

## U.S. Tort Liability Index: 2010 Report

By Lawrence J. McQuillan Hovannes Abramyan

**Foreword by Sarah Palin** 

## U.S. TORT LIABILITY INDEX: 2010 REPORT June 2010

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When you can measure what you are speaking about, and express it in numbers, you know something about it. But when you cannot measure it, when you cannot express it in numbers, your knowledge is of a meager and unsatisfactory kind: it may be the beginning of knowledge, but you have scarcely, in your thoughts, advanced to the stage of science, whatever the matter may be.

Lord Kelvin (1824–1907)

British physicist and mathematician

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### FOREWORD by Sarah Palin

y home state of Alaska offers incredible beauty, amazing wildlife, abundant natural resources, friendly people, and no individual income tax. Alaska also has the best tort climate in the United States according to the *U.S. Tort Liability Index: 2010 Report* from the Pacific Research Institute (PRI).

In this top-notch report, PRI scholars analyze the costs and risks of each state's tort system and conclude that Alaska is best overall. The report, now in its third edition, has been influential because the rankings are based on hard data, not opinions or speculation. The data don't lie and Alaska is number one for good reasons.

Alaska has the second-lowest monetary tort payouts of any state, controlling for the size of each state's economy. Our tort costs are particularly low for businesses—another reason for entrepreneurs to locate here. We also have some of the lowest medical liability costs in the country. We appreciate doctors in Alaska and welcome them with open arms, not abusive lawsuits.

Alaska also boasts the lowest relative tort litigation risks of any state. The state may abound in moose but it doesn't have any "judicial hellholes" skewed to personal injury lawyers. The state also doesn't have huge outlier jury awards. Its tort caseload is third-lowest in the country and it's not flooded with lawyers. We practice the rule of law, not the rule of lawyers as in other states.

Alaska's great tort climate is good for business and for all my fellow Alaskans. As the *U.S. Tort Liability Index* demonstrates, states with sound civil-justice systems and fair tort rules enjoy lower insurance premiums, increased employment and output, and higher individual incomes. A sound civil-justice system also expands the tax base, yields greater innovation, and lowers health care costs while improving access to health care.

Given these sweeping benefits, all states would do well to follow Alaska's example and enact legal reforms that eliminate lawsuit abuse. The state motto, after all, is "North to the Future."

#### Sarah Palin

Eleventh Governor of Alaska

## PREFACE by SALLY C. Pipes

The Pacific Research Institute (PRI) is well into its 31st year of promoting liberty, personal responsibility, and limited government. In that cause, we have achieved many victories, but major battles remain. One hotly contested front involves state civil-justice systems. Lawsuit abuse remains a problem in many states. It burdens businesses with unnecessary costs that lower the standard of living for everyone. Unfortunately, lawsuit reform efforts have stalled in recent years because of focus on bailouts and economic woes.

Since 2006, PRI has been taking note of which states have well-performing tort liability systems and which states do not. The *U.S. Tort Liability Index: 2010 Report* assesses the tort system in each of the 50 states. Like its much-praised predecessors, it is grounded in rigorous statistical analysis. For this edition, PRI joined forces with the Manufacturer's Alliance/MAPI to distribute the *Index* to legislators, policy makers, business leaders, journalists, entrepreneurs, and, of course, taxpayers.

The *Index* provides metrics for the evaluation of state tort systems, and assesses the opportunities for change, the consequences of inaction, and the benefits of reform. Lawsuit reform is a proven way to jump-start an economy, and it does not cost a penny of taxpayer bailout money. Such reform would pay dividends for all in the form of stronger economic growth and higher personal income, among other benefits. This report reveals which states have accomplished much in lawsuit reform, which states have low tort costs and risks, and which states have much work to do.

Our thanks are due to Dr. Lawrence J. McQuillan, director of Business and Economic Studies at PRI, for guiding this project from start to finish. We also thank Hovannes Abramyan, adjunct public policy fellow in Business and Economic Studies (now pursuing a doctorate at the University of California, Los Angeles), for his outstanding research and data collection. Finally, we thank Sarah Palin for writing an insightful foreword.

As we enter our fourth decade, PRI is more committed than ever to a wide discussion of key policy issues and their economic and social consequences. The *U.S. Tort Liability Index: 2010 Report* shows policy makers the path to increased prosperity in years to come.

Sally C. Pipes

President and Chief Executive Officer

Pacific Research Institute

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# ACKNOWLEDGEMENTS by Lawrence J. McQuillan and Hovannes Abramyan

A project of this magnitude is never completely the work of the listed authors. Many others made important contributions and suggestions that improved the product.

In addition to the dozens of people we thanked in the first and second editions of this report, we would like to thank several people who gave us invaluable assistance during the course of preparing the 2010 update.

Special thanks are due to Michael F. Blake, data specialist at A. M. Best Company, who prepared custom data for this study and answered our questions. Mark A. Behrens, Esq., of Shook, Hardy & Bacon LLP, gave us information on successor asbestos-related liability reforms across the country.

Jiaying Hua, operations research analyst with the Division of Practitioner Data Banks at the National Practitioner Data Bank, provided us with information on medical-malpractice tort payments by insurance companies in the 50 states. Mark Chenoweth, legal counsel in the Office of Commissioner Anne M. Northup, U.S. Consumer Product Safety Commission, assisted us in searching for data.

Many thanks to the panelists who spent hours ranking the state input variables discussed in chapter 3. In addition to the coauthors, the panel included: Jeffrey A. Johnson, researcher at Lieberman Research Worldwide in Los Angeles; Matthew C. Piccolo, policy analyst at the Sutherland Institute in Salt Lake City; Emily McClintock Ekins, doctoral student in political science at the University of California, Los Angeles (UCLA); and Annie Moskovian, a graduate of UCLA in political science. These panelists' willingness to tackle such difficult and tedious work in a professional manner enabled the report to be completed on time with accurate input-variable rankings.

Coauthor Lawrence J. McQuillan was invited to speak on the 2008 edition of this report to several groups across the country. The discussions and constructive feedback at these conferences resulted in several refinements to the report, incorporated in this edition. Dr. McQuillan thanks the participants for their comments.

Although it would be convenient to blame all sins of commission and omission on others, good parenting will not allow this abridgement of responsibility. The project is ours, and we recognize that nothing of this kind is ever perfect. As we stated in past editions, we invite comment and criticism so that we can continually improve it. The Executive Summary details the improvements that are part of the 2010 edition.

Our goal is enlightenment, which we think comes from dedication and hard work based on sound principles. We tried at every turn to prevent subjectivity and bias from entering the analysis and, instead, to let the objective data do the talking. No one is likely to agree, or disagree, with all we have done. But in the end, we trust the market and its accumulation of knowledge, and so we pause to let others digest our work.

Our views and conclusions do not necessarily represent those of the board, supporters, or staff of PRI.

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An efficient tort liability system is an important ingredient for a thriving free-enterprise economy. It ensures that businesses and individuals have proper incentives to produce safe products and provide safe services, and that true victims are fully compensated. A tort system of that kind encourages greater trust among market participants, more economic activity and employment, and eventually a higher standard of living for individuals in the society. An optimal tort system provides maximum net benefits to society.

An inefficient tort system, on the other hand, imposes excessive costs on society, not the least of which is forgone production of goods and services. There is growing evidence that tort costs in the United States are far greater than in other countries, and that much of the difference is due to excessive litigation and lawsuit abuse.

All of us shoulder the burden of an excessively expensive and inefficient tort liability system through higher prices, lower wages, decreased returns on investments in capital and land, restricted access to health care, and less innovation. Businesses that spend more money each year on liability insurance have less money available for research and development, or for health benefits for their employees. All of us pay the price, whether we realize it or not. There is growing evidence that today's U.S. tort system as a whole, and especially the system in certain states, is a net cost to society at the margin.

The U.S. Tort Liability Index: 2010 Report measures which states impose the highest, and the lowest, tort liability costs both in absolute and in relative terms. The study also measures relative tort litigation risks across states. Finally, it examines which states have rules on the books that, if implemented and enforced, help reduce lawsuit abuse and tort costs, resulting in a more balanced, predictable, and affordable civil-justice system.



#### The General Methodology

The U.S. tort system is an industry, and, like any industry, it consists of inputs and outputs. Tortsystem inputs include such things as courthouses, judges, juries, clerks, copying machines, law libraries, and the tort rules and procedures on the books that shape tort outputs.

Tort-system outputs consist of cases filed, personal-injury lawyers to file and handle the cases, damage awards, and settlement amounts. In brief, the outputs from the U.S. tort liability system consist of monetary tort losses and tort litigation risks.

This report uses comprehensive, hard data on all 50 states to assess separately the outputs and inputs of each state's tort system and rank the states accordingly. We used the most recent data available as of October 1, 2009. We chose this cut-off point because generally most, if not all, regular sessions of state legislatures have ended by October 1.

All the underlying data and variable rankings are available in an Excel file posted on PRI's Web site at http://special.pacificresearch.org/pub/sab/2010/tort\_reform/. We selected the variables after consulting with dozens of legal scholars, economists, university professors, insurance experts, and lawyers, and after an exhaustive search of the scholarly academic literature.

#### Tort Losses and Tort Litigation Risks: Ranking the States (Chapter 2)

The report measures outputs using 13 variables and then ranks the states from best to worst. The *Index* is ordinally driven, meaning that each state is compared to the other 49 states across all variables. The 13 output variables are grouped into two categories: monetary tort losses and tort litigation risks (see chapter 2, table 2). The output rankings are free of any subjective bias of the report's authors—they are based solely on outside, independent data.

There are two improvements to this edition's output variables: (1) we divided farmowners' losses by the dollar value of farm output rather than the number of farms because the former is a better measure of economic transactions or economic activity than the latter; and (2) we switched to total state tort caseload per million dollars of state output rather than total civil cases per 100,000 residents because the former tracks only tort cases, and its dominator is more activity based.

Table 1 gives a snapshot of how the states currently rank based on the combination of relative monetary tort losses and tort litigation risks.

able 1. U.S. To	rt Liability Index, 2010 Output	ts Ranking
Rank	State	Score
1	Alaska	8.92307692
2	Hawaii	9.23076923
3	North Carolina	9.76923077
4	South Dakota	12.0000000
5	North Dakota	12.03846154
6	Maine	15.46153846
7	ldaho	15.84615385
8	Virginia	16.38461538
9	Wisconsin	16.91538462
10	lowa	17.69230769
11	Louisiana	17.91538462
12	Kansas	18.99230769
13	Utah	19.37692308
14	South Carolina	19.76923077
15	Ohio	20.12307692
16	Arizona	20.20000000
17	Massachusetts	20.22307692
18	Texas	20.29230769
19		20.69230769
	Wyoming	
20	Delaware	20.83076923
21	Mississippi	21.11538462
22	Tennessee	21.38461538
23	New Hampshire	22.15384615
24	Maryland	23.15384615
25	Alabama	23.24615385
26	Minnesota	23.26153846
27	West Virginia	24.06923077
28	Georgia	24.28461538
29	Indiana	24.30000000
30	Arkansas	24.33846154
31	Washington	24.68461538
32	Colorado	25.69230769
33	Nebraska	25.84615385
34	Oregon	25.98461538
35	Oklahoma	26.28461538
36	Kentucky	26.83846154
37	Vermont	26.84615385
38	New Mexico	27.30769231
39	Rhode Island	27.30769231
40	Nevada	27.58461538
41	California	28.42307692
42	Connecticut	28.53076923
43	Michigan	29.69230769
44	Montana	29.69230769
45	Missouri	29.99230769
46	Pennsylvania	34.0000000
47	Illinois	34.29230769
48	Florida	35.09230769
49	New York	38.08461538
50	New Jersey	40.10769231



Chapter 2 also discusses geographical patterns (see figure 3), lists the big movers since 2008, and drills down further to detail state results within the two subgroups: monetary tort losses and tort litigation risks (see tables 4 and 5).

#### A Guide to Reform: Ranking State Tort Rules (Chapter 3)

The inputs to the U.S. tort liability system include the rules on the books in each state that shape its tort-system outputs—its monetary tort losses and tort litigation risks. Tort rules can be crafted by voters, legislators, and/or judges, either directly or indirectly, in each state. It is helpful to think of tort rules as the dials that can be turned to influence the final outputs of the tort system.

This report uses 29 variables to rank each state's tort rules (see chapter 3, table 6). These 29 input variables are grouped into three categories: monetary caps, substantive-law rules, and procedural and structural institutions. We judged how effective, stringent, rigid, or binding each variable was in each state based on current statutory law or on court decisions/common law.

Improvements to this edition's input variables include: (1) splitting the single medicalmalpractice awards cap variable into two variables—one tracking caps on non-economicdamage awards in medical-liability lawsuits and one tracking caps on punitive-damage awards in medical-liability lawsuits; (2) adding two new variables to track general statute of limitations laws and the growing presence of "bad faith" insurer liability laws; (3) removing the variable tracking collateral source rule reform because of mounting evidence of mixed impacts of this reform on tort events; and (4) removing the variable tracking harmful attorneys general because, unfortunately, there is no regularly published update of this information.

Table 7 shows where each state ranks overall in terms of inputs, as well as where it ranks for each individual variable. The state that has the best tort rules on the books—and that will be heading in the right direction if the rules are fully implemented—is Oklahoma, followed by Texas, Ohio, Colorado, and Mississippi.

Once again, as in 2008, Rhode Island occupies the bottom of the barrel, followed by New York, Pennsylvania, Minnesota, and Illinois. New York ranks 50th, dead last, in 19 of the 29 input variables, an eye-popping statistic indicating across-the-board failure and political indifference to lawsuit abuse.

Table 7 makes it easy to spot where tort reformers in each state might want to concentrate future efforts. For example, in California, reformers might want to target class-action rules and asbestos liability. In New York, reformers might want to target monetary caps and repose statutes. In Mississippi, adopting an attorney-retention sunshine law might be a high priority. And Texans might want to abandon partisan district elections to seat judges. Each state has different strengths and vulnerabilities, and table 7 reveals them.

States that implement meaningful tort reform challenge their neighbors to do the same or be at a competitive disadvantage in the battle to attract people and capital.



#### Saints, Sinners, Salvageables, and Suckers (Chapter 3)

By merging the output and input results, we can divide the states into four groups: saints, sinners, salvageables, and suckers.

Briefly, the saints are states that have relatively low monetary tort losses and/or low tort litigation risks and relatively strong tort rules on the books. These five states are well positioned to contain their tort liability costs in the future if the rules are implemented as written.

The sinners are states that have relatively high monetary tort losses and/or high tort litigation risks and relatively weak tort rules on the books. The 20 sinners are likely to face high and rising tort liability costs in the future if lawsuit abuse continues unchecked.

The salvageables are states that have moderate to high relative monetary tort losses and/or moderate to high tort litigation risks, yet have moderate to strong tort rules, probably as a result of recent reforms. If the rules are implemented as written on the books, the 16 salvageables are positioned to do a better job of containing their tort liability costs and to move up in future output rankings as the benefits of reform feed back to improve outputs.

The suckers are the nine states that have weak tort rules on the books because they currently have relatively low monetary tort losses and/or low tort litigation risks and, therefore, believe that reform is not needed.

Table 8 lists the classification of each state based on an analysis of its outputs and its inputs.

#### The Benefits of Lawsuit Reform (Chapter 4)

Chapter 4 examines evidence from today's top economists and legal scholars on the benefits of lawsuit reform in people's lives. We review important research findings that have emerged since the previous edition was published in 2008. The studies document that lawsuit reform can cut insurance premiums; increase productivity, employment, output, earnings, and the tax base; boost innovation and sales of new products; lower health care costs while improving health care access; and save lives (see table 9 for a summary).

Connecting this evidence to the U.S. Tort Liability Index leads to one vital conclusion: A better Index ranking for a state—achieved through a commitment to meaningful lawsuit reform—translates, everything else being equal, into a better legal environment in which to invest human, physical, and financial capital, the ingredients for self-sustaining economic growth and personal prosperity. Given these profound and sweeping benefits, state lawmakers and ordinary citizens would be wise to promote and enact legal reforms that eliminate lawsuit abuse.



The goals of the tort system are to efficiently deter harmful events and fully compensate true victims.



## Chapter 1. INTRODUCTION

In essence, the goals of the tort system are to efficiently deter harmful events and fully compensate true victims, without overly compensating them. When this is achieved, meritless litigation and excessive awards are eliminated.

States vary considerably in terms of the cost of their tort liability systems, the litigation risks faced by individuals and businesses, and the rules on the books that shape tort outcomes.

The *U.S. Tort Liability Index: 2010 Report* measures which states have relatively high tort costs and litigation risks (outputs) and which states have rules on the books (inputs) that, if implemented and enforced, reduce lawsuit abuse and tort costs, resulting in a more balanced and predictable civil-justice system. We begin by defining the scope of the report, specifically the boundaries of civil law and tort law.

In the United States, the histories and circumstances of the states differ, producing differences in the common law in the various states.

#### What Is Tort Law?

Civil law spells out duties that exist between individuals. Contract law, for example, which covers mutual promises and their enforcement, is part of civil law. Tort law, which covers the infringement of one person's legally recognized rights by another, is also part of civil law.

A tort, French for "wrong," is best defined as wrongful conduct by one individual that results in injury to another, which may involve physical harm, property damage, or both. Tort law gives someone who has suffered injury the right to recover monetary damages from another person or persons if the injury was caused by the defendant's failure to exercise a required duty of care, or, in some cases, independent of the level of care, under strict liability. The function of tort law is to provide the injured party with a remedy, not to punish the tortfeasor.

An employee, allegedly injured on the job, sues the employer for an unsafe working environment. A consumer, allegedly injured while using a product, sues the manufacturer for making a defective product. A patient, allegedly injured by negligent treatment, sues the physician. The issue in all these cases is alleged wrongful conduct by one person that injures another. The law of torts covers such wrongful conduct.

American tort law originated in early English common law, also known as case law or judge-made law. In the United States, the histories and circumstances of the states differ, producing differences in the common law in the various states. Even today, when most areas of the law have been codified in statutes such as the Uniform Commercial Code, tort law is found primarily in court opinions. Torts are constantly changing and evolving with society through the common law, and they break down into three major areas.

Intentional torts include assault, battery, false imprisonment, infliction of mental distress, defamation, misrepresentation, invasion of right to privacy, trespass on land or personal property, conversion, nuisance, and infringement on trademarks, patents, and copyrights.

Negligence torts are best thought of as identifying a way of committing a tort—through negligence rather than as a distinct category of torts. In such cases, a person's conduct created a foreseeable risk of consequences that resulted in the injury of another person. Medical-malpractice lawsuits often allege a negligent act on the part of a physician or hospital.

The third area of torts is strict liability or liability without fault. Areas of product-liability law apply the principle of strict liability.

This report examines all types of torts, including medical malpractice, product liability, and tort class actions. It does not cover other areas of civil law, such as employment law, securities law, the Americans with Disabilities Act (ADA), workers' compensation, family law, or contract law.



#### The Increasing Cost of Tort Liability in America

In the 10 years from 1996 through 2005, more than 135 million civil lawsuits were filed in U.S. state courts, an average of 52,000 incoming cases every business day. Approximately 15 percent of these civil cases were defined as torts. This torrent of 7,800 new tort cases each day in states' judicial systems can add value, but at the same time it consumes substantial resources. Tort law in principle adds value by imposing costs on injurers, thus providing incentives for potential injurers to take care in their activities (efficient deterrence). Devoting resources to this process is easily justified on grounds of equity or efficiency.

The goals of the tort system are to compensate true victims fully and to deter harmful events as efficiently as possible. Ideally, monetary compensation is awarded through economic and non-economic compensatory damages equal to the actual loss incurred by a true victim. When this is achieved, meritless litigation and excessive awards are eliminated. Such a tort system encourages greater economic activity and more employment, and it operates to provide optimum net benefits to a state and the country. It promotes higher overall production due to systematic resolution of disputes, which reduces conflict and perhaps violence, and which encourages production and exchange. Also, it deters the production and sale of unsafe products and deters unsafe practices, benefiting society as a whole.

There is growing evidence that tort costs in the United States are far greater than in other countries, and that much of the difference is due to lawsuit abuse.

Observers of the U.S. legal system, however, increasingly express concern that unfair and outdated laws reward abuse of the tort liability system. There is growing evidence that tort costs in the United States are far greater than in other countries, and that much of the difference is due to lawsuit abuse. Lawsuit abuse and the accompanying excessive litigation and damage awards act as a destructive "excess tort tax," which drags down the economy of a state and the country. Excessive tort burdens divert resources to the lawsuit industry and away from more productive activities such as R&D or expanding access to health care. There is growing evidence that today's U.S. tort system is a net cost to society at the margin.

According to Tillinghast–Towers Perrin (now Tillinghast–Towers Watson), which compiles the most frequently cited study on tort costs, direct U.S. tort costs were \$252 billion in 2007, or \$835 per person.<sup>2</sup> In contrast, costs were only \$102 per person in 1950, adjusted for inflation. Tillinghast measures direct U.S. tort costs using three components.

