# UNITED STATES TORT REFORM UPDATE - 2005

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The United States tort system continues to be a focus of attention and debate. Doctors no longer want to practice for fear of lawsuits; asbestos litigation has bankrupted numerous venerable corporations - including some that never manufactured or distributed asbestos products. Total U.S. tort costs have resumed their upward spiral. According to Tillinghast, it took more than $200 Billion in 2002 to compensate injured parties for alleged negligence. That number is projected to be $300 Billion in 2005. That comes out to almost $1,000 per U.S. citizen per year...a slight growth of about 7,000% since 1950. As a percentage of GDP, that is a bit more than 2% or more than double any other industrialized country.

Here is the bad part, according to Tillinghast, payment of economic losses account for only 22% of that total number. Attorneys fees (defense and plaintiff) take up 33%. Selling and administering insurance policies costs account for another 21% with the remaining 24% covering non-economic damages such as pain and suffering and punitive damages - the supposed punishment of the wrongdoer.

So, using the $300 Billion figure for 2005, a little more than $65 Billion will reimburse the injured for medical bills and wage lost. The other $235 Billion goes elsewhere. Plaintiffs will charge $55 Billion to recover $70 Billion in non-economic loss. Defense lawyers will bill a paltry $41 Billion to make sure that overpayments are not made.

Lets face it, given this economic impact, the US is simply not ready to make fundamental changes in the tort system. At best, we can hope for small changes over time. What those changes have been and may soon be will be discussed today.

## What Caused this Increase in Liability Costs?

1. Expanded Basis for Liability: That is, where there used to be a strict requirement that negligence...a deviation from the standard of care be found, liability is now based not on fault, but on compensation for the injured. There is a reluctance to find that an injured person is responsible for their own injury. Further, in certain products liability cases, strict liability is the rule – which imposes liability upon defendants who are in no sense at fault, merely regarded as sufficiently well financed to compensate the injured. Joint and several liability expands the basis for liability to those which may only be vicariously liable or a mere fraction of percentage at fault (read: not at all at fault)

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2. Increase in Number of Lawyers: Medical researchers have switched from using white mice for experiments to using lawyers. There are more of them, lawyers will work for less, and there are just some things a rat wont do. Obviously, the shear number of lawyers creates the market for lawsuits. For each lawsuit filed one or more defense lawyers are needed.

3. Increase in Legal Specialization and Technology: Again obvious. On the technology side, the plaintiffs' bar is incredibly adept at sharing information from testimony given by experts, to senior members of drug company defendants, and in sharing tools that have proven successful in other cases. This wealth is shared such that a small time local lawyer now has access to the same information as the King of Torts. Technology also permits and encourages these so-called lead counsel from around the country to share in each and every case around the country. Increased legal specialization in such matters as asbestos, pharmaceuticals and the like tends to focus the cases with those firms specializing. They can easily reach out and advertise for the cases, join with smaller firms around the country and attack.

4. Investment Market: Corporations in the U.S. have given themselves a very bad name. This has led not just to Sarbannes Oxley, but to distrust globally. People i.e. juries, believe they all have hidden knowledge of defects and all are bad actors. This leads to a tendency to find liability and lots of it.

5. Contingency Fee System: Simply put, encourages plaintiffs with a questionable case to bring it. If they had some exposure, they would think twice. Keep in mind as well, the class action abuses where a plaintiffs' firm will take $10 million in fees, while the individual plaintiffs will get a coupon for a cheeseburger.

6. Class Action Abuse: There has been a significant increase in class action litigation in state courts in recent years - perhaps as much as 1,000%. These suits are frequently an attempt to force a settlement from corporate defendants in very questionable circumstances and certainly without any significant proof of wrongdoing. These settlements also often lead to large contingency fees for lawyers and little recovery for the injured party. The Class Action Fairness Act of 2005 was signed in February. It will be discussed below.

