



# U.S. TORT LIABILITY INDEX

## *2008 Report*

LAWRENCE J. MCQUILLAN *and* HOVANNES ABRAMYAN

Foreword by Jeb Bush, *Former Governor of Florida*



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ISBN-10: 1-934276-07-3  
ISBN-13: 978-1-934276-07-5  
March 2008 | US \$24.95

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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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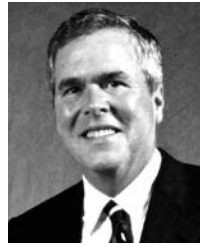
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FOREWORD By Jeb Bush





When I became Florida's governor in 1999, Florida's legal climate was hurting the state's economy. Spiraling litigation costs were limiting job creation. Lawsuit abuse was cutting wages and employee benefits for working Floridians. And all of these lawsuit costs were being passed on in higher prices to consumers and health-care patients. Meaningful reform was needed; so, changing Florida's litigation landscape was a top priority for my administration.

Recognizing that lawsuit abuse was one of the greatest threats to Florida's robust business climate, I worked with legislators in Tallahassee to pass effective tort reforms in several areas. An appeal-bond cap was adopted. Common-sense venue reforms were passed for class-action lawsuits. A 12-year statute of repose was put in place for product-liability cases. Punitive damages were capped at three times the compensatory award or \$500,000, whichever is determined to be greater.

In addition, non-economic damages in medical-malpractice cases were capped. Sensible rules were adopted for asbestos lawsuits, including prohibiting punitive damages. And the doctrine of joint and several liability was repealed, so that defendants are now responsible for paying damages only in proportion to their degree of fault. This will end the practice engaged in by personal-injury lawyers of adding "solvent bystanders" as defendants in lawsuits only because these defendants have deep pockets to pay big awards even if they had only minor or no responsibility for the injury.

As the *U.S. Tort Liability Index: 2008 Report* shows, Florida now has many of the best tort rules on the books, thanks to the reforms adopted during my administration. Our reforms would not have been possible without the support of legislative leaders like former Florida Lieutenant Governor Toni Jennings and former Florida House Speakers Allan Bense and John Thrasher. Overall, Florida's tort rules now rank sixth best in the nation. But the report also shows that lowering tort costs will take time.

The report's 2006 tort-cost data, the most recent data available, reveal that Florida's absolute tort costs were \$13 billion in 2006, ranking third highest. Florida's relative tort costs, which control for the state's population size and level of economic activity, were the highest in the nation. As of 2006, many of the reforms we had passed were still too new to have substantially lowered Florida's tort costs. But costs will fall as the reforms take hold, provided they are fully implemented throughout the state, especially in South Florida. The reforms will make Florida a more attractive place to live and do business.

The Pacific Research Institute's *U.S. Tort Liability Index: 2008 Report* is a valuable tool for governors, legislators, business leaders, and consumer groups to measure how costly and risky a state's tort system is and to discover which tort rules need reform because they expose the state to lawsuit abuse. Everyone who cares about the impact of the legal system on a state's business climate should read this report and take it to heart.



JEB BUSH IS A FORMER GOVERNOR OF FLORIDA, JANUARY 1999—JANUARY 2007.

**P R E F A C E** By Sally C. Pipes



At the Pacific Research Institute (PRI), we recognize a reality that has escaped some politicians: a poor civil-justice system burdens businesses with unnecessary costs and lowers the standard of living for ordinary citizens. Meaningful legal reform, on the other hand, pays dividends for all in the form of stronger economic growth and higher personal income, among other benefits.

Some states have done more than others to improve their civil-justice systems and to position themselves for future economic growth. At PRI, we believe analysis of this process is important, and so we offer the *U.S. Tort Liability Index: 2008 Report*, which assesses the tort system of each state. Grounded in rigorous statistical analysis, this report will prove a useful tool for legislators, policy makers, journalists, entrepreneurs, and, of course, taxpayers. By providing metrics for the evaluation of state tort systems, the *Index* encourages discussion in public forums about each state's tort system, the opportunities for legal reform, and the consequences of inaction.

The *Index* plays a key part in PRI's mission to research and to educate. For nearly 30 years, PRI has promoted public-policy solutions that empower individuals to solve problems through voluntary association and exchange in free markets. Through its research, commentary, and outreach, PRI educates the public on policy solutions that strengthen and preserve individual freedom.

PRI is more committed than ever to a wide discussion of important policy issues. Greater knowledge, more analytic thinking, and a national debate will contribute to reasoned and informed policy decisions. PRI plays a prominent role in this process, and the *U.S. Tort Liability Index* is an important contribution.

Our thanks are due to Dr. Lawrence J. McQuillan, director of Business and Economic Studies at PRI, who guided this project at every step. We also thank Hovannes Abramyan, public-policy fellow in Business and Economic Studies, now in a Ph.D. program at the University of California at Los Angeles, for his outstanding research and data collection. Finally, we thank Jeb Bush for writing an insightful foreword that draws on his experience as a two-term governor of Florida who successfully fought for needed, common-sense tort reform in his state.



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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 suggestions that improved the product.

In addition to the dozens of people we thanked in the first edition of this report, we would like to thank several other people who gave us invaluable assistance during the course of preparing the 2008 update.

Ralph Erickson of the Federal Highway Administration helped track down information on personal and commercial automobile miles driven. David A. Katz, M.D., M.Sc., associate professor of internal medicine and epidemiology, University of Iowa College of Medicine and College of Public Health, Iowa City, Iowa, assisted us in our search for data on state health expenditures, as did Geoffrey Williams, M.D., Ph.D., associate professor of medicine, University of Rochester School of Medicine and Dentistry, Rochester, New York.

We thank Ed Klett for suggesting an improved classification of the variables. Mr. Klett is a lawyer practicing in Pittsburgh who served for 12 years on the Civil Procedural Rules Committee of the Supreme Court of Pennsylvania, the last six years as its chair.

Special thanks also go to Michael F. Blake, data specialist at the A. M. Best Company, who prepared custom data for this study.

Coauthor Lawrence J. McQuillan was invited to speak about the original 2006 edition of this report to several groups across the country. The discussions and constructive feedback at these conferences resulted in several refinements to the methodology, including new variables and data sources, which are incorporated in this edition. Dr. McQuillan thanks participants at meetings of the American Justice Partnership, the American Legislative Exchange Council, and the Civil Justice Reform Group for their insights and thoughtful suggestions.

Many thanks to the panelists who spent hours ranking the input variables in chapter 3. In addition to the coauthors, the panel included: Jeffrey A. Johnson, a researcher at Lieberman Research Worldwide in Los Angeles and a 2006 Charles G. Koch summer fellow at the Pacific Research Institute (PRI), as well as a 2007 recipient of a master of arts in economics from Claremont Graduate University in Claremont, California; Matthew C. Piccolo, a Master of Public Policy student at Pepperdine University in Malibu, California, and a 2007 Charles G. Koch summer fellow at PRI; and Xin Wu, a senior at Lafayette College

in Easton, Pennsylvania, double-majoring in economics and business and in mathematics. These panelists' willingness to tackle such tedious work in a professional manner enabled the report to be completed on time with accurate input-variable rankings.

Many other people helped in the study's organization, design, and marketing. These people included Rowena Itchon, vice president for marketing at PRI; Susan Martin, associate director for marketing at PRI; Denise Tsui, graphic-design manager at PRI; and K. Lloyd Billingsley, Jenna Abel, and Linda Bridges, who provided outstanding editing throughout.

Special thanks go to Sally C. Pipes, president and chief executive officer at PRI, for her support in communications, networking, and fundraising to make this report a reality and to make it a better product.

Although it would be convenient if we could blame all the 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 the first edition, we invite comment and criticism so that we can continually improve it. The Executive Summary details the many improvements that are now part of the 2008 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 now to let others digest our work.



LAWRENCE J. MCQUILLAN



HOVANNES ABRAMYAN

## EXECUTIVE SUMMARY

The *U.S. Tort Liability Index: 2008 Report* measures the best and worst tort systems in America. The Pacific Research Institute developed the *Index* as a tool for governors and state legislators to assess their tort systems and to enact laws that will improve the business climates of their states. The study helps predict the winners and losers in the race for jobs and business investment. It is also useful for business leaders who are deciding where to start a new business, build a new plant, expand operations, introduce a new product, or hire more employees. States that rank worse in the study are less likely to lead in these areas.

An efficient tort system is an important part of a thriving free-enterprise economy. It ensures that firms have proper incentives to produce safe products in a safe environment, and that truly injured people are fully compensated. An efficient tort system results in greater trust among market participants, leading to more trading, and eventually a higher standard of living for individuals in the society. An efficient tort system benefits all.

A poor tort system, on the other hand, imposes excessive costs on society, not the least of which is foregone production of goods and services. There is growing evidence that U.S. tort costs are far greater than other countries' costs 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.

The *U.S. Tort Liability Index: 2008 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 litigation risks across states. Finally, it examines which states have rules on the books that, if implemented and enforced, reduce lawsuit abuse and tort costs, resulting in a more balanced and predictable civil-justice system.

## General Methodology

Every good index is a work in progress. The venerable Consumer Price Index, perhaps the most widely cited and closely watched of all indices, has been refined and improved many times over the years as new data or new theoretical insights have become available. The *U.S. Tort Liability Index* is no exception. The 2008 edition includes many improvements based on helpful comments from people across the country who read the first, 2006 edition. The improvements, highlighted with bullets throughout the Executive Summary, have produced more precise rankings in this edition.

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 rules and procedures on the books that shape tort outputs.

Tort-system outputs consist of cases filed, attorneys practicing to 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 litigation risks.

- This edition, unlike the first edition, calculates separate rankings for the output side and the input side. There is now a clean split between the two sides.

This report uses comprehensive 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 the date we closed the books on the data: October 1, 2007. We chose this cut-off point because all state legislative sessions had ended by then.

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/2008/tort\\_reform/](http://special.pacificresearch.org/pub/sab/2008/tort_reform/). We selected the variables after consulting with dozens of legal experts, university professors, and lawyers, and after an exhaustive search of the scholarly academic literature.

## Ranking State Tort-System Outputs (Chapter 2)

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

- Improvements to this edition's output variables are: removal of the generally non-tort workers'-compensation variable; addition of a new variable that measures awards dispersion across states; addition of new insurance-line-specific denominators for more precise comparisons among states; and inclusion of a ranking of absolute monetary tort losses.

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



Table 1. U.S. Tort Liability Index,  
2008 Output Rankings

Rank	State	Score
1	North Dakota	11.23076923
2	Alaska	12.30769231
3	North Carolina	12.84615385
4	Iowa	13.61538462
5	Virginia	14.00000000
6	New Mexico	14.61538462
7	Utah	15.60769231
8	Wyoming	16.76923077
9	Mississippi	17.06923077
10	Maine	17.46153846
11	Ohio	17.91538462
12	Tennessee	18.00000000
13	South Dakota	18.23076923
14	South Carolina	18.83076923
15	Hawaii	18.92307692
16	New Hampshire	19.53846154
17	Wisconsin	20.15384615
18	Texas	20.38461538
19	Nebraska	20.73076923
20	Oklahoma	20.92307692
21	Minnesota	21.06923077
22	Indiana	21.60769231
23	Vermont	22.07692308
24	Delaware	22.24615385
25	Idaho	22.38461538
26	Kansas	22.46153846
27	Georgia	22.69230769
28	Michigan	23.00000000
29	Louisiana	23.03076923
30	Arkansas	24.34615385
31	Kentucky	24.45384615
32	Oregon	24.53076923
33	Arizona	25.37692308
34	California	25.81538462
35	Maryland	25.99230769
36	Nevada	26.07692308
37	Washington	26.30000000
38	Connecticut	26.76153846
39	Alabama	27.76153846
40	West Virginia	27.76923077
41	Massachusetts	27.94615385
42	Colorado	28.30000000
43	Missouri	29.75384615
44	Rhode Island	30.03846154
45	Pennsylvania	30.07692308
46	Montana	31.61538462
47	Illinois	33.72307692
48	New York	34.63846154
49	New Jersey	36.54615385
50	Florida	38.16923077

Source: PRI

Chapter 2 also drills down further into the results to reveal interesting geographical patterns (see figures 1 and 2) as well as patterns within the two subgroups of losses and risks (see table 4).

### A Guide to Reform: Ranking State Tort-System Inputs (Chapter 3)

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

This report uses 28 variables to rank each state based on tort-system inputs (see chapter 3, table 6). The 28 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 court decisions/common law.

- Improvements to this edition's input variables include: adding new variables to track the nation's most harmful attorneys general, noting whether a state has an "Illinois Brick repealer" statute, tracking rules governing early offers of settlement, and noting whether a state has complex-litigation courts. Additional improvements include using a better data source for the "Daubert or Frye" variable concerning expert witnesses, citing the newest research studies to justify inclusion of each variable, re-sorting the input variables among the three categories, and using a panel to rank the input variables.

