, would have a total limit of $500,000.

The "non-economic" damage caps do not apply if the plaintiff sustains either of the following:

- Permanent and substantial physical deformity, loss of use of a limb, or loss of a "bodily organ system"; or

- Permanent physical functional injury that permanently prevents the injured person from being able to independently care for self, and perform life sustaining activities.

The idea appears to be that there will be no non-economic damage cap in a true catastrophic injury case. We anticipate expert testimony battles over the second exception above, specifically whether or not the plaintiff retains the ability to "perform life sustaining activities." The statute permits the defendant to move for summary judgment as to whether these exceptions to the caps apply. However, the trial court's ruling on that motion, if unfavorable, might require that the jury be instructed that such permanent deformity or functional injury has already been established.

The jury will be asked to return a general verdict, along with interrogatory answers, that will specify the total compensatory damages recovered by the plaintiff, the portion of those damages that represent damages for "economic" loss, and the portion that represents damages for "non-economic" loss. The court, counsel, and witnesses are prohibited from informing the jury of the damage caps. It will be up to the trial court to review the evidence and determine whether a cap should apply to a jury's award of "non-economic" loss.

If the jury awards an amount for "non-economic" damages in excess of the caps, the loss may *not* be reallocated to any other tortfeasor beyond the amount that the tortfeasor would otherwise be responsible for under the laws of Ohio.

It appears that whether or not the caps apply to a particular case, the defendant will have the right to request a post-judgment review of the "non-economic" loss award and to challenge the award as excessive. The trial court is required to review such a challenge and determine whether the evidence presented or the arguments of the attorneys inflamed the passion or prejudice of the jury,

resulted in the improper consideration of the wealth of the defendant, or resulted in the improper consideration of the misconduct of the defendant so as to punish the defendant improperly.

In addition, the trial court shall determine whether the verdict is in excess of verdicts involving comparable injuries to similarly situated plaintiffs (note that it is not clear as to who are similarly situated plaintiffs). Will consideration be given statewide, or will geographic distinctions be permitted? Senate Bill 80 does not say. Finally, the trial court must determine whether there were any extraordinary circumstances in the record to account for an award in excess of what was granted by courts for similarly situated plaintiffs. If the trial court upholds the award that was challenged as being excessive, it must set forth in writing its reasons for upholding the award. In considering an appeal of an award of compensatory damages for "non-economic" loss, appellate courts are to use a *de novo* standard of review.

Significant changes also have been made to Ohio law regarding punitive damages with the enactment of Senate Bill 80, effective April 6, 2005. (R.C. § 2315.21)

If the defendant is an individual or a small employer, i.e., an employer with less than 100 full-time permanent employees (or in the manufacturing sector, 500 or fewer employees), punitive damages are capped at the lesser of two times the compensatory damages, or ten (10%) of the defendant's net worth at the time the tort was committed, but in no event, more than $350,000. For all other defendants, the punitive damages cap is two times compensatory damages. Attorney's fees are not included in this limit. Prejudgment interest may not be awarded on punitive damages.

If the defendant acted purposely and knowingly, and has been convicted of or pled guilty to a felony that has a purposeful or knowing element, there are no limits on punitive damages. Note, however, that this means that in cases involving drunken driving convictions, which in most instances are misdemeanors, the punitive damage caps will apply.

If a defendant has previously been hit with punitive damages, and has paid the punitive damages award in any state or federal court, the defendant receives a credit for those prior punitive damages if they arise from the same actions or course of conduct that is alleged to have caused the injury or loss in the present case.

Upon motion of any party, the court shall bifurcate a plaintiff's claim for compensatory damages from a claim for punitive damages. Compensatory damages shall be determined first, and no party may present any evidence relating solely to the issue of whether the plaintiff is entitled to recover punitive damages. If the plaintiff recovers compensatory damages, evidence may then be presented in the second phase of the trial, during which the jury shall determine whether a plaintiff is entitled to recover punitive damages. If such a determination is made by the jury,

there is no language in the statute that then directs the jury to proceed to determine the amount of punitive damages. This appears to be a drafting error, which we anticipate will soon be challenged via corrective legislation or in a court case.

4. Medical Malpractice Reform

The Ohio Legislature also has passed a number of tort reform measures applicable to claims arising after April 10, 2003 against hospitals, physicians, dentists, optometrists, chiropractors, licensed practical nurses, EMTs and paramedics, and home/residential facilities, which were aimed at curbing excessive verdict awards arising out of medical malpractice claims.

Significant provisions of this legislation include:

1. A Statute of Repose (R.C. § 2305.113 – which provides that except for minors and incompetents, no action may be commenced more than four (4) years after the occurrence of the alleged negligent act. However, discovery of the basis of a claim in the fourth (4th) year may, under certain circumstances, permit filing within one (1) year of date of discovery.

2. Collateral Source (R.C. § 2323.41) – which states that a defendant may introduce evidence of certain (non-subrogated) benefits received by a plaintiff. If such benefits are disclosed, however, the plaintiff may present evidence regarding premiums paid to secure such benefits.

3. Limitations on Damage Awards (R.C. § 2323.43) – there is no cap imposed on "economic" losses, e.g. medical expenses, lost wages. However, "non-economic" damages are subject to caps.

   A. Non-catastrophic injuries are limited to the greater of $250,000 or three (3) times the economic loss to a maximum of $350,000 per plaintiff, and $500,000 per occurrence;

   B. Catastrophic injuries (defined as permanent and substantial deformity, or loss of use of limb or organ; or which prevents a person from independently caring for oneself) limited to three (3) times

the economic loss or $500,000 per plaintiff, with a maximum recovery of $1,000,000.

4. Where future damages exceed $50,000, the defendant may make periodic payments. (R.C. § 2323.55)

5. Where the plaintiff's attorney's fees exceed the amount of the plaintiff's non-economic loss ($250,000 or $500,000), the fees must be approved by the probate court. (R.C. § 2323.43)

6. Determination of Merit of a Plaintiff's Case – a defendant may file a motion to determine whether there is a good faith basis for the plaintiff's suit. During the pendency of the motion, the proceedings and all discovery is stayed.
7. Wrongful death actions are not subject to these tort reform provisions.

5. Products Liability Reform

Prior to the enactment of Senate Bill 100, Ohio followed the Restatement of Torts (2nd), as set forth in *Temple v. Wean United* (1977), 50 Ohio St.2d 317, which provided that manufacturers and sellers of defective products were held strictly liable in tort for a plaintiff's injury. Because a defendant's liability did not turn on any degree of "fault," a plaintiff's contributory negligence (aka comparative fault) was not a defense in such a case. *Bowling v. Heil* (1987), 31 Ohio St.3d 277. However, in 1988, the Legislature codified its strict liability product liability law at R.C. §§ 2307.71-80, recognizing four (4) distinct causes of action for manufacturing defect, failure to conform to an express warranty, failure to warn, and defective design.

With the enactment of Senate Bill 120 in April, 2003, comparative fault/contributory negligence now is a defense. (R.C. § 2315.43) Assumption of the risk by a plaintiff remains a complete defense to all product liabilities claims, and a plaintiff's contributory negligence will bar his/her recovery, if it exceeds the combined tortious conduct of the defendants and absent third parties. A plaintiff found to be more than fifty (50%) responsible for his/her injuries via application of comparative fault is barred from any recovery at all.

With the enactment of Senate Bill 80, additional changes to product liability actions have been made. For example, there is now a ten (10) year statute of repose, which bars any product liability claim after a product has been delivered to its first purchaser. The Legislature's basis for this provision was that after more than ten (10) years after a product has been delivered, it is very difficult for a manufacturer

or supplier to locate reliable evidence and witnesses regarding the design, production, or marketing of the product, thus severely disadvantaging manufacturers or suppliers in their efforts to defend such actions.

There also now is a provision which exempts from civil liability manufacturers, marketers, distributors, advertisers, sellers, suppliers of a qualified product (defined as articles used for food or drink for a human being or other animal; chewing gum; articles used for components of the previously listed products) or a trade association, when the claim is based on cumulative consumption, weight gain, obesity, or a health condition related to cumulative consumption, weight gain, or obesity. (R.C. § 2305.36) A party that prevails on a motion to dismiss such a claim (during the pendency of which all discovery and all other proceedings shall be stayed) may recover reasonable attorneys' fees and costs associated with the motion to dismiss. The liability exemption does not apply for any material violation of federal or state law applicable to the manufacturing, marketing, supplying, distribution, advertising, labeling, or sale of a qualified product and the violation was committed knowingly and willfully. The provisions of this also do not preclude civil liability for breach of express contract or express warranty in connection with the purchase of a qualified food product.

Oklahoma

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1. **Introduction – History of Tort Reform in Oklahoma**

Since 1986, the Oklahoma legislature has enacted a series of laws which we characterize in the nature of tort reform. Thus far, the Supreme Court of Oklahoma has not struck down any of the State's civil justice reform laws as being unconstitutional although many of those reforms have not yet been challenged on constitutional grounds. The most sweeping civil justice reform in Oklahoma took place in 2004 when Governor Brad Henry signed H.B.2661 which included a cap on non-economic damages in malpractice cases and the limitation of joint and several liability in tort cases.

2. **Joint and Several Liability**

Prior to the enactment of H.B.2661, the Oklahoma Courts had engaged in some joint and several liability reform. The cases of Anderson v. O'Donohue, 677 P.2d 648 (Okla. 1983); and Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978), the Oklahoma Courts had barred the application of joint and several liability in the award of all damages if the plaintiff was at fault. The enactment of H.B.2661 further limited the application of joint and several liability. Under the terms of the statute, joint liability is limited only to a defendant that is more than 50% at fault, except where any defendant acted with willful and wanton conduct or reckless disregard. In that event, all defendants may be held jointly and severally liable. Further, that limitation only applies when the plaintiff has no comparative negligence.

Section 18 of H.B.2661 states that:

> In any civil action based on fault and not arising out of contract, the liability for damages caused by two or more persons shall be several only in a joint tort feasor shall be liable for the amount of damages allocated to that tort feasor.

This section changes the general rule involving multiple defendants to one of several liability but does not entirely abolish joint and several liability. Joint and several liability is more the exception now in Oklahoma rather than the rule.

It is still possible for a defendant to be held jointly and severally liable in Oklahoma, but the plaintiff will bear a higher burden to prove the defendant should be held jointly and severally liable. In order for joint and several liability to apply to a defendant, the defendant must be found more than 50% responsible for the plaintiff's injury. A second option for the plaintiffs to argue that the defendant acted in a willful and wanton manner or with "reckless disregard of the consequences of the conduct" and that the defendant's conduct was the proximate cause of the plaintiff's injury.

3. **Damage Caps/Punitive Damages**

Sections 21 and 22 of H.B.2661 amend the $300,000.00 cap on non-economic damages in a medical liability action. Previously, the Oklahoma legislature had passed a $300,000.00 cap on non-economic damages at the end of the 2003 legislative session but H.B.2661 modifies how that cap will function from a defendant's perspective. The $300,000.00 limit on non-economic damages applies only where the defendant has made an offer of judgment and the amount of the verdict is less than one-half times the amount of the final offer of judgment.

This limit is not absolute. Under the applicable statute, the judge always has the power to lift the cap if he or she finds by clear and convincing evidence that the defendant was negligent. The statute also provides that the jury may lift the cap if nine or more members of the jury find by clear and convincing evidence that the defendant committed negligence or if nine or member of the jury find by preponderance of the evidence that the conduct of the defendant was willful or wanton. The statute provides however that the judge must, before submitting such a determination to the jury, make a threshold determination that there is evidence from which the jury could reasonably make findings set forth in a case.

In the event that the jury returns a verdict that is greater than $300,000.00 but less than one and one-half times the amount of the final offer of judgment, the Court shall submit additional forms of possible verdicts to the jury covering possible determinations of negligence and/or willful and wanton conduct.

Non-economic damages do not apply to exemplary damages and these limits do not apply to wrongful death actions.

4. **Punitive Damages**

The first punitive damages reform in Oklahoma took place in 1986 with the passage of S.B.488, which limits the award of punitive damages to the award of compensatory damages unless the plaintiff establishes his or her case by clear and convincing evidence, in which case no limit applies. Subsequently, the Oklahoma legislature passed Okla. Stat. Ann. Tit. 23, Section 9.1, which codified the factors that a jury must consider in awarding punitive damages. This statute provides that when a jury finds by clear and convincing evidence that the defendant: (1) acted in "reckless disregard of the rights of others," the award is limited to the greater of $100,000.00 or actual damages awarded; or (2) acted intentionally and with malice, the award is limited to $500,000.00; two times the award of actual damages; or the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing injury. The limit does not apply if the court finds evidence beyond a reasonable doubt that the defendant acted intentionally and with malice and conduct life threatening to humans.

5. **Medical Malpractice Reform**

In the past five years, medical liability reform has been enacted on a regular basis in Oklahoma. In 2003, S.B.629 was adopted which provided the following provisions:

1. Limits non-economic damages to $350,000.00 involving pregnancy (labor, delivery and postpartum) as well as emergency care.
2. Requires a certificate of merit to be filed with the petition.
3. Permits the admissibility of evidence and collateral source payments.
4. Ties the prejudgment interest rate in a medical liability case to the average U.S. Treasury rate of the preceding calendar year.

Previously, Okla. Stat. Ann. Tit. 5, Section 7 was enacted to limit contingency fees to 50% of a plaintiff's recovery in a medical malpractice case.

In 2004, H.B.2661 adopted additional medical malpractice reforms. These additions related to evidentiary issues. The first limits the admissibility of statements made by the physician following unsuccessful medical treatment and establishes new criteria for the admissibility of expert testimony. The first, commonly referred to as the "I'm sorry rule" prevents a plaintiff from introducing a physician's statement of apology or sympathy to family members after an unexpected outcome. Found in Section 23 of the bill, this provision is designed to allow a physician to be open with family members after a bad outcome by preventing any sympathetic or condoling statements to be used as evidence of malpractice at trial.

The second provision found in section 24 of H.B.2661 applies to the admissibility of expert testimony and a medical malpractice action. Expert testimony is a necessary component to establish that the defendant physician violated the applicable standard of care in most malpractice cases. The new law requires that the expert witness be licensed to practice medicine, or have training in an area of healthcare relevant to the case, and the witness actually practices or has practiced that area of healthcare services.

Oregon

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1. INTRODUCTION

Oregon, like many states, has taken steps to limit the ability of Plaintiffs to successfully bring and recover damages in civil tort actions. Through legislation and court decisions, Oregon has altered the way that tort liability and damages are assessed.

2. LIMITATIONS ON LIABILITY

a. Comparative Fault

Oregon employs a comparative fault system to limit a plaintiff's damages to the extent of the plaintiff's fault. Pursuant to this approach, a plaintiff's contributory negligence will not bar a plaintiff's recovery if the plaintiff's fault was not greater than the combined fault of any party from whom recovery is sought, third party defendants, and any person with whom the plaintiff has settled. ORS § 31.600(1)-(2). Even where some recovery is allowed, however, the plaintiff's damages will be reduced by the percentage of fault attributable to the plaintiff. ORS § 31.600(1).

