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Lawsuit Abuse Reform in the Volunteer State

Evaluating the Legal and Economic Impact of Various Reform Measures

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EXECUTIVE SUMMARY

There is an increased discussion in the Tennessee General Assembly about implementing various reform measures to the state's tort system in an effort to curb the negative consequences of lawsuit abuse. Proponents of these measures argue that reforms will lead to a fairer, more just system and also boost the state economy. This study focuses on various proposed reforms, including non-economic and punitive damages caps, collateral source rule reform, class action reform, and loser-pays.

The goal is to outline both the legal and economic impact that these reforms have had in other states. By identifying the effect these reforms have had in states where they have been enacted, the prospective benefits to Tennessee can better be calculated.

Based on reform results in other states, this study indicates that, among other impacts:

- A similar increase in employment that Mississippi witnessed could lead to nearly 120,000 jobs over the next four years in Tennessee.
- If lawsuit abuse reform had been enacted in 2000, the state could have produced an additional $895 million in healthcare revenue, $611 million in durable goods manufacturing, and an additional $806 million in the retail trade industry in Tennessee over the ensuing decade.
- Reform could bring an emergency physician to at least five or six of the 47 counties currently lacking an emergency physician.
- Reform could allow as many as 67,000 uninsured Tennesseans to become insured.

By following the lead of other states such as Texas and Mississippi, which have implemented broad-based reform, Tennessee could reap significant economic and legal benefits while maintaining a fair, just civil justice system.

Introduction

A tort is non-contractual, civil wrong. Tort suits compromise such actions as medical malpractice, personal injury, and products liability claims. If a monetary judgment is awarded in a tort suit, there are several possibilities for awards that a plaintiff may receive. If a plaintiff is injured through the defendant's negligence, he or she will be awarded compensatory or economic damages.

Economic damages compensate a victim for such expenses as medical bills, lost wages, and, if necessary, future care. Economic damages are based upon evidence provided by the plaintiff and are just compensation for injury, thus this paper will not attempt to suggest reform in this area.

In addition to economic damages, plaintiffs may also be able to recover non-economic damages if the facts of the case support such awards. Unlike economic damages, which are based on tangible evidence such as bills and receipts, non-economic damages are awarded based on amorphous concepts such as pain and suffering and loss of enjoyment of life. While non-economic damages are sometimes deserved, they can be wildly disproportionate to economic damages. As an example, consider the breakdown of the award given in the following case from 2009 in Putnam County in which the plaintiff was injured in a car accident:

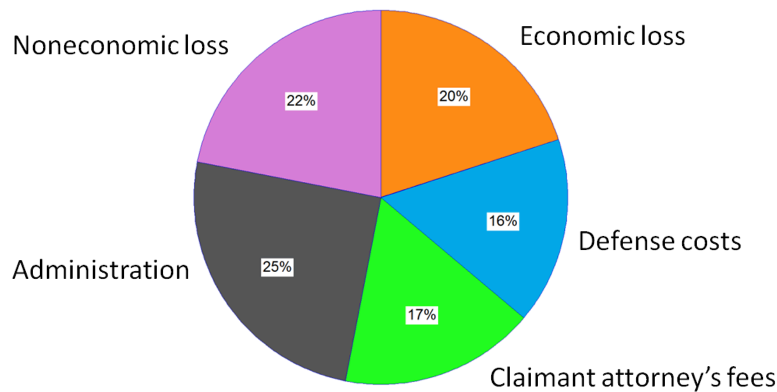
- $509,222 for past medical expenses;
- $7 million for pain and suffering with consideration of life expectancy;
- $6 million for regard to the element of loss of enjoyment of life without duplicating damages awarded for pain and suffering; and

- $5.5 million for permanent disability without duplicating damages awarded for pain and suffering and loss of enjoyment.

The total amount awarded to the plaintiff was more than $19 million, of which almost $18.5 million was based on non-economic damages. Such disproportionate results can have far-reaching effects on the state's economy. For this reason, the potential effects of caps on non-economic damages will be examined in this paper.

In the event that a defendant's actions exceed negligence and are reckless or intentional, reaching the level of willful or wanton conduct, another type of damages known as punitive damages may be granted. In Tennessee, the plaintiff must prove by clear and convincing evidence that the defendant's conduct was intentional, fraudulent, malicious or reckless in order to sustain a claim for punitive damages.[1] Punitive damages are in place to act as a deterrent, and unlike economic and non-economic damages, act to punish the defendant and not simply to reward the plaintiff. While punitive damages are more rare than non-economic damages, this paper will investigate whether a cap on such damages would improve the state's economic landscape.

The tort system of the United States has an annual direct cost of $180 billion, 1.8 percent of the gross domestic product (GDP), making it the most expensive tort system in the world. In 1960, tort costs amounted to just 0.6 percent of the GDP, rising to 1.3 percent of the GDP by 1970. Despite this high cost, only 20 percent of the total costs directly compensate victims for economic losses. The majority of direct tort costs, or 58 percent, goes toward administration, attorney's fees, and defense costs.[2]



Graph 1. A breakdown of how tort costs are distributed in the United States.

The entire 58 percent should not be considered excessive, as there is some level of transaction costs required to administer any system. The White House's Council of Economic Advisors has suggested that the workers' compensation system in the United States, which is designed to deliver compensation to workers who are injured on the job, is the ideal system for litigation cost-breakdown. This is a no-fault system, and thus litigation costs are lower because less money is spent on legal fees. According to the National Academy of Social Insurance, for every dollar paid to workers' compensation claimants, approximately 23 percent is paid in administrative costs.[3]

Assuming this is an efficient percentage for administrative costs, one can begin to estimate the excessive costs inherent in the United States tort system. Even if one assumes that the economic and non-economic damages are awarded at economically efficient levels, $36 billion would go to economic losses, $39.6 billion would pay non-economic damages, and administration overhead would take up $41.4 billion. If the tort system more closely resembled the cost-breakdown of the more efficient workers' compensation system, this means there would have been $63 billion less in deadweight loss. If the United States could

have eliminated that $63 billion, tort costs would only make up 1.17 percent of the total GDP, much more in line with the tort systems of other developed nations.

The ultimate burden of the tort system's current excess costs is borne by individuals through job loss, reduced wages, and increased consumer prices. In order to eradicate inefficiencies in their tort systems that have led to these consequences, several states have enacted various reform measures. Among the most prevalent reform measures include non-economic damages caps, punitive damages caps , the enactment of a loser-pays system, collateral-source rule reform, and changes to class action lawsuits. An estimate of the economic benefit to Tennessee can be determined based on analyzing the impact these various reforms have had in other states.

Potential Impact of a Non-economic Damages Cap in Tennessee

A cap on non-economic damages would serve to limit the amount a plaintiff could obtain for damages in excess of actual harm done, including damages for pain and suffering, loss of enjoyment, and other non-economic compensatory claims. There is ample evidence to suggest that a cap on non-economic damages would benefit Tennessee economically, especially in the areas of business and medicine.