Table 7 shows where each state ranks overall in terms of inputs, as well as where it ranks for each individual variable. The states that have the best overall tort rules on the books, and that will be heading in the right direction if the rules are fully implemented, are Colorado, Texas, Ohio, Georgia, Indiana, Florida, and Michigan. At the bottom of the barrel are Pennsylvania, Illinois, Maryland, New York, Vermont, and, dead last, Rhode Island. California has the 11th-worst overall tort rules. Figure 3 shows the geographical distribution of the overall input rankings.

Table 7 also makes it easy to spot where tort reformers in each state might want to focus their efforts. For example, in California, reformers might want to target class-action rules and asbestos liability. In New York, which ranked 50th on an astounding 18 of 28 input variables, reformers might want to target attorney-retention sunshine rules and monetary caps. In New Jersey, adopting *Daubert* as the standard for scientific review of evidence by expert witnesses might be a high priority. And Texans might want to focus on abandoning partisan district elections to seat judges. States that pass meaningful tort reforms challenge their neighbors to do the same or be at a competitive disadvantage in the battle to attract people and capital to their state.

### 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.

- “Suckers” is a new category in the 2008 edition that allows for more precise classification.

Briefly, the saints are states that have relatively low monetary tort losses and/or few 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.

The sinners are states that have relatively high monetary tort losses and/or high 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 as lawsuit abuse goes unchecked.

The salvageables are states that have moderate to high relative monetary tort losses and/or moderate to high 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 move up in future output rankings as the benefits of reform feed back to improve outputs.

The suckers are states that have weak tort rules on the books because they currently have relatively low monetary tort losses and/or few litigation risks and, therefore, foolishly believe that they are not vulnerable and 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 Tort Reform (Chapter 4)

Chapter 4 examines evidence provided by today's top economists and legal scholars on the benefits of tort reform in people's lives. The studies document the significant beneficial effects of tort reform on productivity and employment, accidental deaths, innovation, defensive medicine and health-care access, state economic performance, and national output and individual well-being (see table 9 for a summary).

- We review important research findings that have emerged since the previous edition was published in 2006.

Connecting this evidence to the *U.S. Tort Liability Index* leads to one vital conclusion: A better *Index* ranking for a state—created through a commitment to meaningful tort 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.

A tort is wrongful  
conduct by one  
individual that results  
in injury to another.

## CHAPTER 1. Introduction

The goal of tort law is to deter wrongdoers efficiently and compensate unjustly injured victims fully, without overly compensating victims. When this is achieved, excessive awards are eliminated.

States vary considerably in terms of the cost of their tort liability system, the litigation risks faced by individuals and businesses, and the rules on the books that shape each state's tort system.

The *U.S. Tort Liability Index: 2008 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 study, specifically the boundaries of civil law and tort law.

### 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 by one person of the legally recognized rights of 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. A tort has been committed when someone has suffered injury caused by the failure of another person to exercise a required duty of care. The actor is to blame, and the injured party is entitled to recover damages. The function of torts is to provide the injured party with a remedy, not to punish the actor.

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, who allegedly received negligent treatment, sues the physician. The issue in all of these cases is alleged wrongful conduct by one person that injures another. The law of torts covers such wrongful conduct.

✦  
The U.S. tort system is the most expensive in the world, about double the average cost of other industrialized nations.  
✦

American tort law originated in early English common law, also known as case law or judge-made law. The histories and circumstances of the U.S. 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. There are three major categories of torts.

Intentional torts include: assault; battery; false imprisonment; infliction of mental distress; defamation; misrepresentation; invasion of right to privacy; trespass to land and 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 category of torts is strict liability or liability without fault. Areas of product liability apply the principle of strict liability.

This study covers 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**

The common-law goal of tort law is to deter wrongdoers efficiently and compensate unjustly injured victims fully. Ideally, the loss is calculated in court, and compensation is awarded through economic and non-economic compensatory damages equal to the actual loss incurred by the injured party. When this is achieved, excessive awards are eliminated. There is growing evidence, however, that U.S. tort costs are far greater than other countries’ costs, and much of the difference is due to lawsuit abuse. Part of doing business in America today, and indeed part of everyday life, is the risk of being sued. Liability insurance to protect against lawsuit costs is an ever-increasing operating expense for businesses.

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 system is the most expensive in the world, about double the average

cost of other industrialized nations.<sup>1</sup> Direct tort costs as a percentage of gross domestic product (GDP) average about 1 percent in 11 industrialized countries with standards of living comparable to that of the United States. In contrast, direct tort costs are 2.09 percent of GDP in the United States. The current U.S. tort system is a huge drain on the productive resources and growth potential of the U.S. economy.

According to Tillinghast–Towers Perrin, which compiles the most frequently cited study on tort costs, direct U.S. tort costs were \$261 billion in 2005, which translates into \$880 per person.<sup>2</sup> In contrast, costs were only \$96 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 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.

In the past 50 years, direct U.S. tort costs have risen more than 100-fold. In contrast, population has not even doubled, and economic output has risen by only 37-fold. As a result, tort costs have become a larger share of our economy. America has become a more litigious society.

Tillinghast does not include the costs incurred by federal and state court systems in administering actual suits, nor does it measure indirect costs or indirect benefits of the tort system. Indirect costs include such things 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. Indirect benefits include higher overall production due to systematic resolution of disputes, which reduces conflict and perhaps violence and encourages production and exchange. Also, the tort system might deter unsafe products and practices, thus benefiting society as a whole.

✦  
 Less than 15 cents of every  
 tort-cost dollar goes to  
 compensating injured people.  
 ✦

A 2007 study by the Pacific Research Institute (PRI), *Jackpot Justice*, measured both direct and indirect costs of the U.S. tort liability system.<sup>3</sup> It looked at 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 tort system. PRI estimated the total annual accounting cost of the current U.S. tort liability system to be \$865 billion, basing its calculations on 34 scholarly studies by 52 top economists and legal scholars.

Of course, not all tort costs are due to excessive litigation and lawsuit abuse. After all, a thriving free-enterprise economy depends on the rule of law, and justified tort costs are not “wasteful.” An efficient tort system ensures that firms have proper incentives to produce safe products in a safe environment, and that truly injured people are fully compensated. An efficient tort system results in greater trust among market participants, leading to more trading, and eventually a higher standard of living for individuals in the society.<sup>4</sup> An efficient tort system benefits all.

A poor tort system, on the other hand, imposes excessive costs on society, not the least of which is foregone production of goods and services. PRI 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.<sup>5</sup> This imposes an annual “excess tort tax” of \$7,848 on a family of four. Not only is the U.S. tort system excessively costly—wasting resources each year equal to the annual output of Illinois—it also applies a very inefficient method of compensating injured parties.

According to *Jackpot Justice*, less than 15 cents of every tort-cost dollar goes to compensating injured people.<sup>6</sup> If every time you pumped gas, 85 percent of it spilled to the ground, you would demand a better system for pumping gas. Nevertheless, this is how inefficiently the tort system works in America today.

The *U.S. Tort Liability Index: 2008 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 litigation risks across states. Finally, it examines which states have rules on the books that, if implemented and enforced, reduce lawsuit abuse and tort costs. In the next chapter, we measure the outputs of each state’s tort liability system, specifically tort costs and litigation risks.



## CHAPTER 2. U.S. Tort-System Outputs and State Rankings

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

Tort-system outputs consist of the cases filed, attorneys practicing to 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 litigation risks. As a rule, lawmakers and voters do not directly control these output factors; they can best control outputs by changing the input rules and procedures on the books. 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.

Table 2 lists the 13 variables used to construct the output rankings. The data are the actual observations on standardized frequencies (continuous data) or qualitative assessments made by an independent outside party (discrete data). As a result, the output rankings are free of any subjective influence from the authors of this report—they are based solely on independent, outside data.

The 13 output variables are grouped into two categories: monetary tort losses and litigation risks. 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 / number of farms
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
9. Commercial self-insurance losses / state GDP

**Litigation Risks**

10. Number of jury-verdict awards in the 100 largest awards [11]
11. Did the state have "judicial hellholes"? [3]
12. Resident and active attorneys / state GDP
13. Total state trial courts' incoming civil cases per 100,000 residents (excluding domestic-relations cases)

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

Each variable is described in detail below, including the data source of each variable. We used the most recent data available as of the date we closed the books on the data: October 1, 2007. We chose this cut-off point because all state legislative sessions had ended by then. 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.

Scholarly literature firmly supports our use of these variables. Articles are cited below for each variable that support its inclusion in the

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

index by confirming a unidirectional effect of that variable on the tort system or on the economy. We did not include variables in the index for which we could not find supporting scholarly research.

## Monetary Tort Losses

1–9. RELATIVE INSURANCE TORT LOSSES AND SELF-INSURANCE TORT LOSSES. The nine variables under “Monetary Tort Losses” track relative monetary tort losses in each state across seven lines of insurance and two categories of self-insurance for 2006, 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.

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>7</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 costs using the same methodology as Tillinghast, except that we used state-level data instead of national data. When tort costs are paid by self-insurance, individuals and companies engage in some form of internal forecasting and reserving to pay their tort expenses.<sup>8</sup>

Each state’s loss ratio for each line was calculated by taking direct losses incurred and dividing it by a line-specific denominator that normalized the data, enabling comparisons across states as different in size, for example, as California and Rhode Island.<sup>9</sup>

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—current payments do not. Losses thus provide a more comprehensive accounting of the actual 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 initial awards do not reflect what defendants actually pay. Insurance losses track the market’s best estimate of 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.

We divided each loss variable by a line-specific, activity-based denominator under the assumption that torts arise during the course of a certain relevant activity. For example, automobile losses were normalized by miles driven. Farmowners’ losses were normalized by the number of farms (as a proxy for the level of farm-related activity in a state). The most frequent denominator was state GDP, which we used under the assumption that the number of 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>10</sup>

A high loss ratio for a state indicates a riskier business climate due to larger plaintiff awards, larger plaintiff settlements, more lawsuits filed, or all three. A recent McKinsey report found that, among executives surveyed, litigation risk ranked second in importance in deciding where to do business, after the availability of qualified workers.<sup>11</sup>

### Litigation Risks

10. NUMBER OF JURY-VERDICT AWARDS IN THE 100 LARGEST AWARDS. This variable tracks for each state the number of jury-verdict awards it had in the nation's 100 largest awards during 2006. Data for this variable come from *Verdict Search's Top 100 Verdicts of 2006*, published by American Lawyer Media.<sup>12</sup> With 18 awards, Texas has the most awards in the top 100, followed by California at 15 and Florida at 12.

The number of large, outlier awards in a state measures the dispersion of awards in that state relative to the other states; thus, it is a measure of the riskiness of the tort climate and the probability of the state 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 economic benefits.

11. DID THE STATE HAVE "JUDICIAL HELLHOLES"? This variable tracks whether the American Tort Reform Association (ATRA) declared a state, or part of a state, a "judicial hellhole" in 2006. Judicial hellholes are defined as regions where personal-injury lawyers specifically seek to have trials held because they expect an excessive verdict or excessive settlement, a favorable precedent, or both. Among the factors contributing to the hellhole designation are: forum shopping; discovery abuse; improper certification of class actions; junk science; strong alliances between plaintiffs' lawyers, judges, and attorneys general; one-sided jury instructions; and uneven application of evidentiary rules. Among the hellholes declared were Madison County, Illinois; the Rio Grande Valley and the Gulf Coast of Texas; South Florida; and West Virginia. The designations come from *Judicial Hellholes 2006*, published by ATRA.<sup>13</sup>

Judicial hellholes have a disproportionately harmful effect on the tort system. The authors of the ATRA report noted that the litigious environment in Illinois, a state containing three of the six hellholes, has made doctors and businesses reluctant to set up shop there. This, in turn, has led to a medical crisis in the state and has harmed its overall economy. The American Medical Association states that Illinois has a medical-liability crisis.<sup>14</sup>

12. RESIDENT AND ACTIVE ATTORNEYS / STATE GDP. This variable tracks the number of resident and active attorneys in each state per dollar of state GDP in 2006. North Carolina, for example, is on the low end of the spectrum, while Illinois 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>15</sup>

In a paper 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.<sup>16</sup> According to the authors, the greater the number of lawyers, the more power they had 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.”

