THE LEGAL REFORM NEW JERSEY NEEDS NOW

New Jersey is consistently rated as having one of the worst legal climates in the country. The Pacific Research Institute's latest U.S. Tort Liability Index called New Jersey the second worst tort system in the nation, ranking our state 49th out of 50. The study found that New Jersey has one of the most burdensome systems in terms of the size of awards, and that relative to other states, we have more lawyers seeking and winning bigger awards.

All of us shoulder the burden of New Jersey's 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 New Jersey Civil Justice Institute urges the Legislature to adopt the following package of reforms in order to restore fairness and predictability to New Jersey's court system, and thus improve the state's legal climate and economic outlook.

AMENDING NEW JERSEY'S CONSUMER FRAUD ACT

The New Jersey Consumer Fraud Act (CFA) was enacted in 1960 to protect New Jersey citizens against deceptive business practices. As one of the first consumer protection laws in the country, it was heralded as a great success and served as the model for similar legislation in many other states.

Over the years, the law has been amended by the legislature, and expanded by the courts, into an enormous and unwieldy piece of legislation. Compliance is difficult, especially for New Jersey's small businesses. It is prone to abuse, incentivizes unnecessary litigation, and makes even technical violations extraordinarily costly to resolve. It is now a significant national outlier in the burdens it places on businesses and the court system.

Though suing under the CFA was never intended to be an avenue of first resort when resolving business disputes, especially minor ones where there are alternatives to litigation, it is increasingly common. Why is this happening?

- Plaintiffs do not have to prove that defendants actually defrauded or deceived them to recover damages or attorney's fees. In many cases a technical violation will suffice.
- Plaintiffs do not need to show out-of-pocket losses.
- Plaintiffs do not need to live in New Jersey to file a claim here.

The broad scope of the law, and the ease with which suits can be filed, has many unintended consequences:

- **Discouraging job creation and entrepreneurship in New Jersey.** The risk of CFA litigation is a deterrent to legitimate businesses coming to New Jersey. Making lawsuits the default form of problem solving in routine business disputes discourages job creation and leads to a diminished tax base, less vibrant communities, and higher prices for goods and services.
- **Higher costs for consumers.** The price of protecting against potential lawsuits and defending against existing ones is built into the prices paid by New Jersey's consumers.
- **Wasting public funds.** As New Jersey streamlines its state budget, and taxpayers are forced to do more with less, excessive litigation is costing our courts precious time and resources.

NJCJI urges the legislature to adopt **A3497/S2293**, which is being sponsored by Assembly Members O'Donnell (D-31), Webber (R-26) Space (R-24) & McHose (R-24) and Senators Oroho (R-24) & Van Drew (D-1). The bill would:

- Require plaintiffs to prove that they were aware of, and relied to their detriment on, an unlawful method, act, or practice when they purchased the product or service at issue;
- Limit the applicability of the CFA to transactions occurring in the State of New Jersey or to transactions with New Jersey residents;
- Limit the CFA's applicability to actions and transactions not otherwise permitted or regulated by the FTC or any other federal regulator;
- Require consumers to ask for their money back or for the alleged fraud to be fixed prior to bringing suit;
- Allow the court discretion in awarding up to three time the amount of actual damages, as opposed to New Jersey's current system of mandatory treble damages; and
- Prohibit the courts from awarding attorneys' fees and court costs for "technical violations" of the CFA.

CAP APPEAL BONDS FOR ALL DEFENDANTS

A key protection against an unfair civil verdict is the ability to seek recourse through an appeal. In order to access an appeal, however, most defendants in New Jersey are required by law to post the entire amount awarded as a bond before they may appeal the decision against them. Judges can also require that additional bond money be posted to secure attorneys' fees and court costs.

New Jersey's current law regarding appeal bonds does not reflect the consequences of contemporary litigation and the current state of the economy. It can be difficult for many small and mid-sized businesses to obtain the financing they need in order to secure large appeal bond requirements. Even large employers can have a difficult time doing so, especially in cases where they rent office space and therefore lack the collateral necessary for securing capital. In these cases, final judgment rests more on economic factors rather than it does on both parties trusting that their case has been fairly decided. This leads to several negative outcomes:

- **Pressure to pay.** Even though rulings may be overturned or significantly reduced on appeal, the high costs of an appeal bond may deter legitimate appeals and force payment for claims that arguably should not be paid. This deprives the courts of the opportunity to review the claim, and may cause honest New Jersey businesses irreparable harm to their reputation and economic viability.

- **Bankruptcy.** Should a company choose to proceed with an appeal, the inability to obtain or afford the bond may result in a company filing for bankruptcy in order to stay the judgment. When this happens, the funds expended by a business to finance a bond for the duration of an appeal – which may last months or years – are lost and never recovered, even if the appeal is ultimately successful.