Medical Reform

States that have passed non-economic damages caps have seen significant economic improvements in the medical community. These improvements can clearly be seen in Texas after its enactment of a non-economic damages cap in 2003. First, there has been a dramatic decrease in medical malpractice suits in Texas, causing the American Medical Association to drop Texas from its list of states in medical liability crisis.[4] This marks the

first time any state has been removed from the list.[5] Additionally, physician recruitment and retention have increased, particularly in high-risk specialties.[6] In 2006 alone, 145 New York doctors applied for licenses to move their practices to Texas.[7] This appears to reflect the inviting nature of Texas malpractice laws in comparison to those in New York. Finally, medical malpractice lawsuits in Harris County, Texas' largest county, have dropped to about half of what they were in 2001 and 2002. There were 204 cases filed in 2004, compared with 441 in 2001 and 550 in 2002.[8]

The medical insurance industry in Texas has also been positively affected by the reform, which in turn has benefitted consumers. After the reform, the five largest Texas medical liability insurers decreased premium rates, which will save doctors approximately $50 million.[9] Texas Medical Liability Trust, the state's largest medical malpractice liability carrier, reduced its premiums by 17 percent.[10] Furthermore, The American Physicians Insurance Exchange reduced its premiums for Texas physicians by $3.5 million in 2005. Beginning in May 2005, 2,200 of the 3,500 physicians insured by the company saw their premiums drop by an average of five percent.[11] Finally, Health Care Indemnity, the state's largest carrier for hospitals, cut rates by 15 percent in 2004.[12]

Similarly, the enactment of a non-economic damages cap in 2004 has led to numerous positive advancements in Mississippi. The Medical Assurance Company of Mississippi, which provides medical malpractice insurance to about 70 percent of doctors in the state, announced a five percent decrease in premiums for 2006.[13] In 2008, just four years after tort reform passed in Mississippi, the number of medical malpractice suits had

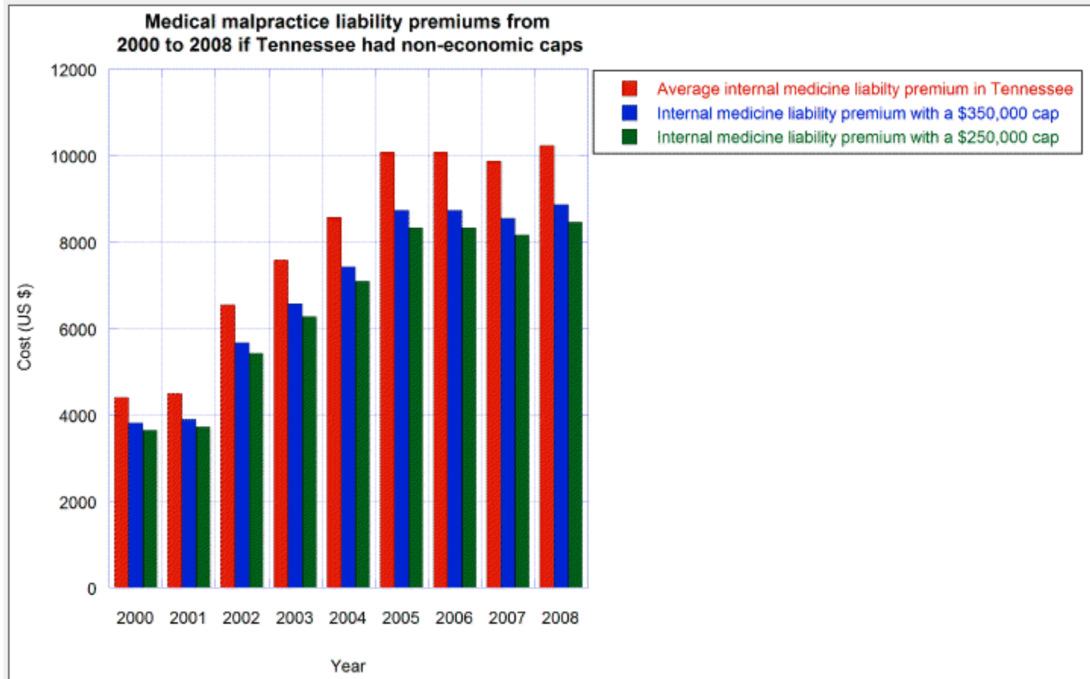
decreased by nearly 90 percent, which in turn caused malpractice insurance costs to drop by 30 to 45 percent.[14]

West Virginia has also experienced positive results from non-economic damages reform. After passing tort reform measures in 2003 that included a $250,000 cap on non-economic damages, West Virginia witnessed an increase in the number of new physicians in the state. According to the West Virginia Board of Medicine, 377 new physicians were licensed in the state in 2004, the most since 1999. The state had previously hit a low point with 305 new licensees in 2000.[15]

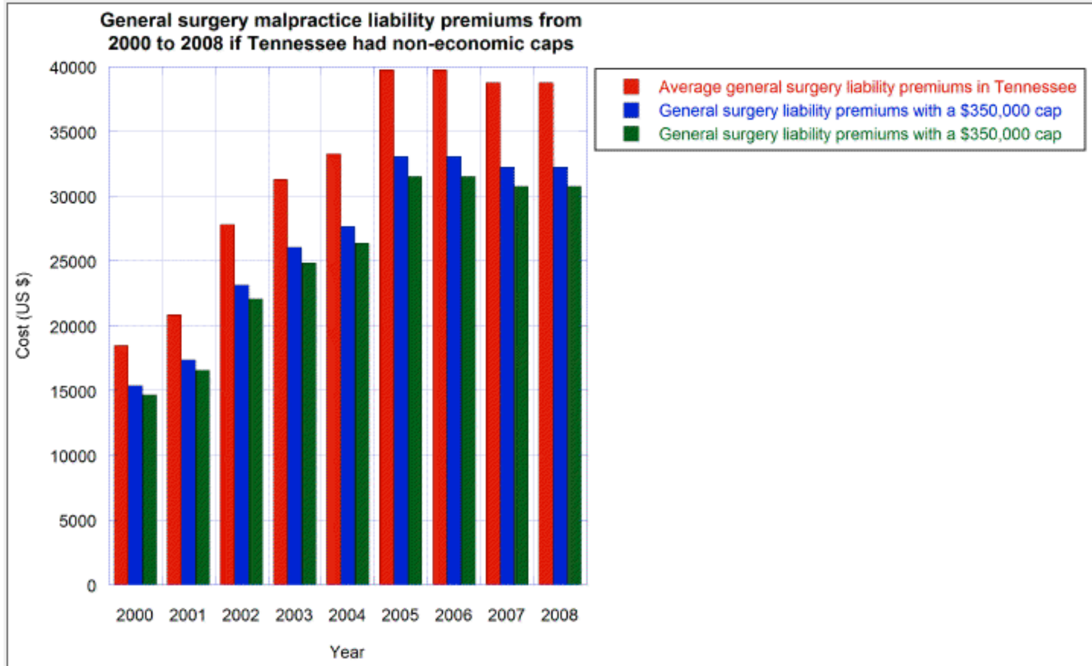
West Virginia Physician's Mutual, the state's largest medical malpractice insurer has regained 100 new doctors who had previously left the state. In addition, the company sought a five percent reduction in malpractice liability premiums in 2005. The company president credits the reduced premiums and addition of doctors to various medical malpractice reforms that have been passed since 2001.[16] Finally, Woodbrook Casualty Insurance, the state's largest private malpractice coverage provider serving about 250 doctors, experienced a 3.9 percent rate decrease in 2005.[17]