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>17</sup> A report by Kevin M. Murphy et al. supports the view that lawyers stunt economic growth.<sup>18</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 TRIAL COURTS’ INCOMING CIVIL CASES PER 100,000 RESIDENTS (EXCLUDING DOMESTIC-RELATIONS CASES). This variable tracks the number of civil-case filings per 100,000 residents in each state (excluding domestic-relations cases) in the most recent year for which this information was available, which was 2004. Tennessee had the lowest number of filings per 100,000 residents: 1,307. Maryland had the highest rate of filings: 17,647. Data on incoming civil cases come from the National Center for State Courts.<sup>19</sup>

A low rate of litigation 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>20</sup> The authors described a vicious cycle of local governments settling cases to save on defense costs, only to encourage more litigation. Businesses also often attempt to avoid risky trials by settling, which again inadvertently encourages more litigation. 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>21</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. Civil cases filed per 100,000 residents and insurance-loss ratios are examples of continuous variables. For each continuous variable, each state was 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, or 50. If there were six gradations, we assigned rankings of 1, 10.8, 20.6, 30.4, 40.2, or 50. The most stringent gradation always received a ranking of 1 and the least stringent always received a ranking of 50. The remaining categories received rankings in equal intervals depending on the number of discernible gradations. This was a tedious process, but it allowed us to

make the fullest use of all available information on subtle differences between states, and it ultimately yielded 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 were assigned a ranking of 1. States on the Watch List or Dishonorable Mention list were assigned a ranking of 25.5. States with a judicial hellhole 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 100 largest awards during 2006. The state with the most awards in the top 100, Texas, was assigned a ranking of 50. Twenty-five states had no awards in the top 100, so they were assigned a ranking of 1. There were 11 gradations in all, yielding intervals between gradations of 4.9.

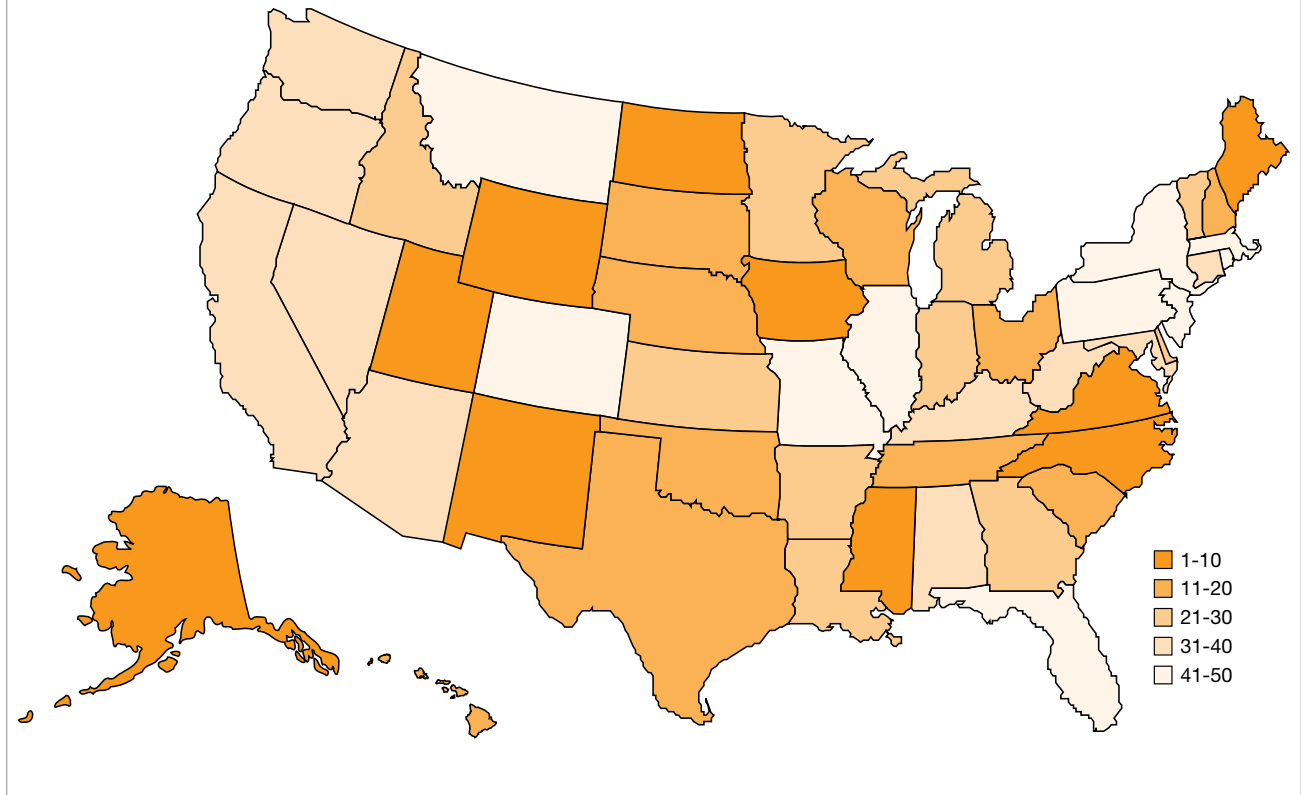
Data were collected for each state across the 13 variables. Once all 13 variables were ranked across all 50 states, we calculated an average ranking for each state by adding together the rank it earned on each of the 13 variables and dividing by 13. This methodology implicitly weighted all variables equally. The average-ranking scores were used to compile the final, overall ranking from 1 to 50. The state with the lowest average ranking across all 13 variables received an overall ranking of 1. The state with the highest average ranking received an overall ranking of 50. 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/2008/tort\\_reform/](http://special.pacificresearch.org/pub/sab/2008/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.

Table 3. U.S. Tort Liability Index, 2008 Output Rankings

Rank	State	Score
1	North Dakota	11.23076923
2	Alaska	12.30769231
3	North Carolina	12.84615385
4	Iowa	13.61538462
5	Virginia	14.00000000
6	New Mexico	14.61538462
7	Utah	15.60769231
8	Wyoming	16.76923077
9	Mississippi	17.06923077
10	Maine	17.46153846
11	Ohio	17.91538462
12	Tennessee	18.00000000
13	South Dakota	18.23076923
14	South Carolina	18.83076923
15	Hawaii	18.92307692
16	New Hampshire	19.53846154
17	Wisconsin	20.15384615
18	Texas	20.38461538
19	Nebraska	20.73076923
20	Oklahoma	20.92307692
21	Minnesota	21.06923077
22	Indiana	21.60769231
23	Vermont	22.07692308
24	Delaware	22.24615385
25	Idaho	22.38461538
26	Kansas	22.46153846
27	Georgia	22.69230769
28	Michigan	23.00000000
29	Louisiana	23.03076923
30	Arkansas	24.34615385
31	Kentucky	24.45384615
32	Oregon	24.53076923
33	Arizona	25.37692308
34	California	25.81538462
35	Maryland	25.99230769
36	Nevada	26.07692308
37	Washington	26.30000000
38	Connecticut	26.76153846
39	Alabama	27.76153846
40	West Virginia	27.76923077
41	Massachusetts	27.94615385
42	Colorado	28.30000000
43	Missouri	29.75384615
44	Rhode Island	30.03846154
45	Pennsylvania	30.07692308
46	Montana	31.61538462
47	Illinois	33.72307692
48	New York	34.63846154
49	New Jersey	36.54615385
50	Florida	38.16923077

Figure 1. U.S. Map of Overall Output Rankings, 2008



### Overall State Rankings and Geographical Patterns

Table 3 shows the 2008 *U.S. Tort Liability Index* ranking of state tort costs and litigation risks. Leading the pack is North Dakota, followed by Alaska, North Carolina, Iowa, Virginia, and New Mexico. At the bottom of the barrel are Rhode Island, Pennsylvania, Montana, Illinois, New York, New Jersey, and, dead last, Florida. At 40th and 41st, respectively, West Virginia and Massachusetts also perform poorly.

Figure 1 gives a bird's-eye view of the geographical distribution of relative tort costs and litigation risks. The states with the lowest costs and risks are scattered across the country: in the Upper Midwest, Rocky Mountains, Southwest, and southern border states.

The states with the highest costs and risks are not as scattered because of a noticeable clustering in the Northeast, where states tend to be like their neighbors. This also suggests, however, that a state that adopts tort reforms in the Northeast will put

pressure on its neighbors to follow or be left behind. Competition between states puts pressure on laggards to reform in order to attract people and capital.

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

### Subgroup State Rankings and Geographical Patterns

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 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 34.11 is the average of its rankings across all nine variables in the monetary-tort-loss subgroup.<sup>22</sup> The states were then ranked from 1 to 50 within each subgroup based on their subgroup score. The lower the score, the better the ranking.

Table 4. Overall Output Rankings and Individual Output-Variable Rankings by State, 2008

State	Overall Output Ranking	Overall Output Score	1. Auto losses	2. Farmowners' losses	3. Commercial multi-peril losses	4. Other-liability losses	5. Homeowners' losses	6. Med-mal losses
Alabama	39	27.76153846	27	39	43	31	45	13
Alaska	2	12.30769231	49	3	12	27	30	3
Arizona	33	25.37692308	32	44	25	25	16	46
Arkansas	30	24.34615385	22	13	19	32	44	33
California	34	25.81538462	17	40	32	35	9	11
Colorado	42	28.30000000	37	37	24	29	26	39
Connecticut	38	26.76153846	40	5	38	24	40	47
Delaware	24	22.24615385	46	14	5	37	21	48
Florida	50	38.16923077	47	24	37	39	39	38
Georgia	27	22.69230769	24	48	9	30	38	15
Hawaii	15	18.92307692	26	4	42	15	2	27
Idaho	25	22.38461538	28	49	34	9	15	16
Illinois	47	33.72307692	20	47	30	47	42	42
Indiana	22	21.60769231	9	50	41	21	50	5
Iowa	4	13.61538462	6	22	17	22	5	24
Kansas	26	22.46153846	33	42	13	11	48	10
Kentucky	31	24.45384615	23	43	21	14	31	29
Louisiana	29	23.03076923	45	9	11	42	1	8
Maine	10	17.46153846	3	11	20	3	23	40
Maryland	35	25.99230769	36	26	18	16	24	37
Massachusetts	41	27.94615385	35	6	31	40	29	35
Michigan	28	23.00000000	38	38	16	28	37	6
Minnesota	21	21.06923077	12	27	33	6	47	22
Mississippi	9	17.06923077	1	12	14	13	32	7
Missouri	43	29.75384615	11	45	39	44	49	20
Montana	46	31.61538462	39	29	49	36	20	45
Nebraska	19	20.73076923	15	41	10	26	10	12
Nevada	36	26.07692308	50	31	47	48	7	4
New Hampshire	16	19.53846154	13	7	28	41	36	31
New Jersey	49	36.54615385	48	1	46	45	35	49
New Mexico	6	14.61538462	30	20	2	1	22	19
New York	48	34.63846154	29	18	48	46	27	50
North Carolina	3	12.84615385	18	16	4	5	11	26
North Dakota	1	11.23076923	2	34	7	2	3	25
Ohio	11	17.91538462	8	23	6	20	34	23
Oklahoma	20	20.92307692	10	28	8	17	33	2
Oregon	32	24.53076923	42	30	40	10	25	28
Pennsylvania	45	30.07692308	41	25	45	34	18	36
Rhode Island	44	30.03846154	43	19	44	49	12	43
South Carolina	14	18.83076923	21	2	35	7	19	17
South Dakota	13	18.23076923	16	32	23	19	4	30
Tennessee	12	18.00000000	5	46	15	12	46	44
Texas	18	20.38461538	25	15	1	23	17	9
Utah	7	15.60769231	31	8	22	18	6	32
Vermont	23	22.07692308	7	21	36	50	28	1
Virginia	5	14.00000000	14	17	3	8	14	21
Washington	37	26.30000000	44	35	27	33	41	34
West Virginia	40	27.76923077	34	10	50	43	8	18
Wisconsin	17	20.15384615	4	33	26	38	43	14
Wyoming	8	16.76923077	19	36	29	4	13	41



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 incoming cases	Litigation Risks Ranking
32	40	37	45	5.9	1	31	16	21
7	2	3	4	1	1	10	12	3
44	37	27	42	5.9	1	6	21	7
20	41	30	33	1	25.5	14	22	24
46	9	24	25	45.1	25.5	36	6	44
43	27	28	39	5.9	1	34	37	34
6	25	36	36	5.9	1	45	35	38
12	7	14	18	15.7	25.5	1	43	37
38	50	44	50	40.2	50	19	31	49
18	23	18	24	1	1	23	47	30
42	21	38	20	1	1	25	2	5
34	19	35	30	1	1	18	32	20
14	5	46	40	30.4	50	48	17	50
21	17	8	23	5.9	1	7	45	23
17	3	26	6	1	1	9	24	9
24	29	12	22	1	1	24	44	28
30	42	22	34	5.9	1	30	26	25
9	43	19	13	5.9	25.5	42	39	43
23	38	33	15	1	1	28	3	6
35	36	20	31	5.9	1	33	50	39
8	32	34	32	10.8	25.5	50	27	45
2	44	9	21	1	1	37	42	36
45	20	13	27	5.9	1	38	4	17
10	47	42	11	5.9	1	32	5	14
33	26	41	46	10.8	1	47	20	35
28	45	49	48	1	1	39	30	29
40	18	25	17	1	25.5	21	25	31
49	34	31	44	1	1	2	34	12
19	24	29	28	1	1	11	13	4
39	31	47	49	20.6	25.5	40	48	48
25	30	6	8	1	1	22	11	8
41	12	48	47	35.3	1	49	46	47
36	11	2	3	1	1	3	33	11
5	8	39	2	1	1	5	14	2
13	15	16	9	5.9	1	27	41	32
37	39	23	16	1	1	44	29	33
48	28	17	37	5.9	1	26	18	19
16	33	40	38	25.5	25.5	43	9	42
1	46	43	43	1	25.5	41	23	40
26	48	5	12	10.8	1	13	40	27
27	6	32	14	1	1	8	38	16
11	16	21	19	1	1	15	1	1
29	14	4	5	50	50	20	8	46
15	13	7	7	5.9	1	16	28	18
4	35	50	29	1	1	46	7	22
31	10	1	1	1	1	12	49	26
50	22	10	41	5.9	1	29	10	15
3	49	45	35	1	50	35	15	41
47	4	15	26	1	1	17	19	10
22	1	11	10	1	1	4	36	13

Table 4 reveals considerable variation across variables even for the same state. Illinois, for example, ranks very well in personal self-insurance, but does poorly in several variables, including medical malpractice and judicial hellholes. California ranks well in homeowners', but does poorly in product liability. Table 4 makes it easy to spot strengths and weaknesses. Further exploration of the two subgroups reveals interesting patterns.