7. Litigation Tourism and Venue Abuse: Bringing an action to a judicial hellhole. They are magnet jurisdictions – places where judges systematically apply laws and court procedures in an unfair and unbalanced manner, usually against defendants; have no relationship to the case – the injury did not occur there, the plaintiff does not live there, the defendant does not live there.

**Judicial Hell-holes**

As indicated, a "Judicial Hellhole" is a place where judges systematically apply laws and court procedures in an unfair and unbalanced manner, usually against defendants and which often have no relationship to the case – the injury did not occur there, the plaintiff does not live there, the defendant does not live there. The American Tort Reform Foundation has identified areas of the U.S. where the scales of justice are way out of balance.

Before discussing those jurisdictions, let's ask - is this concern hypothetical, speculative or legitimate? It is real. Plaintiffs' lawyers in those jurisdictions use the system to intimidate, and use political favors for favors. Judges in these jurisdictions do not apply the law even-handedly to all litigants and do not conduct trials in a fair and balanced manner.

Judicial hellholes are sometimes called "magic jurisdictions" where causes of action previously unknown in the law or procedural rulings foreign to due process are the norm. They magically pull multi-million and even billion dollar judgments out of the magic hat.

The winners last year were:

1. Madison County, IL
2. St. Clair County, IL
3. Hampton County, SC
4. West Virginia (entire state)
5. Jefferson County, Texas
6. Orleans Parish, LA
7. South Florida
8. Philadelphia, PA
9. Los Angeles, CA

Dishonorable mention goes to:

1. Oklahoma
2. Utah Supreme Court
3. District of Columbia
4. New Mexico Appellate Courts.

As in all cases, there are exceptions. There are decent judges even in these jurisdictions who attempt to stem abusive practices and the S.Ct. of the U.S. has stemmed the tide of excessive punitive damages in State Farm v. Campbell. Judges must however, faithfully apply that decision and some do.

So what can be done to balance judicial hellholes?

1. Tighten venue and forum non conveniens laws to stop forum shopping.
2. Ensure that pain and suffering awards serve a compensatory purpose only and are not used to punish or as a way around a limitation on punitive damages.
3. Give federal courts authority in cases of national importance.
4. Address asbestos by prioritizing claims to the truly sick.
5. Enhance the reliability of expert testimony.

*What makes a judicial hellhole?*

What all hellholes have in common is – they systematically fail to adhere to core principles of law. They have strayed far away from the mission of being places where legitimate victims come to seek compensation for legitimate injuries caused by others. Product identification and causation are thrown out the window. Class actions are certified regardless of commonality. Defendants are named not because of culpability but because of deep pockets. Ridiculous verdicts are upheld.

Examples of what may occur:

1. Forum shopping: since hellholes are plaintiff friendly, personal injury lawyers file cases there even if there is no connection to the jurisdiction. Judges do not stop this forum shopping.
2. Novel Legal Theories: Judges allow suits to go forward that are not supported by the law.
3. Discovery abuses: Judges allow unnecessarily broad, invasive and expensive discovery.
4. Consolidation and joinder: Judges join claims together into mass tort actions that have little in common. In one case, the judge consolidated 8,000 claims and 250 defendants into one case. This effectively deprives any one defendant from his day in court.
5. Improper class certification: In states where class certification cannot be appealed until after trial, it can and does force a company to settle.
6. Unfair case scheduling: Such as scheduling numerous cases against a single defendant for the same day.
7. Excessive damages: Judges allow these to stand even when unsupported by the evidence.
8. Junk science: The judges are not acting as the gatekeeper they should be.
9. Uneven application of evidentiary rules.
10. Jury instructions are slanted.
11. Trial lawyer contributions: In a recent poll, 46% of judges said donations influenced their judicial decisions.