A 2007 study by Teresa Waters at the University of Tennessee Health Sciences Center analyzed the correlation between the stringency of economic and non-economic damages caps and insurance premiums between 1991 and 2003. Non-economic damages caps are associated with lower average medical liability insurance premiums per physician and fewer malpractice payouts per physician. Similarly, a 2006 study compared the relationship between tort reforms and medical liability premiums from 1991 to 2004 using data from the Medical Liability Monitor, an independent journal that reports on medical liability insurance rates, tort reform, and significant jury verdicts.[18] In states with non-

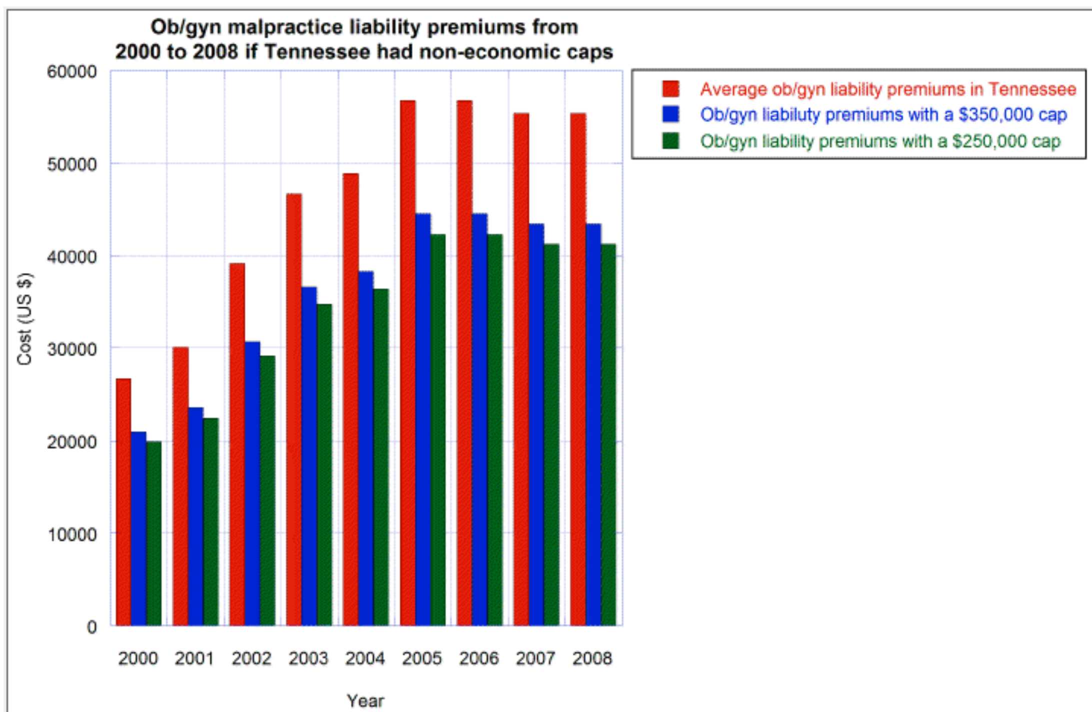
economic damages caps of $250,000, the medical liability premium of internal medicine practitioners is 17.3 percent lower, 20.7 lower for general surgeons, and 25.5 percent lower for obstetrician/gynecologists (OB/GYNs). For each $100,000 increase in the cap, the premiums increased by 3.9 percent.



Graph 2. This plot shows how a non-economic damages cap of $250,000 or $350,000 enacted in Tennessee before 2000 would have lowered the average medical liability premiums of practicing internal medicine physicians.



Graph 3. This plot shows how a non-economic damages cap of $250,000 or $350,000 enacted in Tennessee before 2000 would have lowered the average medical liability premiums of practicing general surgeons.



Graph 4. This plot shows how a non-economic damages cap of $250,000 or $350,000 enacted in Tennessee before 2000 would have lowered the average medical liability premiums of practicing OB/GYNs.

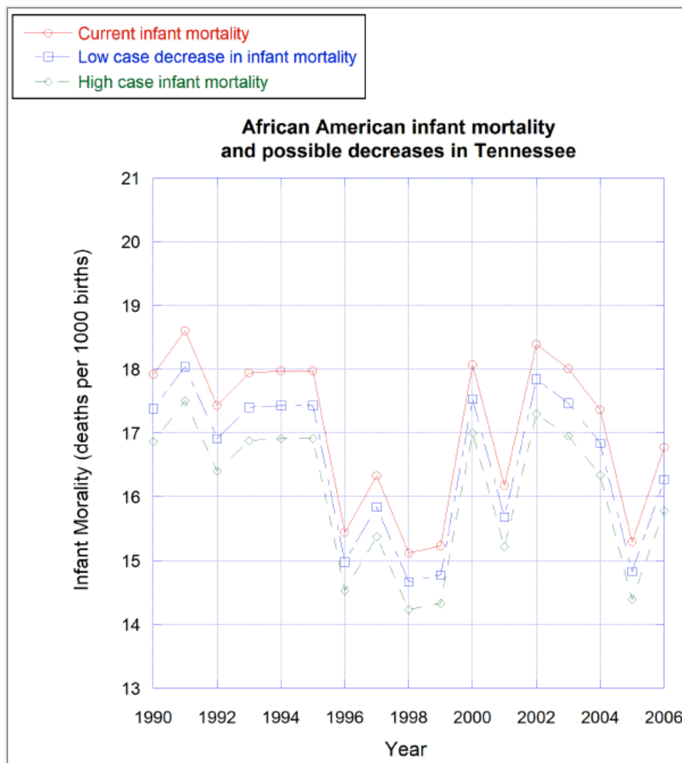
There have been many studies over the years that show a positive correlation between non-economic damages caps and physician supply. Increasing the overall supply of physicians will increase competition and decrease healthcare costs, benefitting both physicians and consumers. A 2005 study reported that direct tort reforms increased physician supply by 2.4 percent in reform states relative to non-reform states. This was confirmed in another study that found that a non-economic damages cap increased physician supply by 2.2 percent between 1985 and 2000 in reform states relative to states without caps.[19] The percent increase of emergency physicians in reform states was particularly large at 11.5 percent compared to states without caps.[20] A third study examined the relationship between physician supply and caps on non-economic or total damages and found the correlation to be especially positive for rural counties in states with caps compared to states without.[21] The number of physicians per capita in rural counties is four percent higher when a state has non-economic damages caps than in similar counties in states without caps.[22] There is also a 10 percent increase in surgical specialists and an 11 percent increase in support specialists in rural counties in states with caps.[23]

As of 2007, 42 Tennessee counties had no residing OB/GYN and 47 counties have no residing emergency physician.[24] Using the results previously discussed on increased physician supply,[25] limitations on non-economic damages could result in at least one more county having a residing OB/GYN and five or six counties obtaining an emergency physician. In terms of surgical specialists, 49 counties have no residing orthopedic surgeon and 81 have no neurosurgeons. With caps on non-economic damages, it is possible that five

counties would gain orthopedic surgeons and one or two additional counties would finally have a resident neurosurgeon.

