



## BRINGING COMMON SENSE TO OUR LEGAL SYSTEM

Our court system shouldn't have to deal with suits over the length of sandwiches,<sup>1</sup> amusement park rides that make kids too dizzy,<sup>2</sup> and gassy co-workers.<sup>3</sup> But it does.

Why? Because numerous state laws explicitly encourage litigation when other means of dispute resolution would be quicker and more cost effective; poorly drafted statutes invite endless lawsuits over their interpretation; and antiquated policies limit the ability of our state to improve its legal climate.

Things have gotten so far off track, New Jersey has been named one of the nation's worst "judicial hellholes."<sup>4</sup> At this point, there is nowhere to go but up, and the time is right to make changes, both legislatively and via judicial action.

Below is a list of 11 common sense reform measures that would ensure New Jersey's legal system is well-positioned for the future and ready to shake its bad reputation.

### More Sensible Consumer Protection Laws

According to the *New York Times*, Josh Finkelman is the "Erin Brockovich of Super Bowl tickets."<sup>5</sup> After paying well over face value for tickets to Super Bowl XLVIII, which was held at Met Life Stadium, he sued the National Football League under New Jersey's Consumer Fraud Act, arguing he should have been able to attend the game without buying expensive tickets on the secondary market.

Three years and multiple dismissals later, this case is still dragging on. This is just one example of the types of abusive lawsuits that New Jersey's Consumer Fraud Act (CFA) encourages.<sup>6</sup>

The CFA is not the only consumer protection law being abused by people looking to make a quick buck. Over the past couple years, we have seen an unprecedented number of Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA) lawsuits filed in New Jersey courts.<sup>7</sup> This consumer protection law has been on the books for decades, but has been the subject of few lawsuits until recently. What is driving this surge in litigation? Plaintiffs' lawyers have figured out the law is a quick ticket to jackpot justice.

The latest trick is to find a website whose terms of service include the phrase "void where prohibited" or some other boilerplate language that does not specify whether it applies in New Jersey or not, then file a TCCWNA class action claiming every person who ever visited the website has been victimized.<sup>8</sup> The law is so vaguely drafted, companies are settling these ridiculous suits because they don't want to spend the time and money fighting them, or risk losing hundreds of thousands of dollars if a judge buys the plaintiffs' arguments.<sup>9</sup>

Rather than incentivizing legal shakedowns, our consumer protection laws should be doing what their name suggests - protecting consumers. It's time we enact some common sense reforms that keep consumer protections in place, but don't encourage legal abuse for profit.

### **Class Action Reform**

"If you bought a Subway Six Inch or Footlong Sandwich between January 1, 2003 and October 2, 2015 your rights could be affected by a lawsuit."<sup>10</sup> This ominous message from subsettlement.com is intended to alert sandwich-eaters everywhere that our long national nightmare is over, the Subway "Footlong" lawsuit has been settled.

So, what does the sandwich-loving public get from this litigation? Money? Free sandwiches for life?

Nope.

The named plaintiffs get \$500 a piece, the attorneys get \$525,000, but all the other Joe Schmoe plaintiffs only get assurances that Subway will improve its quality control program.<sup>11</sup> This is a rather underwhelming reward considering Subway already weighs all the dough before it bakes it, so even if your bread is 11 inches long, you still get the same amount of bread as the 12 inch folks, it's just thicker. You also get the same amount of toppings since that is standardized by Subway.

The courts should step up their gatekeeping role and bring greater scrutiny to class action cases and settlements. Class actions are supposed to help the plaintiffs recover losses, not merely compensate enterprising attorneys.

### **An Appealing Policy Change**

Did you know New Jersey is one of only eleven states where the court system is required to give tobacco companies a benefit that other defendants are denied? It's true. As part of the Master Settlement Agreement reached in 1998, the New Jersey Legislature agreed to put a cap on the amount of money tobacco companies must post as bond in order to appeal adverse verdicts in exchange for money and other concessions from the five tobacco companies involved in the litigation.<sup>12</sup> To this day, tobacco companies are the only defendants in New Jersey that get the benefit of an appeal bond cap.