**Looney Lawsuits**

1. Startled neighbor cookie delivery
2. NBC sued for "Fear Factor"
3. Addiction to cable TV cause obesity
4. Prisoner fly in soup
5. Reckless exotic dancer
6. $9 coupons; $9.25 million fees
7. Injured back leaves convenience store in a pickle

**"Hot" Tort Reform Issues**[2]

- Class Action
- Asbestos
- Medical Malpractice
- Contingency Fees
- Forum and Venue
- Damage Caps
- Uniform Federal Legislation vs. State Reform

**Class Action Reform**

Purpose and Findings:

Class action lawsuits are considered an important and valuable part of the American legal system – when they permit the fair and efficient resolution of the legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused them. BUT – over the past decade, there have been abuses of the class action device that have:

- harmed both class members with legitimate claims and defendants that have acted responsibly.
- undermined public trust and respect for the judicial system.
- class members have often received little or no benefit from class actions when:
  - ♦ counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;
  - ♦ unjustified awards are made to certain plaintiffs at the expense of other class members; and
  - ♦ confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

[2] See Exhibit A, chart of reform undertaken by individual States.

- abuses in class actions undermine the concept of diversity jurisdiction as intended by the framers of the US Constitution in that State and local courts are:

    - ♦ keeping cases of national importance out of Federal court;
    - ♦ sometimes showing bias against out-of-state defendants; and
    - ♦ making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

Thus, the purposes of the Act are to:

- assure fair and prompt recoveries for class members with legitimate claims;
- restore the intent of the framers of the US Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and
- benefit society by encouraging innovation and lowering consumer prices.

**Summary of Act**

1. Expands Federal jurisdiction over class actions asserting state law claims
2. Subjects many more class actions to a body of federal class action law that is less hospitable to large multi-state class actions.
3. The Act applies to any action:

    a. Pleading state law claims
    b. Brought under FRCP 23 or similar state rule permitting class actions
    c. Where the amount in controversy exceeds $5 million in the aggregate
    d. AND in which any class member is a citizen of a state different from any defendant.

4. This changes both diversity and amount in controversy requirements that previously prevented actions from being brought in federal court.

    a. Diversity jurisdiction is based on the parties citizenship
    b. Which for individuals is their place of domicile i.e. a fixed and permanent home.

5. In essence, the district court may decline jurisdiction when (more than 1/3 but less than 2/3 of the class and the primary defendants are citizens of the State in which the action was originally filed:

    - the claims involve matters of national or interstate interest;

- the claims will be governed by the laws of the State in which the action was originally brought or by the laws of others States;
- the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
- the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
- the number of citizens of the State of original filing in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State and the citizenship of other proposed class members is dispersed; and
- during the 3 year period preceding filing, one or more other class actions asserting the same or similar claims on behalf of the same persons have been filed

6. Federal Court may decline jurisdiction when:

   - More than 1/3 but less than 2/3 of all proposed class members are citizens of the forum state, and
   - All of the "primary" defendants are citizens of the forum state (Home State Exception)

   **OR**

   c. More than 2/3 of all proposed class members are forum state citizens;
   d. at least one defendant is a forum state citizen from whom "significant" relieve is sought and whose alleged conduct forms a "significant" basis for the class claims;
   e. the "principle injuries" resulting from the conduct of each defendant were incurred in the forum state; and
   f. No other similar class action has been filed by the same or other persons in the preceding three years ("local controversy" exception.)

7. Remand burden now on plaintiffs
8. Federal Court should err in favor of exercising jurisdiction
9. Removal restrictions are eased:

   a. all in state defendants may remove
   b. all defendants need not unanimously consent
   c. one year removal limitation does not apply

10. Appellate review is now interlocutory (used to have to wait until the action was over thus forcing settlements when costs were prohibitive)

11. **Coupon Settlements**

a Restricts attorneys fees to value of coupons redeemed (not issued) and/or actual time expended by counsel on the case.
b. Issues include what is a coupon; when does plaintiffs counsel get paid?
c. Act prohibits a Federal District court from approving a proposed settlement:

1. absent a finding that the settlement is fair, reasonable and adequate;
2. that involves payments to class counsel that would result in a net monetary loss to class members, absent a finding that the loss is substantially outweighed by non-monetary benefits;
3. that provides greater sums to some class members solely because they are closer geographically to the court.