Looking first at relative litigation risks, which track the effect of lawyers and the extent of litigiousness, we see in table 4 that Tennessee, North Dakota, Alaska, New Hampshire, and Hawaii have the lowest litigation risks.

✦  
**Texas still poses the threat of  
 "jackpot justice."**  
 ✦

The highest litigation risks are in California, Massachusetts, Texas, New York, New Jersey, Florida, and finally Illinois. Pennsylvania, Rhode Island, and West Virginia also have very high litigation risks. All of these states have very risky tort climates because of many lawyers and lawsuits, and large awards.

Tennessee ranks first in this subgroup because it has no judicial hellholes or top-100 jury awards, has the lowest case-filing rate, and has relatively few attorneys per dollar of state GDP. In contrast, Illinois ranks last because it is home to three judicial hellholes and has the third-highest number of attorneys per dollar of output. Massachusetts, sixth-worst in litigation risks overall, has the highest relative number of attorneys, followed by New York.

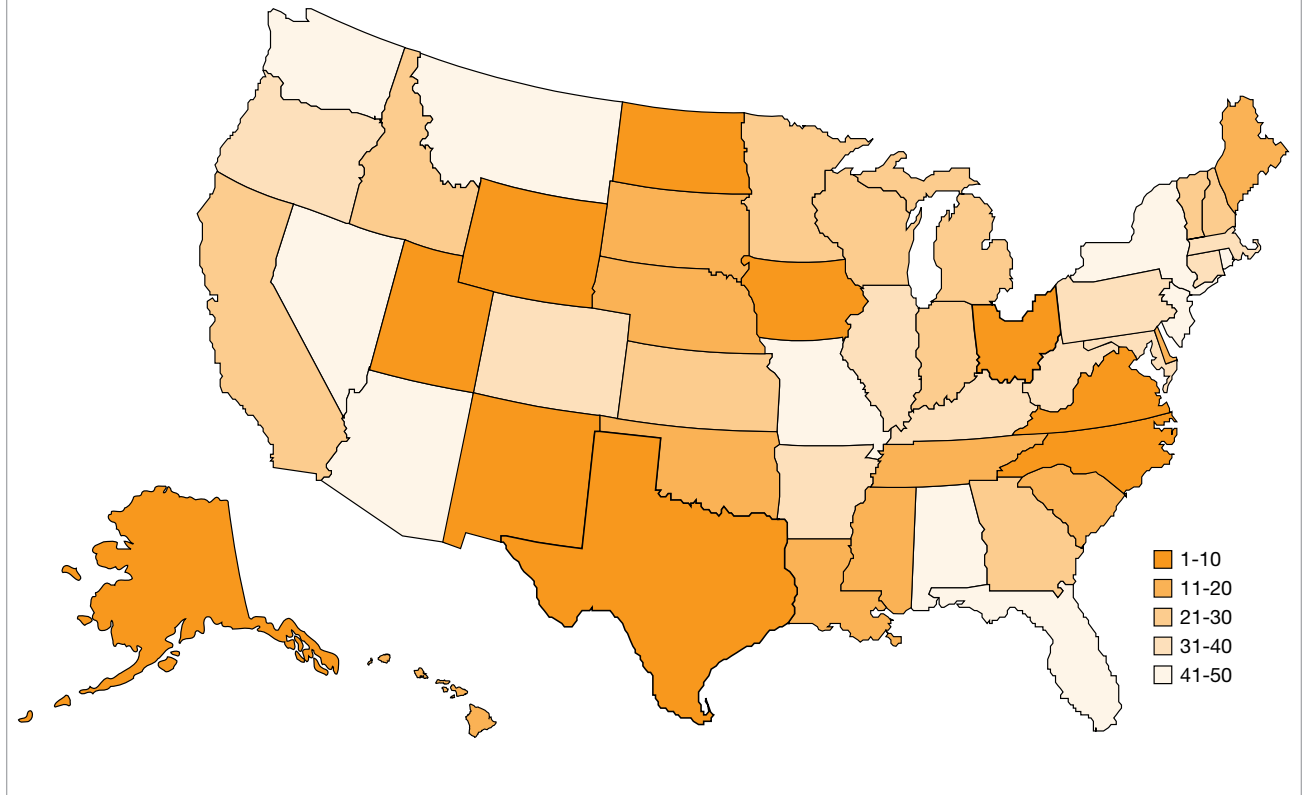
Turning next to monetary tort losses, it is instructive to start by examining absolute monetary tort losses by state. Table 5 reveals that, as we would expect, the largest states have the largest absolute

**Table 5. Ranking of Absolute Monetary Tort Losses, 2006**

<b>Rank</b>	<b>State</b>	<b>Losses</b> (billions of 2006 dollars)
1	California	19.88564164
2	New York	16.03554678
3	Florida	13.15094423
4	Texas	11.11467106
5	Illinois	8.37955028
6	New Jersey	8.09960781
7	Pennsylvania	7.56788353
8	Michigan	5.24460051
9	Ohio	4.93084065
10	Georgia	4.91344419
11	Massachusetts	4.31132784
12	North Carolina	3.99906652
13	Washington	3.92941276
14	Virginia	3.59661721
15	Missouri	3.32491052
16	Maryland	3.31889248
17	Arizona	3.23622047
18	Indiana	2.87408237
19	Tennessee	2.82924657
20	Colorado	2.81848526
21	Louisiana	2.72943719
22	Connecticut	2.67193177
23	Wisconsin	2.62009820
24	Minnesota	2.54324408
25	Alabama	2.28288407
26	Nevada	2.02850867
27	Kentucky	2.01450072
28	Oregon	1.91895127
29	South Carolina	1.89501548
30	Oklahoma	1.62906598
31	Iowa	1.35435785
32	Arkansas	1.31589651
33	Kansas	1.21267359
34	Mississippi	1.19058153
35	Utah	1.14312820
36	West Virginia	1.00446228
37	Nebraska	0.87212244
38	New Mexico	0.81550602
39	Rhode Island	0.77846006
40	Delaware	0.76824777
41	New Hampshire	0.70547172
42	Hawaii	0.65792716
43	Idaho	0.61456630
44	Montana	0.55798353
45	Maine	0.55513744
46	Vermont	0.50044267
47	Alaska	0.38696620
48	South Dakota	0.36471745
49	Wyoming	0.28754606
50	North Dakota	0.26443582

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

Figure 2. U.S. Map of Relative Monetary Tort Losses, 2006



losses. California, New York, Florida, and Texas produce the largest losses and therefore contribute the most to the U.S. total.

But as table 4 shows, Texas, for example, has much lower relative tort losses than its absolute size would predict. It has the fourth-highest absolute tort costs but the fifth-lowest relative tort costs after adjusting for its population size and its level of economic activity—an indication that Texas’s reforms are making a difference. Florida and New York, on the other hand, continue to rank poorly after controlling for relative size. On the flip side, Montana and Rhode Island are excellent examples of states with low absolute monetary tort losses but very high relative losses—an important sign of disproportionate tort costs compared to other states.

Table 4 shows the ranking of states’ relative monetary tort losses. Virginia, North Dakota, North Carolina, Alaska, and Texas have the least burdensome relative monetary tort losses. These states are scattered across the United States, as

shown in figure 2. Texas is an interesting study in contradictions, because it has low tort costs for its size but also 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 common jackpot, or crackpot, award that can bust a company.

The most burdensome relative monetary tort losses are in Alabama, Missouri, New York, Montana, New Jersey, and, dead last, Florida. The worst states tend to be in the Northeast and the South. Illinois and Rhode Island also perform poorly in this subgroup.

Virginia, ranking first in the subgroup, places in the top 10 in four of the nine tort-loss variables. In contrast, the worst state, Florida, ranks 37th or worse in eight of the nine variables. We will see in the next chapter, however, that Florida has recently adopted many reforms in an attempt to cut its absolute and relative tort costs.



## **CHAPTER 3. A Guide to Reform: U.S. Tort-System Inputs and State Rankings**

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

Table 6 lists the 28 variables used to rank each state based on tort-system inputs. The 28 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.

Each variable and its data source are described in detail below. We used the most recent data available as of the date we closed the books on the data: October 1, 2007. We chose this cut-off point because all state legislative sessions had ended by then. 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.

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.

Table 6. Input Variables

**Monetary Caps as of 2007**

14. Appeal-bond caps [18]
15. Caps on non-economic damages (excluding medical-malpractice lawsuits) [9]
16. Caps on punitive damages (excluding medical-malpractice lawsuits) [11]
17. Caps on damage awards in medical-malpractice lawsuits [21]

**Substantive-Law Rules as of 2007**

18. Class-action rules [5]
19. Attorney contingency-fee limits (excluding medical-malpractice lawsuits) [6]
20. Does the state generally use a contributory, comparative, or modified-comparative standard for negligence? [4]
21. Rules on joint and several liability [7]
22. Rules on early offers of settlement [11]
23. Does the state have an “*Illinois Brick* repealer” statute? [3]
24. Attorney-retention sunshine rules [8]
25. Reform of the collateral-source rule [4]
26. Jury-service rules [11]

**Medical Malpractice**

27. Attorney-fee limits [15]
28. Pre-trial screening or arbitration [6]

**Product Liability**

29. Asbestos- and silica-liability rules [7]
30. Construction-liability rules [2]
31. Does the state allow a “FDA defense” or “FTC defense”? [5]
32. Does the state provide guidelines for general-manufacturer liability or retailer liability? [15]
33. Does the state provide civil-liability exemptions for claims concerning junk food or obesity? [2]

**Procedural and Structural Institutions as of 2007**

34. Are state-supreme-court justices appointed or elected? [7]
35. Does the state have a harmful attorney general? [2]
36. Venue rules [9]
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 [5]
39. Statute of limitations on medical-malpractice lawsuits [5]
40. Size of juries in general-jurisdiction courts multiplied by the percentage of jurors needed to reach a verdict [10]
41. Does the state have a complex-litigation court? [2]

**Note:** The number of discernible gradations for each qualitative discrete variable is listed in brackets. This is explained further in the section “Types of Data and Ranking Construction.”

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

We ranked each state across 28 input variables to give readers an indication of how a particular state's tort-system rules align with those of the other 49 states. The input rankings might also be useful in informing governors, legislators, judges, and the public as to which state tort rules are least competitive and would be good targets for change, if legal reform is politically viable. 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 grandfathered into place over time. New reforms that change tort-system 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 can 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. These new rules, however, certainly point to which direction 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 applied in practice.

Third, we ranked each state 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/2008/tort\\_reform/](http://special.pacificresearch.org/pub/sab/2008/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. With a large data set of this kind, however, 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 five 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 discrete input variables, in contrast to the output variables, was inherently a subjective exercise.

For these reasons, the rankings of the input variables should serve to give readers an indication of how a particular state's tort-system rules compare to those of the other 49 states and where the state is potentially vulnerable to, or insulated from, lawsuit abuse, but, as mentioned before, the input rankings are only a guide and not 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 as of 2007

The four variables in this group examine state limits, or caps, on the dollar amount of awards or appeal bonds 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 fore-

stall 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 *Tort Reform Record*, published by ATRA.<sup>23</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."<sup>24</sup> 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.