- **Decline in key industries.** Appeal bonds disproportionately impact businesses and service providers that do not own large facilities or possess hard assets against which a bond can be levied, including high tech, bio-tech, and research-based companies, all of which are major drivers of economic growth in New Jersey.

A1055/S2052, which is being sponsored by Assembly Members Schaer (D-36), McKeon (D-27) & Wimberly (D-35) and Senator Rice (D-28), would cap appeal bonds at $50 million, or the total value of the monetary judgment, whichever is less. This matches the bond cap New Jersey currently grants to tobacco companies. Giving all defendants the benefit of a reasonable cap on appeal bonds ensures justice prevails over economics.

CLASS ACTION REFORM: INTERLOCUTORY APPEAL OF CLASS CERTIFICATIONS

Parties to class action suits in New Jersey state courts do not have a right to an immediate, or interlocutory, appeal of a court's decision to certify, or not certify, a class of plaintiffs. Parties can only appeal certification decisions at the time they are made if the appellate court gives them permission to do so. Most courts are loath to grant a motion for interlocutory review because they generally do not doubt their own decision-making. This means that class certification decisions can be appealed as of right only after the case has been litigated to final judgment.

Why is this bad?

New Jersey's current practice disfavoring interlocutory review of certifications emphasizes economics over justice, and invites plaintiffs to file weak claims.

In New Jersey state courts, the class certification decision often has a greater effect on the outcome of the litigation than the underlying merits of the case. For plaintiffs whose class certification has been denied, the costs of continuing the litigation to final judgment as an individual party are frequently economically prohibitive.

Class certification often triggers the end of litigation for defendants as well. When a questionable class certification decision is made, the defendant faces a no-win situation: it can spend resources

litigating a class action case that may have been erroneously certified, or it can settle, even if it did nothing wrong. Most choose to settle.

When class certification serves as the death knell for litigation, the interests of justice are not being served.

Allowing for an Interlocutory Appeal as of Right Would Solve This Problem

A rule change permitting interlocutory appeal of class certification decisions would enhance the predictability and fairness of the judicial process, and increase the likelihood that courts reach decisions based on the merits of the cases before them.

The entire federal system and a handful of states, including Connecticut, New York, and Pennsylvania, already allow for interlocutory appeal of class certification decisions. A similar change to New Jersey law would ensure this state's litigants also have an opportunity to correct class certification errors.

Either the Courts or the Legislature Could Address This Issue

Though they are by definition procedural, class certifications are in practice dispositive, and thus substantive. This means that either the courts or the legislature could make this policy change.

The NJ Supreme Court Committee on Civil Practices has, at NJCJI's request, formed a subcommittee to consider changing Court Rules to allow for the interlocutory appeal of class action certifications as of right. The next report of the Committee will be issued in early 2016.

NJCJI is also lobbying in favor of **A2756/S1911**, sponsored by Assemblyman Wisneiwski (D-19) and Senator Barnes (D-18), which would make this change legislatively.

ESTABLISH FIRM STATUTES OF LIMITATIONS

All civil claims are subject to statutes of limitations, which are basically countdowns that begin when someone is injured. When the time period specified by the applicable statute of limitations runs out, a claim may no longer be brought. These laws discourage unnecessary delay, and preclude the prosecution of stale or fraudulent claims. They are essential to a fair and well-ordered civil justice system.

The task of defending any type of claim becomes more difficult as time passes. Witnesses become difficult to locate or pass away, records are lost or discarded, and memories fade. The ordinary "he-said-she-said" of litigation can turn into a one-sided allegation by a plaintiff that an event happened because the person says it happened, while the defendant lacks the ability to appear or muster facts that might disprove the allegation. The New Jersey Civil Justice Institute supports strong statute of limitations for all types of claims to ensure that defendants are not denied due process simply because time has passed.

A1254, which is being sponsored by Assembly Speaker Prieto (D-32) and Assembly Members Wimberly (D-35), Diegnan (D-18), Garcia (D-33) & Coughlin (D-19), would bar plaintiffs from suing certain licensed professionals more than two years after an injury has accrued. This change will

bring New Jersey's law more in line with the laws of the surrounding states, and prevent licensed professionals in the state from having to defend against lawsuits filed an unreasonable amount of time after their interaction with the plaintiff.

FEDERAL PREEMPTION

Currently everything from pharmaceutical products and medical devices to the labels on prepared foods are subject to regulation at the federal level, under the Food and Drug Administration (FDA). But they are also effectively subject, by varying degrees, to *ad hoc* regulation at the state level via litigation. The conflict between these two competing regulatory regimes is a growing concern. We should leave the regulation to the regulators, and provide that where the federal regulatory process has approved a given product or label, that approval preempts state litigation.