In determining the proportion of fault, a trier of fact compares the fault of the plaintiff to the fault of the parties described above. ORS § 31.600(2).

b. Several Liability

In Oregon, liability among defendants for civil actions based upon bodily injury, death or property damage, including emotional injury or distress, and loss of care, comfort, companionship, and society is several only and not joint. ORS § 31.610(1). When requested by any party, the trier of fact decides the apportionment of fault based upon a percentage among the parties determined to be at fault. ORS § 31.605(1)(b).

Once the trier of fact determines the percentage of fault, several liability is set forth separately in the judgment based upon the percentages of fault determined by the trier of fact. ORS § 31.610(2). The court must also present a monetary amount that each party at fault will be obligated to pay. ORS § 31.610(2). The court also enters judgment against any third party defendants that are found to be liable, even if the plaintiff did not specifically make a claim against that third party defendant. ORS § 31.610(2).

c. Reallocation

Upon motion, no more than one year after judgment, the court must determine any portion of the judgment that is not collectible. ORS § 31.610(3). If the court determines that any portion is not collectible, the court will reallocate the share that is not collectible among the remaining parties at fault based upon their total percentage of fault. ORS § 31.610(3). Despite this reallocation procedure, a

party's share of the fault cannot be enlarged by reallocation of an uncollectible share if the plaintiff's percentage of fault is equal to or greater than the percentage of fault of that party or that party's fault is 25 percent or less. ORS § 31.610(4)(a)-(b).

3. LIMITATIONS ON DAMAGES

a. Noneconomic damages defined

In Oregon, "noneconomic damages" include the following:

> subjective, nonmonetary losses, including but not limited to pain, mental suffering, emotional distress, humiliation, injury to reputation, loss of care, comfort, companionship and society, loss of consortium, inconvenience and interference with normal and usual activities apart from gainful employment.

ORS § 31.710(2)(b).

b. Limitation on Noneconomic Damage Awards

In most civil actions for damages relating to bodily injury, emotional injury or distress, death or property damages, including claims for loss of care, comfort, companionship and society and loss of consortium, an award for noneconomic damages is limited to $500,000. ORS § 31.710(1).

Limits on noneconomic damages under a common law cause of action, however, were found to offend a plaintiff's state constitutional right to trial by jury. *Lakin v. Senco Products, Inc.*, 329 Or 62, 987 P2d 463 (1999), clarified 329 Or 369, 987 P2d 476 (1999).

A plaintiff involved bringing a civil claim for damages arising out of a operation of a motor vehicle cannot claim noneconomic damages if the plaintiff was uninsured or the plaintiff was driving under the influence of intoxicants unless the defendant was also uninsured or driving under the influence of intoxicants, or the defendant engaged in certain other offending behaviors. ORS § 31.715.

A jury should not be informed of a limitation on noneconomic damages. ORS § 31.710(4). A verdict must separately specify the amount of economic damages and noneconomic damages. ORS § 31.705.

c. Reduction for collateral source payments

In a civil action for the recovery of damages for bodily injury or death of a person, a court may, before the entry of judgment, deduct collateral payments from a damages award. ORS § 31.580(1). Collateral payments include benefits for the injury or death received by the party awarded damages, or the injured or deceased person, other than from the party who is to pay the damages. ORS § 31.580(1).

A court may not, however, deduct the following types of collateral payments: 1) benefits that the recovering party, injured person, or person's estate is required to repay, 2) life insurance or death benefits, 3) insurance benefits for which the injured or deceased person, or that person's family, paid premiums, 4) retirement, disability and pension plan benefits, and federal Social Security benefits. ORS § 31.580(1)(a)-(d).

Evidence of a collateral benefit is not admissible at trial, but may be submitted to the court by affidavit after verdict. ORS § 31.580(2).

d. Limitation on Punitive Damages

A party seeking punitive damages generally may not plead them in an original pleading filed with a court. ORS § 31.725(1). Instead, after filing the pleading, the party may move the court to allow the party to amend a pleading to assert a claim for punitive damages, and the party may submit an affidavit and supporting documentation with the motion. ORS § 31.725(2). The party opposing the motion may also submit affidavits and supporting documentation. ORS § 31.725(2).

A party may not recover punitive damages unless the party seeking the damages proves by clear and convincing evidence that the party against whom punitive damages are imposed acted with malice *or* with "reckless and outrageous indifference to a highly unreasonable risk of harm," *and* a "conscious indifference to the health, safety and welfare of others." ORS § 31.730(1). If a jury awards punitive damages, a court *must* review the award to determine whether a rational juror would have awarded the damages based on the record as a whole and in light of statutory and common law factors for the specific claim involved. ORS § 31.730(2).

Reductions to punitive damages may also be made upon motion by a defendant that the defendant has taken reasonable remedial measures to prevent the claim that gave rise to punitive damages from occurring again. ORS § 31.730(3).

After a verdict awarding punitive damages, the damages must be distributed in a certain fashion. 40% of the punitive damages will be paid to the prevailing party, the prevailing party's attorney must be paid out of that percentage, and the attorney's portion may not exceed 20% of the punitive damages awarded. ORS § 31.735(1)(a). 60% of the punitive damages must be paid to the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section. ORS § 31.735(1)(b).

An award of punitive damages against a health practitioner is prohibited when the health practitioner is licensed, registered, or certified as a psychologist, occupational therapist, clinical social worker, physician, emergency medical technician, podiatric physician or surgeon, nurse, nurse practitioner, dentist, or other type of health practitioner set forth in ORS § 31.740.

4. PRODUCTS LIABILITY

a. General Limitations on Products Liability Actions

A products liability action is a civil action for personal injury, death, or property damage against a manufacturer, distributor, or lessor or seller of products based upon defects in design, testing, inspection, and manufacture, failure to warn, or failure to instruct upon the proper use of a product. ORS § 30.900. There is a disputable presumption that a product is not unreasonably dangerous for its intended purposes. ORS § 30.910.

In a products liability action, punitive damages are limited, and the normal standards and requirements for an award of punitive damages described above apply. In addition, punitive damages will only be awarded in a products liability action based upon the following criteria: 1) likelihood that serious harm would result from the defendant's misconduct, 2) the defendant's awareness of that likelihood, 3) the profitability of the defendant's misconduct, 4) the duration and concealment of the misconduct, 5) the defendant's conduct after the misconduct is revealed, 6) the financial condition of the defendant, and 7) the determent effect of other defendant punishments. ORS § 30.925.

Further punitive damage limitations apply to products liability actions against drug manufacturers of drugs as defined by the Federal Food, Drug, and Cosmetic Act. A drug manufacturer will not be liable for punitive damages if the drug was manufactured and labeled properly pursuant to a license issued by the FDA, or is recognized as safe by the FDA, unless the defendant withholds or misrepresents certain information or fails to conduct an ordered recall. ORS § 30.927.

b. Special Liability Limitations on Certain Types of Products Liability Actions

Oregon provides for specific liability limitations on products liability actions for asbestos containing products and breast implants.

In a products liability action for asbestos, a plaintiff must bring the action within two years from discovery of the problem or when the problem was discoverable through reasonable care. ORS § 30.907(1). A plaintiff cannot bring an asbestos products liability action against a contractor if the contractor used asbestos containing products pursuant to plans and specifications that were prepared by a project owner or on behalf of an owner, the contractor is not a manufacturer or distributor of the product, and the contractor did not provide the asbestos product "independent of the provision of labor." ORS § 30.907(2)(a)-(c).

In a products liability action for breast implants that contain silicone, a plaintiff must bring the action within two years from discovery of the problem or from when the injury or defendant's conduct should have been discoverable through reasonable care. ORS § 30.908(1)(a)-(b). Physicians and health care facilities are not manufacturers, distributors, lessors or sellers of breast implants that contain silicone if the particular physician or health care facility is simply medically implanting the breast implant. ORS § 30.908(5)-(6).

5. ALTERNATIVE DISPUTE RESOLUTION

a. Mandatory Dispute Resolution for Certain Actions Against Health Care Providers

An action for damages against a health care practitioner or health care facility based upon negligence, unauthorized giving of care, or product liability are subject to mandatory dispute resolution. ORS § 31.250(5). Dispute resolution can include arbitration, mediation, or a judicial settlement conference. ORS § 31.250(2).

b. Oregon's Alternative Dispute Resolution System

Oregon prefers alternative dispute resolution, especially through the assistance of a trusted third party mediator, instead of allowing claims to go unresolved or to result in formal litigation proceedings. ORS § 36.100. After all parties appear in most types of civil actions, a judge may refer the case to mediation. ORS § 36.185. If a party files a written objection to mediation, however, the action is removed from mediation and continues normally. ORS § 36.185.

Oregon also implements a mandatory arbitration program. Certain cases that have a value $50,000 or less must be submitted to the mandatory arbitration program. ORS § 36.400(3). The cases that are referred to arbitration normally involve only claims for recovery of money or general or special damages that do not exceed the $50,000 threshold. ORS § 36.405(1)(a). The presiding judge for a judicial district, however, may exempt certain actions that would otherwise qualify for arbitration from arbitration, including certain actions that were already submitted to a mediation program and other actions that qualify for arbitration or were already directed to arbitration. ORS § 36.405(2)-(3).

Following an arbitrator's decision, the arbitrator must file the decision and award with the clerk of court that referred the matter to arbitration. ORS § 36.425(1). Within 20 days after the filing of the arbitrator's decision, a party that must pay relief or a party who claims the value of that party's claim is greater than the arbitrator's award can file a notice of appeal with the clerk of court and request a trial de novo. ORS § 36.425(2)(a). If no notice of appeal is filed within 20 days after the arbitrator's decision is filed, judgment will be entered upon the arbitrator's decision. ORS § 36.425(3).

If a party that files a notice of appeal and requests a trial de novo does not receive a more favorable outcome in the trial de novo, that party cannot recover attorney's fees and costs incurred before the filing of the arbitrator's award and must pay the other parties' attorney's fees and costs incurred in the trial de novo. ORS § 36.425(4)(a).

Pennsylvania

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1. Introduction – History of Tort Reform in Pennsylvania

There has been no significant tort reform in Pennsylvania with regard to punitive damages, attorneys fees or products liability. Tort reform in Pennsylvania has been attempted in the area of joint and several liability with little success. Both the Pennsylvania legislature and the Pennsylvania Supreme Court have issued tort reform in the area of medical malpractice. The specifics of these changes are addressed below.

2. Joint and Several Liability

On June 19, 2002, the Governor of Pennsylvania signed Senate bill 1089 (Act No. 57) into law. The Act amended Title 42 of the Pennsylvania Judicial Code to essentially eliminate the doctrine of joint and several liability in the Commonwealth of Pennsylvania. However, on July 26, 2005, the Commonwealth Court of Pennsylvania, in its decision *DeWeese v. Weaver*, 880 A.2d 54, 61 (Pa.Cmwlth.,2005), held that the enactment of Act 57 violated the single subject requirement of Article 3, Section 3 of the Pennsylvania Constitution because it was coupled with a DNA bill. This decision was affirmed by the Pennsylvania Supreme Court in *DeWeese v. Cortes,* 588 Pa. 738, 906 A.2d 1193 (2006). Accordingly, there have been no successful changes to joint and several liability in Pennsylvania. This issue is still governed by the Comparative Negligence Act, which provides the following:

> Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery. Any defendant who is so compelled to pay more than his percentage share may seek contribution.

3. Medical Malpractice Reform

A. The Medical Care Availability and Reduction of Error Act, 40 P.S. §1303.101 *et seq*., began effective March 20, 2002. The Act addresses a variety of subjects affecting hospitals, physicians and the legal system. Chapter Five of the Act was written to ensure a fair legal process and reasonable compensation for persons injured due to medical negligence in the Commonwealth. Chapter Five provides the following:

(1). Informed Consent – Section 504 of the Act governs informed consent and sets forth those situations for which informed consent must be obtained. Liability is incurred (1) if a physician fails to obtain informed consent only if the patient proves that receiving such information would have been a substantial factor in the patient's decision whether to undergo a procedure or (2) a physician knowingly misrepresents to the patient his or her professional credentials, training or experience.

(2). Punitive Damages – Section 505 of the Act provides for punitive damages in accordance with Pennsylvania case law. It also states that punitive damages shall not be awarded against a health care provider who is only vicariously liable for the actions of its agent unless it can be shown by a preponderance of the evidence that the party know of and allowed the conduct by its agent. With regard to the amount of the punitive damage award, Section 505 notes that except in cases alleging intentional misconduct, punitive damages against an individual physician shall not exceed 200% of the compensatory damages awarded. Punitive damages, when awarded, shall not be less than $100,000 unless a lower verdict amount is returned by the trier of fact.

(3). Collateral Sources – Section 508 of the Act governs collateral sources and provides that a claimant is precluded from recovering damages for past medical expenses or past lost earnings incurred to the time of trial to the extent that the loss is covered by a private or public benefit or gratuity that the claimant has received prior to trial. This rule does not apply to life insurance, pension or profit-sharing plans, social security benefits, cash or medical assistance benefits subject to repayment to the Department of Public Welfare or public benefits paid or payable under a program which Federal statute provides for right of reimbursement.

(4). Payment of Damages – Section 509 of the Act addresses the payment of damages. Specifically, this section dictates that the trier of fact make a determination with regard to each claimant and shall specify amounts for various types of past damages as enumerated in the Act. In addition, future damages are to be reduced to present value. The reduction of future damages to present value is also discussed in Section 510.

(5). Expert Witnesses – Section 512 of the Act governs the requirements for expert witnesses. In order to testify, an expert must have a valid license, not be retired for more than five years and practice in the same subspecialty or one that has a substantially similar standard of care for the specific issue in the case.

(6). Remittitur – Section 515 of the Act provides for remittitur in those cases where a verdict is excessive. In ruling on such a motion, the court is to consider evidence of the impact of the verdict upon availability or access to health care in the community if the defendant is required to satisfy the verdict rendered by the jury.

B. Certificate of Merit

Rule 1042.1-8 of the Pennsylvania Rules of Civil Procedure codify the requirements in a medical malpractice action for a certificate of merit. Under these rules, a certificate of merit must be filed with the complaint or within sixty days after filing the complaint. If a certificate of merit has not been filed and no motion for extension has been filed, the Prothonotary, upon praecipe by the defendant, shall enter judgment of non pros against the plaintiff for failing to file the Certificate of Merit.

Rhode Island

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1. Introduction: History of Tort Reform in Rhode Island

Although other states have seen an explosion of tort litigation and efforts to reform the existing tort law framework, Rhode Island's General Assembly has not made a significant effort to reform the state's traditional tort liability system in over twenty-five years.

2. Limitations on Liability

a. Contributory negligence and Apportionment Liability

In Rhode Island, pure comparative negligence is applied in all tort actions. R.I. Gen. Laws §9-20-4. Contributory negligence is effective soley for the purpose of diminishing the amount of recovery in proportion to the extent of the Plaintiff's negligence. Thus, a Plaintiff may recover 10% even if he is 90% negligent.

A Plaintiff may recover all of his damages from any one Defendant. Each Defendant is liable for all or a proportion of the total damages, but the paying Defendant may seek contribution from non-paying Defendant. R.I. Gen. Laws §10-6-3.

Rhode Island has adopted the Uniform Contribution Among Tortfeasors Act which provides that an action for contribution must be commenced within one year after payment is made by the joint tortfeasor (which discharges common liability). R. I. Gen. Laws §10-6-3 to 10-6-11.

b. Joint and Several Liability

Rhode Island enacted only very minor changes to the common law doctrine of joint and several liability. Rhode Island is generally considered one of the jurisdictions to operate under "pure" joint and several liability.