15. CAPS ON NON-ECONOMIC DAMAGES (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 hard-to-quantify "pain and suffering" or "mental distress," and they generally vary according to circumstances. Colorado, for example, limits non-economic damages to \$250,000 unless the court finds evidence for a larger award not to exceed \$500,000, and it bars damages in breach-of-contract claims unless expressly allowed in the contract. Only 10 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>25</sup>

Caps on non-economic damages lower insurance costs and reduce filing rates. This is confirmed by a report by W. Kip Viscusi and Patricia H. Born that found that caps on non-economic damages reduce insurance losses, especially where a state had previously encountered relatively high losses.<sup>26</sup> The deterrent effect of damage caps is supported by a study by Mark J. Browne and Robert Puelz that found the imposition of such a cap produced a 65-percent reduction in the probability of a claim filing.<sup>27</sup> 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 DAMAGES (EXCLUDING MEDICAL-MALPRACTICE LAWSUITS). This variable tracks whether a state has a cap on punitive damages (excluding medical-malpractice lawsuits). Punitive damages are awards granted in excess of actual damages to punish defendants. As discussed earlier, 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. A third 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>28</sup>

Caps on punitive damages reduce excessive awards, thus lowering insurance rates and losses passed on to businesses. 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.<sup>29</sup> Yoon showed that once 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.<sup>30</sup> Thorpe found that insurance premiums in states that capped awards were more than 17 percent lower than in states with no caps. Punitive-damage caps lower liability-insurance premiums.

17. CAPS ON DAMAGE AWARDS IN MEDICAL-MALPRACTICE LAWSUITS. This variable tracks whether a state has limits on damage awards in medical-malpractice lawsuits, or has increased the negligence standard required to find medical providers responsible for malpractice. In some states, limits on medical-malpractice damages stand on their own. In other states, limits are dependent on a number of factors. West Virginia, for example, enacted a limit of \$250,000 for non-economic damages and \$500,000 for compensatory damages, but only for physicians who carry at least \$1 million in malpractice insurance. West Virginia allows its limits to rise with inflation. Data on medical-malpractice damage caps were collected from ATRA, NAMIC, the National Conference of State Legislatures (NCSL), and Wilson, Elser, Moskowitz, Edelman, & Dicker, LLP.<sup>31</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 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>32</sup> Kessler and McClellan found that these reforms led to a reduction of 5 to 9 percent in medical expenditures without significant effects on mortality or medical complications. Limits on damage awards are the most direct way to reduce medical-malpractice awards.

Damage 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.<sup>33</sup> 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 Hellinger and William 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>34</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.

### Substantive-Law Rules as of 2007

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.

18. 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>35</sup>

Class-action lawsuits have imposed significant costs on defendants, who often find it better 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.<sup>36</sup> 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.

19. ATTORNEY CONTINGENCY-FEE LIMITS (EXCLUDING MEDICAL-MALPRACTICE LAWSUITS). This variable tracks whether a state has limits on attorney contingency-fee arrangements (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>37</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 plaintiff attorneys working on contingency were several times higher than defense counterparts' hourly rates.<sup>38</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>39</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.

20. 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 as of 2007. Negligence 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 or her fault. If he or she 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 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 Mathiesen, Wickert, & Lehrer.<sup>40</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>41</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>42</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.

21. 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 full compensation from any one defendant in a multiple-defendant lawsuit regardless of that particular defendant's proportional fault. For example, a defendant whose fault is only 1 percent could be stuck paying 100 percent of the 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 and American Lawyer Media.<sup>43</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>44</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 cost. 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 cost.

22. **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>45</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.”<sup>46</sup> These settlements result in lower litigation costs and, as a result, lower liability-insurance rates. They also save taxpayers money for court administration costs.

23. **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. An indirect buyer is the group or individual that purchases 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 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 the Ohio Court of Appeals.<sup>47</sup>

Allowing indirect buyers to sue under a repealer statute has a harmful effect on antitrust enforcement. William Landes and Richard 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.<sup>48</sup> 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.

24. **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.<sup>49</sup>

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 noted that contracts between an attorney general and a private personal-injury lawyer can help protect the public interest.<sup>50</sup> Schwartz warned, 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 more competitive bidding or require strict oversight are essential to keep partnerships honest and accountable.

**25. REFORM OF THE COLLATERAL-SOURCE RULE.** This variable tracks whether a state has modified the standard collateral-source rule. The collateral-source rule allows a plaintiff to receive compensation from a party not involved in the litigation, such as an insurance company, and bars the defense from introducing that fact as evidence. Because the collateral-source rule results in many plaintiffs recovering damages twice, some states have modified it. Connecticut allows the introduction of collateral-source evidence, though only after judgment has been made, and permits the court to reduce damages accordingly. Kentucky, on the other hand, mandates that juries be informed of collateral-source payments. Data on reform of the collateral-source rule come from ATRA and NAMIC.<sup>51</sup>

Thomas Campbell et al. found a significant positive relationship between reforms that decrease business exposure to liability—such as collateral-source reforms—and productivity gains.<sup>52</sup> States that adopted liability-reducing reforms experienced a productivity boost of 1.7 percent compared with states that did not enact such reforms. The researchers also noted that liability-reducing reforms had the greatest effect on the insurance industry and industries with the highest liability risk.

**26. 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>53</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>54</sup> The authors 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.

27. **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 state 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>55</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.<sup>56</sup> The authors 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 consumers of health-care services.

28. **MEDICAL MALPRACTICE: PRE-TRIAL SCREENING OR ARBITRATION.** This variable tracks whether a state requires pre-trial screening or arbitration for medical-malpractice litigation. 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 of the action being filed, unless the case has already been settled or all parties voluntarily waive mediation or arbitration. Data on state reforms come from ATRA and NCSL.<sup>57</sup>

Pre-trial screenings 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.<sup>58</sup> Albert Yoon found that screening panels in Nevada have reduced the percentage of medical-malpractice claims that go to trial.<sup>59</sup> 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.

29. **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 silica-liability rules come from ATRA.<sup>60</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>61</sup> According to the authors, these defendants and 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.<sup>62</sup> 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 illness.

30. **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.<sup>63</sup> 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 opportunity to fix a construction defect before a lawsuit can be filed. Data on construction-liability rules come from ATRA.<sup>64</sup>

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 to the problem.<sup>65</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.

31. **PRODUCT LIABILITY: DOES THE STATE ALLOW A "FDA DEFENSE" OR A "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 a FTC defense from product liability for manufacturers of "light" or "low-tar" cigarettes. Data come from ATRA and NCSL.<sup>66</sup>

Enacting a 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 over-promote their products, misprescription should be the sole responsibility of the negligent physician or pharmacist.<sup>67</sup> 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.

32. **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 unless 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.<sup>68</sup>

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.<sup>69</sup> Mahoney and Littlejohn argued that legal uncertainty and scientific innovation are incompatible, resulting in less product research and fewer new products on store shelves.

33. **PRODUCT LIABILITY: DOES THE STATE PROVIDE CIVIL-LIABILITY EXEMPTIONS FOR CLAIMS CONCERNING 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 virtually identical provisions. Information regarding junk-food and obesity civil-liability exemptions comes from the National Restaurant Association.<sup>70</sup>

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.<sup>71</sup> The authors 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.

### **Procedural and Structural Institutions as of 2007**

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.



34. ARE STATE-SUPREME-COURT JUSTICES APPOINTED OR ELECTED? This variable tracks whether a state used appointment or election to seat its supreme-court justices as of 2007. In Arizona, the governor appoints supreme-court 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 through committee, legislative appointment, and partisan elections by district. Information on the selection method of justices comes from the Justice at Stake Campaign.<sup>72</sup>

Whether a state appoints or elects its supreme-court justices is significant because litigation awards tend to be larger in states where the judiciary is elected. In other words, the appointment of justices leads to lower awards and a more business-friendly climate. Alexander Tabarrok and Eric Helland found that awards are larger in states with an elected judiciary.<sup>73</sup> The authors argued that this result is driven by the need for elected judges to buy votes, by redistributing money from out-of-state defendants (nonvoters) to in-state 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 justice, said it best in an extremely candid moment:

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 in-state 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>74</sup>

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

In addition, supreme-court selection method is associated with differences in judicial quality. Russell S. Sobel and Joshua C. Hall found that states selecting 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>75</sup> The authors found that differences in judiciary party control in states that elect judges are associated with differences in outcomes generally considered to be related to judicial quality, including usage 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>76</sup> Insulating judges from political influence, therefore, could come at the price of more litigation but yield fairer outcomes.

35. DOES THE STATE HAVE A HARMFUL ATTORNEY GENERAL? This variable tracks whether a state had a sitting attorney general in 2007 who was on a list of the worst attorneys general in the country. Designation as a harmful attorney general was based on an examination of four areas: dubious dealings, fabrication of law, imperialism and usurping of legislative powers, and predatory practices. Connecticut Attorney General Richard Blumenthal, for example, was given the label of worst in the nation based on

poor grades in all areas, including increasing the power of his office and unethically rewarding his allies. Data for this variable come from a report by the Competitive Enterprise Institute.<sup>77</sup>

Having a harmful state attorney general is bad for the general welfare of a state. An attorney general who continuously abuses his position to promote his own power, who rewrites laws and usurps legislative powers, and/or who preys on out-of-state businesses that have not violated state laws harms his own constituents. According to Michael DeBow, such an attorney general breaches the separation of powers in the state government and also “saddles the public with additional tax and regulatory burdens that are both unwanted and unwise.”<sup>78</sup>

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 state 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.<sup>79</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>80</sup> Kostal noted the concentration of cases in San Francisco County and Alameda County in California in which verdicts are known to be more favorable to plaintiffs and awards are higher than in other jurisdictions. According to the author, awards in California’s more favorable counties average \$3 million higher 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.<sup>81</sup> 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.<sup>82</sup> 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 as of 2007. 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 and Merrick L. Gross and Jason Kellogg, attorneys with the law firm of Akerman Senterfitt in Miami, Florida.<sup>83</sup>

*Daubert* raises the bar for expert review of evidence and testimony, and it reduces the influence of interest groups in the content of testimony. Jeffrey S. Parker elaborated on these effects, arguing that *Daubert* is more economically efficient than alternative standards.<sup>84</sup> In addition, Parker found that proposals that allow for more judicial supervision or impose external constraints are both “unnecessary” and “socially undesirable.” For these reasons, *Daubert* is the preferred, stricter standard for scientific review of evidence by expert witnesses.

38. CONDITIONS ON THE USE OF EXPERT WITNESSES IN MEDICAL-MALPRACTICE LAWSUITS. This variable tracks whether a state applies conditions on the use of expert witnesses in medical-malpractice cases. 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, in active practice, or 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>85</sup>

Rules governing the use of expert witnesses in medical-malpractice 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 to validate instinctually 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>86</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. This variable tracks whether a state has a medical-malpractice statute of limitations. Indiana, for example, sets its medical-malpractice statute of limitations at two years from the alleged harmful act, omission, or neglect by a physician. 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 statutes of limitations come from ATRA and NCSL.<sup>87</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 Studdert et al. also found that such limitations cut medical costs.<sup>88</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.

40. 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>89</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>90</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.

41. DOES THE STATE HAVE A COMPLEX-LITIGATION COURT? This variable tracks whether each state has a complex-litigation court. Complex-litigation courts are designed to handle specialized 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.<sup>91</sup>

Complex-litigation courts handle lawsuits brought before them in a more efficient manner than regular trial courts. 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.<sup>92</sup> The report also noted greater efficiency in the entire court system of states with complex 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>93</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 only be logged as a simple "yes" or "no." For example, "Does the state provide civil-liability exemptions for claims concerning junk food or obesity?" could only be coded as a yes or a no. A yes was ranked 1 and a no was 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.)

For example, some states cap punitive damages, while other states do not. Among the states that do, the monetary amount of the cap or coverage 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/coverage

law was. The most stringent cap received a ranking of 1. 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, or 50. If there were six gradations, we assigned rankings of 1, 10.8, 20.6, 30.4, 40.2, or 50. The most stringent gradation—more encompassing solution—always received a ranking of 1, and 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-system inputs. A panel of five individuals ranked the variables. Their names appear in the Acknowledgements. 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/2008/tort\\_reform/](http://special.pacificresearch.org/pub/sab/2008/tort_reform/).

✦  
There is still room for improvement in  
all states, including those at the top.  
✦

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 "reformed" something. 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 have been the product of purposeful reforms.

### Input-Variable Rankings by State

Table 7 presents the overall input-variable rankings by state and the ranking for each state for each of the 28 input variables. We calculated the overall ranking by comparing average rankings across all input variables—adding together the rankings for each state on each of the 28 variables and dividing by 28. This methodology implicitly weighted each variable equally. The state with the lowest average ranking across all 28 variables received an overall ranking of 1. The state with the highest average ranking received an overall ranking of 50.

Table 7 reveals that the states with the best overall tort rules on the books are Colorado, Texas, Ohio, Georgia, Indiana, Florida, and Michigan. 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 litigation risks.