**How the Class Action Plaintiffs' Bar May Respond**

1. File only State wide class actions in the defendant's Home State;
2. Pick plaintiff's turf and fight removal and remand
3. Name more and larger in-state retailers to qualify for "local controversy" exception.
4. File numerous state class actions and seek to transfer and coordinate multi-district litigation process
5. File in "plaintiff friendlier" federal courts (second [NY, CT, VT] and ninth [CA, OR, NV, AZ, Alaska] - avoid fourth [includes West Virginia, VA, NC], fifth [TX, LA, MS], and seventh [IL, IN, WS]).

## ASBESTOS REFORM

Beginning in the 1940s until the mid-1970s, manufacturers used asbestos as an insulator and fire retardant in hundreds of products, including insulations in floor tiles. Inhaling asbestos fibers into the body, was found to be linked to asbestosis, lung cancer, and mesothelioma. Millions of Americans have been exposed to some form of asbestos that potentially carry adverse health effects. The injuries caused by asbestos can have latency periods up to 40 years, and even limited exposures to some forms of asbestos can potentially result in injury.

The Rand Institute of Civil Justice projects that more than half of a million Americans have filed asbestos lawsuits of some kind or another. Asbestos litigation has had a significant detrimental effect on the United States economy, driving companies into bankruptcy, diverting

resources from those who are truly sick and endangering jobs and pensions. The scope of asbestos litigation cuts across every state in virtually every industry.

The asbestos "crisis," having a significant effect on the health welfare of individual citizens in the United States, on interstate and foreign commerce, as well as the bankruptcy system, has led to numerous calls for Congressional action including a statement by the Supreme Court in 1999. "The elephantine mass of asbestos cases ...defies customary judicial administration and calls for national legislation." Ortiz v. Fibre Board Corp., 527 U.S. 819-821 (1999).

Congress has begun the process of answering the call for asbestos reform, which will be discussed below. While waiting for Federal action, several states have taken it upon themselves to enact asbestos reform efforts extemporaneous to continued Congressional action.

**GEORGIA**

- Effective April 15, 2005 Georgia enacted House Bill 416, which is a significant step forward in asbestos litigation reform.
- Georgia's asbestos reform bill includes reforms such as requiring:
    - A clear showing of a medical condition to which exposure to asbestos or silica was a substantial contributing factor.
    - Medically accepted standards for differentiating between persons who are truly impaired and those who have not established their impairment.
    - The cases of unimpaireds will be deferred.
    - There is no joinder of trial unless all parties agree, i.e. individual cases will be tried in their own merit.
    - Asbestos or silica claims may only be filed in the County where the Plaintiff resides or the County to which the exposure to asbestos or silica occurred to eliminate the threat of forum shopping.

**OHIO**

- Effective September 2, 2004 Ohio passed House Bill 292 and 342 enacting legislation to reform this litigation. The purpose of the Ohio reform bill was to

"give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos, fully preserve the rights of claimants who were exposed to asbestos, to pursue a compensation should those claimants become impaired in the future as a result of such exposure." The asbestos reform bill includes provisions that

- Establishes medical criteria to curb abusive asbestos/silica litigation involving unimpaired claimants and gives priority to injured victims. Specifically "competent medical authority"is defined in the bill as a medical doctor who is a Board Certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist...required to be a treating physician having doctor-patient relationship with the plaintiff.

- Requires plaintiff to make a prima vas showing of asbestos/silica exposure.

- Requires a showing of actual physical impairment and that plaintiff's exposure was a substantial contributing factor to the medical condition.

- It must be noted that the bill was found to be unconstitutionally retroactive as to certain plaintiffs having existing claims on or about September, 2004.

- Ohio touts it's asbestos reform as speeding the resolution of claims brought by people with severe asbestos-related illnesses, protecting the rights of asbestos exposed people who are not sick now to seek future compensation, breaking the log jam of asbestos cases in Ohio Courts, eliminating thousands of claims by people who are not sick, and preserving Ohio jobs businesses.