In Rhode Island joint tortfeasors must either act together to create the Plaintiff's injuries or must otherwise be liable for each other's conduct. Wilson v. Krasnoff, 560 A.2d (R.I. 1989). The effect of joint liability is that each Defendant is liable for the entire amount of the damages to the Plaintiff. The pro rata share is determined by the number of tortfeasors and the relative degree of fault. R.I. Gen. Laws §10-6-3. The common law rule that a release given to one of several joint tortfeasors releases all of them has been abolished. R.I. Gen. Laws §10-6-7. A master and servant or principal and agent are considered a single tortfeasor. R.I. Gen Laws §10-6-2.

In 2003, the state did enact legislation to repeal vicarious liability in the context of long-term auto leasing. R.I. Gen. Laws 31-33-6. The statute was initially passed with a sunset date of July 1, 2004 although it has been extended and clarified by the Rhode Island Supreme Court as recently as 2007. Black v. Vaiciulis, 934 A.2d (2007).

There were attempts to introduce legislation in 2004 which would have established that a Defendant found to be no more than 25% at fault would be severally liable only. However, these attempts were not successful.

3. Damage Caps

In general, Rhode Island has not enacted significant limitations on the amount of damages that may be awarded in a tort case. However, the General Assembly has attempted to address the manner of payment for settlements in tort cases. Section 9-21-13, R.I. Gen. Laws, requires parties to "consider the use of periodic payments as means of settlement."

There are hard damage caps with respect to claims filed against the State of Rhode Island, or any political subdivision thereof. Any damages recovered shall not exceed $100,000. However, in all instances where the state was engaged in any proprietary function in the commission of the tort, or in any situation whereby the state has agreed to indemnify the federal government, or any agency thereof, the damage cap will not apply. R.I. Gen. Laws §9-31-2. There is an identical damage cap with respect to cities, towns and fire districts provided in R.I. Gen. Laws §9-31-3.

Rhode Island also has a longstanding pre-judgment interest statute that is favorable to plaintiffs. R.I. Gen. Laws §9-21-10, which provides for the payment of prejudgment interest in any civil action at the rate of twelve percent (12%) to be paid from the date the cause of action accrues. Since 1987, the only exception to this rule is that pre-judgment interest in medical malpractice actions is to be paid from the date that a plaintiff gives written notice of the claim to a provider or the provider's malpractice insurer.

4. Punitive Damages

Punitive damages may be awarded in Rhode Island. One seeking punitive damages must produce evidence of such willfulness, recklessness or wickedness on the part of the party at fault as amounts to criminality by the Defendant that should be punished. Fenwick v. Oberman, 847 A. 2d 852, 855-56 (R.I. 2004). Conduct that is merely reckless does not justify punitive damages. Wilson Auto Enter., Inc. v. Mobil Oil Corp., 778 F. Supp. 101, 107 (D.R.I. 1991). The standard of proof for awarding punitive damages is clear and convincing evidence. Healey v. New England Newspapers, Inc., 55 A.2d 321 (R.I. 1989).

In Rhode Island the determination as to whether punitive damages are appropriate is a question of law. Cady v. IMC Mortg. Co., 862 A. 2d. 202 (R.I. 2004).

Punitive damages in Rhode Island are not subject to a "ratio rule" based upon the amount of compensatory damages. There is no cap on punitive damages in Rhode Island. Typically, punitive damages would not apply in a respondeat superior theory of liability, "it has long been the law in this state that punitive or exemplary

damages will not be allowed in situations in which a principal is prosecuted for the tortuous act of his servant, unless there is proof in the cause to implicate the principal and make him *particeps criminis* of his agent's act." AAA Pool Service & Supply, Inc. v. Aetna Cas. & Sur. Co., 479 A.2d 112 (R.I. 1984).

Additionally, under Rhode Island law, any survivorship action is limited to compensatory damages and no punitive damages may be assessed. R.I. Gen. Laws §9-1-8.

5. Medical Malpractice Reform

In 1976, the General Assembly enacted the Rhode Island Medical Malpractice Reform Act. In addition, the General Assembly at that time enacted a variety of other measures designed to address a perceived crisis in connection with medical malpractice claims. In pertinent part, the statute effectively abrogated the common law collateral source rule in the context of medical malpractice claims. The common law collateral source rule mandates that evidence of payments made to an insured party from sources independent of a tortfeasor are inadmissible and shall not diminish the tortfeasor's liability to plaintiff. Drysdale v. South County Hosp. Health Care System, unreported, Judge Rubine, January 5, 2005 (quoting Votolato v. Merandi, 747 A.2d 455 (R.I. 2000).

In 1986, Rhode Island enacted legislation permitting a jury to be advised of payments by collateral sources to a Plaintiff seeking medical malpractice damages. The statute, effective January 1, 1987, provides that a defendant in a medical malpractice action may introduce evidence of "any amount payable as a benefit to the plaintiff as a result of the personal injury" under any state disability or workers compensation plans, health or disability insurance, or "any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services." R.I. Gen. Laws 9-19-34.1. Plaintiff is then allowed to introduce evidence of premium payments made for insurance benefits. The statute further requires that the jury be instructed to calculate the difference between the premiums paid and the benefits received. The jury can then reduce any award by that amount or the judge can reduce the award after the verdict. If an award is reduced in this manner, the plaintiff has no obligation to reimburse the provider for benefits paid and any lien held by the provider is foreclosed.

6. Products Liability Reform

In 1971, in Ritter v. Narragansett Electric Co., 283 A.2d 255, 263 (1971), the Supreme Court of Rhode Island adopted the doctrine of strict liability of tort in products liability cases as set forth in the Restatement (Second) Torts § 402A (1965). There are two elements required to establish a product liability claim: "(1) the seller is engaged in the business of selling such a product, and (2) the product is expected to and does reach the user or consumer without substantial change in the

condition in which it is sold." Oshansky v. Rehrig Int'l, 872 A.2d 282, 287 (R.I.2005). Rhode Island's General Assembly has not enacted any reform legislation in this area. Defendants may be subject to punitive damages in products liability cases in the event the misconduct satisfies the high bar outlined above in Fenwick. Rhode Island has not adopted any portion of the Uniform Products Liability Act.

In 2008, the Rhode Island Supreme Court rejected the emerging "public nuisance" theory of product liability that had been emerging in a landmark lead-paint case which initiated in 1999 (where unidentified ills suffered by unidentified people caused by unidentified products in unidentified locations were considered compensable). State v. Lead Industries, Ass'n, Inc., 951 A.2d 428 (R.I. 2008).

7. Attorneys Fees

Rhode Island "staunchly" adheres to the American Rule regarding attorney's fees that "requires each litigant to pay its own attorney's fees absent statutory authority or contractual liability." Moore v. Ballard, 914 A.2d 487, 489 (R.I. 2007) (citing Eleazer v. Ted Reed Thermal, Inc., 576 A.2d 1217, 1221 (R.I. 1990)). Although some Rhode Island statutes authorize the recovery of attorneys fees, Rhode Island has not enacted a specific fee-shifting provision in the general tort areas of personal injury and medical malpractice.

8. Special Issues

Although there is a Liquor Liability Act in effect in Rhode Island it essentially summarizes the common law, the practical impact of the Act is different from other jurisdictions. Unlike some Dram Shop Acts, in Rhode Island there is not a damage cap R. I. Gen. Law §3-14-8 and there are not limits on available special defenses under liquor liability claims R.I Gen. Law §3-14-9.

South Carolina

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1. Introduction

In 2005, the South Carolina General Assembly passed sweeping tort reform legislation that altered South Carolina law and procedure for medical malpractice and

certain professional negligence cases. The specifics of those reforms were addressed in detail in the last published Primerus Compendium. The most significant tort law update since that legislation is arguably the adoption of The South Carolina Fairness in Civil Justice Act of 2011 (the "Act"), signed into law in July 2011. A summary of the Act is provided below by category.

THE SOUTH CAROLINA FAIRNESS IN CIVIL JUSTICE ACT

2. Punitive Damages

The most significant reform adopted in the Act is its effect on punitive damage awards in South Carolina. The new law concerning punitive damages can be found in S.C. Code of Laws § 15-32-510 *et seq*. and became effective January 1, 2012. The first amendment contains procedural revisions. Under the new law, a plaintiff must specifically ask for punitive damages in his or her complaint. S.C. Code Ann. § 15-32-510 (2011). A defendant may also request in any jury trial that the trial be bifurcated. In such a situation, evidence concerning the issue of punitive damages may not be admitted in the compensatory damages stage of the trial. S.C. Code Ann. § 15-32-520(A). Furthermore, punitive damages may only be awarded where a plaintiff is awarded compensatory damages. S.C. Code Ann. § 15-32-520(C).

The Act provides that in order to receive a punitive damages award, a plaintiff must prove by clear and convincing evidence that the harm suffered was the result of the defendant's willful, wanton or reckless conduct. S.C. Code Ann. § 15-32-520(D). The Act codifies a non-exhaustive list of eleven factors to be considered by a jury in determining whether to award a punitive damages award and the amount of the award. These factors include, but are not limited to:

> (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; and
> (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.

S.C. Code Ann. § 15-32-520 (E). In the event punitive damages are awarded, the trial court must review the jury's decision in order to determine if the award is excessive or the result of passion or prejudice and may reduce the award based on the court's determination. Id. Additionally, in actions with multiple defendants, a punitive damages award must be specific to each defendant, and each defendant is liable only for the amount of the award made against that defendant. Id.

S.C. Code Ann. § 15-32-530 sets forth South Carolina's cap on punitive damage awards. The general rule provides that punitive damage awards shall not exceed the greater of three times the amount of compensatory damages awarded to each claimant or the sum of $500,000. S.C. Code Ann. § 15-32-530(A). However, if the jury returns a verdict for punitive damages in excess of the maximum amount, the trial court may increase the cap to an amount not to exceed the greater of four times the amount of compensatory of damages awarded to each claimant or the sum of $2,000,000, if the court makes the determination that one of the following conditions apply:

> (1) the wrongful conduct proven under this section was motivated primarily by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was known or approved by the managing agent, director, officer, or the person responsible for making policy decisions on behalf of the defendant; or
> (2) the defendant's actions could subject the defendant to conviction of a felony and that act or course of conduct is a proximate cause of the plaintiff's damages;

S.C. Code Ann § 15-32-530(B).

§ 15-32-530 further provides a complete exception to the punitive damages cap. No punitive damage award cap applies in the event the trial court determines:

> (1) at the time of injury the defendant had an intent to harm and determines that the defendant's conduct did in fact harm the claimant; or
> (2) the defendant has pled guilty to or been convicted of a felony arising out of the same act or course of conduct complained of by the plaintiff and that act or course of conduct is a proximate cause of the plaintiff's damages; or
> (3) the defendant acted or failed to act while under the influence of alcohol, drugs, other than lawfully prescribed drugs administered in accordance with a prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to the degree that the defendant's judgment is substantially impaired.

S.C. Code Ann § 15-32-530(C). Finally, at the end of each calendar year, the State Budget and Control Board must determine the increase or decrease in the ratio of the Consumer Price Index to the index as of December 31st of the previous year, and the maximum

amount recoverable for punitive damages pursuant to subsection (A) must be increased or decreased accordingly. S.C. Code Ann § 15-32-530(D).

3. Disclosure of Automobile Insurance

Also part of the Act, § 38-77-250 was created to mandate the release of automobile insurance coverage by the insurer. According to statute, every automobile insurer shall provide, within 30 days after receiving a written request from a claimant's attorney, under oath, the name of each insured, the name of the insurer, and the limits of coverage with regard to each known policy of private passenger insurance issued by it or, alternatively, the insurer may provide a copy of the declaration page of each policy. See S.C. Code Ann. § 38-77-250. The information provided to a claimant or his or her attorney shall not create a waiver of any defenses to coverage available to the insurer and shall not be admissible into evidence. Id. The provisions of this statute do not require disclosure of limits for fleet policy limits, umbrella coverages, or excess coverages. Id. Furthermore, the information received pursuant to this section is confidential and must not be disclosed to any outside party. Id. In the event the information is released, the court *must* impose sanctions for a violation. Id. (emphasis added).

South Dakota

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1. Introduction – History of Tort Reform in South Dakota

Tort reform in South Dakota has evolved since the mid-1970s when the state legislature began modifying statutes on medical malpractice liability to address concerns about the shortage of doctors in the state and the numbers of suits being filed, as well as the rising costs of insurance, which discouraged many practitioners from practicing in the state.1 South Dakota's tort reforms, including joint and several liability, medical malpractice, punitive damages and caps, and products liability, have tended to follow national trends as described more fully below. There have been no significant tort reforms in South Dakota since 2003.

2. Joint and Several Liability

South Dakota applies joint and several liability only to a defendant who is 51 percent or more responsible, and the defendant's liability is determined by the proportion of fault attributed. The South Dakota Legislature in 1987 enacted S.D.C.L. § 15-8-15.1, which provides: "If the court enters judgment against any party liable on the basis of joint and several liability, any party who is allocated less than fifty percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party."

3. Damages Caps

The legislature instituted a damages cap for medical malpractice liability actions, which is addressed in Paragraph 5 below.

4. Punitive Damages

South Dakota has joined the number of states that, since the 1980s, have elevated the standard of proof for punitive damages claims from "preponderance of the evidence," the ordinary standard used in civil litigation, to "clear and convincing." In 1986, Senate Bill 280 required a plaintiff to prove by "clear and convincing" evidence that a defendant acted with "willful, wanton, or malicious" conduct. The enacted law specifically provides:

In any claim alleging punitive or exemplary damages, before any discovery relating thereto may be commenced and before any such claim may be submitted to the finder of fact, the court shall find, after a hearing and based upon clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against.

There is no limitation on the amount of special damages that may be awarded. Please refer to paragraph five below regarding Medical Malpractice Reform.

Periodic Payment of Future Damages: SB 281 (1986). Mandates periodic payment of punitive damages when requested by a party to the lawsuit if future damages exceed $100,000.

S.D.C.L. § 21-1-4.1

5. Medical Malpractice Reform

In 1996, the South Dakota Supreme Court held a $1 million medical malpractice compensatory damage cap instituted by the South Dakota Legislature in 1986 violated the substantive due process and open courts provisions of the South Dakota Constitution. Knowles v. United States, 544 N.W.2d 183 (S.D. 1996). Adopting the court's analysis in Knowles, the South Dakota Legislature in 1997 revived a prior damages cap of $500,000 on general, but not special damages, stating, "The Legislature finds that amendment of the revived statute is necessary to recognize the evolution of levels of licensure from the time of initial passage of the statute to the present for the practitioners and entities addressed by the original version of the statute."