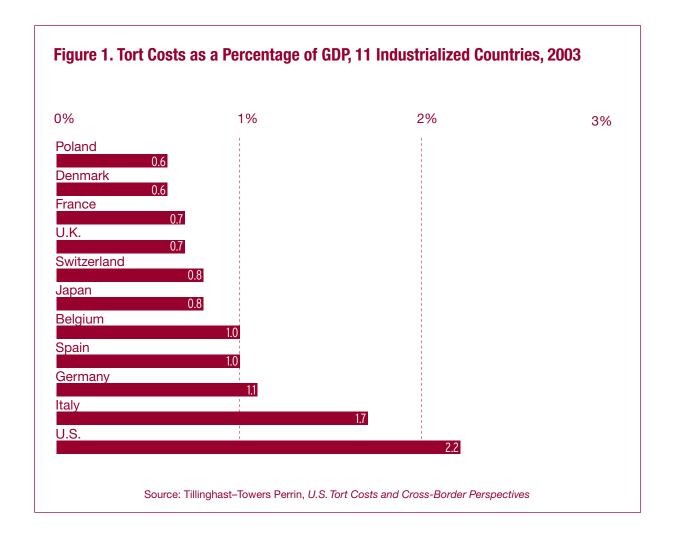
The first component is insurance costs: (1) benefits paid to third parties or to their attorneys alleging injury or damages caused by insured persons or companies, excluding medical malpractice; (2) benefits paid to first-party insureds in the form of claims-handling and legal-defense costs; and (3) insurance-company administrative costs. The second component is self-insurance costs, excluding medical malpractice. The third component is medical-malpractice costs, both insured and self-insured.<sup>3</sup>



The Tillinghast report shows that on average during the 57 years from 1950 to 2007, direct U.S. tort costs rose 9 percent a year, while nominal gross domestic product (GDP) increased 7 percent a year. As a result, tort costs have become a larger share of the U.S. economy—from only 0.62 percent in 1950 to 1.83 percent in 2007. America has become a more litigious society. In fact, the United States has the

highest direct tort costs in the world.

America has become a more litigious society. In fact, the United States has the highest direct tort costs in the world. As shown in figure 1, the U.S. tort system is the most expensive in the world, about double the average of other industrialized nations. In 2003, the last year that Tillinghast performed this analysis, direct tort costs as a percentage of GDP averaged about 1 percent in 10 industrialized countries with standards of living comparable to that of the United States. In contrast, direct tort costs were 2.24 percent of GDP in the United States.<sup>4</sup>





This 1.24 percentage point difference is a huge drain on productive resources, lowering the economic growth potential of the U.S. economy. The cost of the U.S. tort system is a burden that foreign competitors do not bear. It puts American companies at a disadvantage in global markets. If lawsuit reform lowered U.S. direct tort costs to levels comparable with those of other countries, it would free huge amounts of productive resources and make U.S. companies more globally competitive.

If the U.S. lawsuit industry were comparable in relative size with those of other industrialized countries, the freed resources would enable the creation of new and innovative products, new companies, and new jobs at higher wages and with better health care benefits. U.S. businesses would be in a better position to compete in global markets. The standard of living for ordinary Americans would rise more rapidly. The U.S. economy would approach its full productive potential. Instead, enormous resources are wasted today on the unnecessary and unproductive redistribution of wealth—rent-seeking and rent-avoidance activities, as economists call them—that occurs with excessive tort lawsuits, making American society poorer in the process.

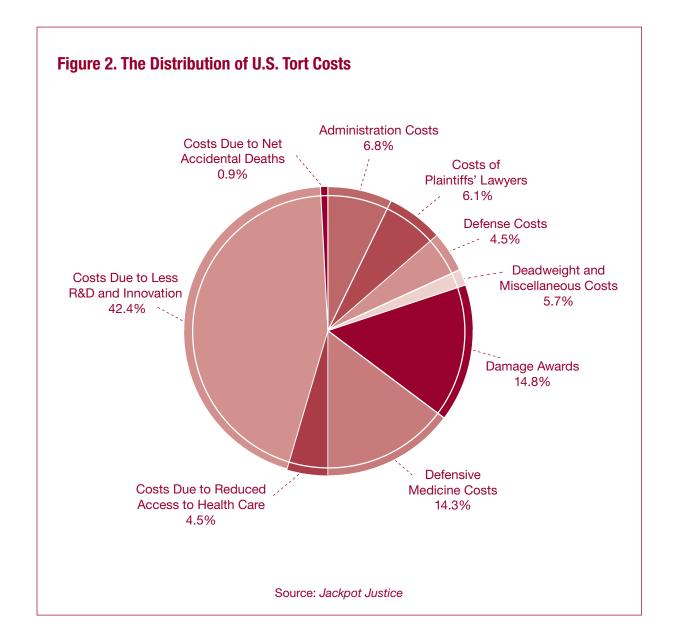
The cost of the U.S. tort system is a burden that foreign competitors do not bear.

Tillinghast admittedly does not attempt to measure the benefits of the tort system. Nor does it measure the costs incurred by federal and state court systems in administering actual suits, or indirect costs such as doctors practicing defensive medicine to guard against malpractice allegations, or companies refusing to introduce new products in order to guard against product-liability lawsuits. As noted by Derek Bok, president emeritus of Harvard University and former law school dean: "Lawsuits often have their greatest effect on people who are neither parties to the litigation nor even aware that it is going on."

In an effort to arrive at a fuller accounting of the true cost of the U.S. tort liability system, *Jackpot Justice*, a 2007 study for the Pacific Research Institute,<sup>6</sup> built on the work of Tillinghast to measure both direct costs and indirect costs.<sup>7</sup> It examined such indirect costs as defensive medicine, reduced access to health care, lost sales of new products from less innovation, and accidental deaths. These costs are secondary, spillover effects of the current abusive tort system. In *Jackpot Justice*, we estimated the total annual accounting cost of the current U.S. tort liability system to be \$865 billion, basing our calculations on 34 scholarly studies by 52 top economists and legal scholars.

As shown in figure 2, created from data in *Jackpot Justice*, less than 15 cents of every tort-cost dollar goes to damage awards to compensate injured people. If every time motorists filled their gas tanks, 85 percent of the gasoline spilled to the ground, they would surely demand a better pumping system. Nevertheless, this is how inefficiently the tort transfer system works in America today.

Less than 15 cents of every tort-cost dollar goes to damage awards to compensate injured people.





Of course, as mentioned earlier, not all tort costs are excessive or due to lawsuit abuse. After all, a thriving free-enterprise economy depends on the rule of law, and justified tort payouts are not wasteful, but actually enhance efficiency and encourage exchange. An optimal tort system ensures that firms have proper incentives to produce safe products in a safe environment, and that true victims are fully compensated. An optimal tort system results in greater trust among market participants, which leads to more trading, and eventually a higher standard of living for individuals in the society.<sup>8</sup> An efficient tort system benefits all.

A suboptimal tort system, on the other hand, encourages lawsuit abuse and imposes excessive costs on society, not the least of which is forgone production of goods and services. In *Jackpot Justice*, we conservatively pegged *excessive* tort costs at \$589 billion in 2006, equivalent to a 7 percent tax on consumption or a 10 percent tax on wages. This imposes an annual "excess tort tax" of about \$2,000 for each American.

To sum up, the U.S. tort liability system is the most expensive in the world. Excess U.S. tort costs waste resources each year (\$589 billion) equal to the annual output of Illinois, or about \$2,000 a year for every American. Instead of fueling the massive lawsuit-industry transfer system—roughly the same size as the U.S. restaurant industry—these resources would be better spent on productive activities to satisfy consumers. The system is also a very inefficient method of compensating victims—the people whom the system is intended to help. And truly injured people often wait years for compensation because of clogged courthouses and endless red tape.

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U.S. citizens shoulder the burden of an excessively expensive and inefficient tort liability system through higher prices, lower wages, decreased returns on investments in capital and land, restricted access to health care, and less innovation.

The *U.S. Tort Liability Index: 2010 Report* measures which states impose the highest, and the lowest, tort liability costs both in absolute and in relative terms. The study also measures relative tort litigation risks across states. Finally, it examines which states have rules on the books that, if implemented and enforced, help reduce lawsuit abuse and tort costs, resulting in a more balanced, predictable, and affordable civil-justice system. In the next chapter, we measure the outputs of each state's tort liability system, specifically monetary tort losses and tort litigation risks.



#### Chapter 2.

## TORT LOSSES AND TORT LITIGATION RISKS: RANKING THE STATES

The U.S. tort system is an industry, and, like any industry, it consists of inputs and outputs. Tort-system inputs include such things as courthouses, judges, juries, clerks, copying machines, law libraries, and the tort rules and procedures on the books that shape tort outputs.

Tort-system outputs, on the other hand, consist of cases filed, personal-injury lawyers to file and handle the cases, damage awards, and settlement amounts. In brief, the outputs from the U.S. tort liability system consist of monetary tort losses and tort litigation risks. As a rule, lawmakers and voters do not directly control these output factors; they can best control outputs by changing the tort rules and procedures on the books (inputs).

Because of the common-law origins of tort law, states vary considerably in terms of the cost of their tort liability system, the distribution of these costs across individuals and sectors of the economy, the litigation risks faced by individuals and businesses, and the rules on the books that help shape tort costs and risks. Chapter 2 measures outputs using 13 variables and then ranks the states from best to worst. Chapter 3 looks at inputs, specifically the tort rules on the books in each state, and then ranks the states.

Table 2 lists the 13 variables used to rank the 50 states according to tort losses and tort litigation risks. The data are actual observations on standardized frequencies (continuous data) or qualitative assessments of discrete data made by an independent outside party. Thus, the output rankings are free of any subjective bias of the report's authors—they are based solely on outside, independent data.

The 13 output variables are grouped into two categories: monetary tort losses (nine variables) and tort litigation risks (four variables). Each variable's place in the lawsuit industry is shown in figure 4 in the appendix.

#### **Table 2. Output Variables**

#### **Monetary Tort Losses**

- 1. Private and commercial automobile-liability insurance losses / miles driven
- 2. Farmowners' multiple-peril [liability portion] insurance losses / dollar value of farm output
- 3. Commercial general-liability multiple-peril (liability portion) insurance losses / state GDP
- 4. Other general-liability insurance losses / state GDP
- 5. Homeowners' multiple-peril [liability portion] insurance losses / number of occupied housing units
- 6. Medical-malpractice insurance losses / projected personal health care expenditures
- 7. Product-liability insurance losses / state GDP
- 8. Personal self-insurance losses / state GDP
- Commercial self-insurance losses / state GDP

#### **Tort Litigation Risks**

- 10. Number of jury-verdict awards in the 101 largest awards [11]
- 11. Did the state have "judicial hellholes"? [3]
- 12. Resident and active attorneys / million dollars of state GDP
- 13. Total state tort caseload / million dollars of state GDP

Note: The number of discernible gradations for each qualitative discrete variable is listed in brackets. This is explained further in the section below titled "Types of Data and Index Construction."

Each variable and its data source are described in detail below. We used the most recent data available as of October 1, 2009. We chose this cut-off point because generally most, if not all, regular sessions of state legislatures have ended by October 1. When faced with a choice among data sets, we selected the most recent, most reliable, and/or most complete data set that we had access to at that time.

All the underlying data and variable rankings are available in an Excel file posted on PRI's Web site at http://special.pacificresearch.org/pub/sab/2010/tort\_reform/. We selected the variables after consulting with dozens of legal scholars, economists, university professors, insurance experts, and lawyers, and after an exhaustive search of the scholarly academic literature.

Scholarly literature firmly supports our use of these variables. For each variable, articles are cited below that support its inclusion in the *Index* by confirming a unidirectional effect of that variable on the tort system or on the economy. We did not include variables for which we could not find supporting scholarly research.



#### Monetary Tort Losses (Variables 1–9)

Part of doing business in America today, and indeed part of everyday life, is the risk of being sued. The litigious environment affects practically every business decision and a host of personal decisions. A prime example is that most individuals purchase automobile insurance (collision and liability), and with good reason: More than half of all state tort cases involve automobile accidents. And what business decision maker today would ignore the risk of becoming a defendant in a lawsuit? The most prominent of these involve product liability, construction liability, premises liability, and medical-malpractice liability. Such threats permeate decisions affecting commerce and production in the United States, and become manifest in higher costs and fewer options, from medical care to housing to playgrounds. Liability insurance to protect against lawsuit costs is an ever-increasing operating expense for businesses.

#### 1-9. Relative insurance tort losses and self-insurance tort losses.

The nine variables under "Monetary Tort Losses" track relative direct monetary tort losses in each state across seven lines of insurance and two categories of self-insurance for 2008, the most recent year for which complete data were available. We used the same insurance lines as Tillinghast, but our data are state-level rather than national. Tillinghast's study cogently demonstrates that these insurance and self-insurance lines track direct monetary tort losses in the United States.<sup>9</sup>

The data used to calculate these variables come from composite financial data for the U.S. insurance industry compiled by the A. M. Best Company. <sup>10</sup> These data are considered the gold standard because they are subject to audit and are reviewed by state insurance regulatory agencies.

We calculated self-insurance tort losses using the same methodology as Tillinghast, except that we used state-level data instead of national data. When tort liabilities are paid by self-insurance, individuals and companies engage in some form of internal forecasting and reserving to pay their tort expenses. <sup>11</sup>

Each state's loss ratio for each line was calculated by taking direct losses incurred (less 2 percent) and dividing it by a 2008 line-specific denominator that normalized the data, thus enabling comparisons across states as different in size as, for example, California and Rhode Island. <sup>12</sup>

These data are considered the gold standard because they are subject to audit and are reviewed by state insurance regulatory agencies.

For several reasons, we chose to use data on direct losses incurred instead of data on current payments or premiums.

A single claim often involves a current payment and future payments. The sum of these payments constitutes the loss. Insurers put aside money, called reserves, to make future payments. So losses measure



the expected total cost of a claim at the time it is incurred, whereas current payments do not. Losses thus provide a more comprehensive accounting of the actual expected tort costs incurred.

Another advantage of using losses is that the method tracks both awards and settlements. Business owners and individuals purchase insurance to protect themselves against both trial awards and settlements, and insurance losses track both.

Also, awards rendered at trial are often reduced or corrected by appellate courts, so in these cases, the initial awards do not reflect what defendants actually pay. Insurance losses track the market's best estimate of the expected final payouts. Finally, we chose to use losses rather than premiums because premiums are often regulated by state price controls or bureaucratic formulas; thus, premiums often do not reflect actual losses, or they do so only with long lags. For these reasons, we used direct losses incurred.

The number of tort lawsuits is driven by the level of exchanges, trades, transactions, and interactions in a state—collectively called economic activity and measured by state GDP.

We divided each loss amount for each state by a line-specific, activity-based denominator under the reasonable assumption that torts arise during the course of a certain relevant activity. For example, automobile owners' losses were normalized by miles driven. Farmowners' losses were normalized by the dollar value of farm output. The most frequent denominator was state GDP, which we used under the assumption that the number of tort lawsuits is driven by the level of exchanges, trades, transactions, and interactions in a state—collectively called economic activity and measured by state GDP. After all, most torts arise during the course of the trading process, whether the stage is production, distribution, consumption, or investment.<sup>13</sup>

A higher loss ratio for a state indicates a relatively more costly and riskier business climate due to larger plaintiff awards, larger plaintiff settlements, more lawsuits filed, or some combination of the three.



#### **Tort Litigation Risks (Variables 10–13)**

A recent McKinsey & Company report found that, among executives surveyed, litigation risks are very important in determining where to establish operations—second only to the availability of qualified workers. <sup>14</sup> Variables 10 through 13 capture the risks posed by lawsuits, lawyers, judges, and outlier verdicts in each state's tort liability system.

**10. Number of jury-verdict awards in the 101 largest awards.** This variable tracks for each state the number of jury-verdict awards it had in the nation's 101 largest awards in 2008 (there are 101, instead of 100, because of a tie). Data for this variable come from VerdictSearch's *Top 100 Verdicts of 2008*. California had the most awards (16) in the top 101, followed by New York at 14 and Florida at 11.

The number of large, outlier awards in a state measures the dispersion of awards in that state relative to the other states and, thus, is a measure of the riskiness of the tort climate and the probability of its yielding a crippling jackpot award at the hands of a runaway jury or judge. Much like the monetary tort loss variables above, the dispersion of awards is an indicator of which states have more costly and unpredictable tort climates. The scholarly literature reviewed in chapter 4 shows that states with more predictable and more cost-efficient tort climates enjoy a wide range of benefits.

Judicial hellholes have a disproportionately harmful effect on a state's civil-justice system and business climate.

#### 11. Did the state have "judicial hellholes"? This variable

tracks whether the American Tort Reform Foundation (ATRF) declared a state, or part of a state, a "judicial hellhole" in 2009. Judicial hellholes are defined as regions in which personal-injury lawyers specifically seek to have trials held because they expect an excessive verdict or excessive settlement, a favorable precedent, or both. What judicial hellholes have in common is that the judges in these jurisdictions "systematically fail to adhere to core judicial tenets or principles of the law." Among the factors contributing to the hellhole designation are: forum shopping; discovery abuse; improper certification of class actions; unfair case scheduling; junk science; biased jury instructions; strong alliances among plaintiffs' lawyers, judges, and state attorneys general; and uneven application of evidentiary rules. Among the hellholes declared in 2009 were south Florida; West Virginia; Cook County, Illinois; and Atlantic County, New Jersey. The designations come from *Judicial Hellholes 2009–2010*, published by ATRF. <sup>16</sup>

Judicial hellholes have a disproportionately harmful effect on a state's civil-justice system and business climate. West Virginia, for example, a perennial judicial hellhole, continues to lose business opportunities because of its poor tort environment and remains ranked dead last for "business friendliness" by CNBC.<sup>17</sup>



**12. Resident and active attorneys / million dollars of state GDP.** This variable tracks the number of resident and active attorneys in each state per million dollars of state GDP in 2008. Delaware is on the low end of the spectrum, while New York and Massachusetts are on the high end. The numbers were calculated using state-level data on resident and active attorneys from the American Bar Association and data on state GDP from the U.S. Bureau of Economic Analysis.<sup>18</sup>

Countries with a higher proportion of college law majors relative to engineering majors have slower economic growth.

In a study on liability reform, Thomas J. Campbell et al. made an interesting observation about the relationship between the number of lawyers in a state and their relative influence on tort-reform legislation in that state. According to the authors, the greater the number of lawyers, the more power they have to create a legal environment favorable to them, encouraging more litigation, higher awards, and less legal reform. Or, as Clarence Darrow said: The trouble with law is lawyers. A revealing new report on the political power of plaintiffs' lawyers concluded: The litigation industry's massive contributions and web of financial ties to state political leaders have enabled it not only to block tort-reform efforts but also, increasingly, to craft an affirmative state-level agenda to expand litigation opportunities.

In addition, attorney involvement in insurance disputes increases average claim sizes. Mark J. Browne and Robert Puelz found that when an attorney is brought into an insurance dispute, the average claim size increases by 64 percent.<sup>21</sup> A report by Kevin M. Murphy et al. supports the view that lawyers stunt economic growth.<sup>22</sup> The authors found that countries with a higher proportion of college law majors relative to engineering majors have slower economic growth.

**13. Total state tort caseload / million dollars of state GDP.** This variable tracks the total tort caseload per million dollars of state GDP in each state for the most recent year for which this information was available, which was 2006. North Dakota had the lightest relative tort caseload, while New Jersey had the heaviest. Data on state tort caseloads come from the National Center for State Courts (NCSC).<sup>23</sup>

A light caseload reduces the amount of resources that businesses and government agencies must set aside in anticipation of legal costs, and it frees those resources for more productive activities. A report by Susan A. MacManus and Patricia A. Turner found that rising litigation costs have had significant effects on local governments' budgets and processes.<sup>24</sup> The authors described a vicious cycle of local governments settling cases in order to save on defense costs, only to find that in the process they have encouraged more lawsuits. Also, businesses often attempt to avoid risky trials by settling, which again inadvertently encourages more lawsuits. The net impact of this continuous litigation and defense is a reduction in resources available for business growth, new jobs, health care benefits, and R&D to develop new products.

For a discussion of other variables that we considered including, but did not for a variety of reasons, please read this endnote.<sup>25</sup>



#### **Types of Data and Index Construction**

The *Index* is ordinally driven, meaning that each state is compared with the other 49 states across the 13 variables. The data used to construct the *Index* are of two types.

First, there are continuous variables. Relative numbers of tort cases filed and insurance-loss ratios are examples of continuous variables. For each continuous variable, the states were ranked from 1 (best) to 50 (worst). States that tied with the same number each received the average ranking. For example, if two states tied at the 26th and 27th spots, they each received a ranking of 26.5 for that particular variable.

The second type of data used in the *Index* is that of qualitative variables. For these variables, we assigned rankings depending on the number of discernible gradations. If there were three discernible gradations, we assigned rankings of 1, 25.5, and 50. If there were six gradations, we assigned rankings of 1, 10.8, 20.6, 30.4, 40.2, and 50. States with the most stringent gradation always received a ranking of 1, and states with the least stringent always received a ranking of 50. The ones in between received rankings in equal intervals depending on the number of discernible gradations. This was a tedious process, but it allows us to make the fullest use of all available information on subtle differences among states, and it ultimately yields more precise rankings.

The judicial-hellhole variable is one of two qualitative output variables. We divided states into three gradations (the number of discernible gradations is listed in brackets in table 2). States with no judicial hellholes—36 states—were assigned a ranking of 1. States on the Watch List or in the Dishonorable Mentions section—eight states—were assigned a ranking of 25.5. States with a judicial hellhole—six states—were assigned a ranking of 50.

The other qualitative output variable is the number of jury-verdict awards in each state that placed in the nation's 101 largest awards in 2008. The state with the most awards in the top 101, California, was assigned a ranking of 50. Twenty-two states had no awards in the top 101, so they were assigned a ranking of 1. There were 11 gradations in all, yielding intervals between gradations of 4.9.