This infusion of additional medical care could alleviate many health problems by people who live far away from metropolitan areas. One study found that rural obstetricians are twice as likely as those practicing in the metropolitan areas to stop or reduce care to patients who were medically high-risk.[26] The same study revealed that rural obstetricians were more likely than their metropolitan counterparts to discontinue their practice.[27]

Research also suggests that caps on non-economic damage awards could result in a reduction in infant mortality. The results are due largely to the availability and acquisition of prenatal care. The impact may be felt primarily among minority populations, as one study finds that a non-economic damages cap could result in a six percent reduction in infant mortality among African Americans.[28] Researchers have discovered that a decrease in malpractice premiums would ultimately lead to a decrease in incidences of improper prenatal care by three to 5.9 percent for African American women, and 2.2 to 4.7 percent for white women. The importance of prenatal care to infant health cannot be understated, as babies born to mothers who did not receive prenatal care are three times more likely to be born with a low birth weight and are five times more likely to die than infants born to mothers who sought prenatal care.[29] Tennessee has a much higher rate of infant mortality when compared with the United States as a whole, so any reforms that would make prenatal care more readily available would directly address this problem.



Graph 5. Possible decline in infant mortality among African American women across the state.

The lack of caps on non-economic damages has also led to the practice of defensive medicine in Tennessee, where doctors order additional tests and services to avoid litigation. Using data from a PriceWaterhouseCoopers study, the nonprofit Pacific Research Institute has found that unnecessary spending on defensive medical procedures reaches $124 billion per year nationwide.[30] That accounts for approximately eight percent of personal healthcare costs.[31] Between 1980 and 2003, the Congressional Budget Office found that hospital spending per insured patient is five percent lower in states where non-economic damages are capped.[32] However, while hospital spending in states with non-economic caps was lower, individual physicians did not appear to have lower spending in states with non-economic caps.

Reducing the number of unnecessary, yet costly, tests that are ordered by physicians to protect themselves would make health insurance more affordable for citizens. The Pacific Research Institute estimates that the practice of defensive medicine has made personal health insurance unaffordable for 3.4 million people nationally.[33] Adjusting for Tennessee's uninsured population, reducing unnecessary defensive medical spending by capping non-economic damages would allow as many as 67,000 more Tennesseans to obtain health insurance.[34]

Business Reform

Mississippi has reaped significant benefits in areas other than the medical field from the enactment of a non-economic damages cap. In a 2004 special legislative session called by Governor Haley Barbour, the Mississippi Legislature passed The Tort Reform Act, which included reform to non-economic damages.[35] Since the law took effect on September 1, 2004, businesses have made new investments in the state including: a $3.5 million investment in new jobs by Winchester Ammunition, a $20 million investment by Kingsford Charcoal, a $35 million investment by Textron Financial, and a $1.8 billion expansion by FedEx Ground.[36]

Mississippi had become known as one of the most anti-business states in the country before enacting tort reform in 2004. Since that time, statistics show that the new laws have helped Mississippi's economy grow faster than Tennessee's.

Increase in per capita real GDP	Mississippi	Tennessee
2000-2001	-0.63%	-0.08%
2001-2002	0.77%	3.10%
2002-2003	2.77%	2.04%
2003-2004	1.46%	3.61%
Total	4.37%	8.67%

Before Reform

Increase in per capita real GDP	Mississippi	Tennessee
2004-2005	0.23%	0.57%
2005-2006	1.72%	1.27%
2006-2007	0.55%	0.01%
2007-2008	1.06%	-0.55%
Total	3.56%	1.30%

After Reform

Table 1. Mississippi and Tennessee per capita real GDP before and after tort reforms in Mississippi.

Increase in real GDP	Mississippi	Tennessee
2000-2001	-0.47%	0.80%
2001-2002	0.95%	3.91%
2002-2003	3.08%	2.93%
2003-2004	2.10%	4.63%
Total	5.66%	12.27%

Before Reform

Increase in real GDP	Mississippi	Tennessee
2004-2005	0.70%	1.87%
2005-2006	1.67%	2.71%
2006-2007	1.39%	1.34%
2007-2008	1.67%	0.51%
Total	3.56%	6.43%

After Reform

Table 2. Mississippi and Tennessee real GDP before and after reforms in Missisippi.

Within four years after the passage of tort reform in Mississippi, approximately 60,000 new jobs were added, an increase of about 4.6 percent.[37] A similar increase in employment in Tennessee, adjusted for population differences, would add nearly 120,000 jobs over a four year period.[38]

There is also evidence that non-economic damages caps have helped to strengthen the Texas economy. In 2003, the Texas Legislature enacted significant reforms to the state's civil justice system.[39] Limiting non-economic damages was a key component of the reform. Since the enactment of reform measures, Texas has made great strides in growing its economy and providing jobs for its citizens. Among the advances to business, Texas was

awarded the 2004 Governor's Cup award for the largest number of job creation announcements.[40] Texas also was selected as the state with the best business climate in the nation by *Site Selection Magazine*, marking the first time the state had won the award since 1992.[41] Furthermore, it is estimated that reforms enacted in 1995 resulted in savings of $2.542 billion that directly benefit consumers.[42] This was coupled with $1.796 billion in annual cost savings from reduced inflation ($216 per household), and $7.056 billion in annual total personal income growth ($862 per household).[43] The net result was a savings of $1,078 per year to the average Texas household.[44]

Texas per capita real GDP has surged in recent years, while Tennessee's statistics have lagged. Texas real GDP has similarly outpaced Tennessee real GDP in recent years.[45]

Increase in per capita real GDP	Texas	Tennessee
2000-2001	0.63%	-0.08%
2001-2002	0.26%	3.10%
2002-2003	-0.23%	2.04%
2003-2004	2.85%	3.61%
Total	3.51%	8.67%

Before Reform

Increase in per capita real GDP	Texas	Tennessee
2004-2005	1.04%	0.57%
2005-2006	2.45%	1.27%
2006-2007	2.28%	0.01%
2007-2008	-0.03%	-0.55%
Total	5.74%	1.30%

After Reform

Table 3. Increase in per capita real GDP in Texas as compared to Tennessee.

Increase in real GDP	Texas	Tennessee
2000-2001	2.49%	0.80%
2001-2002	2.05%	3.91%
2002-2003	1.37%	2.93%
2003-2004	4.54%	4.63%
Total	10.45%	12.27%