Assemblyman Carroll (R-25) has introduced legislation that would address this issue. **A3581** would establish immunity from liability for a manufacturer or seller for harm caused by a failure to warn, where a warning or instruction given in connection with a drug, device, food, or food additive has been approved or prescribed by the federal Food and Drug Administration.

DISCOURAGE UNNECESSARY FEE-SHIFTING

Fee-shifting provisions are showing up in proposed legislation in New Jersey with increasing frequency. These provisions, which allow prevailing plaintiffs to recover attorney's fees and court costs, incentivize litigation, discourage settlement, and drive up the cost of lawsuits.

Encouraging Lawyers to File Cases of Dubious Merit

In New Jersey, fee-shifting provisions reward attorneys for taking a gamble on questionable cases. The standard fee-shifting language authorizes the court to grant "reasonable" attorney's fees to the prevailing party, typically the number of hours worked on the case multiplied by the attorney's hourly rate. However, New Jersey courts are then permitted "enhance" awards by tacking on as much as double the actual fees to compensate attorneys for the contingency that they might not have been paid for their work had they lost the case. That contingency will be highest in those cases where there was the greatest risk of nonpayment, so the most marginal of cases potentially reward the plaintiff's attorneys with the highest fees.

Impediment to Settlement

Fee-shifting also impedes settlement and creates potential conflicts of interest between lawyers and their clients. While the consumer hopes to obtain compensation as quickly as possible, the lawyer, whose fees are being covered by someone other than his client, has little incentive to settle.

In addition, New Jersey has an offer of judgment rule which is designed to encourage settlement and discourage rejection of reasonable settlement offers. Under the offer of judgment rule, should either party make a settlement offer that is rejected, the rebuffing party is responsible for the offering party's attorney fees and court costs incurred from the time the offer was made if the final outcome is within 20% of the rejected offer. Fee-shifting provisions nullify this rule, eliminating the state's single most powerful tool for encouraging settlement, thus compounding the incentives toward litigation and against resolution.

Proliferation in State Legislation

Despite the added expenses and inefficiencies, fee-shifting provisions are increasingly being added to bills targeting a variety of relatively narrow substantive issues. Bills with fee-shifting introduced this legislative session include everything from a requirement that digital records be deleted from photocopiers before the machines are discarded, to the regulation of pharmacy internet sales, to limits on rent increases on senior citizens' apartments.

Proponents argue that fee-shifting provisions enhance access to the courts for plaintiffs who might lack the resources to hire an attorney. However, plaintiffs could often obtain redress far more efficiently via an administrative remedy with a schedule of fines, likely without incurring the added expense of hiring lawyer.

The New Jersey Civil Justice Institute therefore believes that fee-shifting provisions should be used sparingly, only at the request of the bill sponsor, and only in situations where litigation is necessary to resolving a dispute and compensating an injured party.

AMEND THE TRUTH-IN-CONSUMER CONTRACT, WARRANTY AND NOTICE ACT (TCCWNA)

Over the last year we have seen an unprecedented number of Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA) lawsuits filed in New Jersey courts. This consumer protection law has been on the books for years, but has been the subject of few lawsuits until recently. So what is driving the sudden uptick in TCCWNA cases?

- TCCWNA suits can be brought by plaintiffs who suffer no injury or actual harm in cases where the defendant was acting in good faith. For example, a consumer can sue a business if they brought a product whose warranty says "void where prohibited by law." Furthermore, that warranty could be offered by the manufacturer, and the business owner would still be liable even if they didn't know the product came with a warranty. The court's application of TCCWNA has reached a point that it is so broad compliance is virtually impossible.
- Courts are allowing TCCWNA claims to be brought as class actions, even when the composition of the class is questionable. The $100 automatic damages provision in the statute, combined with the ease with which courts are certifying classes, is incentivizing lawyers to bring an increasing number of these cases.
- The government has ceded enforcement of TCCWNA to private attorneys, so they are technically "private Attorney General" cases. The courts look favorably on private Attorney General cases under the assumption that the government approves of the action being brought. However, it is not clear that the government would approve of many of the cases that are being brought because they are an extremely harsh reaction to what are often minor violations. If the government itself was doing the enforcement it would likely use its power of prosecutorial discretion to let some violators off the hook if they correct their mistakes.

The legislature should amend TCCWNA to make sure the state is not unnecessarily incentivizing litigation.

Medical Liability Reform: Strengthening the Affidavit of Merit Requirement

In order to file a medical malpractice claim, the New Jersey statutes require plaintiffs to submit an affidavit of merit from a board-certified medical professional, with expertise in the medical procedure at issue, attesting that the care provided by the defendant fell outside acceptable professional standards.