Data were collected for each state across the 13 variables. Once all 13 variables were ranked across all 50 states, we calculated an average ranking for each state by adding together the ranks it earned on the 13 variables and dividing by 13. This methodology

The rankings in the U.S. Tort Liability Index are the product of an analysis of comprehensive, hard data across all 50 states.

implicitly weighted all variables equally. The average rankings were used to compile the final, overall ranking, from 1 to 50. The state with the best average ranking across all 13 variables received an overall ranking of 1. The state with the worst average ranking received an overall ranking of 50. All the underlying data and variable rankings are available in an Excel file posted on PRI's Web site at http://special.pacificresearch.org/pub/sab/2010/tort\_reform/.



The rankings in the *U.S. Tort* Liability Index are the product of an analysis of comprehensive, hard data across all 50 states. We now turn to the results.

#### **Overall State Output Rankings and Geographical Patterns**

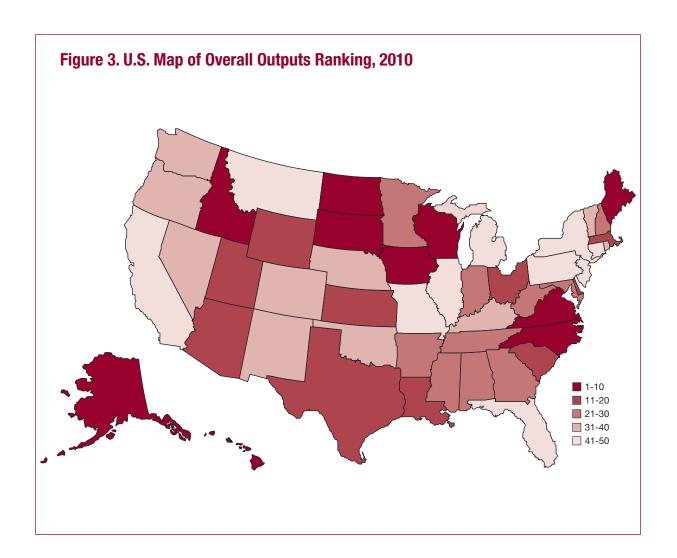
Table 3 shows the 2010 U.S. Tort Liability Index ranking of state tort costs and tort litigation risks. Leading the pack with the best tort climate is Alaska, followed by Hawaii, North Carolina, South Dakota, North Dakota, and Maine. At the bottom of the barrel are Pennsylvania, Illinois, Florida, New York, and, dead last, New Jersey. At 41st, and having slipped seven spots since the 2008 Index, California also performs poorly.

Table 3. U.	S. Tort Liability I	ndex, 2010 Outputs Ranking
Rank	State	Score
1	Alaska	8.92307692
2	Hawaii	9.23076923
3	North Carolina	9.76923077
4	South Dakota	12.0000000
5	North Dakota	12.03846154
6	Maine	15.46153846
7	Idaho	15.84615385
8	Virginia	16.38461538
9	Wisconsin	16.91538462
10	lowa	17.69230769
11	Louisiana	17.91538462
12	Kansas	18.99230769
13	Utah	19.37692308
14	South Carolina	19.76923077
15	Ohio	20.12307692
16	Arizona	20.20000000
17	Massachusetts	20.22307692
18	Texas	20.29230769
19	Wyoming	20.69230769
20	Delaware	20.83076923
21	Mississippi	21.11538462
22	Tennessee	21.38461538
23	New Hampshire	22.15384615
24	Maryland	23.15384615
25	Alabama	23.24615385
26	Minnesota	23.26153846
27	West Virginia	24.06923077
28	Georgia	24.28461538
29	Indiana	24.30000000
30	Arkansas	24.33846154
31	Washington	24.68461538
32	Colorado	25.69230769
33	Nebraska	25.84615385
34	Oregon	25.98461538
35	Oklahoma	26.28461538
36	Kentucky	26.83846154
37	Vermont	26.84615385
38	New Mexico	27.30769231
39	Rhode Island	27.30769231
40	Nevada	27.58461538
41	California	28.42307692
42	Connecticut	28.53076923
43	Michigan	29.69230769
44	Montana	29.69230769
45	Missouri	29.99230769
46	Pennsylvania	34.0000000
47	Illinois	34.29230769
48	Florida	35.09230769
49	New York	38.08461538
50	New Jersey	40.10769231



Figure 3 gives a bird's-eye view of the geographical distribution of overall costs and risks. The states with the lowest relative costs and risks are scattered across the country, but the leaders include several states in the Upper Midwest, three Southern border states, and the two noncontiguous states.

The states with the highest relative costs and risks are also scattered, but there is noticeable clustering in the Northeast, Midwest, and far West, with California and Nevada.





States experiencing big improvements in rank since 2008 include: Massachusetts, Idaho, Louisiana, Arizona, Alabama, Kansas, Hawaii, West Virginia, Maryland, and Colorado. These states are headed in the right direction, with lower tort costs and/or tort litigation risks relative to other states.

States experiencing large drops in rank since 2008 include: New Mexico, Michigan, Oklahoma, Nebraska, Vermont, Mississippi, Wyoming, and Tennessee. Oklahoma's big drop in relative quality is probably what motivated its comprehensive lawsuit reforms enacted last year.

It is instructive to compare the fortunes of two neighboring states that moved in opposite directions: Mississippi down 12 places and Louisiana up 18. We believe the differing responses to hurricanes Katrina and Rita largely explain these results.

USA Today and CNN have both noted that, under the leadership of Gov. Haley Barbour, Mississippi began to rebuild sooner and at a much stronger pace than Louisiana. As people returned and large-scale rebuilding ramped up, torts naturally increased in such a dangerous and unpredictable terrain. In this respect, Mississippi was a victim of its own success. But Mississippi was also a victim of its attorney general, Jim Hood, who filed a civil lawsuit against most insurers in Mississippi, alleging fraudulent handling of claims stemming from Katrina. This has also worked to increase tort losses and tort litigation risks. We expect the fall in Mississippi's ranking to be short-lived, as the hurricane effects weaken over time.

Oklahoma's big drop in relative quality is probably what motivated its comprehensive lawsuit reforms enacted last year.

In contrast, more than three times as many homes were rendered uninhabitable in Louisiana than in Mississippi, and two years after Katrina, the population of New Orleans was still only 60 percent of what it had been pre-Katrina.<sup>27</sup> Louisiana started its rebuilding efforts much later and at a slower pace,<sup>28</sup> due, in part, to the ineffective political leadership of then-Gov. Kathleen Blanco, Sen. Mary Landrieu, and New Orleans Mayor C. Ray Nagin. Since more people were displaced in Louisiana, they returned much more slowly, and rebuilding faltered, torts naturally fell. In addition, since taking office in January 2008, the new governor, Bobby Jindal, has made the state's tort climate a top priority for his administration, including signing expert evidence reform (S.B. 308) in 2008. These factors all combined to lower tort losses and tort litigation risks, improving Louisiana's ranking.

Next we drill down to discern more subtle factors shaping the results.



# **Drilling Down: Subgroup State Rankings**

Table 4 lists the states alphabetically and gives their rankings for each of the 13 individual output variables and for both subgroups: monetary tort losses and tort litigation risks. Each state's subgroup score is the average ranking the state received across all variables in that particular subgroup. For example, Alabama's monetary tort loss score of 22.33 is the average of its rankings across all nine variables in the monetary tort loss subgroup.<sup>29</sup> The states were then ranked from 1 to 50 within each subgroup based on their subgroup score (for example, Alabama is ranked 18th in relative monetary tort losses and 41st in tort litigation risks). The lower the score, the better the ranking.



State	Overall Outputs: Ranking	Overall Outputs: Score	1. Auto losses	2. Farm- owners' losses	3. Commercial multi-peril losses	4. Other- liability losses	5. Home- owners' losses	6. Medmal. losses
labama	25	23.24615385	5	38	30	6	33	22
laska	1	8.92307692	45	16	8	2	11	6
rizona	16	20.20000000	31	10	18	19	8	30
rkansas	30	24.33846154	15	7	19	42	45	11
alifornia	41	28.42307692	33	19	31	44	23	15
olorado	32	25.69230769	30	29	34	41	30	33
onnecticut	42	28.53076923	42	3	41	30	27	40
elaware	20	20.83076923	48	12	14	34	2	47
lorida	48	35.09230769	44	8	29	38	29	25
eorgia	28	24.28461538	24	41	20	21	44	28
awaii	2	9.23076923	26	2	1	17	1	12
laho	7	15.84615385	14	30	37	16	17	2
linois	47	34.29230769	35	25	33	46	36	46
ndiana	29	24.30000000	16	48	43	29	42	21
owa	10	17.69230769	10	21	21	36	32	29
ansas	12	18.99230769	17	42	10	13	43	7
entucky	36	26.83846154	28	50	35	8	41	31
ouisiana	11	17.91538462	40	20	3	1	50	1
faine	6	15.46153846	7	17	38	3	26	35
laryland	24	23.15384615	39	22	11	27	22	43
lassachusetts	17	20.22307692	38	5	6	45	13	38
lichigan .	43	29.69230769	43	43	22	33	31	20
linnesota	26	23.26153846	21	23	24	20	49	23
lississippi	21	21.11538462	2	9	12	26	39	3
lissouri • .	45	29.99230769	12	45	27	43	38	16
Montana	44	29.69230769	34	32	50	47	19	17
lebraska	33	25.84615385	23	33	17	37	46	19
levada	40	27.58461538	49	15	45	39	3	14
lew Hampshire	23	22.15384615	19	13	49	11	40	42
lew Jersey	50	40.10769231	50	4	40	48	20	45
lew Mexico	38	27.30769231	9	24	46	22	14	32
lew York	49	38.08461538	47	18	44	49	5	50
lorth Carolina	3	9.76923077	20	11	7	5	10	9
lorth Dakota	5	12.03846154	3	26	23	4	25	24
hio	15	20.12307692	13	44	16	14	37	18
klahoma	35	26.28461538	18	47	9	10	48	39
regon	34	25.98461538	36	35	48	35	6	13
ennsylvania	46	34.00000000	37	27	42	50	9	44
hode Island	39	27.30769231	46	1	32	31	12	41
outh Carolina	14	19.76923077	25	6	39	7	24	26
outh Dakota	4	12.00000000	6	31	4	9	21	10
ennessee	22	21.38461538	11	49	15	32	34	37
exas	18	20.29230769	27	28	5	24	47	8
tah	13	19.37692308	29	14	28	15	7	36
ermont	37	26.84615385	4	39	47	40	18	49
irginia	8	16.38461538	22	36	2	12	15	27
/ashington	31	24.68461538	41	37	26	28	16	34
lest Virginia	27	24.06923077	32	34	36	18	4	4
/isconsin	9	16.91538462	8	40 46	13 25	23 25	28 35	5 48

7. Product- liability losses	8. Personal self- insurance losses	9. Commercial self- insurance losses	Monetary Tort Loss Ranking	10. Largest awards	11. "Judicial hellholes"	12. Resident and active attorneys	13. Total tort caseload	Litigation Risks Ranking
21	26	20	18	15.7	25.5	35	25	41
9	6	1	2	1	1	7	3	1
33	34	17	17	20.6	1	9	32	25
12	40	39	26	5.9	25.5	15	40	33
31	8	38	28	50	25.5	37	15	47
39	18	37	41	1	1	31	10	12
37	24	30	36	5.9	1	46	44	39
1	32	21	21	10.8	1	1	47	22
27 2	49 35	43 14	43 25	40.2 15.7	50 1	38 24	36 46	48 34
28	35	2	25 1	15.7	1	24	46	6
22	25	15	12	1	1	20	6	7
46	9	45	48	10.8	50	48	16	46
14	27	31	34	5.9	1	10	28	13
15	5	34	20	1	1	8	17	3
40	17	10	16	5.9	1	21	20	15
29	46	23	42	5.9	1	30	21	20
8	41	3	8	5.9	1	32	27	28
7	19	11	7	1	1	27	9	11
18	38	24	29	1	1	33	22	19
5	12	40	19	5.9	1	49	5	23
48	50	28	47	1	1	42	24	30
35	21	12	23	5.9	25.5	41	2	31
16	39	29	10	1	25.5	28	45	40
36	29	41	40	5.9	1	47	49	43
17	44	47	45	1	1	36	41	32
47	22	42	39	1	1	19	29	17
44	42	44	44	20.6	1	4	38	26
42	13	32	32	1	1	12	13	4
49	48	48	50	30.4	50	39	50	49
38	30	33	31	1	50	23	33	44
43	11	49	46	45.1	50	50	34	50
24	23	4	4	1	1	5	7	2
13	1	8	5	1	25.5	2	1	9
6	15	6	9	20.6	1	34	37	37
20	37	19	30 27	15.7 10.8	1	43 26	35	38
30 50	36 31	35 50	37 49	25.5	25.5	40	26 11	27 42
25	43	36	33	25.5	25.5	44	42	35
10	45	16	33 15	1	1	14	43	35 21
19	2	7	3	1	1	6	39	14
3	20	27	24	1	1	18	30	18
11	16	9	11	35.3	25.5	16	12	36
41	28	26	22	5.9	1	13	8	5
26	14	46	38	1	1	45	19	29
23	10	5	6	1	1	11	48	24
34	33	22	35	5.9	1	25	18	16
4	47	18	14	5.9	50	29	31	45
45	7	13	13	5.9	1	17	14	10
32	4	25	27	1	1	3	23	8



Table 4 reveals considerable variation across variables even for the same state. Vermont, for example, ranks very well in auto, but does poorly in medical malpractice. New Jersey ranks well in farmowners' but does poorly in product liability. Table 4 makes it easy to spot strengths and weaknesses. Further exploration of the two subgroups reveals more details.

Looking first at relative tort litigation risks, which track the effect of judges, juries, lawyers, and litigiousness, we see in table 4 that Alaska has the lowest overall tort litigation risk, followed by North Carolina, Iowa, New Hampshire, and Utah.

The highest litigation risk is in New York, followed by New Jersey, Florida, California, Illinois, and West Virginia. All of these states have very risky tort climates because of many lawyers and lawsuits, and large awards.

Alaska ranks first in this subgroup because it has no judicial hellholes or top-101 jury awards, has the third-lowest tort caseload, and has relatively few attorneys given the size of its economy. In contrast, New York ranks dead last because it is home to a judicial hellhole, has the highest number of attorneys per dollar of state output, ranks 45th in outlier verdicts, and 34th in relative caseload. New York state is a plaintiff lawyer's dream come true.<sup>30</sup>

		Losses (billions			Losses (billions
Rank	State	of 2008 dollars)	Rank	State	of 2008 dollars)
1	North Dakota	0.19747635	26	Kentucky	1.66691599
2	South Dakota	0.23241554	27	Wisconsin	1.78365616
3	Alaska	0.24774560	28	Louisiana	1.89410779
4	Wyoming	0.26140822	29	Connecticut	1.97008175
5	Vermont	0.27480593	30	Minnesota	2.12517338
6	Hawaii	0.36256528	31	Tennessee	2.20006442
7	Maine	0.38581279	32	Arizona	2.27957638
8	ldaho	0.44357045	33	Colorado	2.30255586
9	Montana	0.51228621	34	Indiana	2.35686945
10	New Hampshire	0.51429576	35	Missouri	2.40618701
11	Rhode Island	0.51474990	36	Maryland	2.69159881
12	Delaware	0.57299757	37	Virginia	2.71327096
13	West Virginia	0.65552093	38	North Carolina	2.87713519
14	New Mexico	0.76901014	39	Washington	3.04471276
15	Nebraska	0.83300037	40	Ohio	3.31659323
16	Mississippi	0.94008157	41	Massachusetts	3.33279898
17	Kansas	0.94187232	42	Georgia	3.67134557
18	Utah	0.99061169	43	Michigan	5.13508943
19	Arkansas	1.07492960	44	Illinois	6.43180698
20	lowa	1.08652669	45	New Jersey	7.10613827
21	Oklahoma	1.41222538	46	Pennsylvania	7.67542384
22	Alabama	1.47649409	47	Texas	9.33792662
23	Nevada	1.61129190	48	Florida	10.73321285
24	South Carolina	1.61370266	49	New York	14.08952303
25	Oregon	1.65194171	50	California	16.43605037

Source: PRI calculation based on data from A. M. Best



Turning next to monetary tort losses, it is instructive to start by examining absolute monetary tort losses by state. Table 5 reveals that in the last year for which we have complete data (2008), North Dakota, South Dakota, and Alaska had the lowest monetary tort losses. California had the highest tort losses, at \$16.44 billion, followed by New York, Florida, Texas, and Pennsylvania. These states

produce the largest tort losses and therefore contribute the most to the U.S. total. This is not surprising, since these states also have the largest populations and levels of economic activity.

Table 4 shows which states have the highest and lowest monetary tort losses after controlling for state size. Hawaii has the lowest relative tort losses, followed by Alaska, South Dakota, North Carolina, and North Dakota. Hawaii places in the top 10 in five of the nine tort-loss variables.

New York state is a plaintiff lawyer's dream come true.

In contrast, New Jersey has the highest relative tort losses, followed by Pennsylvania, Illinois, Michigan, and New York. New Jersey ranks a dismal 40th or worse in seven of the nine variables.

A few states highlight the need to adjust the figures for state size. Texas, for example, is 47th in absolute tort losses because of its sheer size, but improves to 11th after we adjust for population and level of economic activity—an indication that Texas's reforms are making a difference. Adjusting for size also makes a big difference for North Carolina. New York and Pennsylvania, on the other hand, continue to rank poorly even after we control for state size.

Texas is an interesting study in contradictions, because it has low tort losses for its size but has the specter of great upside risk in individual cases due to its judicial hellholes and runaway jury verdicts. Texas still poses the threat of "jackpot justice," which is characterized by reasonable verdicts and awards in most cases but the all too frequent jackpot (or crackpot) award that can bankrupt a company or an individual.

On the flip side, Montana and Rhode Island are excellent examples of states with low absolute tort losses (ninth and 11th, respectively) because of their small size, but disproportionately high tort losses (45th and 33rd) when we adjust for population and level of economic activity.

If we look for the worst performer in each loss category after controlling for state size, New Jersey has the highest auto losses, Kentucky the highest farmowners' losses, Montana and Pennsylvania the highest commercial losses, Louisiana the highest homeowners' losses, New York the highest medical-malpractice losses, Pennsylvania the highest product-liability losses, Michigan the highest personal self-insured losses, and Pennsylvania the highest commercial self-insured losses. To put New York's horrendous medical-liability crisis into perspective, that state alone accounted for more than a quarter of the nation's total medical-liability insurance payments in 2008—an astounding statistic.<sup>31</sup>

But all is not lost for these, and other, states. The next chapter examines the many reforms that states can adopt to help control tort costs and tort litigation risks.



It is helpful to think of tort rules as the dials that can be turned to influence the final outputs of the tort system.



## Chapter 3.

# A GUIDE TO REFORM: RANKING STATE TORT RULES

The inputs to the U.S. tort liability system include the rules on the books in each state that shape its tort-system outputs—its monetary tort losses and tort litigation risks. Tort rules can be crafted by voters, legislators, and/or judges, either directly or indirectly, in each state. It is helpful to think of tort rules as the dials that can be turned to influence the final outputs of the tort system. Chapter 3 ranks each state's tort rules.

Between the mid-1990s and the mid-2000s, many states adopted reforms to their judicial systems. In an effort to balance benefits and costs, lawmakers in these states reformed the rules that constitute their civil-justice system and especially their tort liability system.

Since publication of the previous edition of our *Index* in 2008, the pace of affirmative tort reform has declined, primarily because of shifts in the composition of state governments, tort-reform fatigue, and the Great Recession, which has reduced the funds available to wage reform campaigns. During the past two years, the primary focus of reform proponents has been on defensive efforts to protect past reforms from court challenges by the plaintiffs' bar and to block efforts by that bar to expand liability through new state legislation. From 2008 through 2009, only 10 states enacted new tort reforms: Arizona (2009), California (2009), Florida (2009), Georgia (2008), Indiana (2009), Louisiana (2008), Oklahoma (2009), Rhode Island (2008), Tennessee (2008), and West Virginia (2008).<sup>32</sup> By far, Oklahoma adopted the most comprehensive reforms (16 categories of reforms).



Table 6 lists the 29 variables used to rank each state's tort rules. These 29 input variables are grouped into three categories: monetary caps, substantive-law rules, and procedural and structural institutions. Each variable's place in the lawsuit industry is shown in figure 4 in the appendix.

Table	e 6. Input Variables
Moneta	iry Caps
	14. Appeal-bond caps [15]
	15. Caps on non-economic-damage awards (excluding medical-malpractice lawsuits) [10]
	16. Caps on punitive-damage awards (excluding medical-malpractice lawsuits) [17]
	17. Caps on non-economic-damage awards in medical-malpractice lawsuits [14]
	18. Caps on punitive-damage awards in medical-malpractice lawsuits [14]
Substa	ntive-Law Rules
	19. Class-action rules [4]
	20. Attorney contingency-fee limits (excluding medical-malpractice lawsuits) [5]
	21. Does the state generally use a contributory, comparative, or modified-comparative standard for negligence? [4]
	22. Rules on joint and several liability [7]
	23. Rules on early offers of settlement [3]
	24. Does the state have an "Illinois Brick repealer" statute? [3]
	25. Does the state have a "bad faith" insurer liability statute? [2]
	26. Attorney-retention sunshine rules [6]
	27. Jury-service rules [5]
	Medical Malpractice
	28. Attorney-fee limits [11]
	29. Pre-trial screening or arbitration [9]
	Product Liability
	30. Asbestos- and silica-liability rules [7]
	31. Construction-liability rules [5]
	32. Does the state allow an "FDA defense" or an "FTC defense"? [6]
	33. Does the state provide guidelines for general-manufacturer liability or retailer liability? [9]
	34. Does the state provide civil-liability exemptions for claims concerning junk food or obesity? [3]
Proced	ural and Structural Institutions
	35. Are state-supreme-court justices appointed or elected? [6]
	36. Venue rules [4]
	37. What is the standard for scientific review of evidence by expert witnesses? [4]
	38. Conditions on the use of expert witnesses in medical-malpractice lawsuits [9]
	39. Statute of limitations on medical-malpractice lawsuits [5]
	40. General statute of limitations [5]
	41. Size of juries in general-jurisdiction courts multiplied by the percentage of jurors needed to reach a verdict [10]
	42. Does the state have a complex-litigation court? [2]

Note: The number of discernible gradations for each qualitative variable is listed in brackets. This is explained further in the section below titled "Types of Data and Ranking Construction."