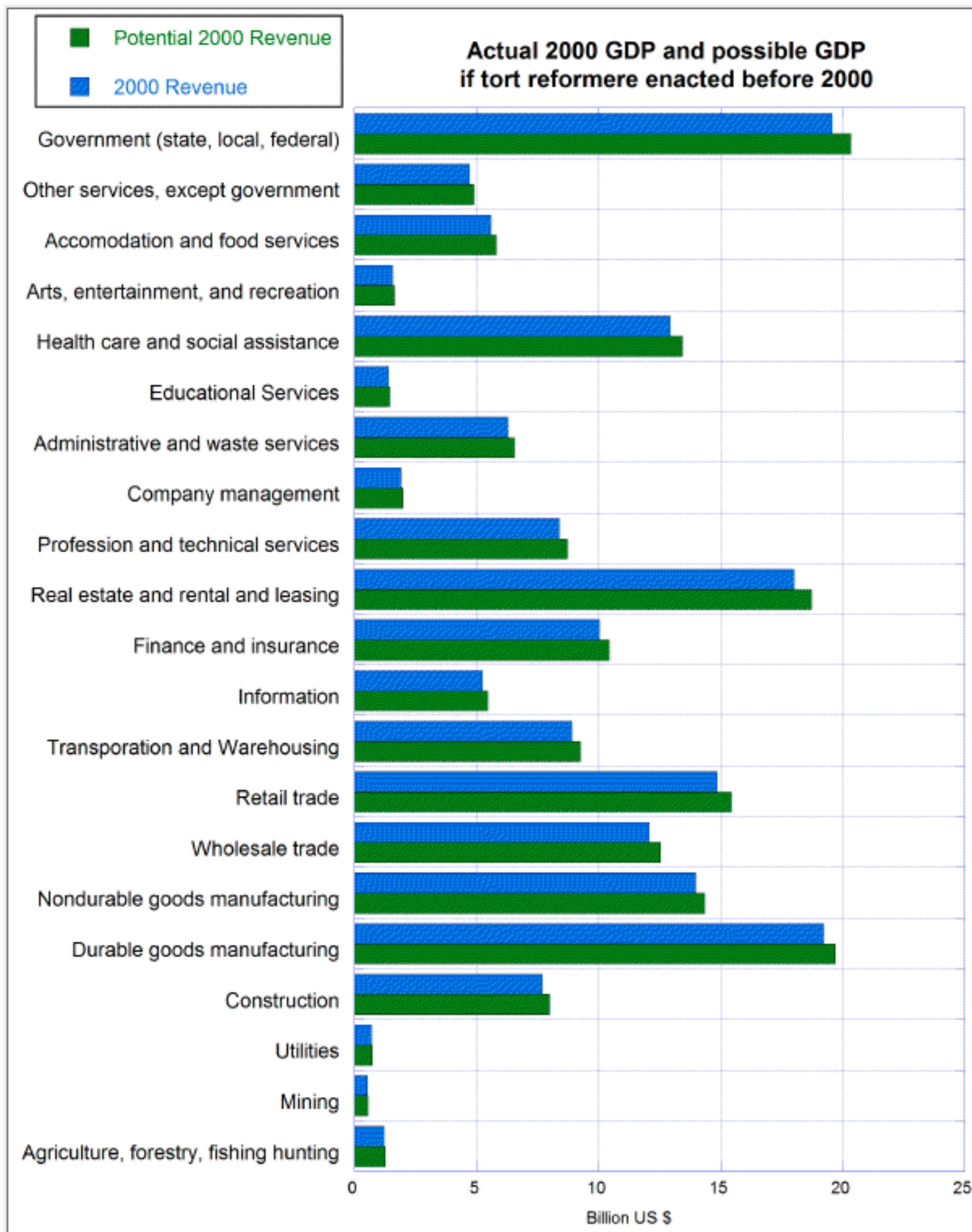
Before Reform

Increase in real GDP	Texas	Tennessee
2004-2005	2.78%	1.87%
2005-2006	4.94%	2.71%
2006-2007	4.37%	1.34%
2007-2008	2.00%	0.51%
Total	14.09%	6.43%

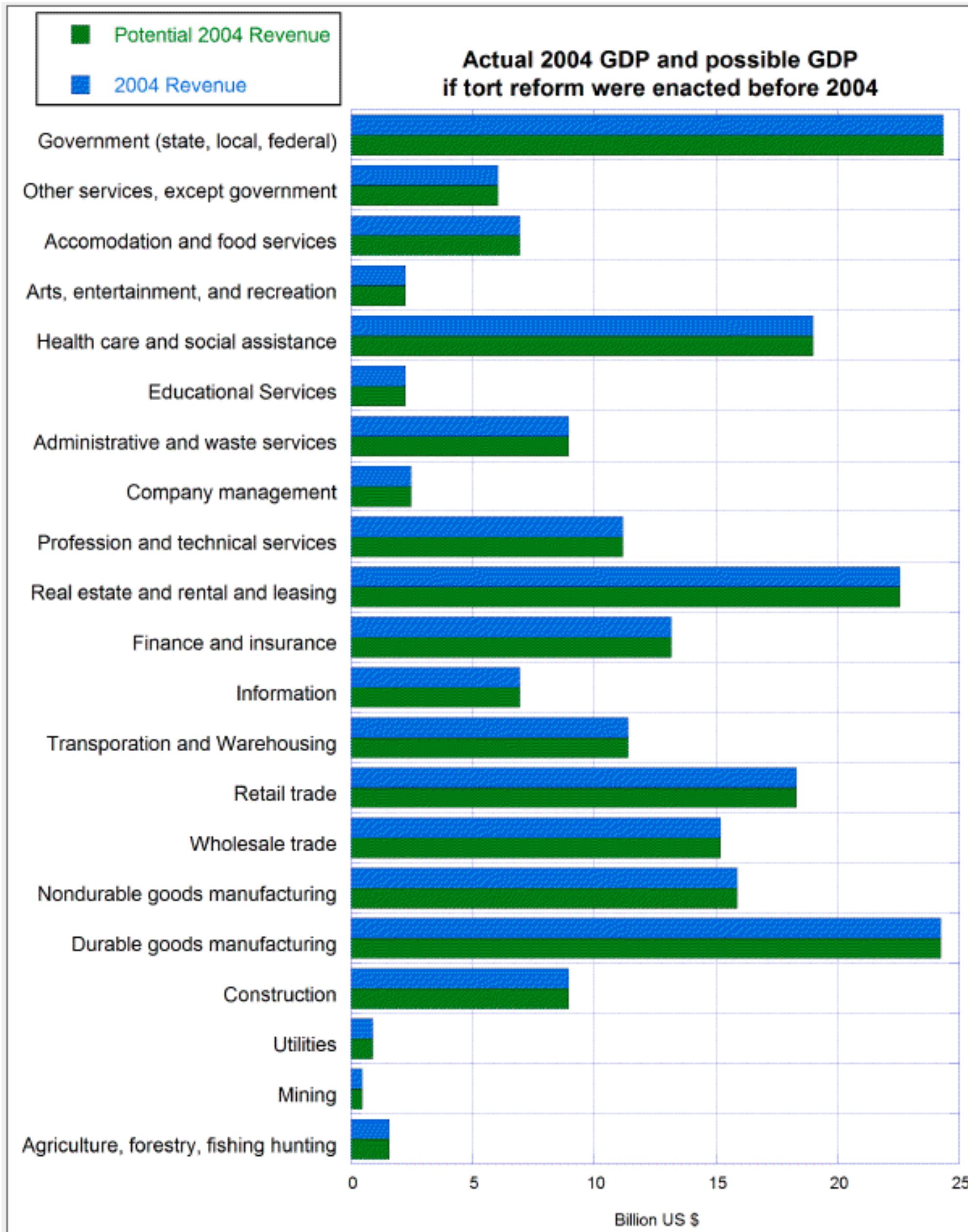
After Reform

Table 4. Changes in real GDP before and after Texas tort reforms versus Tennessee.