Accordingly, Section 21-3-11 was amended to provide:

In any action for damages for personal injury or death alleging malpractice against any physician licensed pursuant to chapter 36-4, chiropractor, dentist, dental hygienist, dental assistant, hospital, rural primary care hospital, registered nurse, licensed practical nurse, certified registered nurse anesthetist, clinical nurse specialist, nurse practitioner, nurse midwife or physician's assistant, or against the practitioner's corporate, limited liability partnership or limited liability company employer based upon the acts or omissions of the practitioner, under the laws of this state, whether taken through the court system or by binding arbitration, the total general damages which may be awarded may not exceed the sum of five hundred thousand dollars. There is no limitation on the amount of special damages which may be awarded. This section applies only to causes of action arising from injuries or death occurring after July 1, 1976. However, in the case of chiropractors, it applies only to the causes of action arising from injuries or death occurring after July 1, 1978. S.D.C.L. § 21-3-11 (1997). The statute was revised in 2002 to include causes of action against optometrists, and again in 2005 to include causes of action against podiatrists.

Collateral Source Rule Reform: S.D. Codified Laws § 21-3-12.

Permits the admissibility of evidence of collateral source payments when the claimant alleges special damages that are or will be paid by insurance, are not subject to subrogation, and are not purchased privately or by government programs.

6. Products Liability Reform

South Dakota most recently amended its products liability laws in 1995 by specifically allowing for the state of the art defense in product liability cases:

In any product liability action based upon negligence or strict liability, whether the design, manufacture, inspection, testing, packaging, warning, or labeling was in conformity with

the generally recognized and prevailing state of the art existing at the time the specific product involved was first sold to any person not engaged in the business of selling such a product, may be considered in determining the standard of care, whether the standard of care was breached or whether the product was in a defective condition or unreasonably dangerous to the user.

S.D.C.L. § 20-9-10.1.

Tennessee

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Tennessee recently enacted significant tort reform directed toward developing more certainty regarding damage exposure in civil matters and in an

effort to make Tennessee competitive with other states and an attractive business market. The Tennessee Civil Justice Act of 2011 [1] became law on June 16, 2011 when signed by Gov. Bill Haslam. The Act has broad effects altering several aspects of Tennessee law such as product liability, medical malpractice and personal injury cases. The Act will apply to causes of action which accrue after October 1, 2011[2].

1. Non –economic damages cap (Section 10)
2. Punitive damages cap (Section 10-11)
3. Venue (Section 2-6)
4. Product Liability (Section 12)
5. Medical Malpractice Act (Section 8-9)
6. Appeal Bond (Section 7)
7. Other aspects of tort reform legislation.

1. Perhaps the most significant element of Tennessee's tort reform legislation is the cap put in place on non-economic damages[3]. Prior to this legislation Tennessee had no cap on non-economic damages. Non-economic damages include: physical and emotional pain and suffering, loss of enjoyment of life, physical impairment and disfigurement, emotional distress, injury to reputation, etc. This cap on no-economic damages does not apply to economic damages which, conversely, are objectively verifiable such as medical expenses, lost wages, lost earning capacity, loss of business, etc.

   This legislation puts in place a cap on non-economic damages at $750,000 per "injured plaintiff." This cap is increased to $1,000,000 for cases involving a "catastrophic loss/injury." This is defined as (1) a spinal cord injury resulting in paraplegia or quadriplegia; (2) amputation of two hands, two feet, or one of each; (3) third degree burns over 40% or more of the face; or (4) wrongful death involving a parent, with custody or visitation rights, leaving a surviving minor child.

   The cap includes derivative claims and loss of consortium. It also applies in the comparative fault context limiting the total recovery a Plaintiff can receive at the cap regardless of the amount of at-fault parties.

[1] State of Tennessee Public Chapter No. 510, House Bill No. 2008
[2] Section 24 of Tennessee Civil Justice Act of 2011
[3] These caps are codified as a new chapter in Tenn. Code Ann., § 29-39-101-§ 29-39-103.

There are three exceptions to the $750,000/$1,000,000 cap. (1) Intentional torts where the defendant intended to inflict serious physical injury or harm and the plaintiff was in fact injured; (2) intentional falsification/destruction concealment of records containing material evidence of defendant's liability; and (3) intoxicated defendant.

The caps will not be disclosed to a jury and the court will apply them after the jury returns its verdict. The verdict form will require the jury to break down damages as economic and noneconomic and will not allow a general unspecified verdict.

2. Prior to this legislation Tennessee had no cap on punitive damages; this legislation changes that[4]. A cap has been placed on punitive damages limiting them to the greater of two (2) times the total amount of compensatory damages, or $500,000; whichever is greater.

The three exceptions applicable to the cap on non-economic damages also apply here; intentional torts where the defendant intended and actually did injure the plaintiff, intentional falsification/destruction/concealment of records containing material evidence of defendant's liability and intoxicated defendants.

A Safe Harbor from punitive damages has been put in place barring a defendant from being liable for punitive damages in three scenarios.

1. The seller of a product. Unless the seller (1) exercised substantial control over the aspect of the design, testing, manufacturing, packaging or labeling of the product that caused the harm for which recovery is sought; (2) the seller altered or modified the product and the alteration or modification was a substantial factor in causing the harm for which recovery is sought; or (3) the seller had actual knowledge of the defective condition of the product at the time the seller supplied the product.
2. Drug or medical device manufacturers if the drug or device was manufactured and labeled in accordance with federal Food and Drug Administration and federal regulations.
3. Any defendant who can show by a preponderance of the evidence that the defendant was in substantial compliance with applicable federal and state regulation setting forth specific standards applicable to the subject activity, and that the applicable regulations are intended to protect a class of persons or entities that includes the plaintiff.

[4] The punitive damage cap is included the new chapter of Tenn. Code Ann., § 29-39-101-§ 29-39-103

3. Current venue provisions have been amended to limit the jurisdictions in which a business entity can be sued. Prior to this enactment a Tennessee or out-of-state business entity could be sued in any county where their principle office is, where the plaintiff resides, where all or a substantial part of the events or omissions giving rise to the claim occurred or where it is "found" (had a presence or did business).

   This allowed plaintiff suing a business entity who had a presence in many counties to file the action in a county they deemed advantageous.

   The amendment to the Tennessee "transitory" venue statue (Tenn. Code Ann. § 20-4-101) removes the provision allowing courts to have jurisdiction in any county where a business entity is "found."[5] Now the claim must be brought in:

   1) The county where all or a substantial part of the events or omissions giving rise to the claim accrued; or
   2) The county where any defendant organized under the laws of this states maintains its principle office; or
   3) The county where the defendant's registered agent for service of process is located or the county where the person designated by statute as the defendant's agent for service of process is located.

4. The Tennessee Products liability act was amended to provide additional protections from liability for "sellers." Tenn. Code Ann. §29-28-106, formerly known as the "sealed container doctrine" has been broadened via this amendment to provide that no product liability action can be commenced against any seller other than the manufacturer. This creates a general bar to liability for sellers, which goes beyond the "sealed container doctrine" defense, to which traditional exceptions still apply:

   1. The seller exercised substantial control over that aspect of the design, testing, manufacturing, packaging or labeling of the product that caused the alleged harm for which recovery is sought;
   2. The seller altered or modified the product which was a substantial factor in causing harm claimed.
   3. The seller gave an express warranty.

[5] Tenn. Code Ann. § 20-4-101 - § 20-4-106 were amended or deleted to accomplish this reform.

4. The manufacturer or distributor of the product is not subject to service of process in Tennessee; or
5. The manufacturer has been judicially declared insolvent.

5. Tennessee previously passed tort reform specifically regarding the area of medical malpractice known as the Tennessee Medical Malpractice Act[6]. The new reform amends this act to provide clarity as to who the Act applies to by defining "health care provider." The definition is spelled out in Tenn. Code Ann. § 29-26-101 and is meant to broadly define health care providers to include, in addition to doctors; health care facilities, nurses, physicians' assistants, pharmacy technicians etc.

   Further, the terms "malpractice" and "medical malpractice" are substituted with the term "health care liability" to coincide with the intention to broaden the applicability of the statutory requirements.

6. In an effort to lessen the cost and burden of an appeal Tenn. Code Ann. § 27-1-124 was amended to reduce the maximum appeal bond in a civil action from $75,000,000 to $25,000,000. The court is barred from including punitive damages in the judgment amount for appeal bond purposes and the bond cannot exceed the lesser of $25,000,000 or 125% of the judgment amount.

7. While capping damages, both non-economic and punitive, is potentially the most far reaching portion of the new legislation the act also amended the timing for appeal of the grant or denial of a class certification.[7]. It further specifies that the Tennessee Consumer Protection Act does not apply to the sale or marketing of securities[8] and under the Tennessee Consumer Protection Act only treble damages are available[9].

Cases filed after The Tennessee Civil Justice Act of 2011went into effect are now going through the litigation process with the various caps in place. We will soon be learning the practical effect of the various provisions and any potential unintended consequences.

[6] Tenn. Code Ann. § 20-26-101-122
[7] Tenn. Code Ann. § 27-1-125
[8] Tenn. Code Ann. § 47-18-109
[9] Tenn. Code Ann. § 47-18-109

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Texas continues to be among the leading states in tort reform. The bulk of Texas tort reform was accomplished in 2003, in which the Legislature passed reforms in the areas of medical malpractice, damages caps, products liability, proportionate liability, and settlement practices. The 79th legislative session in 2005 did not produce nearly as many reform measures. While no single legislative session has been quite as sweeping as the 78th in 2003, Texas has seen some important changes in tort law since 2005.[1]

2007

Overview: In 2007, Texas passed an amendment to its venue statutes that limited plaintiffs' ability to choose notoriously plaintiff-friendly venues in Jones Act cases.

Jones Act Venue Reform: Amendment to Texas Civil Practice & Remedies Code § 15.0181. Before 2007, a seaman injured in the Port of Houston could sue 400 miles away in the Rio Grande Valley if he happened to live there. In 2007, the Texas Legislature eliminated the venue loophole that allowed Jones Act plaintiffs to sue in their county of residence. This amendment was prompted by an increase in Jones Act litigation against dredgers in Hidalgo, Starr, Zapata and Cameron counties, where as of 2003, almost 60% of Jones Act lawsuits against dredgers in the entire United States were being filed. TEXANS FOR LAWSUIT REFORM, *The Fight for the Texas Maritime Industry: Why HB 1602 is Critical*, ADVOCATE, Summer 2007, page 3 (2007). Under the general venue statute, other Texas plaintiffs may not sue in their county of residence unless the defendant has no place of business in Texas and the accident did not occur in Texas.

The venue amendment did not relegate Jones Act plaintiffs to the general venue statute, but did impose substantial reform from the former rule. The amendment affects venue choices based on the location of the injury, and has drawn criticism for its complexity. The venue rule now provides as follows:

For injuries in Texas, Jones Act plaintiffs may now sue:

(i) in the county in which the cause of action accrued; or
(ii) in the county of the defendant's principal office in Texas at the time the cause of action accrued.

For an injury in Louisiana, Mississippi, Alabama and Florida, ashore and on beach reclamation projects, or for an injury on the inland waters of Louisiana, Mississippi, Alabama, Arkansas, Tennessee, Missouri, Illinois, Kentucky, or Indiana or of Florida along the Gulf of Mexico shoreline of Florida from the Florida-Alabama border down to and including the shoreline of Key West, Florida, Jones Act plaintiff may now sue:

[1] The Texas Legislature convenes only in odd-numbered years unless a special legislative session is called.

(i) in the county of the defendant's principal office in Texas at the time the cause of action accrued if the office is in a coastal county;
(ii) in Harris County if the plaintiff lives in Harris County;
(iii) in Galveston County if the plaintiff lives in Galveston County;
(iv) in either Harris county or Galveston county if the plaintiff does not live in either of those counties; or
(v) in the county of plaintiff's residence at the time the cause of action accrued if the defendant does not have a principal office in a Texas coastal county.

For an injury anywhere else in the world, a Texas Jones Act plaintiff may now sue in:

(i) the county of the defendant's principal office in Texas at the time the cause of action accrued;
(ii) in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred; or
(iii) in the county of the plaintiff's residence at the time the cause of action accrued.

TEX. CIV. PRAC. & REM. CODE § 15.0181.

2009

Overview: In 2009, the Texas Supreme Court ruled that a premises owner could qualify for protection from suit under the Worker's Compensation Act if it acted as its own general contractor and offered coverage to its employees in compliance with the Act. Texas also allowed the Residential Construction Commission to be dissolved by allowing its enabling legislation to expire.

Premises Owners Qualify for Workers' Compensation Bar to Suit: Texas law was in a state of uncertainty as to a premises owner's right to assert an exclusive remedy defense under the Texas Workers' Compensation Act[2] if it acted as its own general contractor. Prior to 2009, if Worker A was injured on the job while employed by A Corp., a premises owner acting as its own general contractor that offered Worker's Compensation coverage, Texas courts were split as to whether Worker A could bring suit against A Corp for negligence. On the other hand, if Worker B was injured on the job while employed by B Corp., a general contractor in privity with the premises owner, Worker B would be barred from bringing suit. Given the importance of mineral refining to the Texas economy and the high volume of tort claims arising from refinery accidents, this was a crucial legal question to answer.

[2] Texas Labor Code § 401.001 *et. seq.*

In *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 436-438 (Tex. 2009), the Texas Supreme Court upheld a premises owner's right to claim "employer status" under the Act. This status allows premises owners to claim the same exclusive remedy defense as a general contractor, provided the premises owner meets the Act's definition of a "statutory employer." A premises owner meets the definition if it acts as its own general contractor, includes workers' compensation coverage for employees in the applicable contract, and pays the workers' compensation premiums out of the contract price. In *Entergy*, the Court noted that the Act does not expressly preclude a premises owner from qualifying as a statutory employer, and allowing them to so qualify promotes the public policy of encouraging coverage.

Sunset of the Residential Construction Commission: Before 2009, a residential construction defect case was subject to a lengthy and mandatory administrative process conducted by the Residential Construction Commission before a court could adjudicate the dispute. The result of the administrative dispute resolution proceeding raised only a rebuttable presumption in any further litigation. The dissolution of the RCC streamlined the disposal of residential construction claims by doing away with the administrative agency all together.

Texas passed the Texas Residential Construction Commission Act[3] in 2003, which governed the warranties applicable to design, construction and repair of residential buildings and created the Residential Construction Commission. The Commission was charged with registering builders, collecting fees for homes built by registered builders, and establishing limited warranties and building standards for residential construction. Under the RCCA, residential construction disputes were subject to a mandatory administrative resolution process as a condition precedent to filing suit. The Commission and its enabling legislation were subject to the sunset laws applicable to administrative agencies, found in the Texas Government Code. Because no extending legislation was passed, the Commission was dissolved effective September 1, 2009. However, it continued in effect for one year for purposes of completing pending proceedings. The dissolution eliminated any requirement that a residential construction dispute be submitted to administrative proceedings before suit.

The RCCA's expiration also has significant effect on the applicable building standards for residential construction in Texas. For construction begun before the June 1, 2005 effective date of the RCCA, Texas law recognized common law implied warranties of habitability and good and workmanlike construction. *Humber v. Morton*, 426 S.W.2d 554, 555 (Tex. 1968). For construction begun between June 1, 2005 and September 1, 2009, the RCC standards are still applicable. It is not clear whether the common law implied

[3] Former Texas Property Code § 401.007

warranties recognized before the passage of the RCCA are now applicable to construction begun after September 1, 2009.

2011

In 2011, the Texas Legislature passed the Omnibus Tort Bill, which contained provisions preventing circumvention of statutes of limitation and clarified 2003 legislation that provides for recovery of fees and costs when a litigant rejects a reasonable settlement offer. The bill also charged the Supreme Court with promulgating rules to promote more time- and cost-effective litigation resolution.