Each variable and its data source are described in detail below. We used the most recent data available as of October 1, 2009. We chose this cut-off point because generally most, if not all, regular sessions of state legislatures have ended by October 1. When faced with a choice among data sets, we selected the most recent, most reliable, and/or most complete data set we had access to at that time.

All the underlying data and variable rankings are available in an Excel file posted on PRI's Web site at http://special.pacificresearch.org/pub/sab/2010/tort\_reform/. We selected the variables after consulting with dozens of legal scholars, economists, university professors, insurance experts, and lawyers, and after an exhaustive search of the scholarly academic literature.

Scholarly literature firmly supports our use of these variables. Articles are cited below for each variable that support its inclusion by confirming a unidirectional effect of that variable on the tort system or on the economy. We did not include variables for which we could not find supporting scholarly research.

## Why the Ranking of Inputs Is Less Precise than the Ranking of Outputs

We ranked each state across 29 input variables to give readers an indication of how a particular state's tort rules align with those of the other 49 states. The input rankings are also useful in informing governors, legislators, judges, and the public as to which tort rules in a state are least competitive and would be good targets for reform, if reform is politically feasible. Unlike the output rankings, however, the input rankings serve only as a guide and should not be viewed as a precise measure of where a state stands today. There are several reasons for this.

First, in any state at any given time, many lawsuits are being processed and litigated under older rules, since new tort reforms are generally put into place over time. New reforms that change tort rules generally apply to newly filed cases, but not to older cases already in the pipeline. Only after these older cases work their way through the legal system do all existing cases operate under the newly established rules. In other words, the new rules on the books might not be the rules under which existing lawsuits are being processed and litigated. The new rules, however, certainly point to the direction in which a state is heading in the future.

Second, a rule could look one way on the books, but be applied very differently in the courtroom, especially in situations where judges have wide discretion. It is important, therefore, that readers view the rules as not necessarily set in stone and recognize that, depending on the state, there could be much variation in how the rules are actually applied in practice. We ranked the rules based on how they read on paper in order to eliminate, as much as possible, subjectivity.

Third, we ranked the states across each variable using only the information and wording contained in the relevant cell of the Excel file posted on PRI's Web site at http://special.pacificresearch.org/pub/ sab/2010/tort\_reform/. The sources of the data are provided below. We made every effort to obtain



the most complete and up-to-date data possible, cross-checking them with other sources and people whenever we could; however, with a large data set of this kind, it is possible that some cells are imprecise or incomplete. So, unlike the output data, the input data could have a degree of "noise." In addition, the variables were ranked by a panel of six individuals who attempted to rank them as objectively as possible. Though we do not endorse any specific rule or endorse one rule over another in this report, the ranking of the qualitative input variables, in contrast to the output variables, was inherently a subjective exercise.

The input rankings are also useful in informing governors, legislators, judges, and the public as to which tort rules in a state are least competitive and would be good targets for reform, if reform is politically feasible.

For these reasons, the rankings of the input variables should serve to give readers an indication of how a particular state's tort rules compare to those of the other 49 states and where the state is potentially vulnerable to, or insulated from, lawsuit abuse. But the input rankings serve only as a guide and should not be viewed as a precise measure of where a state stands today.

Keeping this "grain of salt" admonition in mind, we next describe the input variables, data sources, and supporting scholarly literature. "Monetary Caps" is the first of the three input-variable groups.



## **Monetary Caps (Variables 14–18)**

The five variables in this group examine state limits, or caps, on the dollar amount of appeal bonds or damage awards in tort lawsuits.

**14. Appeal-bond caps.** This variable tracks whether a state has a cap on appeal bonds. An appeal bond is submitted by a losing defendant in a civil trial who wishes to appeal to a higher court and forestall payment of the award until a final ruling has been made. Caps on appeal bonds may limit either the amount a signatory to a Master Settlement Agreement is required to pay in securing an appeal, the amount required to appeal punitive damages, or the amount required to appeal all damages. Mississippi, for example, limits bonds in punitive-damage appeals to \$100 million. Georgia, on the other hand, caps appeal bonds at \$25 million for all civil-case judgments. Information on appeal-bond caps comes from the American Tort Reform Association (ATRA).<sup>33</sup>

Excessive appeal-bond amounts restrict defendants' access to the justice system and to their due-process rights; they also potentially threaten the survival of businesses that are required to post the bonds. Without an appeal-bond cap, state courts may demand unreasonably high payment for due process. A *New York Times* editorial described a \$12-billion bond that Philip Morris faced from a judge in Madison County, Illinois, in 2003 as "prohibitively costly." In that case, the company claimed that it would have to file for bankruptcy if forced to post the appeal bond. Reasonable appeal-bond caps protect defendants' due-process rights by allowing them to appeal decisions without putting them out of business.

Excessive appeal-bond amounts restrict defendants' access to the justice system and to their due-process rights.

#### 15. Caps on non-economic-damage awards (excluding

medical-malpractice lawsuits). This variable tracks whether a state has a cap on non-economic damages (excluding medical-malpractice lawsuits). Caps are enacted in order to limit the amount a jury may award for impossible-to-quantify "pain and suffering" or "mental distress," and they generally vary according to circumstances. Kansas, for example, limits non-economic damages to \$250,000. Only 11 states limit, in some form, the recovery of non-economic damages. The data on caps on non-economic damages come from ATRA and the National Association of Mutual Insurance Companies (NAMIC).<sup>35</sup>

Caps on non-economic damages lower insurance costs and reduce filing rates. W. Kip Viscusi and Patricia H. Born found that caps on non-economic damages reduce insurance losses, especially where a state had previously encountered relatively high losses. Mark J. Browne and Robert Puelz reported that the imposition of such a cap produced a 65 percent reduction in the probability of a claim filing. The authors noted that caps on non-economic damages provided the greatest disincentive to filing a lawsuit of any reform examined. Caps on non-economic damages lower insurance costs and litigation rates.



**16.** Caps on punitive-damage awards (excluding medical-malpractice lawsuits). This variable tracks whether a state has a cap on punitive-damage awards (excluding medical-malpractice lawsuits). Punitive damages are awards granted in excess of actual damages in order to punish defendants. As discussed earlier, punitive damages are contrary to tort law, which is intended to compensate, not punish.

Punitive damages are contrary to tort law, which is intended to compensate, not punish.

States use different methods to cap punitive damages. Some states set the cap at a particular dollar amount; Virginia's limit is \$350,000, for example. New Hampshire prohibits punitive damages altogether. Another option is to devise a cap based on factors such as defendant's net worth, type of lawsuit, or compensatory-award levels. Data on punitive-damage caps come from ATRA, NAMIC, and Wilson, Elser, Moskowitz, Edelman, & Dicker, LLP.<sup>38</sup>

Nicole V. Crain et al. found that caps on punitive damages have a small but statistically significant effect, reducing tort losses in states that have enacted such reforms.<sup>39</sup>

**17. Caps on non-economic-damage awards in medical-malpractice lawsuits.** This variable tracks whether a state has limits on non-economic-damage awards in medical-malpractice lawsuits, or has increased the negligence standard required to find medical providers responsible for malpractice. North Dakota has a \$500,000 limit. West Virginia has a limit that can vary from \$250,000 to \$500,000 depending on the severity of the injuries. Utah's limit is adjusted for inflation. Data on medical-malpractice non-economic-damage caps were collected from ATRA, NAMIC, the National Conference of State Legislatures (NCSL), and Wilson, Elser, Moskowitz, Edelman, & Dicker, LLP.<sup>40</sup>

Limits on medical-malpractice damages lessen liability pressures on physicians and lead to reduced medical expenditures. This is supported by a report by Daniel P. Kessler and Mark McClellan, who found that direct malpractice reforms limiting the amount of awards reduce reliance on defensive-medicine procedures such as ordering unnecessary tests or referrals.<sup>41</sup> Kessler and McClellan found that these reforms led to a reduction of 5 to 9 percent in medical expenditures without significant negative effects on mortality or increased medical complications. Limits on damage awards are the most direct way to reduce medical-malpractice awards.

Damage-award caps also lower premiums for medical-malpractice insurance. Meredith L. Kilgore, Michael A. Morrisey, and Leonard J. Nelson looked at the effect of new state damage caps on physician malpractice-insurance premiums from 1991 through 2004. The researchers found that a new damage cap reduced malpractice premiums for internal medicine, general surgery, and obstetrics/gynecology by 17.3 percent, 20.7 percent, and 25.5 percent, respectively. Lowering damage caps by \$100,000 reduced premiums by 4 percent.



State laws limiting malpractice awards also affect where physicians decide to practice medicine. An analysis by Fred J. Hellinger and William E. Encinosa, conducted for the U.S. Department of Health and Human Services, found that states with malpractice damage caps had about 12 percent more physicians per capita than states without damage caps. <sup>43</sup> By comparison, in 1970, before the implementation of any state malpractice caps, the supply of doctors per capita across states was indistinguishable. Of states with malpractice caps, those with lower dollar limits had a greater supply of physicians.

**18. Caps on punitive-damage awards in medical-malpractice lawsuits.** This variable tracks whether a state has limits on punitive-damage awards in medical-malpractice lawsuits. Washington does not allow punitive-damage awards, while Alaska limits them to \$500,000 or three times compensatory damages. Delaware has no limit but awards punitive damages only when there is a finding of malicious intent to injure or willful or wanton misconduct. Data on medical-malpractice punitive-award caps were collected from ATRA, NAMIC, NCSL, and Wilson, Elser, Moskowitz, Edelman, & Dicker, LLP.<sup>44</sup>

When the Alabama
Supreme Court ruled
caps unconstitutional
and removed them,
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approximately doubled.

Caps on punitive awards reduce excessive awards, thus lowering insurance losses and premium rates. This is demonstrated in a report by Albert Yoon, who found that such caps reduced the average medical-malpractice recovery by \$20,000 in Alabama. Yoon showed that when the Alabama Supreme Court ruled caps unconstitutional and removed them, average plaintiff awards approximately doubled. Another study, by Kenneth E. Thorpe, showed that punitive-damage caps lower physicians' insurance premiums. Thorpe found that insurance premiums in states that capped awards were more than 17 percent lower than in states with no caps. Punitive-award caps lower medical-liability premiums.



## Substantive-Law Rules (Variables 19-34)

The 16 variables in this group examine legal rights and responsibilities across states in such areas as medical malpractice, product liability, and class-action suits.

**19. Class-action rules**. This variable tracks a state's class-action rules. Though class-action lawsuits were designed to be an efficient use of court resources by joining together a large number of plaintiffs into a single lawsuit, critics charge that weak standards have allowed class actions to become vehicles for abuse. For this reason, many states have instituted class-action rules that define the procedures for certifying a class, permit interlocutory appeal of class certifications, or reform attorney-fee arrangements. An interlocutory appeal allows an appellate court to review the legality of a class certification before a trial proceeds in order to prevent irreparable harm from occurring. Ohio, for example, provides for interlocutory appeal of class certifications. Texas goes further by mandating that attorney fees reflect time and cost expended rather than a percentage of the total recovery. Data on state-level class-action rules come from ATRA.<sup>47</sup>

Mere classification of a lawsuit as a class action causes many companies to settle, rather than risk crippling financial losses.

Class-action lawsuits have imposed significant costs on defendants, who often find it preferable to settle than risk exorbitant losses in court. A report by George L. Priest validates this strategy in an examination of class-action awards over a 10-year period. Priest found that the average class-action award between 1993 and 2002 was \$138.6 million, and that the top 10 percent of cases had an average recovery of \$1.08 billion. Priest concluded that the mere classification of a lawsuit as a class action causes many companies to settle, rather than risk crippling financial losses. Because class-action reforms tend to set strict criteria for the certification of a class and reduce attorneys' incentives to file, they reduce the number of class actions and lead fewer defendants to settle in order to avoid potentially devastating losses.

**20.** Attorney contingency-fee limits (excluding medical-malpractice lawsuits). This variable tracks whether a state has limits on attorney contingency fees (excluding medical-malpractice cases). Contingency fees allow plaintiffs to retain legal assistance without cost if they are unsuccessful in recovering damages. Lawyers working on contingency are paid only if their client wins the case, by taking a percentage of the award. Contingency-fee rules tend to limit the percentage of an award that attorneys can claim in legal fees, or require judicial approval of legal fees. Illinois, for example, limits contingency fees using a sliding scale ranging from one-third to one-fifth of the award, depending on the total recovery. Oklahoma strictly limits contingency fees to 50 percent of the plaintiff's recovery. Data were collected from ATRA.<sup>49</sup>

Some argue that contingency-fee rules reduce incentives for attorneys to use unethical behavior to extract the largest possible dollar amount from defendants, and that they also limit attorneys' abuse



of plaintiffs. Lester Brickman found that rates for plaintiffs' attorneys working on contingency were several times higher than their defense counterparts' hourly rates.<sup>50</sup> Brickman also discovered a positive relationship between a state's litigiousness and the number of contingency-fee-financed tort lawsuits.

Another criticism of contingency fees comes from Walter K. Olson, who described the contingency-fee problem as two-pronged.<sup>51</sup> According to Olson, with contingency fees there is increased temptation for exploitation of clients and, more dangerously, teaming of lawyer and client against a deep-pocketed defendant. Olson's fear seems to be validated by Brickman's discovery of the association between litigation rates and contingency-fee arrangements.

21. Does the state generally use a contributory, comparative, or modified-comparative standard for negligence? This variable tracks each state's negligence standard for recovery of damages in civil-liability cases. Negli-

States with a comparative-negligence standard have larger legal payouts than states with alternative standards.

gence standards fall into four categories: pure contributory negligence, pure comparative fault, modified comparative fault at 50 percent, and modified comparative fault at 51 percent. Pure contributory negligence prevents the recovery of any damages if the plaintiff is in any degree at fault. Four states use this standard. Pure comparative fault allows a plaintiff to recover an award that is reduced by the percentage of his fault. If he is 25 percent at fault, the award is reduced by a quarter.

Modified comparative fault prevents the recovery of damages if the plaintiff is at fault above a certain percentage, but allows a proportionally reduced award when his fault is below that threshold. If the threshold is 50 percent, a plaintiff cannot recover damages if he is 50 percent or more at fault. If he is less than 50 percent at fault, he can recover, although recovery is reduced by his degree of fault. Iowa, for example, bars the recovery of damages when the plaintiff is 51 percent or more at fault, but allows a reduced award when fault is less than 51 percent. Information on negligence standards comes from Matthiesen, Wickert, & Lehrer, SC.<sup>52</sup>

States with a comparative-negligence standard have larger legal payouts than states with alternative standards. Daniel P. Kessler found that settlement amounts in states applying comparative negligence exceeded those in states applying contributory negligence.<sup>53</sup> He concluded: "This is consistent with conventional wisdom about comparative negligence: it compensates a wider variety of claimants, and it compensates them more generously than contributory negligence."

Stuart Low and Janet Kiholm Smith looked at 9,610 auto-injury accident claims and found that a comparative-negligence standard provides stronger incentives to hire an attorney and file a lawsuit, and is associated with higher dollar awards. <sup>54</sup> The joint probability of representation and filing is 12.5 percent in contributory-negligence states but 21.2 percent in comparative-negligence states.



Alternatives to a pure comparative-negligence standard, especially a contributory-negligence standard, reduce the number of attorneys hired and lawsuits filed, the amounts of damages awarded, and settlement amounts agreed to by both parties.

Fee-shifting arrangements encourage pretrial settlements, saving all parties the costs associated with going to trial.

**22.** Rules on joint and several liability. This variable tracks whether a state has modified the standard rule of joint and several liability. Joint and several liability allows a plaintiff to recover all damages from any one defendant in a multiple-defendant lawsuit regardless of that particular defendant's proportion of fault. For example, under a so-called 1 percent rule, a co-defendant found to be only 1 percent at fault could be stuck paying 100 percent of the plaintiff's damages.

Reforms either limit or bar application of the rule of joint and several liability, and generally define liability according to share of responsibility. Florida, for example, abolished joint and several liability in 2006. Data on reforms come from ATRA.<sup>55</sup>

Joint and several liability can increase consumer costs by discouraging cost-saving contractor affiliations. James Boyd and Daniel E. Ingberman studied the effects of extended liability and found that joint and several liability creates incentives that stall affiliation in situations where contractors differ in wealth.<sup>56</sup> As a result, deep-pocketed contractors are less likely to purchase from producers who also sell to shallow-pocketed contractors. According to the authors, if markets are thin, a producer might be unable to produce at a scale that minimizes production costs. Under a system of proportional liability, however, contractors of varying wealth are willing to be served by the same producer, allowing the producer to manufacture at a level that minimizes costs.

23. Rules on early offers of settlement. This variable tracks rules on early offers of settlement. Most states have adopted a variation of Federal Rule 68, stating that if a defendant offers a plaintiff a pretrial settlement but the offer is rejected, and the plaintiff does not subsequently win a trial judgment greater in value than the offer, the plaintiff must pay trial costs accrued since the offer, minus attorney fees. Some states have variations of Rule 68 that include in the penalty the payment of attorney fees and/or make the provisions applicable to both the defendant and the plaintiff. Other states, such as New Jersey, include provisions that allow for interest to accumulate on offers rejected by a defendant when the trial judgment is either equal to or greater than the settlement offer, starting from the date the offer was made. Data on the rules governing early offers of settlement come from the American College of Trial Lawyers and ATRA.<sup>57</sup>

Fee-shifting arrangements such as Federal Rule 68 encourage pretrial settlements, saving all parties the costs associated with going to trial. An analysis by Kathryn E. Spier noted that "broadening the definition of costs to include attorneys' fees and extending the rules to offers made by either litigant will increase their effectiveness in encouraging settlement." These settlements result in lower litigation costs and, as a result, lower liability-insurance rates. They also save taxpayers money that would otherwise be spent on court administration costs.

24. Does the state have an "Illinois Brick repealer" statute? This variable tracks whether a state has enacted an "Illinois Brick repealer" statute. In 1977, the U.S. Supreme Court ruled in Illinois Brick Co. v. Illinois that only direct buyers have standing to file federal antitrust lawsuits. The decision was based on precedent from an earlier case decided by the Supreme Court, Hanover Shoe v. United Shoe Machinery Corp., in which it was decided that a defendant could not use as a defense the argument that losses incurred by direct buyers were passed on to indirect buyers. A direct buyer is the group or individual that purchases the product in question directly from the defendant company. Indirect buyers are groups or individuals that purchase from the direct buyer; their purchase of the product is indirect in relation to the defendant company.

In *Illinois Brick*, in order to remain consistent in rejecting the passing-on theory, and also to avoid multiple liability from suits filed by both direct and indirect buyers, the high court held that an indirect buyer could not bring a federal antitrust lawsuit. In response to the ruling, several states enacted "Illinois Brick repealer" statutes that allow indirect buyers standing to file antitrust lawsuits. Data on repealer statutes come from a review by Edward D. Cavanaugh.<sup>59</sup>

Allowing indirect buyers to sue under a repealer statute has a harmful effect on antitrust enforcement. William M. Landes and Richard A. Posner conducted an economic analysis of the *Illinois Brick* ruling and concluded that allowing indirect buyers to sue creates a detrimental impact on antitrust enforcement by direct buyers. 60 In addition, the risk of multiple recoveries from indirect and direct buyers is a significant concern when damages are subject to mandatory trebling. For these reasons, a state's legal system is most effective and fair in the absence of a repealer statute.

25. Does the state have a "bad faith" insurer liability statute? This variable tracks whether a state has a "bad faith" insurer liability statute. Bad-faith insurer liability statutes allow for the recovery of damages from insurers for unjust settlement practices concerning first-party coverage. Half of all states currently have one of these statutes in place. Data on bad-faith statutes come from NAMIC.<sup>61</sup>

Insurance contracts already specify duties, and states have administrative procedures in place through state insurance departments to remedy problems. Bad-faith statutes, therefore, are not needed and only serve to expand liability for insurance companies and drive up costs, making insurance less affordable. 62

**26.** Attorney-retention sunshine rules. This variable tracks whether a state has attorney-retention guidelines that tend to require open, competitive bidding between private lawyers and a state seeking their counsel; make public the amount and type of work that private lawyers do for the state that has hired them; or limit the fees an attorney general is allowed to pay a private attorney without some additional form of government approval. North Dakota, for example, requires that an emergency commission approve the attorney general's selection of a private lawyer to assist in civil cases where the amount in question exceeds \$150,000. In addition, North Dakota also strictly limits the circumstances in which contracted legal services can be acquired through contingency arrangements. Virginia requires open and competitive bidding for all contingency-fee contracts between the state and outside counsel where fees and services are likely to exceed \$100,000. Data come from ATRA and NAMIC.63



Regulation of exclusive partnerships between an attorney general and a private trial lawyer reduces potential deception and exploitation. In an opinion piece for the *Washington Post*, Victor E. Schwartz

Changing the rules of jury service to increase participation strengthens the constitutionally protected right to a representative jury of one's peers.

noted that contracts between an attorney general and a private personal-injury lawyer can help protect the public interest.<sup>64</sup> Schwartz warns, however, that if private alliances are allowed to flourish, trial lawyers motivated by profit and dishonest attorneys general will together assume the role of making, not interpreting, laws to their own benefit. For this reason, reforms that allow for competitive bidding or require strict oversight are essential to keep partnerships honest and accountable.