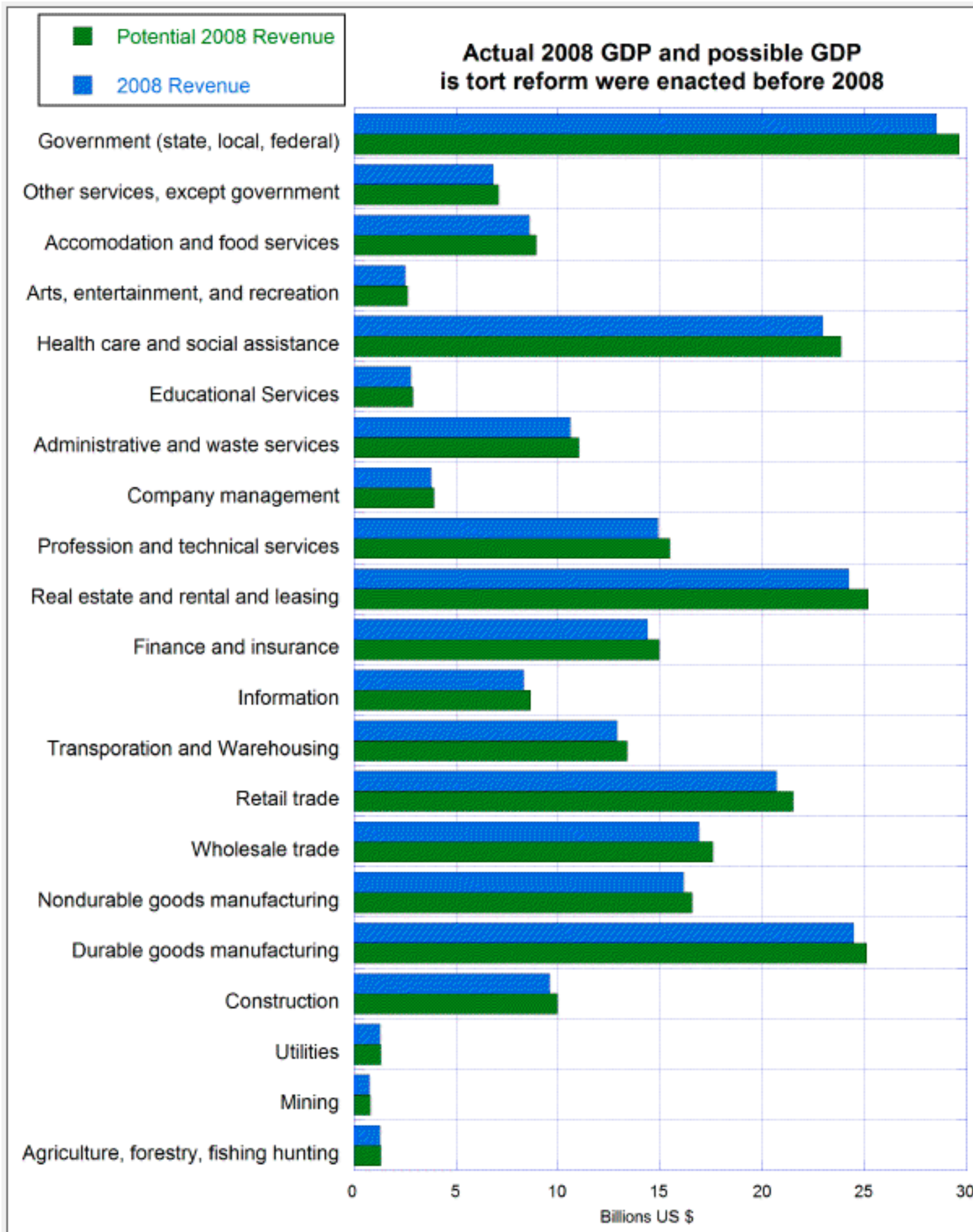
According to the Perryman Group, Texas gained 3.9 percent of output in a variety of sectors generally. More specifically, the state increased its output by 2.5 percent in manufacturing due to tort reform. Based on these numbers, the charts below show all of the economic sectors in Tennessee and their GDP in 2000, 2004, and 2008, and indicates what output could have been if tort reforms had been implemented before 2000. While all sectors could have benefitted from tort reform legislation, there are some key sectors that could have observed an especially large increase. For instance, tort reform could have produced an additional $895 million in healthcare revenue, $611 million in durable goods manufacturing, and an additional $806 million in the retail trade industry in Tennessee.



Graph 6. Per sector actual and possible additional revenue in 2000 if tort reform had been passed.



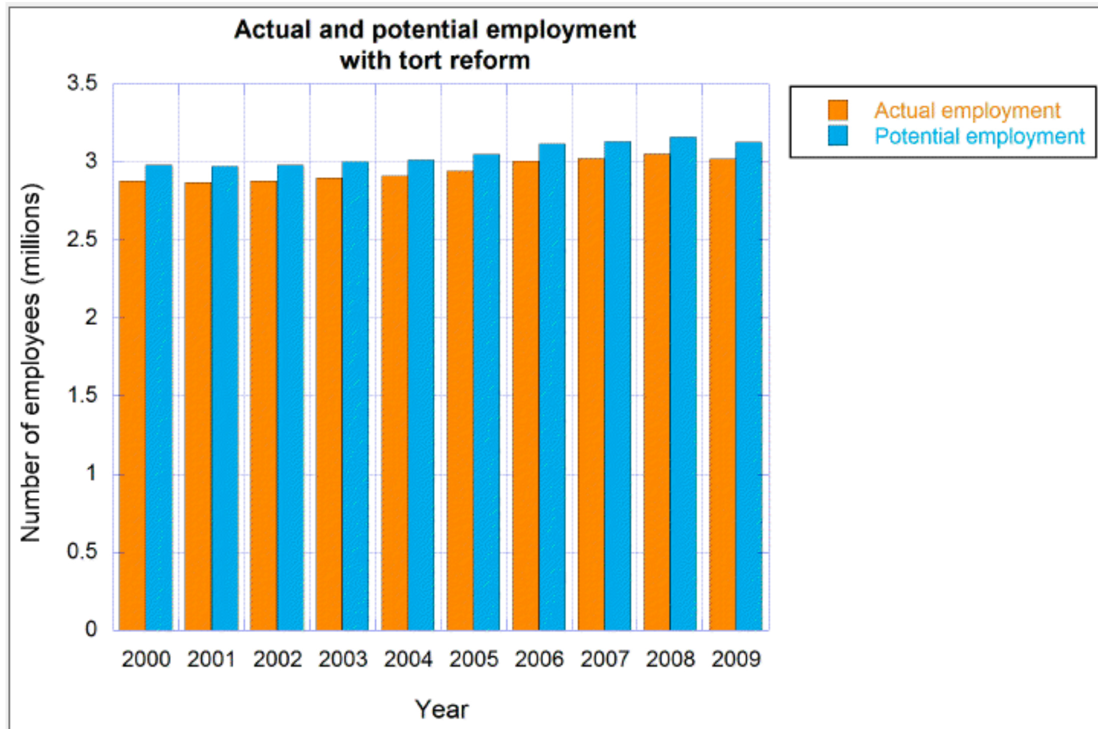
Graph 7. Per sector actual and possible additional revenue in 2004 if tort reforms had been passed.



Graph 8. Per sector actual and possible additional revenue in 2008 if tort reforms had been passed.

After enacting reforms in 1995 and 2003, Texas, like Mississippi, saw an increase in employment. According to the Perryman Group, an additional 499,000 jobs were created in Texas due to tort reform, a 3.57 percent increase over what the state's employment would have otherwise been. The graph below illustrates the additional employment that

could have been possible in Tennessee had similar reform been enacted in 2000 to produce the same result.