Substantive Reforms

Limitations Loophole and Responsible Third Parties: Prior to the 2011 amendment of Texas Civil Practice & Remedies Code § 33.004, if a defendant designated a responsible third party, a plaintiff could join the third party as a co-defendant even if the statute of limitations would otherwise bar the joinder. As explained in the prior Texas edition of this compendium, Texas law allows a defendant to designate a third party as responsible for a plaintiff's damages without joining the third party in the lawsuit. The designating defendant may submit evidence to a jury of the third party's fault in order to reduce damages allocable to the designating defendant. Under the former scheme, a savvy plaintiff could sue a dummy entity which it controlled, have the dummy entity designate a responsible third party well after limitations had run, and still be able to maintain suit. The 82nd Legislature repealed § 33.004(e), which allowed this circumvention. The repeal is effective with respect to civil actions commenced on or after September 1, 2011.

"**Loser Pays"**: Texas clarified what has been called the "Loser Pays" scheme in 2011. This popular handle of Texas Civil Practice & Remedies Code § 42.004 is a misnomer. The statute is really a "consider reasonable settlement offers seriously" law, which encourages parties to settle out of court. Under the statute, a defendant will recover its attorney's fees and costs from the plaintiff if the plaintiff rejects a settlement offer made within sixty days of suit, and then recovers less than 80% of the settlement offer at trial. On the other hand, if a defendant rejects a plaintiff's counter-offer, and the plaintiff then recovers 120% of the counter-offer amount at trial, the plaintiff will recover its costs and fees from defendant. This rule has been effective since January 1, 2004, and was part of HB 4 in 2003. The 2011 amendment limits the amount of fees and costs recoverable by either party to the amount recovered by the claimant before adding or subtracting any award of litigation costs and fees. The amendment rewrites § 42.004(d), which formerly provided a fee and cost recovery cap computed by subtracting the amount of any statutory or contractual liens from the sum of 50% of the economic damages and all non-economic damages and exemplary or additional damages.

Procedural Reforms

Motion to dismiss: As of now, Texas defendants must address a plaintiff's pleading defects via special exceptions, which entails identifying each defect and specifying why it is objectionable. By contrast, as of the spring of 2011, forty-two of the fifty states had adopted procedures for dismissing lawsuits that fail to state a claim upon which relief may be granted. TEXANS FOR LAWSUIT REFORM, *The 2011 Omnibus Tort Reform Bills*, ADVOCATE, Spring, 2011, page 4 (2011). The 82nd Legislature brought Texas up to speed on this front by directing the Texas Supreme Court to develop procedures for a motion to dismiss. The goal of this legislation is to allow quicker disposition of meritless lawsuits. As a matter of current Texas state court practice, the legal tenability of claims is not normally addressed until the summary judgment stage, after substantial fees have been incurred. The lack of a vehicle to dispose of meritless claims early in the litigation increases the "nuisance value" of even the most frivolous lawsuit. The new motion to dismiss procedures will allow defendants an opportunity to challenge the legality of claims early in a case, thereby lessening its nuisance value. These new rules from the Texas Supreme Court are expected in the spring of 2012.

New discovery guidelines: As of now, Texas lawsuits involving claims over $10,000 are governed by one of three discovery plans. Under Levels 1 and 2, each side is allowed 25 interrogatories, unlimited requests for production, unlimited requests for admission, and may request an infinite number of documents, so long as the requests otherwise comply with the discovery rules. A Level 3 plan is a custom plan devised by the parties' agreement or court order, and is available for disputes over any amount. The court may order a Level 3 plan on its own motion, and must order a Level 3 plan on a party's motion. The Level 1 discovery scheme, which is the default plan for disputes over $50,000 or less, limits depositions to six hours per side. The Level 2 discovery plan, which is the default plan for suits over more than $50,000, allows 50 hours of depositions per side. Claims for less than $10,000 may currently be handled in small claims court, with expedited procedures.

2011 legislation directs the Supreme Court to promulgate new discovery rules for expediting and lowering discovery costs in cases in which the amount in controversy is between $10,000 and $100,000. Possible innovations in the new discovery rules could be limits on requests for production and limits on the number of documents that can be requested by a party.

Interlocutory appeal of controlling question of law: The Omnibus Tort Bill gives Texas trial courts the opportunity to allow an interlocutory appeal of a "controlling question of law." As Texas litigation practice stood before this bill, unless a trial court order fell within the scope of a few statutes allowing interlocutory appeals, a litigant had to

wait until final judgment to appeal the order. The Supreme Court has yet to reduce the legislature's intent into concrete procedures.

Utah

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1. Introduction: Tort Reform in Utah

Since the late 1980s, Utah has followed general trends in tort reform with respect to comparative negligence, punitive damages, medical liability and product liability. This
article will outline the developments in Utah law, with a focus on recent legislative enactments.

2. Joint and Several Liability

Utah abolished joint and several liability in 1986, adopting instead a comparative negligence system. *See* Utah Code Ann. § 78B-5-818. No longer would "[t]he fault of a person seeking recovery…bar recovery by that person." Utah Code Ann. § 78B-5-818(1). Instead, "[a] person seeking recovery may recover from any defendant or group of defendants whose fault, combined with the fault of persons immune from suit and nonparties to whom fault is allocated, exceeds the fault of the person seeking recovery prior to any reallocation of fault made under Subsection 78B-5-819(2)."[1] Utah Code Ann. § 78B-5-818(2). Likewise, a defendant cannot be liable for more than the proportion of fault attributed to that defendant. Utah Code Ann. § 78B-5-818(3); 78B-5-820.

In order to allocate fault to a non-party, a party must timely file a description of the factual and legal basis on which fault can be allocated and information identifying the non-party, to the extent known or reasonably available to the party, including name, address, telephone number and employer. Utah Code Ann. § 78B-5-821(4). The party seeking to allocate fault files the description and identifying information in accordance with Rule 9 of the Utah Rules of Civil Procedure or as ordered by the court—but in no event later than 90 days before trial. *Id.*

3. Punitive Damages Reform/Damages Cap

In 1989, Utah enacted Utah Code Ann. Section 78B-8-201, which requires a plaintiff to show that defendant's conduct was "willful and malicious," "intentionally fraudulent," or "knowing and reckless" in order to establish a basis for punitive damages. (The previous standard was merely "reckless.") The plaintiff must establish the defendant's conduct through clear and convincing evidence, rather

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[1] Trial courts may, and when requested by a party shall, direct the jury to find separate special verdicts determining the total amount of damages sustained and the percentage of fault attributable to each person seeking recovery and to each defendant. Utah Code Ann. § 78B-5-819. "If the combined percentage or proportion of fault attributed to all persons immune from suit is less than 40%, the trial court shall reduce that percentage or proportion of fault to zero and reallocate that percentage or proportion of fault to the other parties." Utah Code Ann. § 78B-5-819(2)(a). However, "[i]f the combined percentage or proportion of fault attributed to all persons immune from suit is 40% or more, that percentage or proportion of fault attributed to persons immune from suit may not be reduced under Subsection (2)(a)." Utah Code Ann. § 78B-5-819(2)(b).

than a mere preponderance of the evidence standard. Utah Code Ann. § 78B-8-201(1)(a). The statute also mandates that 50% of the amount of punitive damages in excess of $50,000 shall be remitted to the State's general fund. Utah Code Ann. § 78B-8-201(3)(a).

In an action against a governmental entity for personal injury or wrongful death, the damage award may not exceed $583,900 for one person in any one occurrence. *See* Utah Code Ann. § 63G-7-604(1)(a). The statute abolishing punitive damages in an action against a government entity is Utah Code Ann. Section 63G-7-603.

4. **Medical Liability**[2]

Utah has enacted a number of laws regarding liability of medical providers, including the following:

(a) *Nursing Home Care*

The Legislature amended Utah Code Ann. Section 78B-3-403 in 2002 to add "health care facility" to the definition of "health care provider." The effect of this amendment was to ensure that the state's medical liability reforms apply to nursing care facilities and residential assisted living facilities.

(b) *Arbitration*

Utah Code Ann. Section 78B-3-421 clarifies the rights of doctors and patients with respect to entering into a binding arbitration agreement.

(c) *Collateral Source Rule*

Utah Code Ann. Section 78B-3-405 provides that any amount awarded to a plaintiff in a medical malpractice action shall be offset by amounts received by the plaintiff from collateral sources, excepting those sources that have a subrogation right.

(d) *Contingent Fees*

Utah Code Ann. Section 78B-3-411 provides that attorneys may not collect a contingency fee in a medical malpractice action greater than 1/3 of the recovery.

(e) *Limit on Noneconomic Damages*

Utah Code Ann. Section 78B-3-410 limits the amount of noneconomic damages that a plaintiff may recover to $450,000 for a cause of action arising on or after May 15,

[2] Utah's Health Care Malpractice Act is found in Title 78B, Chapter 3, Part 4 of the Utah Code.

2010, and to $400,000 (adjusted for inflation) for a cause of action arising prior to May 15, 2010. Noneconomic damages include pain, suffering and inconvenience. Utah Code Ann. § 78B-3-410(1).

(f) *Periodic Payment of Future Damages*

Where future damages in a medical malpractice action equal or exceed $100,000, the court shall, at the request of a party, order that compensation for future damages be paid in periodic payments rather than a lump sum payment. *See* Utah Code Ann. Section 78B-3-414.

(g) *Admissibility of Certain Evidence Against Interest*

In 2006, the Legislature amended the Health Care Malpractice Act to include a provision that any expression of apology, sympathy, etc., made by the defendant to the plaintiff for an unanticipated outcome of medical care or any description by the defendant to the plaintiff regarding the sequence or significance of events that led to an unanticipated outcome of medical care is inadmissible as evidence of an admission against liability.
See Utah Code Ann. § 78B-3-422.

5. **Product Liability**

Utah Code Ann. Section 78B-6-703 creates a rebuttable presumption that a product is free from any defective condition with respect to the design or plan of the product, if the design or plan of the product or the method and techniques of manufacturing the product were in conformity with government regulations and standards.

Vermont

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1. Introduction – History of Tort Reform in Vermont

Vermont has enacted little in the way of tort reform recently. In 1970, a statute regarding comparative negligence took effect, and this statute was amended in 1979 to encompass multiple tortfeasors. Vt. Stat. Ann. tit. 12, § 1036. In the mid-to-late 1970s, the Vermont Legislature enacted medical malpractice statutes addressing arbitration, claims based on lack of informed consent, and statutes of limitation and repose. Vt. Stat. Ann. tit. 12, § 7002; Vt. Stat. Ann. tit. 12, § 1909; and Vt. Stat. Ann. tit. 12, § 521.

In a 2006 study by the Pacific Research Institute, all fifty states were ranked according to their tort reform systems, and Vermont was ranked fiftieth for its "relatively high monetary tort losses, [lack of] damage caps, and [lack of] meaningful reforms in class actions, attorney fees, asbestos, construction, junk food, jury service, or venue." Pacific Research Institute, *The U.S. Tort Liability Index: 2006 Report*, 19, *available at* http://www.pacificresearch.org/pub/sab/entrep/2006/Tort_Index_06.pdf.

2. Joint and Several Liability

Vermont has traditionally held multiple tortfeasors jointly and severally liable. *Levine v. Wyeth*, 944 A.2d 179 (Vt. 2006) (citing *Zaleskie v. Joyce*, 333 A.2d 110, 115 (Vt. 1975)). The Vermont Supreme Court, applying the Restatement (Second) of Torts § 876, has held that a person may be liable for harm resulting from another person's tortious conduct if the person:

- Commits a tortious act as part of a common design with the other;
- Gives substantial assistance to the other with knowledge that the other's conduct is a breach of duty; or
- Gives substantial assistance to the other to accomplish a tortious result while also acting in a manner that is a breach of duty to the third person.

Montgomery v. Devoid, 915 A.2d 270, 281 (Vt. 2006).

However, if the plaintiff was contributorily negligent, the plaintiff's recovery will be reduced in proportion to the amount of negligence attributable to the plaintiff. Vt. Stat. Ann. tit. 12, § 1036. If the amount of negligence attributable to the plaintiff is greater than the total amount of negligence attributable to the defendant or defendants, the plaintiff is barred from recovery. *Id*. The statute provides that if recovery is allowed against more than one defendant, each defendant is liable for "that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed." *Id*. In *Levine*, the defendant argued that Vt. Stat. Ann. tit. 12, § 1036 applied and that the defendant was therefore only severally liable for damages because the plaintiff had reached a settlement with

another party in a separate lawsuit related to the same case. *Levine* at ¶ 36. The Court, relying on precedent, held that several liability under this statute does not apply unless 1) the plaintiff was contributorily negligent and 2) multiple defendants are sued in the same action. *Id.* at ¶ 36-38. The Court expressly declined to hold that "joint and several liability should no longer prevent apportionment among joint tortfeasors when one tortfeasor has settled in a previous action." *Id*. at ¶ 39. The defendant was held jointly liable for the entire amount of damages. *Id*. at ¶ 35.

Vermont does not provide joint tortfeasors with a right to contribution from one another. *Murray v. J & B International Trucks, Inc*., 508 A.2d 1351, 1357 (Vt. 1986). The Vermont Supreme Court held in *Howard v. Spafford* that combining contribution with comparative negligence would be problematic because "[t]he number and complexity of issues created, coupled with the prospect of instructions which must be given, under pressure of time, to a jury before it retires, give rise to a spectre of trials replete with reversible error." 321 A.2d 74, 75 (Vt. 1974).

3. Compensatory Damages

The Vermont state legislature has not enacted any laws limiting the amount of compensatory damages a plaintiff may be awarded. The reviewing courts give wide latitude to the jury's decision, stating that "we must consider the evidence in the light most favorable to the damages found by the jury and uphold the verdict if there was evidence reasonably supporting it" and that "to overturn a jury award, an appellant must demonstrate that the verdict was entirely excessive." *In re Estate of Peters*, 765 A.2d 468, 477 (Vt. 2000)(citations omitted).

Under Vermont common law, pre-judgment interest should be added to compensatory damages, but not to punitive damages or to damages that are rarely ascertainable at the time of the injury, such as pain and suffering or permanent impairment damages. *D'Arc Turcott v. Estate of LaRose*, 569 A.2d 1086, 1088 (Vt. 1989).

4. Punitive Damages

The Vermont legislature has not passed any laws capping punitive damages. The Vermont Supreme Court has used the factors set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-75 (1996), to determine whether a punitive damages award is so excessive as to deny due process. *Sweet v. Roy*, 801 A.2d 694, 714 (Vt. 2002). The factors are:

- The degree of reprehensibility;
- The ratio between the compensatory and punitive awards; and
- Possible sanctions for similar conduct.

Id.

The Vermont Supreme Court went on to say in *Sweet* that it will "overturn a punitive damage award only if it is 'manifestly and grossly excessive'" and that "[a]lthough a jury can award punitive damages only if it has awarded compensatory damages, [there is] no requirement that there be any particular ratio between the two awards." *Id*. at 446-47.