**27. Jury-service rules.** This variable tracks each state's jury-service rules. To help resolve the problem of losing representative juries, some states have adopted rules addressing ignored jury summonses, the financial imposition on jurors, and increased administrative costs. Colorado's jury-service rules set stricter criteria for excusal from jury service and provide protections for small businesses that might suffer financially from a temporary loss of employees. Maryland increased juror

compensation from \$15 to \$50 per day after the fifth day of service in order to reduce the number of residents who ignore jury summonses. Data on jury-service rules come from ATRA and NAMIC.<sup>65</sup>

Changing the rules of jury service to increase participation strengthens the constitutionally protected right to a representative jury of one's peers. An analysis by Harry F. Mooney et al. tracked the progress made by both state and federal courts in creating more diverse and inclusive juries. <sup>66</sup> The researchers argued that removing exclusions from jury service creates socially diverse and representative juries that are fair and desirable for defendants. Such juries, in turn, lend additional credibility to the jury verdicts rendered.

**28. Medical malpractice: Attorney-fee limits.** This variable tracks whether a state limits attorney fees in medical-malpractice cases. States use a variety of methods to regulate attorney fees. New York, for example, uses a sliding scale: 30 percent is allowed for the first \$250,000 of an award; 25 percent for the second \$250,000; 20 percent for the following \$500,000; 15 percent for the subsequent \$250,000; and 10 percent above \$1.25 million. Washington courts, on the other hand, must approve attorney fees for each party based on their perceived reasonableness. Data on attorney-fee regulations in medical-malpractice cases come from ATRA and NCSL.<sup>67</sup>

A state's regulation of attorney fees in medical-malpractice lawsuits increases the supply of physicians in that state. This is the conclusion of Daniel P. Kessler et al., who found that the adoption of tort reforms, including attorney-fee limits, increased the supply of physicians by 3.3 percent after three years, controlling for other factors. The researchers also noted that the reforms had a greater effect on retirements and entries than on movement between states. More physicians enter the job market and remain in practice longer after adoption of tort reforms such as attorney-fee limits. This benefits patients.



**29. Medical malpractice: Pre-trial screening or arbitration.** This variable tracks whether a state requires pre-trial screening or arbitration for medical-malpractice lawsuits. Pre-trial screenings are preliminary hearings to determine the validity of a case; arbitration is an alternative to trial that relies on an impartial third party for resolution. Both of these alternative methods of dispute resolution are intended to reduce a state's medical-malpractice caseload. Nebraska attempts to accomplish this goal by mandating a review of malpractice claims by a medical-review panel before the case may proceed to trial. Oregon, on the other hand, requires all parties to participate in dispute resolution within 270 days from when the action is filed, unless the case has already been settled or all parties voluntarily waive mediation or arbitration. Data on dispute-resolution reforms come from ATRA and NCSL.<sup>69</sup>

Pre-trial screening and arbitration reduce the number of meritless cases that clutter courthouses. Pre-trial screening allows a panel of medical professionals to determine the validity of a malpractice claim, instead of passing that burden to jurors who might lack necessary medical knowledge. A report by Claudia E. Lavenant et al. found that pre-trial screening cut the number of physicians who received medical-malpractice sanctions by filtering out cases in which injuries were not caused by physician negligence. Albert Yoon found that screening panels in Nevada have reduced the percentage of medical-malpractice claims that go to trial. Like pre-trial screening, arbitration keeps a number of malpractice cases out of courtrooms; in addition, arbitration can lead to settlements that are agreeable to all parties.

**30. Product liability: Asbestos- and silica-liability rules.** This variable tracks each state's asbestos- and silica-liability rules. These rules generally define the procedures and minimum medical requirements for filing asbestos- or silica-related lawsuits. Florida, for example, sets minimum medical criteria and has a statute of limitations for filing asbestos and silica claims that starts from the time a

patient shows symptoms of illness. Texas additionally requires that each asbestos claim be tried on its own merits, rather than grouped with others in a trial. Data on asbestos- and silicaliability rules come from ATRA, NAMIC, and correspondence with Mark Behrens, Esq., of Shook, Hardy & Bacon, LLP.<sup>72</sup>

Asbestos litigation has burdened an ever-expanding pool of defendants with enormous costs, though cancer victims currently represent only about one out of every 10 asbestos claimants. A RAND study by Stephen J. Carroll et al. determined that from the 1960s through 2002, approximately 730,000 individuals brought claims against about 8,400 businesses, clogging court dockets.<sup>73</sup> According to the researchers, these defendants and

Pre-trial screening and arbitration reduce the number of meritless cases that clutter courthouses.

their insurers spent \$70 billion on legal costs and payouts. A report by Michael J. McCabe estimated that the cost could eventually exceed \$250 billion for asbestos litigation, a category that had only about 300 defendants 20 years ago. McCabe also noted that the effect on business has been significant. Seventy companies have declared bankruptcy, leading to the loss of up to 60,000 jobs. Stricter medical standards for filing claims, a reform enacted in several states and supported by the American Bar Association, would reduce the number of meritless claims filed, resulting in fewer defendants, lower defense costs, more jobs, and faster compensation for those truly suffering from asbestos-related illness.



**31. Product liability: Construction-liability rules.** This variable tracks each state's construction-liability rules. These rules vary from state to state, but they often set a statute of repose or allow the seller of a property to correct a problem before the buyer can litigate. Alaska, for example, sets a 15-year statute of repose for litigation against design and construction professionals, starting from substantial completion of the work. Arizona requires that a purchaser wait until the seller is given an

Seventy companies have declared bankruptcy, leading to the loss of up to 60,000 jobs. opportunity to fix a construction defect before a lawsuit can be filed. Data on construction-liability rules come from ATRA. $^{76}$ 

Construction-liability limits lower insurance costs and increase the supply of affordable housing. A 2002 San Diego Union-Tribune article on California's affordable-housing crisis suggested construction-liability reform as a potential fix for the problem.<sup>77</sup> In the early 1990s, construction-defect litigation almost completely halted condominium and townhouse construction in California. As a result, the median home price in San Diego County rose by nearly 25 percent in one year. Construction-liability reform cuts liability costs and encourages builders to construct more affordable housing.

**32.** Product liability: Does the state allow an "FDA defense" or an "FTC defense"? This variable tracks whether a state allows defendants to use a defense citing the FDA (U.S. Food and Drug Administration) or the FTC (U.S. Federal Trade Commission). These defenses allow a product manufacturer some degree of immunity from liability if the product meets mandatory FDA safety standards or if the product's advertising complies with FTC standards. West Virginia holds that health care providers are not liable for personal injuries caused by prescribed drugs or medical devices used in accordance with FDA regulations. Ohio shields drug manufacturers from punitive damages if the drug was approved by the FDA. The Illinois Supreme Court recognizes an FTC defense from product liability for manufacturers of "light" or "low-tar" cigarettes. Data come from ATRA and NCSL.<sup>78</sup>

Enacting an FDA or FTC defense restricts product-liability cases. In a recent study of drug liability, James A. Henderson and Aaron D. Twerski concluded that, assuming drug manufacturers meet all government standards and do not overpromote their products, misprescription should be the sole responsibility of the negligent physician or pharmacist. Overextending liability, especially to drug manufacturers, reduces innovation, because manufacturers who get sued even though their products meet all government standards are deterred from investing in research and development and instead must redirect funds to lawsuit defense.

**33.** Product liability: Does the state provide guidelines for general-manufacturer liability or retailer liability? This variable tracks whether a state has specific guidelines defining liability for manufacturers or retailers. Florida, as an example, sets a 12-year statute of repose for products with a useful life of 10 years or less, with an exception for products specifically warranted for a life longer than 12 years. Mississippi holds retailers harmless for liability except if one of the following occurred: the retailer had control over the aspect of the product that caused the plaintiff's harm, it modified the



product in a way that caused the harm, it knew of the harmful defect when the product was sold, or it made a precise warranty about the aspect of the product that caused the harm. All data come from ATRA.80

Specifying limitations on manufacturer and retailer liability reduces the cost of product-liability insurance, thus encouraging product innovation. An analysis by Richard J. Mahoney and Stephen E. Littlejohn found that strict liability, large awards, and a proliferation of lawsuits have created an environment of fear and uncertainty for innovators.81 Mahoney and Littlejohn argued that legal uncertainty and scientific innovation are incompatible, resulting in less product research and fewer new products on store shelves.

34. Product liability: Does the state provide civil-liability exemptions for claims con**cerning junk food or obesity?** This variable tracks whether a state has a "junk food" or obesity civil-liability exemption for businesses. These exemptions give civil-damage immunity to manufacturers and distributors of food under certain conditions for claims alleging weight gain, obesity, or other conditions resulting from the long-term consumption of certain types of food.

Tennessee, for example, exempts manufacturers, distributors, sellers, and advertisers of food from liability in obesity claims in all instances except when the claim is based on a material violation of federal or state law prohibiting adulteration or misbranding. Twenty-two other states have adopted similar provisions. Information regarding junk-food and obesity civil-liability exemptions comes from ATRA and the National Restaurant Association.82

Immunity from liability lawsuits alleging weight gain or obesity protects American restaurants and the food industry's approximately 12 million employees from an onslaught of meritless litigation and reaffirms personal responsibility for one's actions. Robert P. Hartwig and Claire Wilkinson analyzed the potential effect of obesity-related litigation and found that smaller companies would be most negatively affected by large settlements and awards. 83 The researchers discovered that large food manufacturers and restaurants tend to self-insure, but smaller entities are likely to purchase insurance in a market affected by large awards and extended liability.

Also vulnerable under extended liability would be franchises of large restaurant chains, marketing partners, advertisers, television networks, and sporting-event organizers, among others. By providing immunity from obesity-related litigation, states protect small restaurants and millions of jobs.



By providing immunity from obesity-related litigation, states protect small restaurants and millions of jobs.



## Procedural and Structural Institutions (Variables 35–42)

The eight variables in this group examine such factors as how court systems are structured, venue is decided, juries and courtrooms operate, and justices are seated.

35. Are state-supreme-court justices appointed or elected? This variable tracks whether a state's supreme-court justices are appointed or elected. In Arizona, the governor appoints supremecourt justices, who must subsequently seek the voters' confirmation in retention elections. Rhode Island justices are nominated by the governor and must be confirmed by both the state House and the state Senate. And in Nevada, there are statewide nonpartisan elections for state-supreme-court justices. Other methods include merit selection by committee, legislative appointment, and partisan elections by district. Information on the selection method for justices comes from the Justice at Stake Campaign.84

Whether a state appoints or elects its supreme-court justices is significant because litigation awards tend to be larger in states where judges are elected, especially if they are elected in partisan elections. Put another way, the appointment of justices is associated with lower awards and a more businessfriendly climate. Alexander Tabarrok and Eric Helland found that awards are larger in states with an elected judiciary.<sup>85</sup> The researchers argued that this result is driven by the need for elected judges to buy votes—which they do by redistributing money from out-of-state defendants (nonvoters) to instate plaintiffs (voters)—and to satisfy trial lawyers, many of whom not only vote but also fund judges' election campaigns. Perhaps Richard Neely, a retired West Virginia Supreme Court judge, said it best in a moment of extreme candor:

As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone's else money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me. . . . It should be obvious that the instate local plaintiff, his witnesses, and his friends, can all vote for the judge, while the out-of-state defendant can't even be relied upon to send a campaign donation.<sup>86</sup>

When judges act as politicians in robes, the civil-justice system is further eroded.

In addition, different supreme-court selection methods are associated with differences in judicial quality. Russell S. Sobel and Joshua C. Hall found that states that select judges through appointment have better average rankings in measures of judicial quality than those that elect judges, primarily because of the partisan nature of elections.<sup>87</sup> The researchers found that differences in party control of the judiciary in states that elect judges are associated with differences in outcomes generally considered to be related to judicial quality, including use of eminent domain. These findings reinforce the conclusion that judicial quality is enhanced when states use a non-partisan appointment method of judicial



selection. Some evidence suggests, however, that state-court litigation rates are higher where judges are appointed—up to 40 percent more cases litigated than in the average elected court.<sup>88</sup> Insulating judges from political influence, therefore, could come at the price of more litigation but bring fairer outcomes.

**36. Venue rules.** This variable tracks each state's venue rules. Venue rules limit the ability of a plaintiff to file a lawsuit in a jurisdiction other than one of the following: where the damage allegedly occurred, where the plaintiff resides, where the defendant resides, or where the defendant company's principal place of business is located. West Virginia, for instance, specifies that a sizable part of the alleged action had to have occurred in the state for consideration in a state court, and it requires each plaintiff to establish venue independently. Louisiana allows district-court judges to dismiss a case at the defendant's request if the action leading to the lawsuit occurred outside the state. Data on venue rules come from ATRA and the Foundation for Fair Civil Justice.<sup>89</sup>

Susan Kostal, in an article for the *American Bar Association Journal*, pointed out the shift of asbestos litigation to plaintiff-friendly venues once states began imposing tort reforms. <sup>90</sup> Kostal noted the concentration of cases in San Francisco County and Alameda County in California, where verdicts are known to be more favorable to plaintiffs and awards are higher than in other jurisdictions. According to Kostal, awards in California's more favorable counties average \$3 million more than in less favorable counties.

Awards in California's more favorable counties average \$3 million more than in less favorable counties.

Michelle J. White examined all asbestos trials from 1987 to 2003 and found that when lawsuits are filed in six particularly favorable jurisdictions, plaintiffs' expected returns from trial increase on average by \$800,000, to nearly \$4 million. These jurisdictions include Mississippi, West Virginia, parts of Texas, and Manhattan. Because plaintiffs and their attorneys can benefit from filing where there is a higher probability of winning and collecting a large award, "venue shopping" or "litigation tourism" is common. Eric Helland and Alexander Tabarrok found that forum shopping can increase awards by hundreds of thousands of dollars. Venue rules lessen this practice by plaintiffs.

**37.** What is the standard for scientific review of evidence by expert witnesses? This variable tracks each state's standard for scientific review of evidence by expert witnesses. States fall into one of four general categories: those that have adopted *Daubert* v. *Merrell Dow Pharmaceuticals* (509 U.S. 579, 1993), those that use a modified version of *Daubert*, those that use *Frye* v. *United States* (293 F. 1013, D.C. Cir. 1923), and those that use an alternative state standard. California is one of the states that use the *Frye* standard, which holds that new scientific evidence is permissible in court if the method has gained "general acceptance" in the relevant field.

Mississippi, on the other hand, has adopted the stricter *Daubert* standard, which requires that expert testimony reflect a method that is not only generally accepted, but also supported by "good grounds."



Data on scientific-review standards come from the Product Liability Advisory Council (PLAC) and the Defense Research Institute (DRI).<sup>93</sup>

Daubert raises the bar for expert review of evidence and testimony, and it reduces the influence of interest groups on the content of testimony. Jeffrey S. Parker elaborated on these effects, arguing that Daubert is more economically efficient than alternative standards. <sup>94</sup> In addition, Parker found that proposals that allow for more judicial supervision or impose external constraints are both "unnecessary" and "socially undesirable."

There is also evidence that *Daubert* is a "gun that kicks as hard as it shoots." Brian Beckcom notes that he and other plaintiffs' lawyers have successfully used *Daubert* to disqualify scientific expert witnesses called by defendants. <sup>95</sup> Both defendants and plaintiffs are relying on *Daubert*, and the end result is a fairer and more science-based civil-justice system that works better for both parties. For these reasons, *Daubert* is the preferred, stricter standard for scientific review of evidence by expert witnesses.

The sale of expert witnesses is big business, as certain firms specialize in maximizing jury awards through expert-witness testimony.

**38.** Conditions on the use of expert witnesses in medical-malpractice lawsuits. This variable tracks whether a state sets conditions for the use of expert witnesses in medical-malpractice lawsuits. Expert-witness rules vary in strictness from state to state. Minnesota, for example, requires that medical-malpractice claimants sign an affidavit whenever an expert has been consulted. Michigan, on the other hand, requires that expert witnesses be licensed and board-certified in a specialty similar to that of the defendant, be in active practice, or have been engaged in teaching medicine during the year preceding the action. Data on expert-witness rules in medical-malpractice cases come from ATRA and NCSL. <sup>96</sup>

Rules governing the use of expert witnesses in medical-mal-practice cases increase the likelihood that fair decisions will be rendered. This is because, under these rules, courts are forced to require that testimony be based on accepted professional opinion, rather than novel approaches. Walter K. Olson, in an article for *Fortune*, noted that judges are often expected instinctually to validate expert testimony on their own, but he argued that this should not be the case, as judges often lack sufficient medical knowledge to do so. <sup>97</sup> Olson also showed that the sale of expert witnesses is big business, as certain firms specialize in maximizing jury awards through expert-witness testimony. Tough validation criteria disallow expert views outside the mainstream and keep defendants accountable to accepted medical standards in their field.

**39. Statute of limitations on medical-malpractice lawsuits, and 40. General statute of limitations.** The first of these variables tracks a state's statute of limitations in medical-malpractice lawsuits. Indiana, for example, sets its medical-malpractice statute of limitations at two years from the alleged harmful act, omission, or neglect. Kentucky sets its statute of limitations at one year from the alleged act or reasonable discovery, but no more than five years after the act. Data on medical-malpractice statutes of limitations come from ATRA and NCSL.<sup>98</sup>



The second variable tracks a state's statute of limitations in general tort lawsuits, as specified, other than medical-malpractice lawsuits. The most common statute of limitations among the states is two years. Data on general statutes of limitations come from *Tort Law Desk Reference*.<sup>99</sup>

A reasonable statute of limitations lowers litigation rates while ensuring that cases are tried when actions and incidents are more easily recalled and causation is more apparent. As the time lengthens between when the alleged injury, or discovery, took place and when the claim or lawsuit is brought, a fair trial becomes more difficult, as witnesses move away, get sick, or die; documents are lost; and memories fade.

Such limitations ultimately reduce medical-malpractice litigation by eliminating older cases, thus lowering legal costs for physicians. David M. Studdert et al. also found that such limitations cut medical costs. <sup>100</sup> Looking at Pennsylvania physicians, the researchers found that the practice of defensive medicine was highly prevalent among doctors who paid the most for liability insurance. Nearly all the doctors the researchers asked admitted to avoiding certain procedures and patients perceived to have higher litigation rates in order to reduce their insurance costs. By restricting eligible cases, limitations reduce legal and insurance expenses and reduce the need for costly defensive medicine.

**41. Size of juries in general-jurisdiction courts multiplied by the percentage of jurors needed to reach a verdict.** This variable tracks the size of juries multiplied by the percentage of jurors needed to reach a verdict in general-jurisdiction courts in each state as of 2001, the most recent year for which complete data are available. Alabama civil trials require a unanimous decision by 12 jurors to reach a verdict. Pennsylvania also mandates juries of 12 people; however, agreement by only 10 jurors is required for a verdict. Data on this variable come from the Bureau of Justice Statistics at the U.S. Department of Justice.<sup>101</sup>

Requiring more people to reach a verdict helps guarantee fairer trials for defendants and maintains good faith in court operations. The American Bar Association's House of Delegates agrees. In February 2005, it adopted a set of principles calling for a return to 12-person juries and unanimous verdicts. Terry Carter, a senior writer for the *American Bar Association Journal*, argued in favor of these principles in a feature story on jury reforms. <sup>102</sup> Carter noted that non-unanimous juries often neglect to consider the potentially helpful opinions of some jurors if they have already reached the necessary majority for a verdict.

people to reach a verdict helps guarantee fairer trials for defendants and maintains good faith in court operations.

Requiring more

#### 42. Does the state have a complex-litigation court?

This variable tracks whether a state has a complex-litigation court. Complex-litigation courts are designed to handle special-

ized cases that require intensive judicial management. Examples include business courts and courts that handle class actions, mass torts, or technology litigation. Delaware's business court is perhaps the best-known complex-litigation court, handling litigation involving internal affairs of businesses and



corporations within the state. Data on complex-litigation courts come from the National Center for State Courts. 103

Complex-litigation courts handle lawsuits brought before them more efficiently than would a regular trial court. According to an analysis by the Maryland Business and Technology Court Task Force, business courts have generally been well regarded, handling cases in a more efficient, effective, and predictable manner. The report also noted greater efficiency in the entire court system of states with complex-litigation courts because "complex business disputes requiring extensive court time are removed from the general docket, allowing judges to concentrate their efforts on other matters."

For a discussion of other variables that we considered including, but did not for a variety of reasons, please read this endnote.<sup>105</sup>

## **Types of Data and Ranking Construction**

The input variables above were ranked as qualitative variables, which fall into one of two classifications. Some qualitative variables can be logged only as a simple "yes" or "no." For example, "Does the state have a complex-litigation court?" could be coded only as a yes or a no. States receiving a yes were ranked 1 and states receiving a no were ranked 50. There were only two gradations for this variable. Other qualitative variables, however, allowed for finer gradations (the number of discernible gradations for each input variable is reported in brackets in table 6).

The top states are the states with the best tort rules on the books, not necessarily the top reformers—although, very often, good tort rules are the product of purposeful reforms.