Graph 9. Possible increases in employment from 2000 to 2009 in Tennessee.

Product Liability Reform

Product liability laws are intended to compensate consumers injured by defective products and deter manufactures from selling such products. While product liability laws should promote efficient levels of product safety, misdirected liability may suppress beneficial innovations. Product liability litigation increased dramatically in the 1980s, with the number of cases filed in federal court rising from 2,393 in 1975 to 13,408 in 1989.[46] As the number of cases filed increased, business liability insurance costs rose six-fold over the 14 year period.[47] There were several changes to product liability procedures that

encouraged the growth of litigation. First, producers were determined to self-insure the safety of their products. If companies are also viewed as insurers, the range of situations where the company would be directly liable for compensation increases dramatically.[48] Second, courts expanded the design defects for which a company could be liable, a function previously held exclusively by product risk regulatory agencies.[49] Third, the emergence of mass toxic torts, such as for asbestos or Agent Orange, generated litigation on an unprecedented scale.[50]

There are several examples of how high product liability costs may depress innovation. In 1989, the Monsanto Company decided not to market its already-patented phosphate fiber asbestos substitute because Monsanto "was not prepared to accept the potential product liability risks associated with marketing the reinforced fiber, no matter how safe it might be."[51] Therefore, a safe replacement for asbestos was not put on the market. The National Academy of Sciences concluded that American pharmaceutical firms were terminating research on advanced contraceptives, in part, because the liability risks were so great.[52] The vaccine market was also hit. The number of companies producing vaccines for serious childhood diseases decreased from 13 to just three during the 1980s.[53]

Asbestos is a silica-based insulator that became popular in the late 19th Century because of its resistance to heat, electrical, and chemical damage, as well as its sound absorption capabilities. When asbestos was used as a fire or heat resister, the silica fibers were often woven into fabric or mats or mixed with concrete. Asbestos exposure becomes a health concern when the silica asbestos fibers are inhaled over a long time period of time. Disease is unlikely to occur from a single, high dose exposure or from a short period of low-level exposure.[54] As of 1993, asbestos litigation began to account for over half of all

litigation in federal courts.[55] Asbestos litigation widely expanded for years, with about 10 percent of claims coming from cancer patients.[56] In fact, from the 1960s through 2002, approximately 730,000 individuals brought claims against 8,400 businesses.[57] It is estimated that these defendants and their insurers spent approximately $70 billion on legal costs and payouts.[58] A subsequent study estimated that the costs for asbestos litigation could exceed $250 billion nationwide.[59] A 2005 report from the peer-reviewed journal *Risk Management* estimated that 70 companies had declared bankruptcy as a result of asbestos litigation, costing up to 60,000 workers their jobs.[60]

The Pacific Research Institute ascertains that establishing stricter medical standards for filing claims, which several states have already enacted and is supported by the American Bar Association, would drastically reduce the number of claims filed, resulting in fewer defendants, lower defense costs, and more jobs.[61] By 2005, several states were enacting asbestos litigation reform after a practice known as "venue shopping" had taken over as standard practice.[62] A classic example is the huge concentration of cases in San Francisco and Alameda County, California, where verdicts are known to be more favorable to plaintiffs. Awards in California's more pro-plaintiff counties average $3 million higher than those in other jurisdictions.[63] "Venue shopping" or "litigation tourism" can increase awards by hundreds of thousands of dollars.[64] With the passage of the Silica Compensation Fairness Act in 2006, Tennessee now establishes minimum medical criteria for the filing of silica (the basic compound making up asbestos) cases.[65] However, a non-economic damages cap would further decrease the number of cases, and rules against "venue shopping" would also potentially increase the state's economic output.

There is also some evidence that product liability reform decreases accidental deaths. Many factors that affect state death rates change only slightly over a short period of time. Therefore, quick changes in a state's death rate following the enactment of a tort reform suggest a relationship between these variables. Product liability reform has been enacted in a variety of states, and comparing those individual states' death rates from non-motor accidents immediately before and after tort reform provides compelling evidence that reform affects death rates. In many states, death rates were increasing prior to non-economic damages caps, but began to decrease in years following the reforms.[66] A cap on non-economic damages is associated with, on average, a 3.9 percent decrease in accidental, non-motor vehicle deaths and product liability reform with a 3.2 percent decrease.[67]

Avoiding the Pitfalls of Other States Whose Non-economic Caps Were Struck Down

On February 4, 2010, the Illinois Supreme Court held that a law capping non-economic damages at $1,000,000 against hospitals and $500,000 against individual physicians violated the separation of powers clause of the state constitution.[68] Similarly, on March 22, 2010, the Georgia Supreme Court held that a law that limits awards of non-economic damages in medical malpractice cases "violated [the] state constitutional right to jury trial" and therefore overturned it.[69]

Despite these recent decisions, there is evidence to suggest that were Tennessee to enact a properly crafted cap on non-economic damages, it would be upheld as constitutional. Responding to a federal challenge to Michigan's medical malpractice cap, the U.S. Court of Appeals for the Sixth Circuit, which has jurisdiction over Ohio, Michigan, Kentucky, and Tennessee, unanimously held that "Michigan's cap on medical malpractice damages did not implicate any protected jury rights, and thus, did not violate the Seventh

Amendment [to the U.S. Constitution].[70]" A non-economic damages cap similar to that in Michigan would likely pass federal constitutional muster.

The question then turns to whether reforms would withstand state constitutional scrutiny. Article I, Section 6 of the Tennessee Constitution states, "That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors."[71] Article I, Section 17 states, "That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct."[72] These and other provisions open tort reform efforts up to four main lines of attack: the Open Courts Clause, Separation of Powers, Equal Protection, and the Jury Trial Clause. The weight of established law, though scant, seems to rebuff these arguments in favor of reform.

A majority of state courts that have considered the matter have found damage caps constitutional. The constitutions of these states had substantially similar language with respect to the portions relevant to this discussion.

There does not appear to be any Tennessee case directly on point on any of these issues, however *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978), is close. *Harrison* involved a plaintiff who attacked the state's medical malpractice statute of limitations as unconstitutional. A claim that a statute of limitations on medical malpractice claims is unconstitutional would likely be considered by Tennessee courts as very similar to a claim that a cap on damages is unconstitutional.