**FLORIDA**

- Effective July 1, 2005 Florida also passed asbestos reform legislation (House Bill 1119).

- Florida's asbestos reform efforts intend to

  - require a clear showing of physical impairment to which exposure to asbestos or silica was a substantial contributing factor.

  - Medically accepted standards of illness. Requiring that qualified doctors interpret x-rays, as curving the practice of doctors-for-hire finding non-existent "evidence" of asbestos damage in healthy people.

- The Florida tort reform efforts also intent to limit the right to sue to Florida residents and people who are exposed to asbestos in Florida and attempt from forum and venue shopping in pursuit of bigger jury awards.
- It also defers cases of unimpaireds.
- Prohibits punitive damages awards.
- Eliminates strict liability for defendants who sold but did not manufacture asbestos or silica.

**TEXAS**

- Texas passed a Senate Bill 15, which is known as the Texas Asbestos Reform Bill. The Texas Asbestos Reform Bill is a comprehensive asbestos and silica litigation reform that preserves the rights of victims while protects Texas businesses from litigation abuse. The Texas Reform Bill includes reforms such as:
  - Adopt medically accepted standards to differentiate between non-malignant asbestos related impairments and unimpaired individuals.
  - A clear showing of medical condition to which exposure to asbestos or silica was a substantial contributing factor.
  - Evaluation by Board Certified licensed physicians.
  - Deferred cases of unimpaired.
  - Prohibits joinder of one or more claimant for trial.
  - Expands application of existing multi-district litigation rules in asbestos cases.
  - Virtually eliminates "mass screenings" and "bundling" of claims.

**FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OR FAIR ACT OF 2005**

As mentioned earlier, authoritative voices in America have been calling for Federal intervention to reform the asbestos litigation "crisis" for years. Public interest groups, investors, workers, legal medical organizations, asbestos family victim organizations, various legal business and industry groups, Federal and State Courts, the Bush Administration, and the United State Supreme Court are among those who have called to Congress to correct this system of asbestos litigation. There have been numerous attempts to introduce legislation to both the House of Representatives and the Senate to address the problem. None have ever made it to a floor until recently when the FAIR Act passed the Senate Judiciary Committee. The FAIR Act has been described as "the most comprehensive asbestos reform bill ever". The FAIR Act calls for

- A special asbestos Court to extract hearings.
- A trust fund of at least $141 billion dollars to insure fair compensation to all asbestos victims to be paid entirely by asbestos defendants and insurers.
- Independent medical review and criteria recommended by the American Medical Association.
- Legal procedures recommended by the American Bar Association.

The legislation cites the expressed purpose of the Act to:

- Create a privately funded publically administered fund to provide the necessary resources for a fair and efficient system to resolve asbestos claims.
- Provide compensation to those present and future victims based on the severity of their injuries.
- Relieve Federal and State Courts the burden of the asbestos litigation.
- Increase economic stability when resolving the asbestos litigation crisis that bankrupted companies with asbestos liability, diverted resources from the truly effected, and endangered jobs and pensions.

The trust fund would be financed by annual payments by asbestos defendants and their insurers. Defendants would be required to make annual payments for 30 years subjected to increases declared by the fund administrator. Any sale or transfer of assets, or even bankruptcy, would have no effect on this required payment. Presently it is estimated that the asbestos defendants would pay $94 billion into the trust and insurers would pay $46 billion.

Annual payments to the trust fund would be determined by it's placement to one of seven "tiers". Tier I consists of defendant participants that are currently in bankruptcy and that have prior asbestos expenditures of a million dollars or greater. Tier VII consists of defendant participants that have been subject to asbestos claims brought under the Federal Employers Liability Act as a result of operations as a common carrier by railroad. Whether a defendant-participant falls into Tiers II, III, IV, V and VI depends on the amount of "prior asbestos expenditures" currently defined in the Fair Act expenditures made on or before December 31, 2002 for both the defense and indemnity of asbestos claims. Significantly, payments made by an insurer on behalf of a company would count towards the companys' prior asbestos expenditures, not the insurers. Finally, insurance coverage for asbestos claims will disappear upon enactment along with a significant portion of insurance responsive portions of insurance responsive to non-asbestos claims, such as environmental liabilities, leaving most companies with reduced insurance for other currently covered "long tails" liabilities.