At the bottom of the barrel are Pennsylvania, Illinois, Maryland, New York, Vermont, and, dead last, Rhode Island. California has the 11th-worst overall tort rules.

Notice that even the states at the top of the list have much variability across the 28 input variables. Colorado, for example, is ranked first overall but is 50th in four of the variables; and the average of its individual rankings is roughly 21. 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.

Table 7. Overall Input Rankings and Individual Input-Variable Rankings by State, 2008

State	Overall Input Ranking	Overall Input Score	Monetary Caps			
			14. Appeal-bond caps	15. Non-econ damage caps	16. Punitive damage caps	17. Med-mal caps
Alabama	26	31.61041548	50	50	10.8	50
Alaska	16	30.10972222	50	50	35.3	15.7
Arizona	21	30.88194444	50	50	50	50
Arkansas	22	30.94215805	9.64705882	50	15.7	32.85
California	40	34.78455763	47.11764704	50	50	32.85
Colorado	1	20.97410131	9.64705882	25.5	30.4	5.9
Connecticut	33	32.86944564	1	50	35.3	50
Delaware	27	31.83749881	50	50	50	30.4
Florida	6	27.4558415	18.29411764	50	30.4	18.15
Georgia	4	26.23382353	9.64705882	50	15.7	20.6
Hawaii	39	34.63962537	38.47058822	13.25	50	37.75
Idaho	10	28.52904412	35.58823528	7.125	35.3	8.35
Illinois	46	36.53750119	50	50	50	8.35
Indiana	5	27.2118464	38.47058822	50	30.4	23.05
Iowa	37	34.37161067	26.94117646	43.875	50	50
Kansas	17	30.35155229	3.88235294	1	45.1	27.95
Kentucky	34	33.39730392	26.94117646	50	50	50
Louisiana	8	28.3377451	29.82352940	50	10.8	8.35
Maine	28	32.14027659	1	50	50	50
Maryland	47	37.38819444	50	19.375	50	42.65
Massachusetts	24	31.2388877	1	50	30.4	8.35
Michigan	7	28.0629902	9.64705882	43.875	1	3.45
Minnesota	41	34.88202495	26.94117646	13.25	50	30.4
Mississippi	23	31.21495098	44.23529410	37.75	35.3	8.35
Missouri	11	28.87389587	18.29411764	50	40.2	15.7
Montana	31	32.48194444	50	50	35.3	1
Nebraska	30	32.47164914	15.41176470	50	1	8.35
Nevada	18	30.75098039	18.29411764	50	50	13.25
New Hampshire	14	29.11249881	1	50	1	30.4
New Jersey	12	28.90506417	41.35294116	50	40.2	35.3
New Mexico	44	35.95139008	50	50	50	10.8
New York	48	37.9875	50	50	50	50
North Carolina	25	31.36715686	9.64705882	50	35.3	32.85
North Dakota	20	30.85604694	9.64705882	50	25.5	15.7
Ohio	3	26.03083912	18.29411764	31.625	10.8	47.55
Oklahoma	13	28.91740315	38.47058822	50	15.7	27.95
Oregon	42	35.49428105	47.11764704	50	50	30.4
Pennsylvania	45	36.5184232	44.23529410	50	20.6	30.4
Rhode Island	50	39.675	50	50	50	50
South Carolina	19	30.80318746	32.70588234	50	50	20.6
South Dakota	36	34.27687789	9.64705882	50	50	42.65
Tennessee	9	28.46642038	21.17647058	50	50	50
Texas	2	22.84893672	6.76470588	50	25.5	25.5
Utah	15	29.83954248	12.52941176	50	50	40.2
Vermont	49	38.94583333	1	50	50	50
Virginia	38	34.61576797	9.64705882	50	5.9	25.5
Washington	32	32.68717201	44.23529410	50	1	8.35
West Virginia	43	35.720056	24.05882352	50	50	42.65
Wisconsin	35	34.26396821	26.94117646	50	50	45.1
Wyoming	29	32.42965686	9.64705882	50	50	50

Substantive-Law Rules						
18. Class-action rules	19. Contingency-limits	20. Negligence standard	21. Joint and several rules	22. Early offers	23. Brick repealer statute	
13.25	50	1	50	25.5	50	
50	40.2	50	1	30.4	1	
50	50	50	9.1667	1	1	
50	50	17.33333333	9.1667	15.7	1	
50	50	50	17.3333	1	50	
25.5	50	17.33333333	1	20.6	25.5	
50	50	33.66666667	33.6667	5.9	1	
50	50	33.66666667	50	25.5	1	
37.75	50	50	1	40.2	1	
1	50	17.33333333	1	40.2	1	
50	50	33.66666667	33.6667	10.8	25.5	
50	50	17.33333333	1	5.9	25.5	
50	1	33.66666667	25.5	500.	50	
50	50	33.66666667	1	25.5	1	
50	50	33.66666667	9.1667	10.8	1	
25.5	50	17.33333333	1	25.5	50	
50	50	50	1	25.5	1	
25.5	50	50	1	45.1	1	
50	30.4	17.33333333	50	25.5	50	
50	50	1	50	50	25.5	
50	50	33.66666667	41.8333	25.5	1	
50	50	33.66666667	25.5	5.9	50	
50	50	33.66666667	17.3333	10.8	50	
50	50	50	1	25.5	50	
25.5	50	50	17.3333	25.5	1	
50	50	33.66666667	17.3333	25.5	1	
50	40.2	17.33333333	17.3333	25.5	50	
50	50	33.66666667	9.1667	10.8	50	
50	50	33.66666667	17.3333	50	1	
50	50	33.66666667	17.3333	1	1	
50	50	50	9.1667	10.8	50	
50	50	50	25.5	25.5	50	
50	50	1	50	25.5	1	
50	50	17.33333333	9.1667	10.8	50	
25.5	50	33.66666667	17.3333	50	1	
50	20.6	17.33333333	25.5	25.5	1	
50	50	33.66666667	25.5	25.5	25.5	
50	50	33.66666667	17.3333	50	1	
50	50	50	50	25.5	25.5	
50	50	33.66666667	9.1667	25.5	1	
50	50	50	17.3333	25.5	50	
50	50	17.33333333	1	10.8	1	
1	50	33.66666667	17.3333	35.3	1	
50	50	17.33333333	1	25.5	1	
50	50	33.66666667	1	25.5	50	
50	50	1	50	50	1	
50	50	50	17.3333	25.5	1	
50	50	17.33333333	25.5	25.5	1	
50	10.8	33.66666667	17.3333	5.9	50	
50	50	33.66666667	1	10.8	1	

Table 7. Overall Input Rankings and Individual Input-Variable Rankings by State, 2008

State	Substantive-Law Rules				
	24. Attorney retention sunshine	25. Collateral source reform	26. Jury-service rules	27. Med-mal attorney fee limits	28. Med-mal pre-trial screening / arbitration
Alabama	50	17.3333	1	50	1
Alaska	50	1	50	46.5	1
Arizona	50	17.3333	15.7	36	10.8
Arkansas	50	50	50	50	30.4
California	50	1	45.1	11.5	30.4
Colorado	15	1	35.3	50	30.4
Connecticut	36	1	50	15	40.2
Delaware	50	17.3333	50	4.5	10.8
Florida	50	1	50	8	30.4
Georgia	50	50	50	50	30.4
Hawaii	50	1	50	39.5	1
Idaho	50	1	50	50	10.8
Illinois	50	33.6667	50	18.5	40.2
Indiana	50	1	20.6	36	10.8
Iowa	50	1	50	43	30.4
Kansas	1	50	50	39.5	10.8
Kentucky	50	1	50	50	20.6
Louisiana	50	50	5.9	50	30.4
Maine	50	17.3333	50	8	1
Maryland	50	50	35.3	43	20.6
Massachusetts	50	50	50	18.5	10.8
Michigan	50	1	50	32.5	20.6
Minnesota	43	1	50	39.5	1
Mississippi	50	50	10.8	50	1
Missouri	50	1	5.9	50	50
Montana	50	33.6667	50	50	1
Nebraska	50	50	50	46.5	10.8
Nevada	50	17.3333	50	11.5	20.6
New Hampshire	50	50	50	1	1
New Jersey	50	1	50	22	20.6
New Mexico	50	50	20.6	50	10.8
New York	50	1	40.2	15	40.2
North Carolina	50	50	50	50	30.4
North Dakota	22	1	50	50	20.6
Ohio	50	17.3333	1	50	30.4
Oklahoma	50	33.6667	5.9	29	30.4
Oregon	50	1	50	36	20.6
Pennsylvania	50	33.6667	50	50	20.6
Rhode Island	50	1	50	50	30.4
South Carolina	50	50	50	50	20.6
South Dakota	50	1	50	50	30.4
Tennessee	50	17.3333	45.1	25.5	30.4
Texas	8	50	30.4	50	1
Utah	50	1	25.5	25.5	1
Vermont	50	50	50	50	30.4
Virginia	29	50	50	50	1
Washington	50	1	50	39.5	20.6
West Virginia	50	17.3333	50	50	10.8
Wisconsin	50	17.3333	50	22	30.4
Wyoming	50	50	50	25.5	1



Substantive-Law Rules				
29. Asbestos / silica rules	30. Construction-liability rules	31. FDA / FTC defense	32. Manufacturer / retailer liability	33. Junk food / obesity
50	50	50	50	50
50	1	50	50	50
50	1	37.75	50	1
50	50	50	50	50
50	50	50	50	50
50	1	37.75	18.5	1
50	50	50	50	50
50	50	50	50	50
1	50	50	39.5	1
25.5	50	50	32.5	1
50	50	50	50	50
50	50	50	50	1
50	50	25.5	50	1
50	50	1	29	1
50	50	50	39.5	50
33.66666666	50	50	50	1
50	50	50	50	1
50	50	50	25.5	1
50	50	50	43	1
50	50	50	50	50
50	50	50	50	50
50	50	1	46.5	1
50	50	50	50	50
50	50	50	1	50
50	50	50	50	1
50	50	50	22	50
50	50	50	50	50
50	50	50	50	50
50	50	50	36	50
50	50	1	4.5	50
50	50	50	50	50
50	50	50	50	50
50	50	50	8	50
50	50	37.75	50	1
17.33333333	50	37.75	11.5	1
50	50	50	50	50
50	50	37.75	50	1
50	50	50	50	50
50	50	50	50	50
25.5	50	50	50	50
50	50	50	50	1
41.83333333	50	50	50	1
9.16666666	50	1	15	1
50	50	1	50	1
50	50	50	50	50
50	50	50	50	50
50	1	50	50	1
50	50	13.25	50	50
50	50	50	50	1
50	50	50	50	1

Table 7. Overall Input Rankings and Individual Input-Variable Rankings by State, 2008