Compare this to Florida, where the "Hulk v. Gawk" sex tape saga played out last year. Although the internet media company's owners ultimately decided to cut their losses and settle with the Hulkster instead of appealing the \$130 million verdict against them,<sup>13</sup> if they had appealed, and were required to post a bond, it would have been capped at \$50 million thanks to a relatively recently enacted Florida law.<sup>14</sup>

It is time for New Jersey to recognize that in today's world of high-dollar verdicts, tobacco companies are not the only litigants who might want to appeal a big case. Our state should adopt an appeal bond cap for all defendants. Giving all companies the ability to appeal big verdicts against

them without mortgaging their future or declaring bankruptcy is good legal policy. Like plaintiffs, defendants should have their day in court; and appeal bond caps allow that to happen.

### **Establish Firm Statutes of Limitations**

Do you remember what you had for lunch yesterday? How about 2 weeks ago? How about 10 years ago? Even if you do remember, do you think you could come up with evidence - like witnesses or receipts - to back up your story, or do we just have to take your word for it?

The task of proving or 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 statutes of limitations for all types of claims to ensure that defendants are not denied due process simply because time has passed and a mounting a defense is impossible.

### **Stop Regulating Business One Jury at a Time**

When the only tool you have is a hammer, a lot of your problems start looking like nails. Reading through many of the bills that have been proposed to address employment and consumer issues over the past few legislative sessions, you might think the only tool the legislature has for bringing bad actors into line is the hammer of litigation. Litigation is a powerful tool, but it is not the only way, or even the best way, to solve every problem.

The New Jersey Civil Justice Institute opposes legislation that seeks to regulate business one jury at a time rather than relying on other, more uniform and predictable enforcement mechanisms.<sup>15</sup> In many situations, the parties involved could obtain justice far more efficiently via an administrative remedy with a schedule of fines without incurring the added expense of hiring lawyer.

NJCJI will also continue to advocate against including unnecessary fee-shifting provisions in legislation that is enforced via litigation.<sup>16</sup> These provisions, which allow prevailing plaintiffs to recover attorney’s fees and court costs, always benefit attorneys, but can end up harming plaintiffs. In general, fee-shifting provisions should be used sparingly, and should only be included in legislation at the request of a bill’s sponsor.

### **Medical Liability Reform**

Over the past couple years, a number of studies and surveys have drawn attention to an emerging problem in the healthcare industry – care is being dictated not just by medical necessity, but also by fear of litigation.<sup>17</sup> Defensive medicine is just one symptom of a larger problem. Our sue-happy legal

culture is also driving up the costs of liability insurance for physicians to the point that many are restricting their practices, moving out of state, or retiring.<sup>18</sup>

The New Jersey Civil Justice Institute is working with a coalition of healthcare professionals and providers interested in advancing common sense reforms that will preserve patients' access to care and help reduce health care costs while protecting doctors from frivolous litigation.

### **Keeping Junk Science Out of New Jersey's Courtrooms**

There's a big difference between astronomy and astrology, but both fields of study have experts and conduct what they consider to be scientific research. That, in a nutshell, is the reason New Jersey needs to update its court rules governing the admissibility of expert testimony during trials. Judges need to have a time-tested and trial-perfected set of rules that they can apply consistently to keep junk science out of the courtroom.

New Jersey judges currently operate under a different set of rules than the federal courts, which means that evidence that would be barred from federal court is sometimes allowed into New Jersey courtrooms.<sup>19</sup> It is time to update New Jersey's rule on expert testimony so that state court judges are tasked with keeping junk science out of our courtroom just like their counterparts on the federal bench. Both plaintiffs and defendants have an interest in having only solid science in front of a jury.

### **Fight Settlement Trust Fraud**

The system that was set up to compensate victims of the asbestos industry is plagued by fraud.<sup>20</sup> Billions of dollars are being held in trust for victims of the asbestos industry, but rather than filing trust claims, unscrupulous attorneys are filing lawsuits against still-viable companies which manufactured equipment that included an asbestos part (like a gasket or brake pads). The plaintiffs in these cases swear the only asbestos they ever came into contact with came from these companies' products, yet as soon as they get a payout from the company, they file claims with the asbestos trusts alleging other asbestos exposure.<sup>21</sup> These plaintiffs and attorneys are either lying to the courts or to the bankruptcy trusts. No matter which, it is fraud.