In 2010, the New Jersey Supreme Court significantly weakened the state's affidavit of merit requirements with its ruling in *Ryan v. Renny* by allowing a certificate from a general surgeon in a case where the defendant was a board-certified specialist.

The legislature should clarify that the affidavit of merit law requirements should only be waived under the circumstances outlined in the statute, such as when a specialist is not available. This will ensure that physicians are being justly accused of wrongdoing.

Update New Jersey's Standards For Expert Testimony

New Jersey was one of the first jurisdictions to recognize the increasing importance of expert testimony in modern litigation, one of the first to stress the importance of judicial gate keeping, and one of the first to adopt a more structured multi-factor test for examining the validity of expert testimony. Unfortunately, New Jersey can no longer claim it is on the cutting edge when it comes to ensuring weak expert testimony is barred from the courtroom.

New Jersey is one of only a handful of states that have not yet adopted some form of the federal *Daubert* standard for expert testimony. Under the *Daubert* standard, before a witness offers expert testimony the judge must:

- Determine whether the offered evidence is based on sufficient facts or data;
- Confirm that the evidence is the product of reliable principles and methods; and
- Ensure the evidence is based on the application of those principles and methods to the facts of the case.

This three-part screening process keeps junk science out of the courtroom, ensuring justice is not thwarted by a scientific charlatan.

In contrast, New Jersey's evidentiary rules allow for any testimony that "will assist the trier of fact to understand the evidence or to determine a fact in issue." Under this much weaker standard, state court judges often allow testimony which might be barred as unreliable in federal court and in the majority of other state's state courts.

It is time to update New Jersey's rule on expert testimony to keep junk science out of the courtroom.

ENSURE FOREIGN JUDGMENTS ARE FAIRLY ENFORCED

When courts outside of the United States hear disputes involving U.S. citizens, those foreign judgments can be brought back to the U.S. for enforcement against U.S. assets. The law on the recognition and enforcement of foreign judgments is a matter of state law, so there is an incentive to forum-shop for the most lenient court system.

As noted by the New Jersey Law Revision Commission, New Jersey has not updated its laws on foreign judgment recognition since 1962.

The legislature should update New Jersey's law on foreign judgment recognition to protect the procedural and substantive rights of judgment debtors and to discourage forum shopping both within the United States and abroad.

INCREASE SETTLEMENT TRUST TRANSPARENCY

Numerous types of personal injury trusts have been created under the federal bankruptcy code and state laws to ensure that injured people can be properly compensated even if the defendant company ceases to exist. The "easy money" that flows out of these settlement trusts tends to attract unscrupulous players, who cheat the system or double-dip in order to increase their compensation.

The lack of transparency in the trust claims process makes cheating and double-dipping difficult to catch. In some instances, plaintiffs who file, or could file, claims with these settlement trusts may also seek compensation for their injuries through a second channel – lawsuits against solvent defendants in the courts.

By filing their personal injury trust claims after their lawsuits have concluded, and otherwise hindering access to the exposure information presented to trusts, the plaintiffs' bar is denying businesses an opportunity to fully and fairly defend themselves, and giving plaintiffs a windfall. Equally problematic is that the double-dipping by plaintiffs and their lawyers is unfair to other personal injury victims because it depletes the corpus of the trust and could thus limit recovery by future plaintiffs.

Numerous New Jersey-based companies, including many small and medium sized businesses, are being hurt by the current lack of trust claims transparency. As a state with a strong manufacturing sector, New Jersey businesses stand to lose if the double-dipping and fraud related to settlement trusts is not curtailed.

Several other states have passed legislation that would increase transparency in the settlement trust process to deter double-dipping and maximize fair compensation for injured parties. Such reforms:

- Require plaintiffs filing tort actions to disclose whether they have filed or anticipate filing a claim against a settlement trust;
- Direct the plaintiff to disclose any materials relevant to plaintiff's parallel claims against the trust, for purposes of allocating liability for the plaintiff's injury; and

- Ensure that any settlement trust recovery is setoff against any parallel recovery against a defendant at trial.

New Jersey should adopt legislation that increases transparency and discourages fraud so that settlement dollars are available only to legitimately injured parties and solvent defendants are not paying for injuries caused by other parties.

By enacting these reforms, New Jersey can make real strides in improving its legal climate. In the short run, legal reform can send an important pro-business message without the loss of tax receipts or an increase in spending. In the long run, states with improved litigation climates have higher job creation rates, leading to increased revenue collections and lower unemployment.

If you have questions about any of these policy initiatives, or would like to help NJCJI advocate for them, please contact a member of the NJCJI team or visit the NJCJI website http://www.civiljusticenj.org.