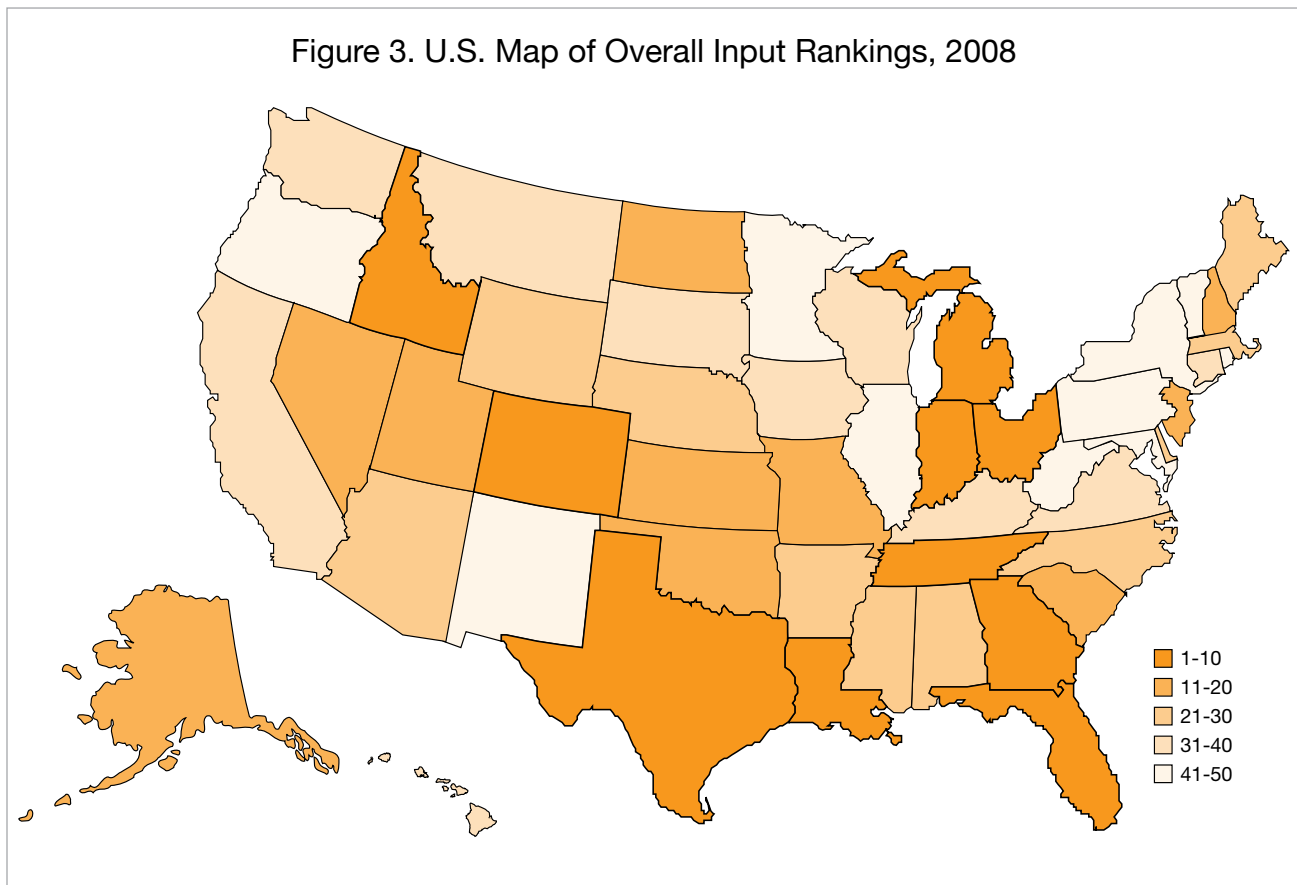
State	Procedural and Structural Institutions			
	34. Supreme Court justice selection	35. Harmful attorney general?	36. Venue rules	37. Expert witness standard
Alabama	50	1	31.625	17.33333333
Alaska	17.33333333	1	50	1
Arizona	17.33333333	1	50	50
Arkansas	25.5	1	13.25	1
California	17.33333333	1	50	50
Colorado	17.33333333	1	50	1
Connecticut	1	50	50	1
Delaware	1	1	50	1
Florida	17.33333333	1	43.875	50
Georgia	25.5	1	25.5	33.66666666
Hawaii	1	1	50	33.66666666
Idaho	25.5	1	50	1
Illinois	41.83333333	50	50	50
Indiana	17.33333333	1	50	1
Iowa	17.33333333	1	50	1
Kansas	17.33333333	1	50	50
Kentucky	25.5	1	50	1
Louisiana	50	1	37.75	1
Maine	1	1	50	1
Maryland	17.33333333	1	50	50
Massachusetts	1	1	50	1
Michigan	25.5	1	43.875	50
Minnesota	25.5	1	50	50
Mississippi	25.5	1	1	1
Missouri	17.33333333	1	7.125	50
Montana	25.5	1	50	1
Nebraska	17.33333333	1	50	1
Nevada	25.5	1	50	17.33333333
New Hampshire	1	1	50	1
New Jersey	9.16666666	1	50	50
New Mexico	17.33333333	1	50	1
New York	1	1	50	50
North Carolina	25.5	1	50	17.33333333
North Dakota	25.5	1	50	50
Ohio	33.66666666	1	50	1
Oklahoma	17.33333333	1	50	1
Oregon	25.5	1	50	17.33333333
Pennsylvania	50	1	19.375	50
Rhode Island	1	50	50	1
South Carolina	1	1	1	1
South Dakota	17.33333333	1	50	1
Tennessee	17.33333333	1	50	1
Texas	50	1	1	1
Utah	17.33333333	1	50	50
Vermont	9.16666666	50	50	1
Virginia	9.16666666	1	50	33.66666666
Washington	25.5	1	50	50
West Virginia	50	50	19.375	1
Wisconsin	25.5	1	50	33.66666666
Wyoming	17.33333333	1	50	1

Procedural and Structural Institutions			
38. Med-mal expert witness conditions	39. Med-mal statute of limitations	40. Jurors needed for a verdict	41. Complex-litigation court?
13.25	1	1	50
1	37.75	11.88888889	50
25.5	1	39.11111111	50
25.5	1	17.33333333	50
37.75	13.25	17.33333333	1
25.5	1	39.11111111	1
25.5	1	39.11111111	50
37.75	25.5	1	1
1	37.75	39.11111111	1
1	1	1	50
50	37.75	11.88888889	50
37.75	1	33.66666667	50
1	25.5	17.33333333	50
50	1	39.11111111	50
37.75	37.75	28.22222222	50
25.5	50	22.77777778	50
50	13.25	17.33333333	50
1	1	17.33333333	50
50	13.25	39.11111111	50
13.25	37.75	39.11111111	1
50	37.75	11.88888889	1
1	37.75	50	1
13.25	25.5	44.55555556	50
25.5	37.75	17.33333333	50
13.25	1	17.33333333	50
1	37.75	22.77777778	50
50	1	6.44444444	50
1	13.25	17.33333333	1
13.25	25.5	1	50
13.25	37.75	28.22222222	1
50	13.25	11.88888889	50
50	13.25	50	1
25.5	13.25	1	1
1	37.75	28.22222222	50
13.25	37.75	39.11111111	1
13.25	37.75	17.33333333	1
50	37.75	28.22222222	50
50	37.75	11.88888889	1
37.75	37.75	1	50
1	37.75	1	50
50	1	11.88888889	50
13.25	1	1	50
13.25	50	11.88888889	50
50	25.5	39.11111111	50
50	37.75	1	50
13.25	50	39.11111111	50
50	50	28.22222222	50
13.25	50	39.11111111	50
50	37.75	50	1
50	37.75	17.33333333	50

Figure 3 gives a bird's-eye view of the geographical distribution of tort rules. With the exception of Illinois and Minnesota, the Great Lakes states and the South tend to have stronger tort rules, primarily because of recent reforms. The Northeast/Mid-Atlantic states and parts of the West tend to have weaker tort rules on the books.

America's federalist system encourages state experimentation; 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-system rules. The current legal-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 focus their future efforts. For example, in California, reformers might want to target class-action rules and asbestos liability. In New York, which ranked 50th on an astounding 18 of 28 variables, reformers might want to target attorney-retention sunshine rules and monetary caps. In New Jersey, adopting *Daubert* as the standard for scientific review of evidence by expert witnesses might be a high priority. And Texans might want to focus on abandoning partisan district elections to seat judges. Each state has different strengths and vulnerabilities, as revealed in table 7.



### Saints, Sinners, Salvageables, and Suckers

By merging the output and input results, we can divide states into four groups: saints, sinners, salvageables, and suckers. The saints are states that have relatively low monetary tort losses and/or few 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. These states include Alaska, Mississippi, Ohio, Tennessee, and Utah.

The sinners are states that have relatively high monetary tort losses and/or high 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. These states include—among others—Alabama, California, Illinois, Massachusetts, and New York.

✦  
**In the game of lawsuit  
 “Whack-a-Mole,” the suckers  
 will be the states where plaintiffs  
 and their lawyers pop up next to  
 pursue abusive lawsuits.**

The salvageables are states that have moderate to high relative monetary tort losses and/or moderate to high 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. These states include Alaska, Colorado, Florida, Georgia, Michigan, and Texas.

Table 8. Saints, Sinners, Salvageables, and Suckers

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

Source: PRL

Depending on the reform, this feedback process can be immediate or can take years. Writing about medical-malpractice 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>94</sup>

Of course, the salvageable states will move up in the rankings only if they reject challenges to beneficial reforms once they have been enacted, and only if they keep pace with the beneficial reforms enacted by other states. The rankings are a constant ordinal race.

The suckers are states that have weak tort rules on the books because they currently have relatively low monetary tort losses and/or few litigation risks and, therefore, foolishly believe that they are not vulnerable and 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 will be the states where plaintiffs and their lawyers pop up next to pursue abusive lawsuits because these states have not pre-emptively closed off opportunities for excessive litigation. The suckers include Iowa, New Mexico, North Carolina, and Virginia.

Table 8 lists each state's status as a saint, sinner, salvageable, or sucker based on the merged output and input results.

States at the top of the *U.S. Tort Liability Index* have fairer and 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 stronger economic growth. Chapter 4 looks at these benefits.

## CHAPTER 4. Why Legal Reform Is Important

According to the Pacific Research Institute, excessive tort costs in the United States due to lawsuit abuse total \$589 billion each year.<sup>95</sup> But why should you care about this cost?

The average person pays for lawsuit abuse 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, cofounder 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].”<sup>96</sup> We are all paying for lawsuit abuse whether we realize it or not.

The civil-justice system of a U.S. state or of a country affects people’s lives in many important ways. A poor civil-justice system acts as a burdensome tax, weighing down the standard of living for ordinary citizens. Meaningful legal reform, on the other hand, not only improves fairness, it also pays dividends in the form of stronger economic growth and higher personal income. Legal reform, as we will see, can also mean the difference between life and death.

Chapter 4 examines evidence from today’s top economists and legal scholars showing the importance of the legal environment and legal reform for 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

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

a particular industry or type of liability, we survey studies that provide a bird’s-eye view of the benefits of tort reform.

Connecting this evidence to the *U.S. Tort Liability Index* leads to one vital conclusion: A better *Index* ranking for a state—created through a commitment to meaningful tort 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.

## The Link between Tort Reform and Greater Prosperity in the United States

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.”<sup>97</sup> Let’s look at the returns from tort reform.

### PRODUCTIVITY AND EMPLOYMENT

Thomas J. Campbell, Daniel P. Kessler, and George B. Shepherd examined the impact of liability reforms on labor productivity.<sup>98</sup> Writing in *Brookings Papers on Economic Activity*, Campbell et al. measured the growth in productivity from 1970 to 1990 in U.S. states that changed their liability laws, and compared it with productivity growth in states where liability laws remained the same. 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 those states that enacted reform were about 2 percent greater between 1972 and 1990. This translates into a \$1,125 increase in output per worker per year in 2007 dollars. Productivity in manufacturing increased even more, about 2.7 percent or \$1,892 per worker. These findings confirm that legal reforms that curb exposure to liability lawsuits increase productivity.

Tort reforms increase employment, too.

Lisa Kimmel examined the effect of tort reform on employment.<sup>99</sup> She looked at six 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 state employment by 1 percent. To put this into perspective, an additional tort reform in California would create more than 152,000 jobs, and an additional tort reform in New York would create more than 87,000 jobs.

Another study has shown that tort reform saves lives.

### ACCIDENTAL DEATHS

Paul H. Rubin and Joanna M. Shepherd examined the link between tort reform and accidental deaths. Writing in the *Journal of Law and Economics*, Rubin and Shepherd posited two competing potential effects of tort reform on accidental deaths.<sup>100</sup> 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.



✦  
 The current U.S. tort system  
 costs lives at the margin.  
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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.<sup>101</sup> The current U.S. tort system costs lives at the margin—liability burdens exceed the tipping point. The Pacific Research Institute estimated the cost of tort-related net accidental deaths to be \$7.51 billion in terms of foregone output in 2006.<sup>102</sup>

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

#### INNOVATION

U.S. product-liability law often discourages innovation and research and development (R&D).<sup>103</sup> W. Kip Viscusi and Michael J. Moore examined the consequences of product-liability costs on product and process R&D and on new-product introductions by manufacturing companies.<sup>104</sup> 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 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 damage 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.”<sup>105</sup> In other words, when businesses operate in a low-liability-cost 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.

Their analysis found that 13 manufacturing industries were beyond the tipping point where additional liability burdens reduced 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 “identify a strong relationship between liability and innovation that has made the courts a major player in the product innovation process.”<sup>106</sup> The Pacific Research Institute concluded that the suppression of product R&D and process R&D due to excessive liability resulted in lost sales of new products of more than \$367 billion in 2006 alone.<sup>107</sup>

Tort reform also improves 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.<sup>108</sup> Medical-liability concerns, therefore, very often prompt health-care providers to order more tests, referrals, and procedures than they would do otherwise. This practice is commonly referred to as “defensive medicine.” Daniel Kessler and Mark McClellan found that medical-liability concerns prompted defensive hospital costs of 5 to 9 percent.<sup>109</sup>

PriceWaterhouseCoopers has generalized the Kessler and McClellan findings beyond hospital costs to all personal health-care costs.<sup>110</sup> When applied in this manner, defensive medicine increased personal health-care expenditures by \$124 billion in 2006. In other words, tort reforms that eliminated unnecessary, defensive medicine would cut health-care costs by \$124 billion each year, enabling greater access to health care through more affordable health insurance.

According to estimates by the Pacific Research Institute, increased health-care costs due to defensive medicine have added 3.4 million Americans to the rolls of the uninsured.<sup>111</sup> 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 due to “absenteeism” (fewer or shorter paid workdays) and “presenteeism” (reduced productivity at work attributable to poorer health).