For example, some states cap punitive damages, while other states do not. Among the states that do, the monetary amount of the cap can vary, allowing for finer distinctions among states. In the case of monetary caps, states were divided into gradations based on how stringent the cap was. States with the most stringent cap received a ranking of 1, and all states with the same degree of limitation received a ranking of 1 for this variable. The worst states, which had no cap, received a ranking of 50.

For each qualitative variable, we assigned rankings depending on the number of discernible gradations. If there were three discernible gradations, we assigned rankings of 1, 25.5, and 50. If there were six gradations, we assigned rankings of 1, 10.8, 20.6, 30.4, 40.2, and 50. States with the most stringent gradation—most encompassing solution—always received a ranking of 1, and states with the least stringent gradation—no solution—always received a ranking of 50. The remaining gradations were divided in equal intervals as described above.

This process was applied to each input variable. It is a very tedious process, but it allows for the fullest use of all available information on subtle differences among states and ultimately yields a more precise guide to distinguishing among state tort rules. A panel of six individuals, including the coauthors, ranked the variables. The names of the other four panelists are listed in the acknowledgements of this report. All of the underlying data and variable rankings are available in an Excel file posted on PRI's Web site at http://special.pacificresearch.org/pub/sab/2010/tort\_reform/.

It is important to keep in mind that a state's ranking for a particular variable could be good because it did nothing, not because it did something. For example, a state might have a good ranking for its negligence standard because it inherited a contributory standard from colonial times and never tampered with it. In this case, it has a good ranking because it did nothing, not because it engaged in active reform. The top states below, therefore, are the states with the best tort rules on the books, not necessarily the top reformers—although, very often, good tort rules are the product of purposeful reforms.

## Rankings of State Tort Rules

Table 7 presents the overall input-variable rankings by state as well as the ranking for each state in each of the 29 input variables. We calculated the overall ranking for each state by comparing average rankings across all input variables: adding together the rankings for each state across all 29 variables and dividing by 29. This methodology implicitly weighted each variable equally. The state with the best average ranking across all 29 variables received an overall ranking of 1. The state with the worst average ranking received an overall ranking of 50.

State	Overall Inputs: Ranking	Overall Inputs: Score
Alabama	33	34.06784483
Alaska	16	31.20439113
Arizona	31	33.74857280
Arkansas	24	32.33138373
California	27	32.94028736
Colorado	4	23.75362649
Connecticut	29	33.52305556
Delaware	23	32.26380628
Florida	21	31.80481041
Georgia	8	28.04496669
ławaii	41	36.59489084
daho	20	31.65266124
llinois	46	37.88492915
ndiana	11	29.72891052
owa	40	36.21868774
Kansas	7	27.42122528
(entucky	43	37.13649425
ouisiana	12	29.80243352
Maine	42	36.65630268
Maryland	44	37.31386677
Massachusetts	10	29.12934486
/lichigan	6	26.35511936
/linnesota	47	38.14127754
Mississippi	5	26.18107125
/lissouri	25	32.49841710
Montana	34	34.29597103
lebraska	18	31.39086919
levada	26	32.61257067
lew Hampshire	9	28.58327586
lew Jersey	13	30.55116175
New Mexico	45	37.84472251
lew York	49	39.31310345
Jorth Carolina	30	33.74225237
Jorth Dakota	28	33.43015171
Ohio	3	23.44294202
Oklahoma	1	18.16026581
Oregon	39	35.44017601
Pennsylvania	48	38.14977371
Rhode Island	50	39.71120690
South Carolina	14	30.81216616
South Dakota	32	33.82571762
ennessee	22	31.98896552
exas	2	22.80273132
Itah	15	31.02079206
/ermont	38	35.07448276
/irginia	19	31.61592236
Vashington	37	34.69270911
West Virginia	36	34.49228411
Visconsin	35	34.37529616
Vyoming	17	31.36528736

			Monotory	Cane				
	Monetary Caps  14 Appeal 15 Non-seep 16 Pupitive 17 Med mel pen 19 Med mel pupitive 17 Med mel pen 19 Med mel pupitive 18 Med mel pen 19 Med							
State	14. Appeal- bond caps	15. Non-econ damage caps	16. Punitive- award caps	17. Medmal. non- econdamage caps	18. Medmal. punitive award caps			
Alabama	50	50	34.7	50	50			
Alaska	50	50	37.8	23.6	34.9			
Arizona	50	50	47	50	50			
Arkansas	11.5	50	13.3	50	8.54			
California	46.5	50	38	1	50			
Colorado	11.5	22.8	37.8	4.8	23.6			
Connecticut	1	50	46.9	50	50			
Delaware	50	50	50	50	23.6			
Florida	36	50	34.7	23.6	31.15			
Georgia	11.5	50	40.8	19.8	23.6			
Hawaii	36	33.67	50	27	50			
Idaho	32.5	1	31.6	4.8	27.38			
Illinois	50	50	50	27	1			
	36	50	31.6	42.5	46.23			
Indiana	22	44.556	35	50	50			
lowa	11.5	44.556	16.3	1	16.08			
Kansas								
Kentucky	22	50	50	50	50			
Louisiana	25.5	50	4.1	34.9	1			
Maine	1	50	50	50	50			
Maryland	50	17.333	50	12	50			
Massachusetts	1	50	4.1	27.4	1			
Michigan	15	33.667	1	9	1			
Minnesota	22	39.11	38	50	23.6			
Mississippi	43	28.22	19.4	12.3	19.85			
Missouri	15	50	31.6	4.8	42.5			
Montana	50	50	43.9	1	24			
Nebraska	15	50	1	46	1			
Nevada	15	50	47	5	19.85			
New Hampshire	1	50	1	50	1			
New Jersey	39.5	50	46.9	50	38.7			
New Mexico	50	50	50	39	46.2			
New York	50	50	50	50	50			
North Carolina	11.5	50	28.6	50	19.85			
North Dakota	11.5	50	25.5	12.3	19.8			
Ohio	15	11.889	22.4	50	19.85			
Oklahoma	8	6	28.6	23.6	23.62			
Oregon	46.5	50	35	50	23.6			
Pennsylvania	43	50	28.6	50	23.6			
Rhode Island	40	50	50	50	50			
South Carolina	32.5	50	50	20	50			
South Dakota	11.5	50	38	16	50			
Tennessee	18.5	50	50	50	50			
Texas	8	50	10.2	16.1	4.8			
Utah	29	50	35	12	50			
Vermont	1	50	50	50	50			
	11.5	50	7.1	27.4	12.3			
Virginia Washington								
Washington	43	50	4	31	1			
West Virginia	43	50	50	9	50			
Wisconsin	22	50	38	16	50			



	Substantive-Law Rules								
State	19. Class- action rules	20. Contingency- fee limits	21. Negligence standard	22. Joint-and- several rules	23. Early offers	24. " <i>Brick</i> repealer" statute	25. "Bad faith" insurance law	26. Attorney- retention sunshine	
Alabama	17.33	50	1	50	1	50	50	50	
Alaska	50	37.8	50	1	25.5	1	1	50	
Arizona	50	50	50	9.16	1	50	1	50	
Arkansas	50	50	17.33	25.5	1	1	50	50	
California	50	50	50	9.16	1	50	1	50	
Colorado	33.7	50	17.33	1	1	25.5	50	20.6	
Connecticut	50	50	33.66	33.66	1	1	50	30.4	
Delaware	50	50	33.66	50	1	50	1	50.4	
Florida	17.33	50	50	1	25.5	25.5	50	50	
Georgia	17.55	50	17.33	1	25.5	1	50	50	
Hawaii	50	50	33.66	33.66	1	25.5	1	50	
daho	50	50	17.33	9	1	25.5	1	50	
Ilinois	50	1	33.66	33.66	50	50	50	50	
ndiana	50	50	33.66	33.00	1	1	1	50	
owa	50	50	33.66	25.5	1	25.5	1	50	
Kansas	33.7	50	17.33	1	1	50	1	1	
Kentucky	50	50	50	1	1	1	50	50	
Louisiana	33.7	50	50	1	25.5	1	50	50	
Maine	50	13.3	17.33	50	1	50	50	50	
Maryland	50	50	17.55	50	50	25.5	50	50	
Massachusetts	50	50	33.66	41.83	1	1	50	50	
Michigan	50	50	33.66	25.5	1	50	1	50	
Minnesota	50	50	33.66	17.33	1	50	50	30.4	
Mississippi	50	50	50	17.33	1	50	1	50.4	
Missouri	33.7	50	50	17.33	1	1	50	50	
Montana	50	50	33.66	17.33	1	1	50	50	
Nebraska	50	37.8	17.33	17.33	1	50	1	50	
Nevada	50	50	33.66	9.16	1	50	50	50	
New Hampshire	50	50	33.66	17.33	50	1	1	50	
New Jersey	50	50	33.66	17.33	25.5	1	1	50	
New Jersey New Mexico	50	50	50.00	9.16	20.0	50	50	50	
New York	50	50	50	25.5	1	50	50	50	
North Carolina	50	50	ານ 1	50	1	25.5	50	50	
North Dakota	50	50	17.33	9.16	1	50	1	10.8	
Ohio	33.7	50	33.66	25.5	1	1	1	50	
Oklahoma	1	25.5	17.33	17.33	1	1	1	50	
Oregon	50	50	33.66	17.33	1	25.5	1	50	
Pennsylvania	50	50	33.66	50	50	1	50	50	
Rhode Island	50	50	50	50	1	25.5	50	50	
South Carolina	50	50	33.66	17.33	1	1	1	50	
South Dakota	50	50	50	17.33	1	50	1	50	
Tennessee	50	50	17.33	17.33	1	25.5	50	50	
Texas	1	50	33.66	17.33	25.5	20.0	50	10.8	
Jtah	50	50	17.33	17.33	25.5	1	1	50	
Vermont	50 50	50 50	33.66	1	1	50	1	50	
	50	50	33.00	50		1	1	10.8	
Virginia Vashinaton					50			10.8 50	
Washington	50 50	50 50	50 17.33	25.5 17.33	1	1	50 50	40.2	
West Virginia									
Visconsin	50 50	13.3 50	33.66 33.66	17.33 1	1	50 1	1	50 <b>50</b>	

			Substant	ive-Law Rules			
27. Jury-service rules	28. Medmal. attorney-fee limits	29. Medmal. pre-trial screen- ing/arbitration	30. Asbestos/ silica rules	31. Construction- liability rules	32. FDA/FTC defense	33. Manufac- turer/retailer liability	34. Junk food/ obesity
1	50	37.75	50	50	50	50	50
50	45.1	7.125	50	1	50	50	50
13.25	40.2	1	50	25.5	30.4	50	1
50	50	37.75	50	50	50	50	50
25.5	10.8	31.625	50	50	50	50	50
13.25	50	25.5	50	13.25	10.8	13.25	25.5
50	5.9	43.875	50	50	50	50	50
50	1	7.125	50	50	50	50	50
50	1	25.5	1	50	50	31.625	25.5
50	50	43.875	17.33	50	50	31.625	25.5
50	40.2	43.875	50	50	50	50	50
50	50	37.75	50	50	50	50	25.5
50	10.8	43.875	50	50	40.2	50	25.5
13.25	35.3	31.625	41.83	50	30.4	25.5	25.5
50	40.2	31.625	50	50	50	31.625	50
50	40.2	13.25	41.83	50	50	50	25.5
50	50	43.875	50	50	50	50	25.5
1	50	31.625	50	50	50	25.5	25.5
50	10.8	19.375	50	50	50	37.75	25.5
13.25	40.2	19.375	50	50	50	50	50
50	10.8	7.125	50	50	50	50	50
50	30.4	37.75	50	50	1	43.875	1
50	45.1	1	50	50	50	50	50
1	50	1	33.66	50	1	1	50
1	50	50	50	50	50	50	25.5
50	50	7.125	50	50	50	25.5	50
50	45.1	13.25	50	50	50	50	50
50	5.9	13.25	50	50	50	50	50
50	10.8	13.25	50	50	50	25.5	50
50	25.5	31.625	50	50	20.6	1	50
13.25	50	19.375	50	50	50	50	50
37.75	5.9	37.75	50	50	50	50	50
50	50	31.625	50	50	50	25.5	50
50	50	37.75	41.83	50	30.4	50	25.5
1	50	43.875	9.16	50	1	19.375	1
1	20.6	1	25.5	50	50	25.5	25.5
50	30.4	37.75	50	50	30.4	50	25.5
50	50	31.625	41.83	50	50	50	50
50	50	37.75	50	50	50	50	50
50	50	31.625	1	50	50	50	50
50	50	37.75	50	50	50	50	1
37.75	15.7	37.75	33.66	50	50	50	25.5
25.5	50	1	9.16	50	30.4	7.125	25.5
1	15.7	25.5	50	50	30.4	50	25.5
50	50	25.5	50	50	50	50	50
50	50	13.25	50	50	50	50	50
50	40.2	1	50	37.75	50	50	1
50	50	13.25	50	50	30.4	50	50
50	15.7	37.75	50	50	50	50	25.5
50	15.7	1	50	50	50	50	1



			nd Structural Institutio	
State	35. Supreme-court- justice selection	36. Venue rules	37. Expert-witness standard	38. Medmal. expert- witness conditions
abama	40.2	33.66	17.33	1
aska	30.4	50	1	7.125
zona	30.4	50	50	37.75
kansas	40.2	17.33	1	31.625
alifornia	20.6	50	50	37.75
Colorado	30.4	50	33.66	19.375
Connecticut	1	50	1	31.625
elaware	1	50	1	37.75
lorida	30.4	33.66	50	1
Georgia	40.2	33.66	1	25.5
awaii	1	50	33.66	50
daho	40.2	50	33.66	43.875
linois	50	50	50	1
ndiana	20.6	50	33.66	19.375
owa	20.6	50	33.66	37.75
ansas	30.4	50	50	19.375
entucky	50	50	1	50
ouisiana	50	33.66	1	1
laine	1	50	33.66	50
laryland	30.4	50	50	31.625
lassachusetts	1	50	1	50
lichigan	40.2	17.33	1	19.375
/linnesota	40.2	50	50	43.875
Mississippi	50	1	1	25.5
/lissouri	30.4	17.33	33.66	31.625
/lontana	40.2	50	1	25.5
lebraska	30.4	50	1	50
levada	40.2	50	17.33	31.625
ew Hampshire	1	50	1	31.625
ew Jersey	1	50	33.66	1
lew Mexico	30.4	50	1	50
ew York	10.8	50	50	43.875
lorth Carolina	40.2	50	33.66	31.625
lorth Dakota	40.2	50	50	19.375
hio	40.2	50	1	19.375
klahoma	30.4	33.66	1	1
regon	40.2	50	1	50
ennsylvania	40.2	17.33	50	43.875
hode Island	1	50	1	43.875
outh Carolina	10.8	1	33.66	7.125
outh Dakota	30.4	50	1	50
ennessee	30.4	50	17.33	1
exas	50	1	1	19.375
Itah	30.4	50	33.66	50
ermont	1	50	1	50
irginia	10.8	50	17.33	13.25
ashington	40.2	50	50	50
/est Virginia	40.2	33.66	1	13.25
isconsin	40.2	50	33.66	50
/yoming	30.4	50	1	50

39. Medmal. statute	Procedural and Stru 40. General statute		
		44 luveve seeded	40 Compley litination
of limitations	of limitations	41. Jurors needed for a verdict	42. Complex-litigation court
or initiations	1	101 a veruici	50
37.75	1	11.88	50
1	1	39.11	50
1	13.25	17.33	50
13.25	1	17.33	1
1	13.25	39.11	1
1	10.20	39.11	50
25.5	1	1	1
37.75	50	39.11	1
1	1	1	50
37.75	1	11.88	50
1	1	33.66	50
25.5	37.75	17.33	50
25.5	37.75 1	39.11	50
37.75		28.22	50
	1		
50	•	22.77	50
13.25	1	17.33	50
12.05	50	17.33	50
13.25	50	39.11	50
37.75	13.25	39.11	1
37.75	13.25	11.88	1
37.75	13.25	50	1
25.5	1	44.55	50
37.75	13.25	17.33	50
11	37.75	17.33	50
37.75	13.25	22.77	50
1	25.5	6.44	50
13.25	25.5	17.33	1
25.5	13.25	1	50
37.75	1	28.22	1
13.25	13.25	11.88	50
13.25	13.25	50	1
13.25	13.25	1	1
37.75	50	28.22	50
37.75	1	39.11	1
37.75	1	17.33	1
37.75	13.25	28.22	50
37.75	1	11.88	1
37.75	13.25	1	50
37.75	13.25	1	50
1	13.25	11.88	50
1	13.25	1	50
50	1	11.88	50
25.5	25.5	39.11	50
37.75	13.25	1	50
50	1	39.11	50
50	1	28.22	50
50	1	39.11	50
37.75	13.25	50	1
37.75	13.25	17.33	50



Table 7 reveals that in the wake of its comprehensive lawsuit reforms in 2009, Oklahoma has the best tort rules on the books, followed by Texas, Ohio, Colorado, and Mississippi. Keep in mind, for the reasons we discussed earlier, that having the best tort rules is not the same as having the lowest tort costs or tort litigation risks.

It is no accident that Oklahoma and Texas are first and second. Oklahoma's reforms were largely driven by the earlier reforms adopted in neighboring Texas. A state that reforms puts pressure on its neighbors to follow or be left behind in the competition to attract people and capital.

Once again, as in 2008, Rhode Island is at the bottom of the barrel, followed by New York, Pennsylvania, Minnesota, and Illinois. New York ranks 50th, dead last, in 19 of the 29 input variables, an eyepopping statistic indicating across-the-board failure and legislative indifference to lawsuit abuse.

Notice that even the states at the top of the list have much variability across the 29 input variables. Oklahoma, for example, is ranked first overall but is 50th in three of the variables; and the average of its individual rankings is 18. Second-place Texas is ranked 50th in eight of the variables. Neither state has reached tort nirvana. There is still room for improvement in all states, including those at the top.

America's federalist system encourages experimentation in the states; thus, there has always been much variation among state legal systems. The recent wave of civil-justice reform, which continues across the country, has added greater variation in tort rules. The current lawsuit-reform movement is best viewed as an attempt by some states to rein in what they perceive as excessive litigation without denying access to the courts for individuals with legitimate claims for injuries incurred. Some states have done more than others—and have needed to do more than others—to curb excesses.

Table 7 makes it easy to spot where tort reformers in each state might want to concentrate future efforts. For example, in California, reformers might want to target class-action rules and asbestos liability. In New York, reformers might want to target monetary caps and repose statutes. In Mississippi, adopting an attorney-retention sunshine law might be a high priority. And Texans might want to abandon partisan district elections to seat judges. Each state has different strengths and vulnerabilities, and table 7 reveals them.

# Saints, Sinners, Salvageables, and Suckers

By merging the output and input results, we can divide states into four groups: saints, sinners, salvageables, and suckers. 106 The saints are states that have relatively low monetary tort losses and/or low tort litigation risks and relatively strong tort rules on the books. These states are well positioned to contain their tort liability costs in the future if the rules are implemented as written. There are five states in this category: Alaska, Kansas, Louisiana, Ohio, and South Carolina (see table 8).

State	Outputs Ranking	Inputs Ranking	Classification
Alabama	25	33	Sinner
Alaska	1	16	Saint
Arizona	16	31	Salvageable
Arkansas	30	24	Sinner
California	41	27	Sinner
Colorado	32	4	Salvageable
Connecticut	42	29	Sinner
Delaware	20	23	Salvageable
Florida	48	21	Salvageable
Georgia	28	8	Salvageable
Hawaii	2	41	Sucker
Idaho	7	20	Sucker
Illinois	47	46	Sinner
Indiana	29	11	Salvageable
lowa	10	40	Sucker
Kansas	12	7	Saint
Kentucky	36	43	Sinner
Louisiana	11	12	Saint
Maine	6	42	Sucker
Maryland	24	44	Sinner
Massachusetts	17	10	Salvageable
Michigan	43	6	Salvageable
Minnesota	26	47	Sinner
Mississippi	21	5	Salvageable
Missouri	45	25	Sinner
Montana	44	34	Sinner
Nebraska	33	18	Sinner
Nevada	40	26	Sinner
New Hampshire	23	9	Salvageable
New Jersey	50	13	Salvageable
New Mexico	38	45	Sinner
New York	49	49	Sinner
North Carolina	3	30	Sucker
North Dakota	5	28	Sucker
Ohio	15	3	Saint
Oklahoma	35	1	Salvageable
Oregon	34	39	Sinner
Pennsylvania	46	48	Sinner
Rhode Island	39	50	Sinner
South Carolina	14	14	Saint
South Dakota	4	32	Sucker
Tennessee	22	22	Salvageable
Texas	18	2	Salvageable
Utah	13	15	Salvageable
Vermont	37	38	Sinner
Virginia	8	19	Sucker
Washington	31	37	Sinner
West Virginia	27	36	Sinner
Wisconsin	9	35	Sucker



The sinners are states that have relatively high monetary tort losses and/or high tort litigation risks and relatively weak tort rules on the books. The sinners are likely to face high and rising tort liability costs in the future if lawsuit abuse continues unchecked. There are 20 states in this category, including Alabama, California, Illinois, New York, and Pennsylvania.

The sinners are likely to face high and rising tort liability costs in the future if lawsuit abuse continues unchecked.

The salvageables are states that have moderate to high relative monetary tort losses and/or moderate to high tort litigation risks, yet have moderate to strong tort rules, probably as a result of recent reforms. If the rules are implemented as written on the books, the salvageables are positioned to do a better job of containing their tort liability costs and to move up in future output rankings as the benefits of reform feed back to improve outputs. There are 16 states in this category, including Colorado, Florida, Georgia, Mississippi, Oklahoma, and Texas.