In final analysis every insurer, reinsurer, issues finite risk policies and one authenticity with asbestos related obligations in the United States must contribute to the asbestos trust fund. It will be significant to monitor the Congressional debates on the Fair Act to see if any significant amendments are inserted into the legislation.

## MEDICAL MALPRACTICE

The cost of medical malpractice insurance has been rising after almost a decade of essentially flat prices. Rate increases were precipitated in part by the growing size of claims, particularly in urban areas. Among the other factors driving up prices is reduced availability of coverage as insurers exit medical malpractice business because the difficulty of making a profit and rapidly rising medical care cost.

New research suggest that premium increases may be moderating, however, for a full recovery from what has been described as a "crisis", significant reforms in both medical care and in the liability system are generally believed to be needed to occur. Significantly, recent studies predict that the medical malpractice insurance sector may become profitable in 2006 for the first time in several years. The expected turn around in the situation is due to a series of rate increases over the past four years that have allowed insurers to catch up with losses as well as tort reform measures passed on the state level.

There are several different measures which have been enacted at the state level that are contributing to medical malpractice reforms generally. Such reforms include: "caps" on non-economic damages, limitations on attorneys fees, inadmissability of "expressions of sympathy" on the part of health care providers, immunity to liability for emergency medical situations (often times with the sole exception of a showing of gross negligence), reforms in the requirements for expert witnesses, pre-trial screening process, and mandatory non-binding mediation.

The Federal Government is also presently attempting to pass legislation to affect medical malpractice reform. At the end of July, 2005, Congress passed legislation that would create a network for reporting and analyzing medical errors. Reporting of mistakes by hospitals would be voluntary, the information would be confidential and information could not be used in medical malpractice cases. There are currently similar state programs and most of them have mandatory reporting.

President Bush succeeded in getting the House of Representatives to pass a comprehensive medical malpractice reform bill but failed to achieve similar passage in the Senate. The bill that the President proposes would limit non-economic damage awards at $250,000, put limits on punitive damages awards, place limits on the time allowed to injured patients to file a lawsuit as well as establish a fee schedule for plaintiff's lawyers' contingency fees. A provision in the President's bill would also provide liability protection from pharmaceutical firms. Significantly, the House of Representatives has approved similar bills with respect to medical malpractice some seven times. Each time the measure was defeated in the more bi-partisan Senate.

At the State level, 2005 saw much reform in medical malpractice in the liability arena.

## NON-ECONOMIC DAMAGES REFORM

- **ALASKA -** lowered the limit on non-economic damages in medical liability cases to $250,000. In the most severe cases involving disfigurement, severe permanent physical impairment, and wrongful death, the limit on non-economic damages is $400,000. The previous limit on non-economic damages ranged from $400,000 to $1 million dollars depending on the severity of the injuries**.**

- **GEORGIA** - limited non-economic damages to $350,000 per health care provider with an overall aggregate limit of $1.05 million dollars.

- **MISSOURI** - limited non-economic dames in medical liability cases to $350,000 regardless of the number of defendants in the case.

- It must be noted that in July, 2005, the Wisconsin Supreme Court ruled that the state's law capping non-economic damages in medical malpractice cases was **unconstitutional** on the grounds that it violates victims' right to due process. The cap was about $433,000.

## EXPRESSIONS OF SYMPATHY

- **GEORGIA** - provided that expressions of sympathy, regret, apology, etc. by health care providers are inadmissable as evidence and shall not constitute admission of liability.