5. Medical Malpractice Reform

a. Statute of Limitations

In 1977, the Vermont Legislature codified common law rules regarding the statute of limitations in a medical malpractice act and added a statute of repose. Generally, a medical malpractice action must be brought within three (3) years of the alleged malpractice or two years from the date the injury is or reasonably should have been discovered, whichever is later, but not more than seven (7) years from the date of the incident.[1] Vt. Stat. Ann. tit. 12, § 521. However, if fraudulent concealment prevented the patient from discovering the negligence, there is no statute of limitations upon the patient's right to recover damages. *Id*. If the action is based on the discovery of a foreign object in the patient's body after the general limitation period, the action may be commenced within two years of discovery of the foreign object. *Id*. If the claimant is mentally incompetent, a minor, or in prison, the same periods of limitation run after the removal of the disability. Vt. Stat. Ann. tit. 12, § 551.

b. Burden of Proof

A medical malpractice plaintiff in Vermont must prove both that the defendant physician was negligent and that this negligence proximately caused the plaintiff's injuries. *Senesac v. Associates in Obstetrics & Gynecology*, 449 A.2d 900, 902 (Vt. 1982). To meet this burden, the plaintiff must establish the three elements set out in Vt. Stat. Ann. tit. 12, § 1908:

- The degree of knowledge or skill possessed or the degree of care ordinarily exercised by a prudent health care professional in a similar practice under similar circumstances;

- That the defendant lacked this degree of knowledge or skill or failed to exercise this degree of care; and

- That as a proximate result of this lack of knowledge or skill or the failure to exercise the degree of care the plaintiff suffered injuries that would not have otherwise been incurred.

[1] Vermont's statute of repose, which begins running from the time of the injury, is seven years. Vt. Stat. Ann. tit. 12, § 521.

Smith v. Parrott, 833 A.2d 843, 847 (Vt. 2003)

Vt. Stat. Ann. tit. 12, § 1908 was codified in 1976. In 2003, the Vermont Supreme Court was urged to depart from these requirements in favor of a "loss of change" theory of recovery, which was not recognized in 1976.[2] *Id*. at 848. The Court declined to do so because the loss of change doctrine "represents a significant departure from the traditional meaning of causation in tort law," and "to expand the definition of causation and thus the potential liability of the medical profession in Vermont 'involves significant and far-reaching policy concerns' more properly left to the legislature." *Id*., See also *Price v. Town of Fairlee*, 26 A. 3d 26 (Vt. 2011).

Ordinarily, the elements of Vt. Stat. Ann. tit. 12, § 1908 must be established by expert testimony. *Senesac*, 449 A.2d at 902. However, the exception is when "the violation of the standard of medical care is 'so apparent to be comprehensible to the lay trier of fact.'" *Id*. (citing *Largess v. Tatem*, 291 A.2d 398, 403 (Vt. 1972)).

c. Lack of Informed Consent

The Vermont legislature requires medical practitioners to provide "a reasonable answer to any specific question about foreseeable risks and benefits" unless doing so would "adversely and substantially affect the patient's condition," in which case the medical practitioner is to provide the information to a member of the patient's immediate family if possible. Vt. Stat. Ann. tit. 12, § 1909(d). However, the statute also provides that there is no right to recover for lack of informed consent in an emergency situation. Vt. Stat. Ann. tit. 12, § 1909(b). The statute also provides four defenses to such a suit:

- The risk not disclosed is too commonly known to require disclosure, and the risk is not substantial;
- The patient assured the medical practitioner that he would proceed with the medical treatment regardless of any risk involved, or the patient indicated that he did not wish to be informed;
- Consent by or on behalf of the patient was not reasonably possible; or
- A reasonably prudent person in the plaintiff's position would have undergone the medical treatment if he had been fully informed.

Vt. Stat. Ann. tit. 12, § 1909(c).

[2] The loss-of-chance doctrine compensates a plaintiff "for the extent to which the defendant's negligence reduced the victim's likelihood of achieving a better outcome, notwithstanding the fact that the likelihood may have been reduced by less than fifty-one percent." *Smith v. Parrott*, 833 A.2d 843, 846 (Vt. 2003) (quoting J. King, *"Reduction of Likelihood" Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine*, 28 U. Mem. L. Rev. 491, 493 (1998)).

Finally, judgment must be granted in favor of the defendant at the end of a plaintiff's case based solely on lack of informed consent if the plaintiff does not provide expert medical testimony in support of the plaintiff's allegation that he was not provided with sufficient information, defined in (a)(1) as "alternatives [to the medical treatment] and the reasonably foreseeable risks and benefits involved as a reasonable medical practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation." Vt. Stat. Ann. tit. 12, § 1909(e), (a)(1).

d. Arbitration of Medical Malpractice Claims

Under Vt. Stat. Ann. tit. 12, § 7002(a), a medical malpractice claimant may submit the claim in writing to arbitration prior to the commencement of any trial regarding that claim, but not thereafter, as long as all parties to the claim agree to arbitration. The arbitration panels consist of a judicial referee selected by the court administrator; a lay person; and a member of the defendant's profession. Vt. Stat. Ann. tit. 12, § 7002(a). The members of the panel are selected randomly, but the parties are given a number of peremptory strikes set by the statute. Vt. Stat. Ann. tit. 12, § 7002(a) and (c). Upon application by any party, the superior court is to issue a judgment order in accordance with the arbitration panel's decision, and the order may be appealed to the supreme court. Vt. Stat. Ann. tit. 12, § 7005.

In 1991, the Vermont legislature adopted a contingent amendment to § 7002, § 7005, and other statutes in the same chapter to provide for mandatory arbitration in medical malpractice cases, but the amendment is contingent on the enactment of a universal access health care system enacted by the general assembly. Vt. Stat. Ann. tit. 12, Pt. 10, Ch. 215.[3] Because there is not yet such a system, the amendments are not yet effective. *Id*.

6. Products Liability Reform

There have been no recent reforms in the area of product liability in Vermont. Generally, a plaintiff may bring a products liability action under a strict liability theory, breach of warranty, or negligence. *Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc.*, 473 F.3d 450, 456 (2nd Cir. 2007); *Mainline Tractor & Equip. Co., Inc. v. Nutrite Corp.,* 937 F. Supp. 1095, 1101 (D. Vt. 1996).

In 1975, the Vermont courts adopted strict products liability as set forth in the Restatement (Second) of Torts § 402A. *Webb v. Navistar International Transportation Corp*., 692 A.2d 343, 346 (Vt. 1996). Under the Restatement, "a manufacturer is strictly liable for physical harm or property damage resulting from a defective product that reaches a user without undergoing substantial change." *Id*. A plaintiff must prove that the product is defective and that the defect was the proximate cause of the harm. *Id*. Also, the defective product must be dangerous to

[3] This amendment is found in a note under the Chapter 215 heading.

an extent beyond which the ordinary consumer with ordinary knowledge would contemplate. *Id*. The defendants in a strict liability case must be "engaged in the business of selling such a product." *Zaleskie,* 333 A.2d at 113 (quoting Restatement (Second) of Torts § 402A(1)(a) (1965)).

A manufacturer may also be held strictly liable for failure to warn consumers of inherent dangers in a product. *Webb*, 692 A.2d at 347. In this case, a plaintiff must prove that the defendant had a duty to warn the plaintiff, that the lack of warning made the product unreasonably dangerous and therefore defective, and that the defendant's failure to warn was the proximate cause of the injury. *Blanchard v. Eli Lilly & Co*., 407 F.Supp. 2d 308, 321 (D. Vt. 2002). There is a presumption that had there been a warning, the consumer would have read and heeded the warning. *Id*.

To establish causation in a strict liability or breach of warranty case, the plaintiff must prove 1) the product is defective and 2) the defect existed in the product at the time it left the possession and control of the defendant. *Allstate Ins. Co*., 473 F.3d at 456. In a breach of warranty action, a plaintiff may prove his case by circumstantial evidence. *Travelers Ins. Companies v. Demarle, Inc., USA*, 878 A.2d 267, 272 (Vt. 2005).

The statute of limitations that applies to products liability actions for property damage is Vt. Stat. Ann. tit. 12, § 511, which states that "[a] civil action, except one brought upon the judgment or decree of a court of record of the United States or of this or some other state, and except as otherwise provided, shall be commenced within six years after the cause of action accrues and not thereafter." *University of Vermont v. W.R. Grace & Co*., 565 A.2d 1354, 1355 (Vt. 1989). Vt. Stat. Ann. tit. 12, § 511 does not state when a claim accrues, but in an asbestos case the Vermont Supreme Court held that the cause accrued when the plaintiff knew or should have known the damage caused by the asbestos manufactured by the defendant. *Id*. at 1357. The statute of limitations that applies to products liability actions for personal injury is Vt. Stat. Ann. tit. 12, § 512(4), which requires actions for personal injury to be commenced within three years after the cause of action accrues "provided that the cause of action shall be deemed to accrue as of the date of the discovery of the injury." *Id*. at 1356. If the action is to recover for "ionizing radiation injury or injury from other noxious agents medically recognized as having a prolonged latent development," the claimant must bring the action within three years after he knew or reasonably should have known of the injury and its cause, and "in no event more than twenty years from the date of the last occurrence to which the injury is attributed." *Id*.; Vt. Stat. Ann. tit. 12, § 518.

7. Attorneys' Fees

At this time, Vermont has not enacted any statute regarding attorneys' fees in tort cases. According to the case law, the general rule in Vermont is that, absent a statute or contract providing for such recovery, attorneys' fees are not recoverable as damages. *Welch v. LaGue*, 451 A.2d 1133, 1135 (Vt. 1982). The exception to this

rule is when the wrongful act of one person causes another person to be involved in litigation with a third person. *Id*. In *Chandler v. Bombardier Capital Inc*., an unpublished district court opinion, the plaintiff cited New York and Ohio cases that allowed attorneys' fees to be awarded "in connection with tort claims for which punitive damages would be appropriate." 1992 WL 474798, *11 (D.Vt. 1992). The district court, applying Vermont law, noted that Vermont has not recognized any such exception and refused to predict that such an exception would be recognized. *Id*.

Virginia

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I. Allocation of Fault

A. Joint and Several Liability

In Virginia, if separate and independent acts of negligence of two parties directly cause a single indivisible injury to a third person, either or both wrongdoers are responsible for the whole injury.[1] Thus, in determining the liability of a person whose concurrent negligence results in such an injury, comparative degrees of negligence shall not be considered and both wrongdoers are equally liable irrespective whether one may have contributed in a greater degree to the injury.[2]

When there are multiple, divisible injuries covered by a compromise settlement, the finder of fact is required to attempt an allocation of the amount in contribution a wrongdoer must pay for his negligent act or acts causing one or more of those divisible injuries.[3]

B. Releases and Covenants Not to Sue

At common law, a plaintiff's release of one tortfeasor released all joint tortfeasors.[4] Virginia has since amended the common law rule by statute so that a plaintiff may settle selectively with some tortfeasors without forfeiting remedies against others under certain specific conditions.[5]

Such a release or covenant not to sue may be binding even if there is only an oral or written agreement to later memorialize a formal release or covenant not to sue, as long as the parties intended that the terms agreed on should merely be put into form.[6] However, if an oral or written agreement is made "subject to" the execution of a formal release or convent not to sue, the release or covenant not to sue would be unenforceable if no formal release or covenant not to sue has been executed.[7]

Any amount recovered against any or all of the other tortfeasors will be reduced by the greater of the amount stipulated by the release or covenant not to sue or the amount of consideration paid, whichever is greater.[8]

C. Contributory Negligence

Under Virginia law, contributory negligence is a complete bar to recovery on a negligence claim (but not a claim of breach of warranty).[9] Negligence is not compared between the parties to reduce recovery.[10] The test is not whether the plaintiff actually knew of the danger confronting him, but whether in the exercise of reasonable care he should have known he was in a situation of peril.[11] The standard is an objective one, i.e.,

whether the plaintiff acted for his own safety as a reasonable person would have acted under similar circumstances.[12]

II. Contribution / Non-Contractual Indemnity

A. Contribution and Non-Contractual Indemnity Generally

The right to contribution is based on the equitable principle that where two or more persons are subject to a common burden it shall be borne equally.[13] A right of contribution against a joint tortfeasor lies when one wrongdoer has paid or settled a claim not involving moral turpitude for which other wrongdoers also are liable.[14]

However, before contribution may be had it is essential that a cause of action by the person injured lie against the alleged wrongdoer from whom contribution is sought.[15] While contribution will lie if the injured party's cause of action is not presently enforceable but was enforceable at some time in the past, contribution is unavailable if the injured party never had an enforceable cause of action against the target of the contribution claim [16]

The party seeking contribution has the burden of proving that the concurring negligence of the remaining tortfeasors was a proximate cause of the injury for which damages were paid.[17] The remaining tortfeasors may present defenses in a contribution action, including that the settling tortfeasor was not negligent, that the remaining tortfeasors were not concurrently negligent with the settling tortfeasor, that that remaining tortfeasors' negligence was not a proximate cause of the damages compromised, or that the settlement agreement was unreasonable, excessive, or made in bad faith.[18]

Indemnity is distinguishable from contribution in that contribution springs from the equitable theory that where there is a common burden, as between joint tortfeasors, there should be a common right, while indemnity springs from an express or implied contract.[19] While indemnity is traditionally based in contract, the Supreme Court of Virginia has recognized that claims for indemnity may arise in non-contractual cases.[20] For example, an implied warranty of merchantability would suffice to create an implied contract for indemnity.[21] Nevertheless, a defendant's active negligence precludes a claim of indemnification.[22] Equitable indemnification arises when a party without personal fault is nevertheless legally liable for damages caused by the negligence of another; the innocent party is allowed to recover from the negligent actor the amounts paid to discharge the liability.[23] A prerequisite to recovery based on equitable indemnification is the initial determination that the negligence of another person caused the damage.[24] Further, it is uniformly held that there can be no recovery on an indemnity obligation where there has been no actual loss or damage.[25]

A defendant may recover attorneys' fees from a third party that breached a duty owed if the defendant was required to act in the protection of its interests by bringing or defending an action against a plaintiff.[26]

B. Statute of Limitations

The two-year statute of limitations for personal injury actions is distinct from the three-year limitations period for contribution actions, based upon implied contracts.[27] Actions for contribution or indemnification do not accrue until after the contributee or indemnitee has paid or discharged the obligation.[28]

C. Releases and Covenants Not to Sue

A tortfeasor who enters into a release or covenant not to sue with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury, property damage or wrongful death is not extinguished by the release or covenant not to sue.[29] Application of this law is not limited to specific "joint tortfeasors," but also to those vicariously liable as employers, masters, and principals.[30] However, a settling tortfeasor can seek contribution from other tortfeasors who were also released.[31] The settling tortfeasor cannot recover any amount paid by him that is in excess of what was reasonable.[32]

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[1] *Sullivan v. Robertson Drug Co.*, 639 S.E.2d 250, 255 (Va. 2007) (citing *Maroulis v. Elliott*, 151 S.E.2d 339, 345 (Va. 1966)); *Murray v. Smithson*, 48 S.E.2d 239, 241 (Va. 1948).

[2] *Sullivan*, 639 S.E.2d at 255 (citing *Maroulis*, 151 S.E.2d at 344); *Van Roy v. Whitescarver*, 89 S.E.2d 346, 352 (Va. 1955).

[3] *Sullivan*, 639 S.E.2d at 255; *Tzewell Oil Co. v. United Virginia Bank*, 413 S.E.2d 611, 622 (Va. 1992).