Depending on the reform, this feedback process can be immediate or can take years. Writing about medical-liability reforms, Robert P. Hartwig and Claire Wilkinson noted: "It

may take a minimum of five years for states in which caps have only been recently introduced to see the resulting effect on premiums, and even longer to repair the balance sheets of insurers hit by very large payouts not envisaged when the policies were written years earlier."<sup>107</sup>

Of course, the salvageables will move up in the rankings only if they defeat challenges to beneficial reforms already enacted, and only if they keep pace with the beneficial reforms enacted by other states. The rankings are a constant ordinal race.

Finally, the suckers are states that have weak tort rules on the books because they currently have relatively low monetary tort losses and/or low tort litigation risks and, therefore, believe that reform is not needed. These states are a personal-injury lawyer's next green pasture. In the game of lawsuit "Whack-a-Mole," the suckers are the states where plaintiffs and their lawyers will pop up to pursue abusive lawsuits because these states have not pre-emptively closed off opportunities for excessive litigation. There are nine states in this category, including Idaho, Iowa, North Carolina, North Dakota, South Dakota, and Virginia.

States at the top of the *U.S. Tort Liability Index* have more predictable legal systems with less lawsuit abuse and fewer excessive awards. This is valuable in its own right, and it also results in many positive spillover effects for state economies, ranging from more jobs and greater innovation to improved health care and higher personal incomes. Chapter 4 looks at these benefits.





# We are all paying for lawsuit abuse whether we realize it or not.

## Chapter 4.

# THE BENEFITS OF LAWSUIT REFORM

According to our PRI study *Jackpot Justice*, excessive tort costs in the United States due to lawsuit abuse total \$589 billion each year.<sup>108</sup> But why should you care about these costs?

The reason is that we all pay for lawsuit abuse—about \$2,000 per person each year—in many ways: higher product prices, higher insurance premiums, higher taxes, reduced access to health care, lower wages, lower returns on investments in capital and land, and less innovation. But most people do not see these costs, because they are usually buried in the price of everything we buy. Perhaps Bernie Marcus, co-founder of The Home Depot and its former CEO, said it best: "Every product we sold—for example, lawn mowers, ladders, hammers—there's a dollar amount built into those products from the manufacturers [to pay for liability and legal costs]." We are all paying for lawsuit abuse whether we realize it or not.

Many states over the years have concluded that their civil-justice system is beyond the tipping point, and liability burdens have become a net cost to their economy at the margin. These states believe that their civil-justice system is a burdensome tax, weighing down the standard of living for ordinary citizens, and they have responded by enacting meaningful lawsuit reforms to improve fairness and predictability, lower costs, and increase economic growth and personal incomes.



Chapter 4 examines evidence from today's top economists and legal scholars on the benefits of lawsuit reform in people's lives. The studies we examine were drawn from the consensus view among those who have studied these issues. Although there are micro studies of a particular industry or type of liability, we have surveyed studies that provide a bird's-eye view of the benefits of lawsuit reform.

Connecting this evidence to the *U.S. Tort Liability Index* leads to one vital conclusion: A better *Index* ranking for a state—achieved through a commitment to meaningful lawsuit reform—translates, every-



thing else being equal, into a better legal environment in which to invest human, physical, and financial capital, the ingredients for self-sustaining economic growth and personal prosperity.

Legal scholar Ross Levine wrote: "Although changing legal codes and improving the efficiency with which legal systems enforce laws and contracts is difficult, the economic returns to improving the legal environment appear very large." Let's look at the returns from lawsuit reform, focusing first on direct benefits, followed by secondary, spillover benefits.

#### **Tort Losses and Tort Insurance Premiums**

In a new study, *Tort Law Tally*, Nicole V. Crain et al. identified which state tort reforms reduce tort losses and tort insurance premiums the most and by how much.<sup>111</sup>

Tort Law Tally used a quantitative analysis that compared losses and premiums in states that have implemented a particular tort reform to losses and premiums in states without this reform. The study assessed 25 specific reforms. Multivariate regression analysis controlled for a number of factors that cause tort losses and premiums to vary among states.

The statistical analysis identified 18 reforms in state civil-justice systems that significantly reduce tort losses and/or tort insurance premiums. If a state were to enact and implement all of the successful reforms, the cumulative effect—on average, across all tort categories and states—would be a 47 percent reduction in losses and a 16 percent reduction in annual insurance premiums for consumers. For some reforms, the savings are even bigger in certain tort categories. Meredith L. Kilgore, Michael A. Morrisey, and Leonard J. Nelson reported similar results in their study of the benefits of medical-liability reform on doctors' malpractice insurance premiums. They found that reforms lowered premiums up to 25 percent.<sup>112</sup>

The next sections examine the secondary, spillover benefits of lawsuit reform.



### **Productivity and Employment**

Thomas J. Campbell, Daniel P. Kessler, and George B. Shepherd examined the impact of liability reforms on labor productivity. Writing in *Brookings Papers on Economic Activity*, they measured the growth in productivity in states that changed their liability laws, and compared it with productivity growth in states where liability laws remained the same, using data from 1970 through 1990. They looked at eight types of legal reforms, ranging from caps on damage awards to caps on contingency fees and reform of joint and several liability—all variables in the *U.S. Tort Liability Index*.

The researchers concluded: "States that changed their liability laws to decrease levels of liability experienced greater increases in aggregate productivity than states that did not." Labor-productivity gains in states that enacted reform were about 2 percent greater from 1972 through 1990. This translates into an increase in output per worker per year of \$1,164 in 2009 dollars. Productivity in manufacturing increased even more, about 2.7 percent, or \$1,958 per worker. Over time, real wages per employee will increase to match these productivity gains. These findings confirm that legal reforms that curb exposure to liability lawsuits increase productivity.

{ Lawsuit reform can increase employment, too. }

University of California, Berkeley, economist Lisa Kimmel examined the effect of lawsuit reform on employment.<sup>114</sup> She looked at six common tort reforms adopted by states between 1970 and 1997: compensatory-damage caps; reform of the collateral-source rule; reform of joint and several liability; punitive-damage caps; periodic payment of judgment; and maximum contingency fee. Her statistical analysis showed that an additional tort reform increased employment in manufacturing (1.5 percent), construction (1.4 percent), wholesale trade (0.8 percent), automobile repair (1 percent), and local and interurban transit (1.5 percent). Meanwhile, an additional reform cut employment in the legal sector by 1 percent, which explains the continued opposition by personal-injury lawyers to meaningful reform. Overall, an additional tort reform increased total employment in a state by 1 percent. To put this into perspective, one additional tort reform in California would create more than 141,000 new non-farm jobs, and an additional tort reform in New York would create more than 85,000 new jobs.

One additional tort reform in California would create more than 141,000 new non-farm jobs, and an additional tort reform in New York would create more than 85,000 new jobs.

 $ig\{$  Another study has shown that lawsuit reform can save lives.  $ig\}$ 



#### **Accidental Deaths**

Paul H. Rubin and Joanna M. Shepherd examined the link between tort reform and accidental deaths. <sup>115</sup> Writing in the *Journal of Law and Economics*, Rubin and Shepherd posited two competing potential effects of tort reform on accidental deaths. On the one hand, tort reforms could increase accidents, as potential tortfeasors internalize less of the external costs of their actions and, thus, have diminished incentive to reduce the risk of accidents. Alternatively, tort reforms could decrease accidents, as lower expected liability costs result in lower prices and increased supply, enabling consumers to buy more risk-reducing products such as medicines, safety equipment, and medical services.

Tort reforms adopted by states in this period saved, on net, 24,000 lives.

The researchers measured which effect dominates by examining the impact of tort reforms adopted by states between 1981 and 2000 on accidental-death rates in cases not involving motor vehicles. The tort reforms that produced statistically significant effects were: caps on non-economic damages, higher standards of evidence to assess punitive damages, product-liability reform, reform to pre-judgment interest, reforms of the collateral-source rule that offset damage payments, and reforms of the collateral-source rule that allow a payment to be admitted into evidence. All of these reforms, except the two collateral-source reforms, decreased accidental deaths.

Overall, Rubin and Shepherd found that tort reforms adopted by states in this period saved, on net, 24,000 lives. They concluded that the U.S. tort system "is an extremely expensive system and can be justified only if it provides substantial deterrence," which it does not. 116 On balance, the current U.S. tort system costs lives—liability burdens exceed the tipping point. A PRI study estimated the cost of tort-related net accidental deaths in 2006 to be \$7.51 billion in terms of forgone output. 117

{ Tort reform saves lives, and it can also increase innovation. }

#### Innovation

U.S. product-liability law often discourages research and development (R&D) and, consequently, innovation. W. Kip Viscusi and Michael J. Moore examined the effects of product-liability costs on product and process R&D and on new-product introductions by manufacturing companies. Liability costs have two competing effects. First, product liability ideally should promote efficient levels of product safety by inducing companies to internalize the external costs imposed on people who are harmed by using their products. This should spur producers to invest more in safety-related product improvements and to introduce new products with safer technologies. This response increases R&D.



On the other hand, misdirected or excessive liability costs cause companies to spend resources on settling lawsuits, paying judgment awards, paying higher insurance premiums, and hiring additional lawyers—resources that might otherwise have been spent on product and process improvements. These costs also cause companies to withdraw or withhold products from the market because of a lack of resources or a fear of lawsuits. These effects decrease R&D. Viscusi and Moore looked at these two competing responses using data from the manufacturing industry.

Writing in the *Journal of Political Economy*, the researchers reported the results of their statistical analysis: "At very low liability-cost levels, firms have incentives to invest in product-safety research in order to reduce these costs, yet still introduce the product to the market." In other words, when businesses operate in a low-liability-risk environment, they respond to increased liability burdens by investing in product-safety improvements and new technologies that will lessen their exposure to safety-related lawsuits. This response increases R&D.

In contrast, when businesses operate in a high-liability-risk environment, they respond to increased liability burdens by eliminating investments in product novelty because new products have more uncertain safety characteristics. Think of it this way: In high-liability-risk environments, businesses are already doing all they can to produce inherently risk-free products in order to shield themselves from safety-related lawsuits—it would be irrational to act otherwise. If liability burdens increase, the only option at that point is to withdraw products from the market, or not introduce new products, and spend yet more resources on legal defense. These responses decrease R&D, indicating a tipping point at which greater liability burdens result in less, not more, innovation.

Viscusi and Moore's econometric results demonstrate that, on average, product R&D is maximized when bodily-injury premiums equal 5 percent of sales or when bodily-injury insurance losses equal 6 percent of sales. Beyond these tipping-point percentages, R&D investments begin to fall.

Viscusi and Moore's analysis found that 13 manufacturing industries were beyond the tipping point where additional liability burdens reduce innovation. These industries produce some of the most highly litigated products, such as asbestos, chemicals, fireworks, tires, safety valves, power tools, welding equipment, saws and slicers, electrical equipment, book matches, lighters, and houses. For these industries, tort reform would increase innovation. Viscusi and Moore concluded that their findings

13 manufacturing industries were beyond the tipping point where additional liability burdens reduce innovation.

"identify a strong relationship between liability and innovation that has made the courts a major player in the product innovation process." A PRI study concluded that the suppression of product R&D and process R&D due to excessive liability costs resulted in lost sales of new products of more than \$367 billion in 2006 alone. 122

{ Lawsuit reform can also improve health care. }



#### **Defensive Medicine and Health Care Access**

According to one estimate, every year one out of eight doctors is sued personally for alleged medical negligence. Medical-liability concerns, therefore, often prompt health care providers to order more tests, referrals, and procedures than they would otherwise deem necessary in order to avoid being sued. This practice is referred to as defensive medicine. According to a survey of doctors published in the *Journal of the American Medical Association*, 93 percent of physicians admit to practicing defensive medicine. Another survey of physicians published by the Massachusetts Medical Society in 2008 reported that about 25 percent of medical procedures are defensive in nature.

Tort reforms that eliminated unnecessary, defensive medicine would cut health care costs by \$191 billion each year, enabling greater access to health care through more affordable health insurance.

Building on a seminal academic journal article by Daniel P. Kessler and Mark McClellan, <sup>126</sup> we estimated in our white paper *The Facts about Medical Malpractice Liability Costs* that 8 percent of total health care expenditures each year—or more than \$191 billion in 2008—are the result of defensive medicine. <sup>127</sup> In other words, tort reforms that eliminated unnecessary, defensive medicine would cut health care costs by \$191 billion each year, enabling greater access to health care through more affordable health insurance.

According to our estimates in *Jackpot Justice*, increased health care costs due to defensive medicine have added 3.4 million Americans to the rolls of the uninsured. Compared to the insured, the uninsured tend to have higher mortality rates due to a lack of, or reduced rate of, certain types of care. The uninsured also are less productive members of the workforce because of absenteeism (fewer or shorter paid workdays resulting from poor health) and "presenteeism" (reduced productivity at work attributable to poor health).

Researchers at PRI totaled the costs of premature deaths and lost productivity due to the reduced access to health care attributable to defensive medicine and arrived at a figure of nearly \$39 billion in 2006. This is in addition to the \$191 billion in direct defensive-medicine expenditures. Medical-liability reform, therefore, not only would improve health care, but would also save billions of dollars annually for other uses. 130

 $ig\{$  Lawsuit reform can also improve state economic performance.  $ig\}$ 



#### **State Economic Performance**

When entrepreneurs are deciding where to open a new business, expand operations, or market a new product, they weigh the comparative costs and benefits of different locations. The tax structure, education level of local workers, transportation networks, technological capabilities of area universities, and weather are all factors that are assessed. Another factor is the state's legal system. Is it a secure legal system that is fair and predictable? Does it protect private-property rights and render timely court decisions? If the answer is yes, the state will attract entrepreneurs and capital, foster competition, and experience faster economic growth as a result.

We examined the connection between a healthy state tort system and a strong state economy.<sup>131</sup> The health of a state's tort system was determined by its ranking in the 2006 *U.S. Tort Liability Index*. We found that states with better tort climates at the beginning of 2006 had better economic performance throughout the year.

In 2006, job growth was 57 percent greater in the 10 states with the best tort climates than in the 10 states with the worst tort climates. Labor-earnings growth was more than 5 percent greater in the best states. And state GDP, a comprehensive measure of economic activity, grew 25 percent faster in the 10 best tort states than in the 10 worst.

A healthy tort climate also improves a state's fiscal health. In 2006, the top 10 tort states had an average growth rate of tax revenues that was 24 percent greater than that of the bottom 10. The greater infusion of tax revenue was due to higher economic growth, not higher tax rates. In fact, taxpayers in the top tort states paid effective tax rates that were 8 percent lower in 2006 than those in the bottom states.

Census data show a 232 percent difference in net state-to-state migration rates in 2006 between the top states (net inflow of people) and bottom states (net outflow of people). In other words, people were fleeing predatory legal environments and moving to less threatening locations. A healthy civil-justice system provides a supply-side boost, expands economic opportunities, and increases a state's employment, earnings, economic output, and tax revenues.

Another study has confirmed the link between a state's legal system and its economic performance. Todd G. Buchholz and

Job growth was 57 percent greater in the 10 states with the best tort climates than in the 10 states with the worst tort climates.

Robert W. Hahn examined the effect of a state's legal environment on the growth rate of its real gross state product (GSP) per capita. <sup>132</sup> They used the *State Liability Systems Ranking Study* conducted for the U.S. Chamber of Commerce's Institute for Legal Reform by Harris Interactive to rank the states according to how fair and reasonable each state's tort liability system is perceived to be by senior litigators in large companies.



The researchers found that per-capita GSP increased by 0.75 percent for every 10 percent improvement (or five-place jump) in a state's legal ranking.<sup>133</sup> For example, if New York's ranking improved 10 places—an optimistic but not unobtainable goal—annual state output would increase by \$17 billion and state tax revenue would increase by \$1.04 billion.<sup>134</sup> Buchholz and Hahn concluded: "A state that imposes a capricious or arduous court system on businesses is likely stunting its growth compared

If New York's ranking improved 10 places—an optimistic but not unobtainable goal—annual state output would increase by \$17 billion and state tax revenue would increase by \$1.04 billion.

with a state that offers a more reasonable structure."

Next, an international comparison shows that the U.S. tort system is the most expensive in the world. If lawsuit reform lowered U.S. tort costs to levels comparable with those of other countries, it would free huge amounts of productive resources and make U.S. companies more competitive globally.

## **National Output and Individual Well-Being**

Compared to the tort systems of other countries with advanced economies, such as Germany, Japan, and the United Kingdom, the U.S. tort system is the most expensive in the world—about double the average cost of the tort systems in other industrialized nations—and has been for many years. <sup>135</sup> Direct tort costs as a percentage of GDP average about 1 percent in 10 industrialized countries with standards of living comparable to the United States. In contrast, direct tort costs are 2.09 percent of GDP in the United States. <sup>136</sup> This 1.09 percentage point difference is a huge drain on the productive resources and economic potential of the U.S. economy. It is a cost borne by U.S. companies that is not also paid by major foreign competitors. It also puts the United States at a disadvantage in attracting foreign direct investment. <sup>137</sup>

If lawsuit reforms were enacted in the United States that shaved direct tort costs down to 1 percent of GDP and, as a result, also eliminated indirect costs such as net accidental deaths, lost innovation, and defensive medicine, resources valued at \$589 billion would be freed each year. To put it into perspective, this amount is roughly equivalent to the entire annual output of the state of Illinois. The cost of lawsuit abuse in the United States is equivalent to a 7 percent tax on consumption or a 10 percent tax on wages. The annual price tag, or "excess tort tax," for a family of four in terms of costs and forgone benefits is \$7,848.



If the U.S. lawsuit industry were comparable in relative size to those of other industrialized countries, the freed resources would enable the creation of new innovative products, new companies, and new jobs at higher wages and with better health care benefits. U.S. businesses would be in a better position

to compete in global markets. The standard of living for ordinary Americans would rise more rapidly. The U.S. economy would approach its full productive potential.

Instead, enormous resources are wasted today on the unnecessary and unproductive redistribution of wealth—rent-seeking and rent-avoidance activities, as economists call them—that occurs with excessive tort lawsuits, making society poorer in the process.

Table 9 summarizes the benefits of lawsuit reform. The message is clear: Lawsuit reform can cut insurance premiums; increase productivity, employment, output, earnings, and the tax base; boost innovation and sales of new products; lower health care costs while improving health care access; and save lives. Given these profound and sweeping benefits, state lawmakers and ordinary citizens would be wise to promote and enact legal reforms that eliminate lawsuit abuse.

Enormous resources are wasted today on the unnecessary and unproductive redistribution of wealth that occurs with excessive tort lawsuits, making society poorer in the process.

Meaningful lawsuit reform will improve a state's ranking in future editions of the *U.S. Tort Liability Index*. But more important, a reformed state will be a more favorable place to invest human, physical, and financial capital—the ingredients for new businesses, new products, new jobs, and an improved standard of living for everyone. States that maintain an onerous legal environment, on the other hand, might as well hang a sign at the state line saying "Businesses Not Welcome."



Study	Year	Benefit of Lawsuit Reform	
<b>Tort Losses and Tort Insurance Premiums</b> Crain et al.	2009	A 47% reduction in losses and a 16% reduction in annual insurance premiums.	
Kilgore, Morrisey, and Nelson	2006	Even more savings for doctors' liability insurance premiums.	
<b>Labor Productivity</b> Campbell, Kessler, and Shepherd	1998	A 2% increase in labor productivity. A \$1,958 increase in output per employee per year in manufacturing (with subsequent increases in real wages).	
<b>Employment</b> Kimmel	2001	A 1.5% increase in manufacturing employment. A 1% increase in total state employment, or more than 141,000 jobs in California.	
Accidental Deaths Rubin and Shepherd	2007	24,000 lives saved, net, 1981–2000.	
McQuillan, Abramyan, and Archie	2007	\$7.51 billion in additional output per year (2006 dollars).	
<b>Innovation</b> Viscusi and Moore	1993	Greater innovation in 13 manufacturing industries if product-liability burdens cut.	
McQuillan, Abramyan, and Archie	2007	\$367 billion per year in sales of new products (2006 dollars).	
Defensive Medicine and Health Care Access Kessler and McClellan McQuillan and Abramyan McQuillan, Abramyan, and Archie Hellinger and Encinosa	1996 2009 2007 2003	Eliminate defensive-medicine costs of \$191 billion each year (2008 dollars). Enable 3.4 million more Americans to afford health insurance, generating \$39 billion in additional output per year (2006 dollars). Increase the number of physicians in a state.	
State Economic Performance McQuillan and Abramyan	2007	Jobs, earnings, output, tax revenue, and population grow faster in top tort states than in bottom, and tax rates are lower too.	
Buchholz and Hahn	2002	A 0.75% hike in per-capita state GSP for every 10% (five-place) improvement in state's legal ranking.	
<b>National Output and Individual Well-Being</b> McQuillan, Abramyan, and Archie	2007	\$589 billion saved per year if U.S. tort-cost levels comparable in relative size to those of other industrialized countries; an annual benefit for a family of four of \$7,848 (2006 dollars).	



# **APPENDIX**

## **The Civil-Litigation Process**

Below is a general explanation of how the civil-litigation process works from beginning to end. Each state has different rules and procedures, so it will not fit any state precisely. But it is a general overview that will answer many questions for those unfamiliar with the process.

We depict the lawsuit industry as a probability game of gambles and payoffs. Figure 4 shows where each of our variables, measuring an input or an output, falls in the lawsuit industry.

#### Civil-Case Procedure before Trial 140

A lawsuit begins when a plaintiff files a complaint with the proper court. The complaint identifies parties involved in the case and describes, in short and plain sentences, the nature of the grievance and the remedy sought. A copy of the complaint is served to each of the defendants along with a summons. The summons states that the defendant must respond to the complaint in a given number of days.