- **MISSOURI** - prohibited statements, writings, or benevolent gestures expressing sympathy by medical providers from being admitted into evidence**.**

- **WEST VIRGINIA** - provided that no statement, affirmation, gesture or conduct of a health care provider who provided health care services to a patient, expressing apology, sympathy, commiseration, condolence, compassion or general sense of benevolence to the patient, or a relative to the patient or a representative of the patient and which relates to the discomfort to the pain, suffering, injury or death of the patient shall be admissible as evidence of an admission of liability or as evidence of an admission against interests in medical liability civil actions.

- **MONTANA** - provided that statements of sympathy, apology, etc. by medical providers are inadmissible as evidence of liability in medical liability cases.

**EMERGENCY MEDICAL SITUATIONS**

- **GEORGIA** - provided that in claims arising out of the provision of emergency medical care against a hospital emergency department, no physician or health care provider shall be liable unless disproved by clear and convincing evidence that the physician or health care provider'(s) actions show a gross negligence.

- **SOUTH CAROLINA** - provided that a physician is not liable for claims arising out of an emergency situation unless that physician was grossly negligent. Provides that a physician is not liable in a claim arising out of an obstetrical care rendered in an emergency situation where there is no previous doctor/patient relationship or where the patient has not receive pre-natal care unless the physician was grossly negligent.

- **MISSOURI** - provided civil immunity from damages for physicians who provide uncompensated medical care (volunteer services).

**MISC. STATE REFORMS**

- **MISSOURI** - *Statues of Limitations for Minors* - specified that actions against physicians and other health care providers for malpractice must be brought within two years of a minor's 18$^{th}$ birthday.

- **MONTANA** - *Expert Witness Standards* - provided that an expert witness: must be a licensed health care provider in at least one state; routinely treat or routinely treated within the previous five years the subject matter of the malpractice claim; and demonstrate a familiarity with the standards of care and practice as related to the subject matter of the malpractice claim. In cases involving treatment recommended by a physician, an expert witness may not testify on issues of negligence or standards of care unless the witness is also a physician. In addition, a witness qualified as an expert in the medical speciality that is unrelated to the malpractice claim may only testify if it can be proven that the standards of care in practice in the two specialties are substantially similar.

- **NEW HAMPSHIRE** - *Pre-Trial Screening Panels* **-** created a pre-trial screening panel requiring all medical liability cases to go before a three person panel: a judge, an attorney, and a health care practitioner of the same or similar speciality as the defendant. The reform does not restrict anyone's right to a jury trial. The panel helps plaintiffs with smaller cases because panel expenses are less**.** The reform required the panel to decide negligence based on a preponderance of evidence (more likely than not), thus encouraging the dropping of non-meritorious cases were quicker settlements of meritorious cases**.** Only unanimous decisions by the panel are admissible in any future trials. The reform also created a legislative oversight committee that will look at data over the next few years to determine if the new panel system is working. The reform required liability insurers to report certain data to the New Hampshire Department of Insurance annually**.**

- **SOUTH CAROLINA** - *Mediation* - required that prior to filing an action, the Plaintiff must file a Notice of Intent to File Suit**,** and the parties must participate in a Court-supervised mediation. If the matter is not resolved through mediation, the Plaintiff may initiate the action within 60 days of the end of mediation or prior to the expiration of the statute of limitations, whichever is later.

- **WEST VIRGINIA** - *Innocent Prescriber* - provided that no health care provider is liable to a patient or a third party for injuries sustained as the result of the ingestion of a prescription drug or use of a medical devise that was prescribed or used by a health care provider in accordance with instructions approved by the U.S. Food and Drug Administration regarding dosage and administration of the drug, the indications for which the drug should be taken or devise should be used, and the contraindications against the drug or using the devise. The liability exemption does not apply if: (1) the health care provider had actual knowledge that the drug or devise was inherently unsafe for the purpose for which it was prescribed or used or (2) the manufacturer of such drug or devise publically

announces changes in the dosage or administration of such drug or changes in contraindications against taking the drug or using the devise and the health care provider fails to follow such publically announced changes and such failure proximately caused or contributed to Plaintiff's injuries or damages.