[4] *Fairfax Hosp. Sys. V. Nevitt*, 457 S.E.2d 10, 12 (Va. 1995) (quoting *Wright v. Orlowski*, 235 S.E.2d 349, 352 (Va. 1977).

[5] Va. Code §8.01-35.1; *Nevitt*, 457 S.E.2d at 12.

[6] *Golding v. Floyd*, 539 S.E.2d 735, 737 (Va. 2001) (quoting *Snyder-Falkinham v. Stockburger*, 457 S.E.2d 36, 41 (Va. 1995)).

[7] *Golding* 539 S.E.2d at 737 (Va. 2001) (citing *Boisseau v. Fuller*, 30 S.E. 457, 458 (Va. 1898)).

[8] Va. Code §8.01-35.1(A)(1).

[9] *Smith v. Va. Elec. & Power Co.*, 129 S.E.2d 655, 659 (Va. 1963); *Ford Motor Co. v. Bartholomew*, 297 S.E.2d 675, 780-681 (Va. 1982).

[10] *Litchford v. Hancock*, 352 S.E.2d 335, 337 (Va. 1987).

[11] *Reed v. Carlyle & Martin, Inc.*, 202 S.E.2d 874, 876, cert. denied, 419 U.S. 859 (Va. 1974).

[12] *Hoar v. Great E. Resort Mgmt.*, 506 S.E.2d 777, 787 (Va. 1998).

[13] *Sullivan*, 639 S.E.2d at 255; *Jewel Tea Co.*, 118 S.E.2d at 646.

[14] *Sullivan*, 639 S.E.2d at 255 (citing *Nationwide Mut. Ins. V. v. Minnifield*, 196 S.E.2d 75, 76 (Va. 1973)); *See also* Va. Code §8.01-34.

[15] *Va. Elec. & Power Co. v. Wilson*, 277 S.E.2d 149, 150 (Va. 1981).

[16] *Pulte Home Corp. v. Parex, Inc.*, 579 S.E.2d 188, 194 (Va. 2003) (citing *Gemco-Ware, Inc. v. Rongene Mold & Plastics Corp.*, 360 S.E.2d 342, 344 (Va. 1987)).

[17] *Sullivan*, 639 S.E.2d at 255 (citing *Jewel Tea Co.*, 118 S.,E.2d at 649).

[18] *Id.* at 255 (citing *Jewel Tea Co.*, 118 S.,E.2d at 649 (Va. 1961)).

[19] *Whittle v. Timesavers, Inc.*, 614 F. Supp. 115, 118 (W.D. Va. 1985) (citing *Moretz v. General Electric Company*, 170 F. Supp. 698, 704 (W.D.Va. 1959)).

[20] *Philip Morris, Inc. v. Emerson*, 368 S.E.2d 268, 285 (Va. 1988).

[21] *Whittle*, 614 F. Supp. at 118.

[22] *Emerson*, 368 S.E.2d at 285.

[23] *Carr v. Home Ins. Co.*, 463 S.E.2d 457, 458 (Va. 1995) (citing *Maryland Casualty Co. v. Aetna Casualty & Surety Co.*, 60 S.E.2d 876, 879 (Va. 1950); *McLaughlin v. Siegel*, 185 S.E. 873, 874 (Va. 1936)).

[24] *Carr*, 463 S.E.2d at 458.

[25] *Richmond v. Branch*, 137 S.E.2d 882, 886 (Va. 1964).

[26] *RML Corp v. Lincoln Window Prods.*, 67 Va. Cir. 545, 567 (Va. Cir. Ct. 2004) (citing *Patel v. Anand, L.L.C.*, 564 S.E.2d 140, 144 (Va. 2002); *Prospect Development Co. v. Bershader*, 515 S.E.2d 291, 301 (Va. 1999); *Fidelity Nat'l Ins. Co. v. Southern Heritage Ins.*, 512 S.E.2d 553, 557-58 (Va. 1999); *Owen v. Shelton*, 277 S.E.2d 189, 192 (Va. 1981); *Hiss v. Friedberg*, 112 S.E.2d 871, 875-76 (Va. 1960)).

[27] *Gemco-Ware*, 360 S.E.2d at 345; *See also* Va. Code §8.01-243(A); *See also* Va. Code §8.01-246(4).

[28] Va. Code §8.01-249(5)

[29] Va. Code §8.01-35.1(B).

[30] *Thurston Metals & Supply Co. v. Taylor*, 339 S.E.2d 538 (Va. 1986).

[31] *Sullivan*, 639 S.E.2d at 256; Va. Code §8.01-35.1.

[32] *Sullivan*, 639 S.E.2d at 256.

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I. Introduction – History of Tort Reform in WASHINGTON

Washington adopted comparative fault in 1974. RCW 4.22.101 (repealed). In 1981, the legislature adopted contribution among joint tortfeasors based on percentage of fault. However, the 1981 Act retained joint and several liability, even where the plaintiff was at fault, and permitted claim reduction based solely on the dollar amount of the settlement, provided the settlement was found to be reasonable. In 1986, the legislature enacted the Tort Reform Act, adopting comparative fault for apportionment of responsibility for damages. RCW 4.22.005 *et seq.* The key features of the Tort Reform Act were (a) elimination of joint and several liability except in limited cases, and (b) adopting a percentage method for computing the amount of settlement credit for a settling tortfeasor's share.

II. Joint and Several Liability

Washington's Tort Reform Act of 1986 replaced joint and several liability with proportionate liability in most cases. "As a general rule, Washington has abolished joint and several liability." *Yong Tao v. Heng Bin Li*, 140 Wn. App. 825, 166 P.3d 1263 (2007). Liability for an indivisible harm is proportionate except as otherwise provided in RCW 4.22.070. RCW 4.22.030. RCW 4.22.070 in turn provides that liability will be proportionate, except in certain instances. These instances include: (a) the torfeasors acted in concert or the tortfeasor is an agent or servant of a defendant, or (b) the plaintiff was not at fault. In addition, even when an exception applies under RCW 4.22.070, the liability is limited to the proportionate shares of the defendants against whom judgment is entered.

III. Damages Caps

See prior summary prepared by Chris Keay.

IV. Punitive Damages

See prior summary prepared by Chris Keay.

V. Medical Malpractice Reform

In 1976, the legislature preempted "all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care." RCW 7.70.010. *See Berger v. Sonneland*, 144 Wn.2d 91, 26 P.3d 257 (2001) ("When injury results from health care, any legal action is governed by RCW chapter 7.70 RCW"). "Health care" is the process of "examining, diagnosing, treating or caring for the plaintiff" as a patient. *Id.* Per RCW 7.70.030, there are only three bases upon which a plaintiff can recover for injuries "occurring as a result of health care." RCW 7.70.030 states:

> No award shall be made in any action or arbitration for injury occurring as a result of health care which is provided after June 25, 1976, unless the plaintiff establishes one or more of the following propositions:
>
> (1) The injury resulted from the failure of a health care provider to follow the accepted standard of care;
>
> (2) That a health care provider promised the patient or his representative that the injury suffered would not occur; and
>
> (3) That injury resulted from health care to which the patient or his representative did not consent.
>
> Unless otherwise provided in this chapter the plaintiff shall have the burden of proving each fact essential to an award by a preponderance of the evidence.

RCW 7.70.030.

The standard of care is established by showing that the health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at the time acting under the same or similar circumstances. RCW 7.70.040. The plaintiff must also show that the failure was a proximate cause of the injury complained of. *Id.* Absent exceptional circumstances, expert testimony is required to establish the standard of care and most aspects of causation in a medical negligence action. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989).

Until recently, Washington law required 90-day written notice of intent to sue before filing suit against a "health care provider." Washington law also required the filing of a Certificate of Merit. The Certificate of Merit had to be executed by a "health care provider" who is a qualified expert and had to state that there is a reasonable probability that the defendant's conduct failed to meet the standard of care. RCW 7.70.150. This requirement was stricken down as unconstitutional. *Putnam v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 216 P.3d 374 (2009). Likewise, the notice of intent to sue requirement was stricken down as unconstitutional in 2010. *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010).

VI. Products Liability Reform

Unknown. This is not our area of practice. Notwithstanding, a broad overview is:

The Washington Product Liability Act (WPLA) applies to any "product liability claim." RCW 7.72.010. "Product liability claim" is defined in RCW 7.72.010(4):

> "Product liability claim" includes any claim or action brought for harm caused by the manufacturer, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product. It includes but is not limited to, any claim or action previously based on: Strict liability in tort; negligence; breach of express or implied warranty; breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or other claim or action previously based on any other substantial legal theory except fraud, intentionally caused harm or a claim or cause of action under the consumer protection act, chapter 19.86 RCW.

The WPLA defines "product" as follows:

> "Product" means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce. Human tissue and organs, including human blood and its components, are excluded from this term.

RCW 7.72.010(3).

The WPLA offers four different approaches by which a plaintiff can show that the product as not "reasonably safe." Three of these involve proof that the product had a defect, either in manufacturing, design or warning. The fourth basis for recovery is a breach of express or implied warranty regarding product performance. RCW 7.72.030.

VII. Attorneys Fees

Washington follows the American rule that attorneys are not recoverable unless there are grounds in contract, statute, or equity. *In re Impoundment of Chevrolet Truck, WA License #A00125A ex. rel. v. State*, 148 Wn.2d 145, 60 P.3d 53 (2002). A trial court can award the prevailing party statutory costs and fees under RCW 4.84.010. That statute narrowly defines the costs that a prevailing party may recovery. Items that are allowable as costs include filing fees, costs of service of process, notary fees, costs of reports and records as evidence, statutory attorney and witness fees, costs of transcription of depositions used at trial or arbitration and costs otherwise authorized by law. RCW 4.84.010. But absent a statute expressly permitting expanded cost recovery, or with grounds in contract or equity, a plaintiff is not entitled to costs beyond those enumerated in RCW 4.84.010. *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 880 P.2d 988 (1994).

VIII. Practice Pointers

N/A

IX. Special Issues

N/A

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Allocation of Fault

West Virginia has established a three step process the jury makes in allocating fault among the various parties. First, the jury must determine whether the defendants in the case are liable to the plaintiff and state the gross amount of damages for the plaintiff.[1] A defendant's negligence need only be one of the efficient causes of the plaintiff's injuries, not the sole cause.[2]

Second, the jury must determine whether the plaintiff's percentage of contributory negligence bars recovery.[3] West Virginia has adopted the doctrine of comparative negligence – "a party is not barred from recovering damages in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident."[4] Product liability law in West Virginia is based upon strict liability[5]; however, the affirmative defense of comparative contributory negligence is available in strict liability, but cannot be based upon a failure to discover or guard against the product's defect.[6] The plaintiff's contributory negligence must be compared to the negligence of all tortfeasors who contributed to the accident, not just the named defendants.[7] The jury considers the fault of the joint tortfeasors as a whole and does not at this point make a comparison of the individual defendant's negligence.[8] If the plaintiff's negligence or fault does not equal or exceed that of the other tortfeasors, the trial court will then reduce the damages award by the amount of the plaintiff's percent of fault.[9]

West Virginia has repeatedly reinforced and emphasized that defendants are jointly and severally liable. Therefore, the plaintiff can elect to sue one or more of the joint tortfeasors and seek payment after judgment from any of the defendants who is able to pay, regardless of that defendant's degree of fault.[10]

Contribution

The third step the jury may make is to determine the degree of fault of the individual defendants for purposes of comparative contribution.[11] However, "[t]he right of comparative contribution is not automatic but must be requested by one of the defendants."[12] Absent a defendant's request for comparative contribution, all defendants found liable to the plaintiff share in the total judgment on a pro rata basis.[13] Thus, a jury does not always enter into this third step in allocating fault.

"Contribution is the right of one who owes a joint obligation to call upon his fellow obligors to reimburse him if compelled to pay more than his proportionate share of the obligation." [14] The right to contribution arises any time one tortfeasor pays or if found liable will pay more than its percentage of fault.[15] Contribution is not limited to cases of joint negligence but arises whenever tortfeasors share a common obligation to plaintiff,

regardless of the theory of liability.[16] A defendant's right to seek contribution does not alter the plaintiff's right to joint and several liability against the defendants.[17]

West Virginia recognizes a statutory right of contribution[18] and an "inchoate right to contribution".[19] A statutory right to contribution arises only among parties found jointly liable in a judgment. An inchoate right to contribution arises when a joint tortfeasor is not a party to the action. A defendant exercises its inchoate right to contribution by "implead[ing] one [a third party] who is or may be liabile to him for all or part of the plaintiff's claim" under Rule 14 of the West Virginia Rules of Civil Procedure. [20] The Supreme Court of Appeals of West Virginia has expressly held that a tortfeasor "may not pursue a separate cause of action against a joint tortfeasor for contribution after judgment has been rendered in the underlying case, when that joint tortfeasor was not a party in the underlying case and the defendant did not file a third-party claim pursuant to Rule 14(a) of the West Virginia Rules of Civil Procedure."[21] Because a defendant's exercise of a right to contribution requires impleading a party into a single action, if a tortfeasor enters into a settlement with the injured party, it cannot subsequently seek contribution in a separate action.[22] The impleading party may assert any theory of liability against the impleaded party that the plaintiff could have asserted.[23]

West Virginia recognizes comparative contribution between tortfeasors based upon their relative degrees of fault or negligence.[24] In order to allocate the damages between the joint tortfeasors, a defendant must request "special interrogatories pursuant to Rule 49(b) of the West Virginia Rules of Civil Procedure."[25] Obviously, if a defendant is not guilty of primary negligence, it is not liable for contribution.[26] While the defendant can have the jury allocate its degree of fault, it cannot have a jury determine what portion of the plaintiff's injuries were caused by its wrongdoing.[27]

If a tortfeasor enters into a settlement with the plaintiff prior to judgment, the tortfeasor will ordinarily be relieved of liability to the other tortfeasors for contribution. However, the settlement must be made in good faith and the amount of the settlement must be disclosed to the trial court.[28] The disclosure of the amount of the settlement does not require disclosure of the settling party's identity.[29] A non-settling party wishing to challenge the settlement has the burden of showing the settlement was not made in good faith by "clear and convincing evidence."[30] That is because settlements "are presumptively made in good faith."[31] In determining whether a settlement was made in good faith, "the chief consideration is whether the settlement arrangement substantially impaired the remaining defendants from receiving a fair trial."[32] Only upon a showing of corrupt intent (e.g., collusion, dishonesty, fraud, or other tortious conduct) by the settling plaintiff and tortfeasor, will a settlement be found to lack good faith.[33] The Supreme Court of Appeals of West Virginia has provided four factors relevant to the determination of whether a settlement was made in good faith: 1) the amount of the settlement in comparison to the

potential liability of the settling tortfeasor at the time of settlement; 2) whether the settlement is supported by consideration; 3) whether the motivation was to single out a non-settling defendant or defendants for wrongful tactical gain; and 4) whether there is a relationship between the settling parties that is naturally conducive to collusion (e.g., familial or employment relationships).[34] While the settling tortfeasor is relieved from liability for contribution, the non-settling defendants are entitled to a credit against the the damage award (i.e., a reduction) in the amount of the settlement on a dollar-for-dollar (pro tanto) basis.[35]