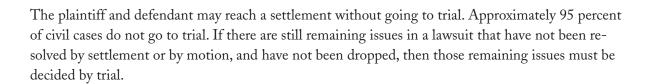
The defendant responds to the complaint by filing an answer in the same court, within the required time period. The defendant must either admit to or deny the allegations in the complaint, or state that he has insufficient knowledge to admit to or deny them. If no answer or other responsive pleading is filed within the time allowed by law, the court may enter a default judgment in favor of the plaintiff.

The next stage in a civil case is discovery, allowing all parties to inform themselves fully of the relevant facts in the lawsuit. Typical discovery includes asking questions of party and non-party witnesses via interrogatories or depositions, and reviewing documents obtained by subpoena or by a request for production of documents.

Interrogatories are written questions served to one party by another. Interrogatories are used to gather information about the theories of the opponent's claims and/or defenses, and to discover potential witnesses and documents. The opposing party, under oath, must answer these questions within a set number of days.

Depositions are oral interrogatories—questions asked in person of individuals who might know something about the subject matter of the lawsuit. Depositions are generally taken under oath before a certified court reporter. The deposition is the sworn testimony of the deponent, and may be used in court.

After a plaintiff files a complaint, the defendant may, instead of filing an answer, file pre-trial motions, which are responses to the complaint but do not constitute an answer. Many of these responsive motions must either be filed before the answer, or be included with the answer; otherwise they are waived.



#### **Civil-Case Trial Procedure**

Depending on the type of action, a case may be tried before a judge (bench trial) or before a jury with a judge presiding. Whether it is a judge trial or a jury trial, the procedure is essentially the same. (Evidence suggests, however, that juries are significantly more likely to award punitive damages than are judges, and the punitive and compensatory awards by juries are higher.<sup>141</sup>)

At the trial's beginning, the clerk calls a panel of prospective jurors. The judge, or in some cases the lawyers, ask the potential jurors questions about their background and general beliefs to determine any biases or prejudices. This process is called *voir dire*. If the judge determines that a juror is not qualified for the case, the juror is excused "for cause." There is no limit to the number of jurors who can be dismissed for cause. Both sides are also entitled to a limited number of "peremptory challenges," which means they may excuse some prospective jurors without stating any reasons (unless the motive appears racial).

When the jury has been impaneled, an attorney for the plaintiff must (and an attorney for the defense may) make an opening statement to inform the court and the jurors of the nature of the case, the evidence his side will present, and the facts he expect to prove. The defense may choose to wait to make an opening statement until after the plaintiff has rested its case, or it may choose not to make an opening statement at all.

Each side makes its case based on testimony from witnesses and physical evidence. The plaintiff calls its witnesses for direct examination to state what they know about the alleged injury. The defense may ask questions of the same witnesses (cross-examination). Then the plaintiff may re-examine its witnesses (redirect). Physical evidence, such as documents, pictures, and other exhibits, is introduced at this time.

After the plaintiff has rested its case, the defense may call witnesses to give testimony to disprove the plaintiff's case and to establish the defendant's case. The plaintiff may cross-examine the defense witnesses. The defense may then re-examine its witnesses.

When the defense has presented all its witnesses, the plaintiff may again call witnesses to rebut any new information introduced by defense witnesses. The judge may allow surrebuttal (a rebuttal to the rebuttal) by the defense.

Before the attorneys present their closing arguments, the judge instructs the jurors carefully as to what law they are to apply. In civil cases, the jury must determine that a preponderance of the evidence



favors one party—unlike criminal cases, in which the defendant must be found guilty beyond a reasonable doubt to be convicted.

After the jury has been instructed, both attorneys summarize the evidence and testimony in an effort to persuade the jury (or the judge, in a bench trial) to decide the case in favor of their client. The plaintiff makes its closing argument first, then the defense, and then the plaintiff responds to the defense's

The size of the jury and the percentage needed to reach a verdict vary in different jurisdictions.

closing argument. Either side may waive closing arguments. After closing arguments, the court orders the jury to retire to the jury room for deliberations.

A verdict is reached if a certain percentage of the jurors agree. In criminal trials, the verdict must be unanimous. In civil trials, the verdict may be less than unanimous. The size of the jury and the percentage needed to reach a verdict vary in different jurisdictions. If the jury cannot reach a verdict, that constitutes a "hung jury," and the judge must declare a mistrial. In civil cases, two types of verdicts may be rendered—general and special. In a general verdict, the jury has decided the case in fa-

vor either of the defendant or of the plaintiff. In a special verdict, a general decision is not announced. Rather, the jury has answered certain factual questions, leaving the "total" decision up to the judge.

After the verdict, or after the court has decided the facts in a bench trial, a judgment is rendered. The court may award money damages and/or injunctive relief. The defendant and plaintiff may settle even after the verdict, if they choose.

Appellate and supreme courts may subsequently review trial-court judgments.

The civil-litigation process described above can also be viewed as a probability game.

## The Lawsuit Industry as a Probability Game

Figure 4 depicts the lawsuit industry as a probability game of gambles and payoffs and also shows where each of the *Index* variables, measuring an input or an output, falls in this process. The variables are described in chapter 2 (outputs) and chapter 3 (inputs).

Figure 4 shows a company at the top of the diagram. The company can self-insure or purchase insurance to protect itself against the risk of various liabilities. For example, it could have product-liability insurance, general-liability insurance for such things as "slip and fall," and commercial automobile insurance.

Next in figure 4 is the pool of potential plaintiffs. This pool includes customers, employees, suppliers, and neighbors/general public. **P1** is the probability that one of these individuals will file a lawsuit. Before a lawsuit is filed, two questions must be answered in the affirmative by the plaintiff's lawyer.

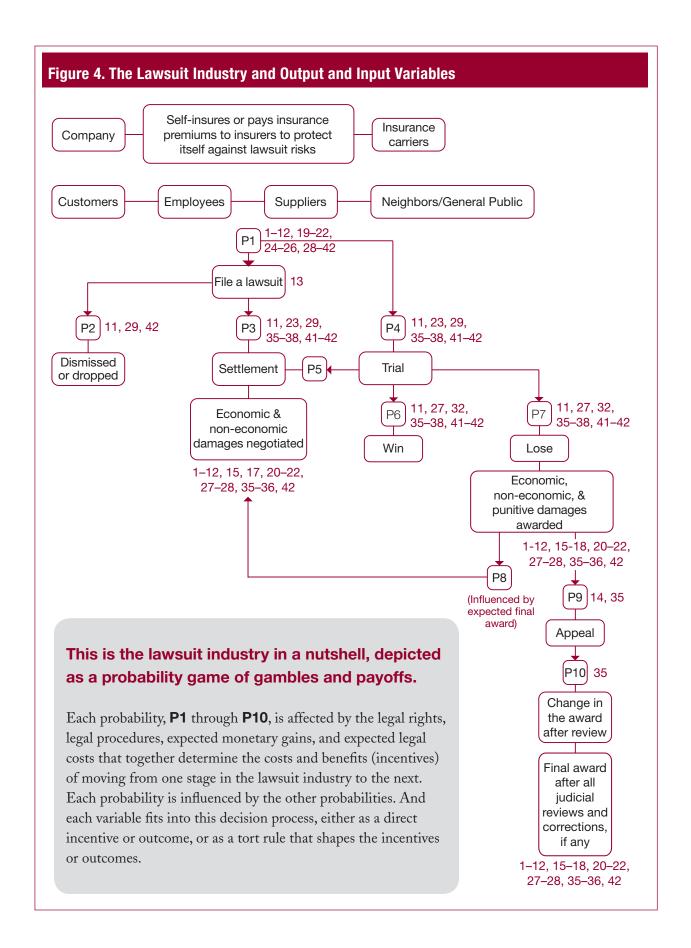


The first is a question of law: Do the merits of the case justify moving forward? The second is a question of economics: Will the case provide net revenues to the law firm? If both answers are "yes," the lawsuit is filed.

If a lawsuit is filed, there are three initial possibilities: (1) the lawsuit is dismissed or dropped; (2) a settlement is negotiated before the case goes to trial; or (3) the case goes to trial. There is a probability, **P2**, **P3**, and **P4**, respectively, associated with each possibility.

Before a lawsuit is filed, two questions must be answered in the affirmative by the plaintiff's lawyer. If the case is settled before trial, a remedy is negotiated between the plaintiff and the defendant (the company) that might include the defendant's paying the plaintiff economic and non-economic damages. If the case proceeds to trial, one of three outcomes is possible: (1) the case is settled before a verdict is reached (**P5**); (2) the defendant wins in a jury or judge trial, or the case is dropped (**P6**); or (3) the defendant loses in a trial (**P7**) and the plaintiff is awarded economic, non-economic, and, possibly, punitive damages.

If the company loses, there is a probability (**P8**) that both parties will still prefer to settle at that point. If a settlement is not reached, there is a probability (**P9**) that the company will appeal the judgment. If an appellate court reviews the case, there is a probability (**P10**) that the judgment will be overturned or modified, ultimately affecting the final award after all judicial reviews and corrections, if any.







# **ENDNOTES**

- 1 National Center for State Courts, Court Statistics Project, Examining the Work of State Courts, 2006. A thorough description of the sources of tort data and their limitations is provided in Eric Helland, Jonathan Klick, and Alexander Tabarrok, "Data Watch: Tort-uring the Data," Journal of Economic Perspectives, vol. 19, no. 2 (spring 2005), pp. 207-220.
- 2 2008 Update on U.S. Tort Cost Trends (New York: Tillinghast-Towers Perrin, 2008).
- 3 Our method for estimating medical-malpractice tort losses differs from the method used by Tillinghast. For a discussion of the merits of our approach, see Lawrence J. McQuillan and Hovannes Abramyan, The Facts about Medical Malpractice Liability Costs, Health Policy Prescriptions, vol. 7, no. 10 (San Francisco: Pacific Research Institute, October 2009), pp. 1–2.
- 4 U.S. Tort Costs and Cross-Border Perspectives: 2005 Update (New York: Tillinghast-Towers Perrin, 2006).
- 5 Philip K. Howard, "Making Civil Justice Sane," City Journal (spring 2006).
- 6 The Journal of Empirical Legal Studies calls PRI one of America's "leading organizational proponents of tort reform."
- 7 Lawrence J. McQuillan, Hovannes Abramyan, and Anthony P. Archie, Jackpot Justice: The True Cost of America's Tort System (San Francisco: Pacific Research Institute, 2007).
- 8 See Lawrence J. McQuillan, Michael T. Maloney, Eric Daniels, and Brent M. Eastwood, U.S. Economic Freedom Index: 2008 Report (San Francisco: Pacific Research Institute, 2008).
- 9 2008 Update on U.S. Tort Cost Trends.
- 10 Source: © A. M. Best Company—used by permission.
- 11 We contacted Conning & Company, Judy Diamond Associates, and the Self-Insurance Institute of America to inquire whether they had self-insurance data in a form that would not require an estimate, but they did not.
  - We calculated each state's personal self-insurance tort losses as a percentage of state GDP using the data provided by A. M. Best Company and information in appendix 4 of Tillinghast's study. We followed these steps: (1) we added together for each state direct losses incurred for homeowners' multiple-peril [liability portion] insurance and for private passenger automobile-liability insurance; (2) that sum was then divided by 0.98 to yield each state's total personal tort losses (insured plus self-insured); (3) each state's personal insurance tort losses (found in step 1) was subtracted from the state's total personal tort losses (found in step 2), yielding each state's total personal selfinsurance tort losses; finally (4) the outcome of step 3 was divided by the state's GDP for 2008 and multiplied by 100 to achieve the personal self-insurance tort losses as a percentage of state GDP, 2008.

We calculated each state's commercial self-insurance tort losses as a percentage of state GDP as follows: (1) we added together for each state direct losses incurred for commercial automobile-liability insurance, farmowners' multiple-peril [liability portion] insurance, commercial multiple-peril (liability portion) insurance, other general-liability insurance, medical-malpractice liability insurance, and product-liability insurance; (2) this sum was divided by (1.0 minus 0.35)\* to yield each state's total commercial tort losses (insured plus self-insured); (3) each state's commercial insurance tort losses (found in step 1) were then subtracted from its total commercial tort losses (found in



- step 2) to yield each state's total commercial self-insurance tort losses; finally (4) the outcome of step 3 was divided by each state's GDP for 2008 and multiplied by 100 to yield each state's commercial self-insurance tort losses as a percentage of state GDP, 2008. We expressed both commercial and personal self-insurance tort losses as a percentage of state GDP under the assumption that greater economic activity generates more torts (and therefore exposure to potential tort losses). \*We used 35 percent rather than 34.4 percent (see appendix 4 of Tillinghast's study) because the portion of commercial tort costs that are self-insured has been trending upward, so it is likely to have been higher in 2008 than the 2007 portion. Use of 35 percent is also consistent with our previous editions of this index.
- 12 We reduced each state's insured losses by 2 percent to reflect, in Tillinghast's words: "an estimate of non-U.S. business in the [A. M. Best] data" (p. 9). Also, homeowners' and farmowners' insurance lines each include liability (tort) coverage and first-party property coverage. The A. M. Best data do not separate the two coverages, so we used the method applied by Tillinghast. Based on its experience in the insurance industry, Tillinghast estimates that 9 percent of the losses for the homeowners' and farmowners' insurance lines are tort related (p. 9). Therefore, we subtracted 91 percent from losses incurred for these two insurance lines, leaving us with the tort liability portion, and then we calculated the loss ratio.
- 13 The data source for each denominator is listed in an Excel file posted on PRI's Web site at http:// special.pacificresearch.org/pub/sab/2010/tort\_reform/.
- 14 Editorial, "Schumer's Tort Epiphany," Wall Street Journal, January 29, 2007, p. A16.
- 15 VerdictSearch, Top 100 Verdicts of 2008 (New York: American Lawyer Media, 2009).
- 16 Judicial Hellholes 2009–2010 (Washington, D.C.: American Tort Reform Foundation, 2009).
- 17 Ibid., p. 8.
- 18 American Bar Association, "National Lawyer Population by State," http://new.abanet.org/ marketresearch/PublicDocuments/2009\_NATL\_LAWYER\_by\_state.pdf; and U.S. Bureau of Economic Analysis, "News Release: Gross Domestic Product (GDP) by State, 2008," http://www. bea.gov/newsreleases/regional/gdp\_state/gsp\_newsrelease.htm/.
  - Some people have questioned the validity of this variable because many lawyers in certain states work on so-called "national" cases, not "state" cases. While true, this variable still has value because (1) the human capital of lawyers is transferable from national work one day to state work the next day; (2) national lawyers often hear about events or potential clients and refer them to state lawyers for lawsuits; (3) national lawyers are tapped to deliver votes and campaign contributions at the state level for political influence, especially on legislation and in elections affecting the tort system; and (4) so many companies across the country have a presence in states with many "national" lawyers that these lawyers working on national cases still have a major impact on the economic performance of their resident state—New York immediately comes to mind. For these reasons, this variable is an important relative indicator.
- 19 Thomas J. Campbell, Daniel P. Kessler, and George B. Shepherd, "The Causes and Effects of Liability Reform: Some Empirical Evidence," NBER Working Paper W4989 (Cambridge, MA: National Bureau of Economic Research, 1995).
- 20 James R. Copland, Trial Lawyers Inc.: K Street—A Report on the Litigation Lobby, 2010 (New York: Center for Legal Policy at the Manhattan Institute for Policy Research, 2010), p. 8.
- 21 Mark J. Browne and Robert Puelz, "Statutory Rules, Attorney Involvement, and Automobile Li-



- ability Claims," Journal of Risk and Insurance, vol. 63, no. 1 (1996), pp. 77-94.
- 22 Kevin M. Murphy, Andrei Shleifer, and Robert W. Vishny, "The Allocation of Talent: Implications for Growth," Quarterly Journal of Economics, vol. 106, no. 2 (1991), pp. 503–530.
- 23 National Center for State Courts, Court Statistics Project, state court caseload statistics, http://www. ncsconline.org/D\_Research/csp/CSP\_Main\_Page.html/. For the most part, 2006 data on total state tort caseloads were straightforward. In its Examining the Work of State Courts publication, the NCSC provided data for most states. But data were missing for the following states: Alabama, Georgia, Illinois, Louisiana, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Vermont, Virginia, and Wyoming. Data for Pennsylvania and West Virginia are also notably underreported, and so we treated them as missing. To address the missing data, a multi-step procedure was used.

Data for the aforementioned states were imputed under the assumption that they are missing at random. In other words, we assumed the missing states are random with regard to the amount of true caseload. This assumption allows us to predict tort caseload values for these states using another variable that is very highly correlated. The correlated variable we used was total incoming state trial court civil cases—also provided in the NCSC publication, and for which we had complete data. A bivariate model shows that 70 percent of the variance in total state tort caseloads is accounted for by total incoming state civil cases.

Before imputing the missing data it was necessary to re-express the data on total state civil cases. These data are presented by the NCSC in terms of a rate per 100,000 people. Using 2006 state population estimates from the U.S. Bureau of the Census, we translated the data to absolute numbers of civil cases for each state. This step ensured that both our variables were expressed in the same units: counts representing absolute numbers of cases.

Imputation was conducted using linear regression, with total state tort caseload as the dependent variable and absolute number of state trial court civil cases as the independent variable. Tort caseload values are predicted for the aforementioned 14 states using the model's computed parameter estimates:  $(\hat{Y}_i = 114.4 + 0.036X_i\hat{Y}_i = 114.4 + 0.036X_i)$ . This approach is similar to that used by political scientist David R. Mayhew in Divided We Govern: Party Control, Lawmaking, and Investigations, 1946–2002 (New Haven: Yale University Press, 2005). Our final step was to standardize the now complete set of state tort caseload values by dividing them by 2006 state GDP. Data on state GDP came from the Bureau of Economic Analysis.

- 24 Susan A. MacManus and Patricia A. Turner, "Litigation as a Budgetary Constraint: Problem Areas and Costs," *Public Administration Review*, vol. 53, no. 5 (1993), pp. 462–472.
- 25 There were several output variables that we thought of, or that people suggested to us, that proved not to be available. We thought of allocating the total Tillinghast tort costs across all 50 states. However, according to Russ Sutter—the primary author of the study, a consulting actuary with Tillinghast-Towers Perrin, and a principal of Towers Perrin—it is not possible to disaggregate Tillinghast's total tort costs by state given its aggregated method of constructing the study. (Telephone conversation between Lawrence McQuillan and Jennifer McClellan on behalf of Russ Sutter.)

Another suggested variable was average attorneys' fees as a percentage of awards or settlements by state. Another alternative we pursued was the amount that companies or corporations spend on legal costs/fees by state as a percentage of state GDP. According to Professor Geoffrey P. Miller



of the New York University School of Law, who has conducted path-breaking work on attorneys' fees, those data are not available. (E-mail correspondence between McQuillan and Professor Miller.) See Theodore Eisenberg and Geoffrey P. Miller, "Attorney Fees in Class Action Settlements: An Empirical Study," Journal of Empirical Legal Studies, vol. 1, no. 1 (2004), pp. 27-78. We were unable to find any comprehensive or systematic data on defense costs incurred across states. Though 2003 data were available from Georgia State University, we were unable to locate updated figures on these costs. Since these data came not from any published report, but instead from the calculations of a professor with access to a database on such costs, this information has not been updated regularly.

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McQuillan speaks regularly to civic and policy groups across the country and to reporters around the world. His television appearances include NBC news, FOX, CNBC, and CNN. YouTube hosts some of his interviews. He is a frequent guest on nationally syndicated radio talk shows hosted by Ron Insana, Jim Bohannon, Roger Hedgecock, Ronn Owens, and Lars Larson, to name a few. He advises lawmakers and advocacy groups around the world, provides legislative testimony, and was a member of Governor Arnold Schwarzenegger's task force on a constitutional spending limit for California.

McQuillan has had more than 240 articles published in such leading outlets as the Wall Street Journal, New York Times, Chicago Sun-Times, Los Angeles Times, Washington Times, San Francisco Chronicle, New York Daily News, Weekly Standard, Forbes, USA Today, and Investor's Business Daily. He writes on such topics as lawsuit abuse, economic freedom, tax and spending limits, workers' compensation, and medical-liability reform.

McQuillan created the California Golden Fleece Awards, exposing fraud and abuse in California government. Cited in The Nation and the Los Angeles Times, these awards led to the overhaul of the California Victim Compensation Program, helped reform California's workers' compensation system, and made PRI "one of the leading players" to end direct taxpayer funding of the University of California's Miguel Contreras Labor Program.

From 1998 until 2001, McQuillan was a research fellow at the Hoover Institution, Stanford University, where he specialized in international economics. He edited the book *The International Monetary Fund:* Financial Medic to the World? (translated into Japanese) and wrote the study The Case against the International Monetary Fund, which Nobel laureate Milton Friedman described in his review as "excellent."

From 1993 until 1997, McQuillan was the founding publisher and contributing editor of *Economic* Issues, a national subscription newsletter based in Chapel Hill, North Carolina, which reviewed

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While in graduate school at George Mason University in Fairfax, Virginia, where he earned an M.A. and a Ph.D. in economics, McQuillan was a research assistant for Nobel laureate James M. Buchanan and received the H. B. Earhart Fellowship for research excellence. Trinity University in San Antonio, Texas, awarded him a B.A. in economics and business administration.



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Abramyan earned a B.A. in political science from the University of California at Berkeley, graduating with honors distinction. He recently earned an M.A. in political science from the University of California at Los Angeles, where he is currently a doctoral student in political science.



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