Researchers at the Pacific Research Institute totaled the costs of premature deaths and lost productivity due to reduced access to health care attributable to defensive medicine and arrived at a cost of nearly \$39 billion in 2006.<sup>112</sup> This is in addition to the \$124 billion in defensive-medicine expenditures. Medical-liability reform, therefore, would not only improve health care, but it could save \$163 billion annually for other uses.<sup>113</sup>

Tort reform also improves state economic performance.

## STATE ECONOMIC PERFORMANCE

When entrepreneurs decide 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.

✦  
**A healthy civil-justice system  
 expands economic opportunities  
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 and tax revenues.**  
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The present authors, Lawrence J. McQuillan and Hovannes Abramyan of the Pacific Research Institute, have examined the connection between a healthy state tort system and a strong state economy.<sup>114</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 systems 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 systems than in the 10 states with the worst tort systems. Labor-earnings growth was more than 5 percent greater in the best states. And state gross domestic product, 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 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 8 percent less in effective tax rates 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 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 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>115</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>116</sup> The rank order of states' legal frameworks explained about 12 percent of the variation among the 50 states' GSP growth rates. The researchers concluded:

“A state that imposes a capricious or arduous court system on businesses is likely stunting its growth compared 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 tort 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 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 other industrialized nations—and has been for many years.<sup>117</sup> Direct tort costs as a percentage of GDP average about 1 percent in 11 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>118</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.

✦  
 Enormous resources are  
 wasted today on the unnecessary  
 and unproductive redistribution  
 of wealth that occurs with  
 excessive tort litigation.  
 ✦

If tort 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.<sup>119</sup> 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 foregone benefits is \$7,848.<sup>120</sup>

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 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 litigation, making society poorer in the process.

Table 9 summarizes the benefits of tort reform in the United States. The message is clear: Tort reform increases productivity, employment, output, and earnings; boosts innovation and sales of new products; lowers health-care costs while improving health-care access; and saves 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.

Table 9. The Benefits of Tort Reform in the United States

<b>Study</b>	<b>Year</b>	<b>Benefit of Tort Reform</b>
<b>LABOR PRODUCTIVITY</b>		
Campbell, Kessler, and Shepherd	1998	2% increase in labor productivity. \$1,892 increase in output per worker per year in manufacturing.
<b>EMPLOYMENT</b>		
Kimmel	2001	1.5% increase in manufacturing employment. 1% increase in total state employment, or more than 152,000 jobs in California.
<b>ACCIDENTAL DEATHS</b>		
Rubin and Shepherd	2007	24,000 lives saved, net, 1981–2000.
McQuillan, Abramyan, and Archie	2007	\$7.51 billion in additional output, 2006 dollars. Tort reform saves lives and boosts output on balance.
<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 in sales of new products, 2006 dollars.
<b>DEFENSIVE MEDICINE/ACCESS</b>		
Kessler and McClellan	1996	Eliminate defensive-medicine costs of \$124 billion each year, 2006 dollars. Enable 3.4 million Americans to afford health insurance, generating \$39 billion in additional output per year, 2006 dollars. Increase the number of physicians in a state.
PriceWaterhouseCoopers	2006	
McQuillan, Abramyan, and Archie	2007	
Hellinger and Encinosa	2003	
<b>STATE ECONOMIC PERFORMANCE</b>		
McQuillan and Abramyan	2007	Jobs, earnings, output, tax revenue, and population grow faster in top tort states than bottom, and tax rates are lower too.
Buchholz and Hahn	2002	0.75% hike in per-capita state GSP for every 10% (five-place) improvement in state's legal ranking.
<b>NATIONAL OUTPUT &amp; INDIVIDUAL WELL-BEING</b>		
McQuillan, Abramyan, and Archie	2007	\$589 billion saved per year if U.S. tort-cost levels were comparable in relative size with other industrialized countries; an annual benefit for a family of four of \$7,848.

Meaningful tort reform will improve a state's ranking in future editions of the *U.S. Tort Liability Index*. But more important, a reform 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 Welcomed.”

## 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 for those who are 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<sup>121</sup>

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 or deny the allegations in the complaint, or state that he has insufficient knowledge to admit 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 within the answer; otherwise they are waived.

The plaintiff and defendant may reach a settlement without going to trial. Approximately 95 percent of civil cases do not go to trial. If there are still remaining issues in a lawsuit that have not been resolved by settlement or by motion, and have not been dropped, then those remaining issues must be decided by trial.

### 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>122</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 any attorney or the judge feels that a juror is not qualified for the case, the juror is excused "for cause." There is no limit to a party's challenges 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, attorneys for each side make opening statements to inform the court and the jurors of the nature of the case, the evidence they will present, and the facts they 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.

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 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 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; in criminal cases, 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 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 to a verdict. In criminal trials, the verdict must be unanimous. In civil trials, the verdict can be less than unanimous. The verdict percentage and jury size varies in different jurisdictions. If the jury cannot reach a verdict, the judge may declare a "hung jury" and declare a mistrial. In civil cases, two types of verdicts may be rendered—general and special. In general verdicts, the jury has decided the case in favor either of the defendant or of the plaintiff. In special verdicts, 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.

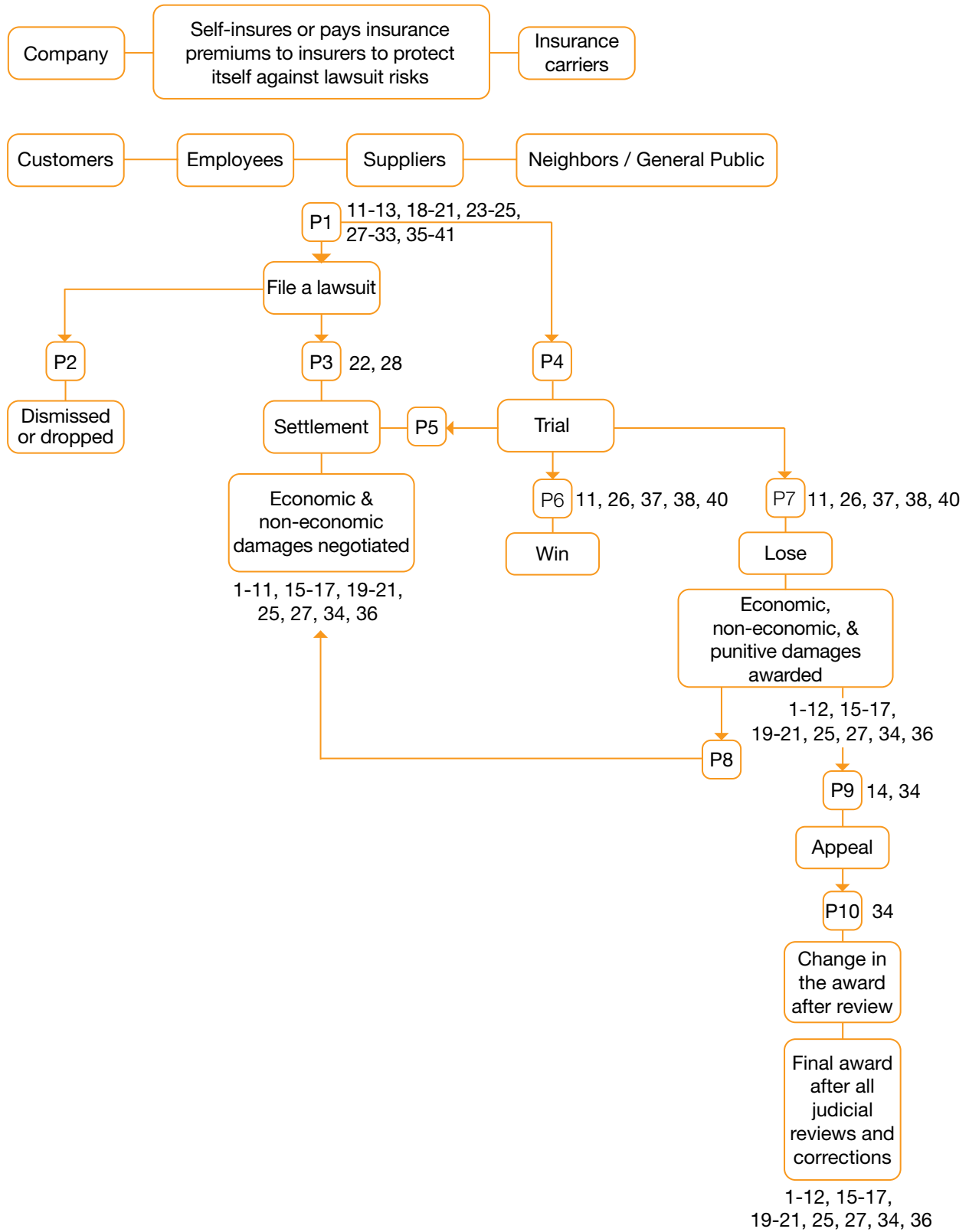
The civil-litigation process described above can also be viewed as a probability game.

### 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, representing 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 and lawsuits. For example, it could have product-liability insurance, general-liability insurance for such things as "slip and fall," and commercial automobile insurance.

Figure 4. The Lawsuit Industry and Output and Input Variables



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: Either the lawsuit is dismissed or dropped, a settlement is negotiated before the case goes to trial, or the case goes to trial. There is a probability, **P2** through **P4**, respectively, associated with each possibility.

If the case is settled before trial, a remedy is negotiated between the plaintiff and the defendant (company) that might include the defendant paying the plaintiff economic and non-economic damages. If the case proceeds to trial, one of three outcomes is possible: the case is settled before a verdict is reached (**P5**); the defendant wins in a jury or judge trial, or the case is dropped (**P6**); or 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 decision will be overturned or modified, ultimately affecting the final award after all judicial reviews and corrections.

This is the lawsuit industry in a nutshell, depicted as a probability game of gambles and payoffs.

Each of the probabilities, **P1** through **P10**, is affected by the legal rights, legal procedures, expected monetary gains, and expected legal costs that together determine the costs and benefits (incentives) of moving from one stage in the lawsuit industry to the next. Each probability is influenced by the other probabilities. And each variable fits into this process (see figure 4) by either directly measuring incentives or outcomes, or by measuring the rules that shape the incentives or outcomes.

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- We calculated each state's personal self-insurance tort costs as a percentage of state GDP using the data provided by A.M. Best Company and the methodology in Appendices 3 and 4 of Tillinghast's study. We followed these steps: (1) we added together for each state direct premiums earned for homeowners' multiple-peril insurance and liability insurance for private passenger automobiles; (2) that sum was multiplied by 1.048 (the 2004 combined ratio from Appendix 3 of Tillinghast's study) to produce each state's personal insurance tort costs; (3) that product was then divided by 1.02 to yield each state's total personal tort costs (insured and self-insured); (4) each state's personal insurance tort costs (found in step 2) was subtracted from the state's total personal tort costs (found in step 3), yielding each state's personal self-insurance tort costs; finally (5) the outcome of step 4 was divided by the state's GDP for 2006 and multiplied by 100 to achieve the personal self-insurance tort costs as a percentage of state GDP, 2006.
- We calculated each state's commercial self-insurance tort costs as a percentage of state GDP as follows: (1) we added together for each state direct premiums earned for commercial automobile liability insurance, farmowners' multiple-peril insurance, commercial multiple-peril (liability portion) insurance, other general-liability insurance, medical-malpractice insurance, and product-liability insurance; (2) this sum was multiplied by 1.048 (the combined ratio from Appendix 3 of Tillinghast's study) to produce each state's commercial insurance tort costs; (3) this product then was divided by [1-.35]\* to yield each state's total commercial tort costs (insured and self-insured); (4) each state's commercial insurance tort costs (found in step 2) were then subtracted from its total commercial tort costs (found in step 3) to yield each state's commercial self-insurance tort costs; finally (5) the outcome of step 4 was divided by each state's GDP for 2006 and multiplied by 100 to yield each state's commercial self-insurance tort costs as a percentage of state GDP, 2006. We expressed both commercial and personal self-insurance tort costs as a percentage of state GDP under the assumption that greater economic activity generates more torts (exposure to potential tort losses).
- \*We used 35 percent rather than 33 percent (Appendix 4 of Tillinghast's study) primarily because the commercial self-insurance cost percentage is trending upward, so it is likely to have been higher in 2006 than in 2004. Use of 35 percent is also consistent with our previous edition of this index.
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McQuillan speaks regularly to civic and policy groups across the country and on the national news media. His television appearances include NBC news, CNBC, and CNNfn. YouTube hosts some of his interviews. He is a frequent guest on nationally syndicated radio talk shows including the *Ron Insana Show*, *Roger Hedgecock Show*, and *Jerry Doyle Show*. He counsels governors, legislators, and advocacy groups across the country; provides legislative testimony; and was a member of Governor Arnold Schwarzenegger’s task force on a constitutional spending limit for California.

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