West Virginia Workmen's Compensation Act provides a limited immunity to employers who subscribe into the system.[36] When an employer is immune from liability under the Act, it is also likely immune from liability for contribution.[37] However, when the claim against the employer is based upon the "deliberate intent" exception to the immunity statute, a third party may maintain an action for contribution against the employer.[38]

Non-contractual Indemnity

West Virginia also recognizes a right of implied indemnity.[39] The right of indemnity arises when one party is primarily liable but a second party has been held liable with the first.[40] However the right of implied indemnity is limited to parties without fault.[41] West Virginia has specifically recognized a right of implied indemnity in a seller of a defective product against the manufacturer.[42] The Supreme Court of Appeals has specifically noted that "the manufacturer is often the culpable tortfeasor as a result of conduct associated with designing or manufacturing a defective product."[43]

The right of implied indemnity between a manufacturer and seller can be limited by contract, so long as the limitations are not "unconscionable".[44] A disclaimer or limitation is unconscionable if it "shock[s] the conscience and confound[s] the judgment of any man of common sense."[45] Additionally, where a business agreement requires one party to bear all the business losses while splitting profits equally, the agreement was held unconscionable.[46]

Like an action for contribution, an action for indemnification can be brought before or after judgment. If the indemnitor was not a party to the original suit and judgment, the indemnitee must provide notice to the indemnitor prior to judgment in order to bind the indemnitor to the original judgment.[47] The better option for seeking indemnification is Rule 14 impleader, which will bind the impleaded party to the original judgment.[48]

Unlike in an action for contribution, a good faith settlement between the plaintiff and the primarily responsible party, like the manufacturer, does not extinguish the right of the non-settling party, like the seller, to assert implied indemnity, if its liability was not predicated on its independent fault or negligence.[49] While the Supreme Court of Appeals of

West Virginia initially suggested that "a settlement by a plaintiff with the manufacturing defendant solely responsible for the defective product covers all damages caused by that product and extinguishes any right of the plaintiff to pursue others in the chain of distribution"[50], it ultimately determined that settlement with a manufacturer does not have the effect of releasing a retailer.[51] The Court stated "[a] primary wrongdoer enters [settlement] agreements at the peril of being later held to respond again in an indemnification action brought against him by the vicarious wrongdoer."[52]

West Virginia has not determined whether the Workmen's Compensation Act immunity bars a valid claim for express or implied indemnity. However, it has suggested that would not.[53]

Neither the West Virginia Code nor the Supreme Court of Appeals of West Virginia have explicitly addressed the statute of limitations applicable to a claim for implied indemnity. Therefore, the statute of limitations for bringing a separate action for indemnification is likely two years after entry of an adverse judgment.[54]

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[1] *Bradley v. Appalachian Power Co.,* 256 S.E.2d 879, 885-86 (W.Va. 1979).
[2] *Long v. City of Weirton,* 214 S.E.2d 832, 843 (W.Va. 1975).
[3] *King v. Kayak Manufacturing Corp.,* 387 S.E.2d 511, 514 (W.Va. 1989).
[4] *Bradley,* 256 S.E.2d at 885. *See also Star Furniture Co. v. Pulaski Furniture Co.,* 297 S.E.2d 854, 861 (W.Va. 1982) ("In mathematical terms, the plaintiff, in order to recover, cannot be more than 49 percent negligent.").
[5] *Morningstar v. Black and Decker Manufacturing Co.,* 253 S.E.2d 666, 683 (W.Va. 1979):

> [T]he general test for establishing strict liability in tort is whether the involved product is defective in the sense that it is not reasonably safe for its intended use. The standard of reasonable safeness is determined not by the particular manufacturer, but by what a reasonably prudent manufacturer's standards should have been at the time the product was made.

[6] *Star Furniture Co.,* 297 S.E.2d at 863. Likewise, the affirmative defense of assumption of risk is available in strict liability actions, but only if it satisfies the principles of comparative contributory negligence. *King,* 387 S.E.2d at 517. The defense of assumption of risk in West Virginia requires a showing that the plaintiff continues to use the product will "full appreciation" of the defect. *Morningstar,* 253 S.E.2d at 684.
[7] *Bowman v. Barnes,* 282 S.E.2d 613, 621 (W.Va. 1981).
[8] *King,* 387 S.E.2d at 514.
[9] *Bradley,* 256 S.E.2d at 886.
[10] *Kodym v. Frazier,* 412 S.E.2d 219, 222-23 (W.Va. 1991).
[11] *King,* 387 S.E.2d at 515.
[12] *Id.*
[13] *Sitzes v. Anchor Motor Freight, Inc.,* 289 S.E.2d 679, 688 (W.Va. 1982).
[14] *Dunn v. Kanawha County Board of Ed.,* 459 S.E.2d 151, 155 (W.Va. 1995).
[15] *Sitzes,* 289 S.E.2d at 689 n.23.
[16] *Bd. of Educ. v. Zando, Martin & Milstead, Inc.,* 390 S.E.2d 796, 802 (W.Va. 1990).
[17] *King,* 387 S.E.2d at 515.
[18] W. Va. Code 55-7-13 (1923): "Where a judgment is rendered in an action ex delicto against several persons jointly, and satisfaction of a judgment is made by any one or more

of such persons, the other shall be liable to contribution to the same extent as if the judgment were upon an action ex contractu."
[19] *Haynes v. City of Nitro,* 240 S.E.2d 544, 549 (W.Va. 1977).
[20] *Hill v. Joseph T. Ryerson & Son, Inc.,* 268 S.E.2d 296, 302 (1980).
[21] *Howell v. Luckey,* 518 S.E.2d 873, 877 (1999).
[22] *Lombard Can., Ltd. v. Johnson,* 618 S.E.2d 446, 451 (2005).
[23] *Syndenstricker v. Unipunch,* 288 S.E.2d 511, 518 (1982).
[24] *Sitzes,* 289 S.E.2d at 688
[25] *Id*. This same procedure – requesting special interrogatories – is used under both the statutory right of contribution after judgment and the inchoate right of contribution before judgment. *Id.* at 688 n. 20.
[26] *King,* 387 S.E.2d at 514.
[27] *Kodym,* 412 S.E.2d at 224.
[28] *Smith v. Monongahela Power Co.,* 429 S.E.2d 643, 648 (W.Va. 1993).
[29] *Cline v. White,* 393 S.E.2d 923, 927 (W.Va. 1990).
[30] *Smith,* 429 S.E.2d at 652.
[31] *Id.* at 651-52.
[32] *Zando,* 390 S.E.2d at 804-05.
[33] *Smith,* 429 S.E.2d at 652.
[34] *Id.*
[35] *Bradley,* 256 S.E.2d at 886-87.
[36] *See* W.Va. Code § 23-2-6 ("Any employer subject to this chapter who subscribes and pays into the workers' compensation fund the premiums provided by this chapter or who elects to make direct payments of compensation as provided in this section is not liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after so subscribing or electing, and during any period in which the employer is not in default in the payment of the premiums or direct payments and has complied fully with all other provisions of this chapter.").
[37] *Belcher v. J.H. Gletcher & Co.,* 498 F.Supp. 629, 631 (S.D.W.Va. 1980).
[38] *Syndenstricker,* 288 S.E.2d at 517. *See* W.Va. Code § 23-4-2.
[39] *Hill,* 268 S.E.2d at 301.
[40] *Dunn,* 459 S.E.2d at 158.
[41] *Id.*
[42] *Hill,* 268 S.E.2d at 301.
[43] *Dunn,* 459 S.E.2d at 157.
[44] *Hill,* 268 S.E.2d at 306. *See also* W.Va. Code 46-2-719(3) ("Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.").
[45] *Hill,* 268 S.E.2d at 306 n. 8 (quoting *Billups v. Montenegro Reihms Music Co.,* 70 S.E. 779, 780 (W.Va. 1911)).
[46] *Summers v. Ort,* 163 S.E. 854 (W.Va. 1932).
[47] *Hill,* 268 S.E.2d at 301-02.
[48] *Id.* at 302.
[49] *Dunn,* 459 S.E.2d at 158.
[50] *Id.*
[51] *Woodrum v. Johnson,* 559 S.E.2d 908, 915 (W.Va. 2001) (citing *Cartel Capital Corp. v. Fireco of New Jersey,* 410 A.2d 674, 680 (1980)).
[52] *Id.* at 917 (quoting *Van Cleave v. Gamboni Const. Co.,* 706 P.2d 845, 848 (1985))
[53] *Syndenstricker,* 288 S.E.2d at 516 n. 4.

[54] W.Va. Code § 88-2-12: "Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property . . . ."

Wisconsin

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1. Tort Reform in Wisconsin.

Wisconsin has enacted tort reform legislation over the last few years largely in the area of medical, nursing home and product liability. Additionally, many auto insurance changes that took place several years ago were repealed by the new Republican government in 2011. The current state of several of Wisconsin's tort law principles are summarized below.

2. Joint and Several Liability/Contributory Negligence.

Wisconsin has revised it contributory negligence statute several times since 1971. Currently, contributory negligence does not bar recovery by a plaintiff for damages if that negligence was not greater than the negligence of the person against whom recovery is sought. The liability of each person found to be causally negligent (whose negligence is less than 51%) is limited to the percentage of the total negligence attributable to that person, however if the plaintiff is more at fault than any defendant, he is barred from collecting against that defendant. If a person is found to be at least 51% negligent, that person is jointly and severally liable for the total damages. Additionally, if two or more defendants act in accordance with a common scheme, those parties are jointly and severally liable for the total damages. *See* Wis. Stat. Section 895.045. This section requires the finder of fact to first find 100% of the plaintiff's damages, which are then reduced by the amount of contributory negligence.

3. Punitive Damages.

In Wisconsin, a plaintiff may receive punitive damages if clear and convincing evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff. *See* Wis. Stat. Section 895.043; *Wangen v. Ford Motor Co.*, 294 N.W.2d 437 (Wis. 1980). If the plaintiff establishes a prima facie case for the allowance of punitive damages, the plaintiff may introduce evidence of the wealth of a defendant and the judge shall submit a special verdict as to punitive damages to the jury or, if the case is tried without a jury, the court shall issue a special verdict as to punitive damages.

However, Wisconsin legislature recently enacted Wis. Stat. Section 895.043(6), which places a limitation on punitive damages. Punitive damages may not exceed twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater. There are certain exceptions where the cap does not apply, such as if the defendant was intoxicated while operating a vehicle.

4. Collateral Source Payments.

Wis. Stat. Section 893.55(7), allows for the admissibility of evidence of any compensation for bodily injury received from sources other than the defendant to

compensate the claimant in medical liability and nursing home cases only. In all other cases, the amounts billed are presumed to be both reasonable and necessary.

5. Contingent Fee Reform in Medical Liability Cases.

Wis. Stat. Section 655.013 limits contingent fees (where the contingency fee arrangement is entered into after June 14, 1986) to 1/3 of the first $1 million recovered, 25% of the first $1 million recovered if liability is stipulated within 180 days of filing of the original complaint and not within 60 days of the first day of trial, and 20% for amounts exceeding $1 million recovered. The statute does allow the court to exceed the caps in exceptional circumstances.

6. Non-Economic Damages in Medical Liability Cases.

Wis. Stat. Section 893.55 limits non-economic damages in medical liability cases for injuries incurred on or after April 6, 2006, to $750,000 per occurrence.

7. Non-Economic Damages in Long-Term Care Provider Liability Cases

Wis. Stat. Section 893.555 limits non-economic damages in long-term care provider liability cases for injuries incurred on or after February 1, 2011, to $750,000 per occurrence.

8. Wrongful Death Damage Caps In Long-Term Care Provider Liability Cases

Wis. Stat. Section 895.04(4), in conjunction with Wis. Stat. Section 893.555(6), limits the damages recoverable for wrongful death claim to $500,000 per occurrence for a deceased minor, or $350,000 per occurrence in the case of a deceased adult, for loss of society and companionship.

9. Remedies Against Manufacturers, Distributors, Sellers, And Promoters Of Products

Wis. Stat. Section 895.046 was created by the legislature and applies to cases on or after February 1, 2011. Not only does it make requirements to bring a claim more stringent, but also the statute does away with joint liability. *See* Wis. Stat. Section 895.046(6).

10. Product Liability; Liability of Manufacturer and Liability of Seller or Distributor

The Wisconsin Legislature created Wis. Stat. Section 895.047 affecting claims on or after February 1, 2011. This statute requires proving certain elements beyond a preponderance of the evidence. It also creates rebuttable presumption defenses such as if the claimant was under the influence of any controlled substance or had a

blood alcohol level above 0.08 and if the product complied in material respects with relevant standards, conditions, or specifications adopted or approved by a federal or state agency. *See* Wis. Stat. Section 895.047(3).

11. Bases Of Opinion Testimony By Experts

The Wisconsin Legislature amended Wis. Stat. Section 907.03 to comport with *Daubert*. This new expert standard applies to cases filed on or after February 1, 2011.

Wyoming

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1. Introduction: History of Tort Reform and Damage Caps in Wyoming

While its neighboring state of Colorado underwent significant tort reform beginning in the mid-80's, Wyoming steered in a different direction. Wyoming's legislature has been more conservative in enacting statutes reforming the state's tort-based liability system.

2. Joint and Several Liability

Wyoming enacted tort reform legislation in 1986 with the passage of its comparative fault statute. Under W.S. § 1-1-109, a tortfeasor may only be held liable for his own proportionate share of fault. The effect of the statute was to abolish joint and several liability.

The 1986 amendment to W.S. § 1-1-109 also made contribution among tortfeasors unnecessary. Therefore, the legislature simultaneously repealed W.S. § 1-1-110. Tortfeasors are no longer allowed to seek contribution from joint tortfeasors because the tortfeasor can only be held liable for its own proportionate share of fault. In essence, there should never be a reason to seek contribution. *See Haderlie v. Sondgeroth*, 866 P.2d 703 (Wyo. 1993).

3. Damage Caps/Punitive Damages

The legislature of Wyoming has not enacted legislation imposing limitations on damages of any kind.

4. Medical Malpractice Reform

Medical Review Panel: In Wyoming, an amendment to the Wyoming Constitution passed in 2005. This Act, The Medical Review Panel Act, permits the Wyoming legislature to enact laws requiring alternative dispute resolution or medical panel review before a person files a lawsuit against a health care provider for injury or death. The Act provides that admissibility of a panel decision will be left to the trial court's discretion. Panels will be comprised of two health care providers, two attorneys and one layperson. Attorney panelists will be selected from a list of attorneys provided by the bar association.

5. Products Liability Reform

Wyoming still follows strict liability set forth in the Restatement Second of Torts §402A in products liability actions. Wyoming has no established test for deciding design defect cases.

6. Attorneys Fees

Like many states, Wyoming follows the American Rule with regards to awards of attorneys fees. Unless a specific and applicable statute, court rule, or private contract states otherwise, the prevailing party is not entitled to an award of attorneys fees. *See Werner v. American Sur. Co. of New York*, 423 P.2d 86 (Wyo. 1967). Wyoming has also enacted several statutes providing for the recovery of attorneys fees. For example, a prevailing party in a shoplifting, theft of identity, or stalking case is entitled to reasonable attorney fees. *See* W.S. §§ 1-1-126; 1-1-127; and 1-1-128.