New Jersey should adopt legislation that increases transparency and discourages fraud so that solvent defendants are not paying for injuries caused by other parties, and bankruptcy trusts are not drained by people who have already been made whole.

### **Federal Preemption**

Have you taken XYZ drug and are now suffering from complications? You may be eligible for compensation! The television ads for lawyers seeking drug and medical device clients are never-ending. It's gotten so bad, lawyers might as well dust off the old "I'm not a real doctor, but I play one on TV" line since patients are starting to pay as much attention to these ads as they are their own doctors.<sup>22</sup>

Let's leave the regulation of drugs and medical devices to the regulators at the Food and Drug Administration (FDA), by providing that where the federal regulatory process has approved a given product or label, that approval preempts state-level litigation.

### **Preserving Access to Alternative Dispute Resolution**

Most people would rather get a root canal than go to court, yet New Jersey's lawmakers and jurists seem to be determined to force people to litigate rather than allowing access to other means of dispute resolution. Arbitration is faster, cheaper, and recognized by the court system itself as being just as fair as litigation,<sup>23</sup> yet there have been numerous bills introduced in the New Jersey Legislature to curtail it, and a recent line of cases from the New Jersey Supreme Court very much disfavors arbitration.<sup>24</sup>

New Jersey must stop trying to snuff out arbitration. Whether through legislation or by the courts, any attempt to hold arbitration agreements to a higher standard than other contractual provisions just because they involve arbitration is bad policy. It is also contrary to federal law, and the United States Supreme Court's interpretation of that law.

### **High Quality Courts**

Anyone who has watched *Boardwalk Empire* or read the books by Judge Nelson Johnson that inspired the show's producers, knows what a disgrace New Jersey's legal system was prior to its 1947 reform.<sup>25</sup> The court system we have now is better, but New Jersey's consistent appearance in the American Tort Reform Association's "Judicial Hellholes" report<sup>26</sup> is cause for concern.

New Jersey's court system is making several big changes this year that will position it to once again become a model for the nation.<sup>27</sup> New judges are being added, and seats that have been vacant for years are being filled.<sup>28</sup> E-filing is expanding,<sup>29</sup> and a new law that assesses risk instead of holding people in jail unless they can come up with bail money is being implemented.<sup>30</sup> Let's not stop there.

If we want to improve the quality of our courts, we must ensure independent, capable judges are appointed and retained. To attract such high-qualified jurists, the selection of New Jersey's judges must be timely and transparent, their compensation just,<sup>31</sup> and their workload reasonable.

New Jersey must also continue to modernize its court system. E-filing<sup>32</sup> should be an option in all cases, and experiments like the Complex Business Litigation Program (CBLP)<sup>33</sup> should be applauded, and expanded if successful.

*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-economic growth 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.*