## OTHER PROPOSALS THAT DEAL WITH MEDICAL MALPRACTICE CONCERNS

- **INCOMPETENT DOCTORS -**

Experts commissioned by the Bush Administration to study medical malpractice litigation have said state authorities need to do a better job at disciplining incompetent doctors. The public needs to be protected against sub-standard practice by physicians in that improving the policing of medical treatment would decrease the number of medical malpractice lawsuits. State medical boards often have insufficient resources to handle thousands of complaints that received each year and that the process of removing the license of an incompetent doctor is long and ineffective.

Significantly, the majority of doctors are not sued. Those who are sued have had multiple claims asserted against them. For instance, between 1990-2002, according to the Public Citizen Compilation, doctors who had four or more claims lodged against them accounted for 22% of all medical malpractice claims. Doctors with three claims asserted against them accounted for 24% or all medical malpractice claims in NY.

One idea to take action against incompetent doctors is an example such as Florida, where a proposed constitutional amendment takes away medical licenses from those with three or more medical malpractice judgments against them. A study found that about 7% of the state's practicing doctors would be effected.

- **OTHER IDEAS -**

  - Aside from more effective disciplining of incompetent doctors from state authorities, other solutions to the medical malpractice liability insurance problem have been suggested. Here is a sample:

    - change the way insurers set rates so that the impact of the insurance cycle is minimized.

    - Continue efforts to expand the number of states that have pre-trial screening panels.

    - Increase Medicaid, payments to obstetricians.

- Create special courts of law to handle medical malpractice cases. Several states are weighing the is option, including Illinois, Maryland, Massachusetts, and Pennsylvania. A Federal bill, the Medical Liability Procedure Reform Act of 2005, authorizing funding to states creating a pilot program of health courts, has also been introduced.

## SAMPLING OF OTHER 2005 STATE TORT REFORM ENACTMENTS

### FLORIDA

Asbestos/Silica Litigation Reform (HB 1019): Establishes minimum medical criteria, based upon recommendations from the American Medical Association (AMA), for filing asbestos and silica claims. Claims may first be filed only after a patient demonstrates symptoms and the award of punitive damages in these claims is now prohibited.

Asbestos/Successor Liability Reform (CS/SB 2228): This Act encompasses corporations that are successors and became successors before January 1, 1972. Asbestos-related claims against successor corporations are limited to a "fair market value" of total gross assets of transferor determined at the time of merger or acquisition.

### GEORGIA

Class Action Reform (SB 19): specifies detailed procedures for the filing and certification of class action lawsuits and provided for the interlocutory appeal of class action certifications.

Expert Witness Standards: Solidified expert witness procedures and adopted the *Daubert* standard in civil cases.

Obesity Litigation Reform (HB 196): This bill exempts all parties associated with the production, shipment, selling and advertisement of foods (as mentioned in 21 U.S.C. 321 (f)), or association of these entities in claims arising out of obesity, its health conditions and long-term weight gain. This exemption does not however, protect these entities in claims based upon misbranding.[3]

### MISSOURI

[3] Similar legislation is found in Kansas, Kentucky, North Dakota, Texas and Wyoming.

Collateral Source Rule Reform: the collateral source rule in the state was modified to allow the actual amount of paid medical expenses to be used as evidence rather than the amount billed.

Joint Several Liability Reform: Joint and several Liability is applicable if defendant is 51% or more at fault. When such occurs, the defendant is liable for the amount of judgment rendered against the defendant. If defendant is less than 51% at fault, then the defendant is only responsible for the judgement he/she is responsible for.[4]

Punitive Damages Reform: Limits punitive damages to $500,000 or five times the judgement; whichever is greater. Limitations does not apply to cases involving housing discrimination.

**SOUTH CAROLINA**

Frivolous Lawsuits: Allows sanctions against lawyers and parties who create frivolous claims, including the reporting of lawyers to the Commissions on Lawyers Conduct and the requirement of the Supreme Court to keep records of such claims.

[4]Similar legislation is found in South Carolina and West Virginia.