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- <sup>2</sup> U.S. Chamber Institute for Legal Reform, *Six Flags Sued Over Child Losing Balance on Bugs Bunny Ride*, May 11, 2016, <http://www.instituteforlegalreform.com/resource/six-flags-sued-over-child-losing-balance-on-bugs-bunny-ride->.
- <sup>3</sup> Keith Brown, *Trenton Pork Roll Maker Fired Man For Farting, Lawsuit Says*, TIMES OF TRENTON, October 2, 2015, [http://www.nj.com/mercer/index.ssf/2015/10/lawsuit\\_trenton\\_pork\\_roll\\_maker\\_fired\\_man\\_for\\_fart.html](http://www.nj.com/mercer/index.ssf/2015/10/lawsuit_trenton_pork_roll_maker_fired_man_for_fart.html).
- <sup>4</sup> American Tort Reform Foundation, *Judicial Hellholes 2016-2017*, December 2016, <http://www.judicialhellholes.org/wp-content/uploads/2016/12/JudicialHellholes-2016.pdf>.
- <sup>5</sup> Alan Feuer, *Lone Fan Tackles the N.F.L. Over Super Bowl Ticket Prices*, NY TIMES, January 31, 2014, <https://www.nytimes.com/2014/02/02/nyregion/lone-fan-tackles-the-nfl-over-super-bowl-ticket-prices.html>.
- <sup>6</sup> New Jersey Civil Justice Institute, *New Jersey’s Consumer Fraud Act Hall of Shame*, July 11, 2014, <http://www.civiljusticenj.org/new-jerseys-consumer-fraud-act-hall-of-shame/>.
- <sup>7</sup> New Jersey Civil Justice Institute, *The Truth About TCCWNA*, <http://www.civiljusticenj.org/issues/the-truth-about-tccwna/>.
- <sup>8</sup> Time Darragh, *Those Terms and Conditions (That Nobody Reads) Could Cost N.J. Retailers*, NJ.com, August 18, 2016, [http://www.nj.com/news/index.ssf/2016/08/those\\_terms\\_and\\_conditions\\_that\\_nobody\\_reads\\_could.html](http://www.nj.com/news/index.ssf/2016/08/those_terms_and_conditions_that_nobody_reads_could.html).
- <sup>9</sup> *Id.*
- <sup>10</sup> *In re Subway Footlong Sandwich Marketing and Sales Practices Litigation* Settlement Website, <http://www.subsettlement.com/>.
- <sup>11</sup> Jacob Gershman, *Subway ‘Footlong’ Settlement Short on Dough*, WALL STREET JOURNAL, October 20, 2015, <http://blogs.wsj.com/law/2015/10/20/subway-footlong-settlement-short-on-dough/>.
- <sup>12</sup> New Jersey Civil Justice Institute, *An Appealing Policy Change*, July 10, 2015, <http://www.civiljusticenj.org/an-appealing-policy-change/>.
- <sup>13</sup> Jonathan Randles, *Gawker, Hulk Hogan Settlement Wins Court Approval*, WALL STREET JOURNAL, December 14, 2016, <http://www.wsj.com/articles/gawker-hulk-hogan-settlement-wins-court-approval-1481664760>.
- <sup>14</sup> Peter Sterne, *Jury Awards Hulk Hogan \$115 Million as Gawker Looks to Appeal*, POLITICO, March 18, 2016, <http://www.politico.com/media/story/2016/03/jury-awards-hulk-hogan-115-million-as-gawker-looks-to-appeal-004433>.
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- <sup>23</sup> Stephen L. Carter, *Arbitration Is Everywhere and Not All Bad*, BLOOMBERG, Nov. 3, 2015, <http://www.bloombergview.com/articles/2015-11-03/arbitration-is-everywhere-and-not-all-bad>.
- <sup>24</sup> See U.S. Legal Services Group, *L.P. v. Patricia Atalese*, 219 N.J. 430 (2014).
- <sup>25</sup> Nelson Johnson, *BOARDWALK EMPIRE: THE BIRTH, HIGH TIMES, AND CORRUPTION OF ATLANTIC CITY* (2010); Nelson Johnson, *BATTLEGROUNDS NEW JERSEY: VANDERBILT, HAGUE AND THEIR FIGHT FOR JUSTICE* (2014).
- <sup>26</sup> American Tort Reform Foundation, *Judicial Hellholes 2016-2017*, December 2016, <http://www.judicialhellholes.org/wp-content/uploads/2016/12/JudicialHellholes-2016.pdf>; American Tort Reform Foundation, *2015-2016 Judicial Hellholes*, December 2015, <http://www.judicialhellholes.org/wp-content/uploads/2015/12/JudicialHellholes-2015.pdf>; American Tort Reform Foundation, *2014-2015 Judicial Hellholes*, December 2014, <http://www.judicialhellholes.org/wp-content/uploads/2014/12/JudicialHellholes-2014.pdf>.
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- <sup>30</sup> New Jersey Judiciary, *Criminal Justice Reform Information Center*, <http://www.judiciary.state.nj.us/criminal/cjr/>.
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- <sup>32</sup> New Jersey Judiciary, *New Jersey eCourts*, <http://www.judiciary.state.nj.us/ecourts/index.htm>.
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