The Open Courts argument raised in *Harrison* is that the Legislature's creation of a statute of limitations restricts the injured plaintiff's right to access the courts in violation of the Open Courts Clause. Tennessee Supreme Court Chief Justice Joe Henry wrote, "This Section of our constitution has been interpreted by this court as a mandate to the judiciary and not as a limitation upon the legislature."[73] A cap on damages is arguably even less of a restriction of access to the courts than statutes of limitation, so a Tennessee court is not likely to overturn tort reform because of this provision of the Tennessee Constitution. A 2003 Nebraska Supreme Court decision seems to support this proposition. That court refused to overturn a non-economic damage cap on the theory that it violated the Nebraska constitution's Open Courts Clause,[74] which states that "All courts shall be open, and every person, for any injury done him or her in his or her lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay."[75]

Tennessee Chief Deputy Attorney General Andy D. Bennett wrote in 2004 that the Separation of Powers argument is also unlikely to prevail in court.[76] Because the Tennessee Supreme Court has said that the General Assembly "unquestionably has the constitutional and legislative authority to change the common law of this state," Mr. Bennett wrote that "it would seem that a cap on damages would not violate separation of powers principles under the Tennessee Constitution either."[77]

Mr. Bennett's opinion suggests that Tennessee would use a rational basis test to decide an Equal Protection claim brought against tort reform because the *Harrison* court used it to decide whether the malpractice statute of limitations was unconstitutional.[78] With the rational basis test, the classification drawn by the legislature will be upheld if

some reasonable basis for it can be found by the court. This test gives greater deference to the legislature's action than does strict scrutiny, which requires the government to demonstrate a compelling reason for the law. The same rationale which supported the statute of limitations in *Harrison* could just as easily support a cap on damages in medical malpractice cases. The government could also likely demonstrate alternative rational bases for the law if the court were to require some other reason different from the one shown in *Harrison*. Mr. Bennett noted that a cap on damages resulting from non-malpractice cases would probably require the government to demonstrate reasons other than those accepted in *Harrison* in order to pass rational basis review, since that case was particularly concerned with issues stemming from medical malpractice.[79]

Courts are split on whether damages caps violate the right to a jury trial. A majority of courts that have addressed the issue have found that they do not. These courts hold that the constitutional requirement is met because the jury still serves as the fact-finder, and that the limitation on damages is within the legislature's prerogative. The minority holds that damages should also be decided by the jury. Mr. Bennett finds the reasoning of a Nebraska court persuasive,[80] which states, "If the Legislature has the constitutional power to abolish a cause of action, it also has the power to limit recovery in a cause of action."[81]

Overall, a damages cap would probably be seen in Tennessee as an aspect of the cause of action itself, which is within the province of legislative regulation. The 2005 Sixth Circuit decision mentioned above now serves as extra support for that position.

Furthermore, if Tennessee wished to secure a cap on non-economic damages, it could follow Texas' lead and write the non-economic damages cap into the state

constitution.[82] Texas did this with a constitutional amendment which passed with more than 51 percent of the vote in 2003.[83]

Potential Impact of a Punitive Damages Cap in Tennessee

Punitive damages have been awarded by Tennessee's courts for almost 175 years. Their two-fold purpose is to punish wrongful conduct and to deter others from engaging in similar conduct in the future.[84] Eighteen years ago, the Tennessee Supreme Court acknowledged the potential difficulties with punitive damages awards, limiting the circumstances in which punitive damages could be awarded. The Court also prescribed procedures to assure that punitive damages were not arbitrarily and capriciously awarded.[85]

Some have argued that punitive damages caps are unnecessary for a number of reasons. First, punitive damages are rarely awarded, and even more rarely collected. According to the Bureau of Justice, an organization tasked with monitoring the efficiency of the civil litigation system, in 2001 only six percent of the 6,504 civil trials in the nation's 75 largest counties resulted in punitive damage awards.[86] Furthermore, the median punitive damage award in civil jury trials was $63,000 in 1992 and gradually declined to $50,000 by 2001.[87]

Post-trial activity—including motions, appeals, settlement negotiations, and agreements—often results in a reduction of punitive damages for those plaintiffs who receive them. Only 44 percent of plaintiffs collect all punitive damages they are awarded.[88] In 18 percent of cases, plaintiffs collect a partially reduced punitive award,[89] and in 38 percent of suits, plaintiffs who are awarded punitive damages at trial ultimately receive no

punitive damages at all.[90] For example, in the infamous McDonald's coffee case, the plaintiff was awarded $2.7 million dollars in punitive damages by the jury. The trial judge reduced that amount to $480,000 before the parties settled the matter privately.

Additionally, the public is becoming more aware of the increase in tort suits and costs associated with them. Consequently, some claim that juries are beginning to account for the fact that their decisions have ramifications outside of the courtroom. For example, "It has been suggested that the lack of inflated awards in automobile accident litigation is due to jurors' appreciation of the effect this has on their automobile insurance premiums."[91] According to John Hasnas, a leading torts professor at Georgetown Law School, "It may just be that if our politicians and intellectuals could summon the patience to allow the common sense of the ordinary citizen to surface, we might find that even in its present corrupted form, the tort system is still adequately self-correcting."[92]

How quickly that self-correcting may come about it still unknown. While punitive damages are frequently lowered on appeal, that process costs significant time and money for all parties involved, and drains resources from the court system. A punitive damages cap would more rapidly reduce the extent of these inefficiencies.

Proponents of limiting punitive damages also point to the impact the threat of such damages can have on cases that never even go to trial. As Yale Law professor George Priest has noted, "[T]he availability of unlimited punitive damages affects the 95 percent to 98 percent of cases that settle out of court prior to trial. It is obvious and indisputable that a punitive damages claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process, increasing the likelihood of litigation."[93]

While punitive damages have not become commonplace across the board in Tennessee, they have become prevalent in specific types of tort cases. The nursing home industry has been particularly impacted by the current tort system. Due to high tort liability, nursing homes face significant loss costs, defined as “the cost per exposure of settling and defending [legal] claims.”[94] These are costs that could otherwise be directed toward patient care. According to a 2010 study, the loss cost in Tennessee rose from $1,820 per bed in 2001 to $3,010 per bed in 2009.[95] In comparison, the state of Massachusetts recorded the lowest loss cost at $380 per bed in 2009, nearly eight times lower that the loss cost for Tennessee.[96] The study cites the “staying power of effective tort limits” as a means to reducing this waste.[97] In particular, punitive damages caps could provide targeted industries like nursing homes with the ability to redirect significant resources toward patient care that are currently lost as a result of excessive legal costs.

Potential Impact of Collateral Source Rule Reform in Tennessee

The collateral source rule prohibits courts from admitting evidence that a plaintiff’s costs will be paid by a collateral source such as an insurance company or worker’s compensation. The theory behind the collateral source rule is that a defendant should not escape paying for an injury that he or she causes simply because the plaintiff has access to alternate forms of compensation. The collateral source rule has come under scrutiny from advocates of tort reform, however, who argue that the collateral source rule brings unnecessary and duplicative costs into the court system by making defendants pay for injuries that are already covered by third parties—after all, the goal of economic damages in particular is to make the plaintiff whole. These advocates call for disclosure of collateral

compensation at trial, and for that compensation to offset the costs for which the defendant is liable. To understand what effect, if any, these reforms would have on Tennessee, it is instructive to compare Tennessee's existing collateral source rule reform that of other states.

Tennessee's only collateral source rule reform relates to medical liability. Tennessee law allows economic damages to be offset in medical liability cases by collateral sources, except for sources including the assets of the plaintiff and the immediate family, or insurance purchased by the plaintiff.[98] Tennessee joins 37 other states that have some form of collateral source rule reform,[99] and is one of 13 states that have collateral source rule reform only in the field of medical liability.[100]

A recent survey of tort reform initiatives revealed that collateral source rule reform in medical liability cases—like the kind Tennessee has enacted—is a crucial part of reducing medical insurance premiums. The study found that collateral source rule reform in medical liability suits alone can lower premiums by as much as one to two percent, and when coupled with reforms such as non-economic damages caps and elimination of joint and several liability, can create even greater reductions.[101] Furthermore, evidence suggests that instituting collateral source rule reform for medical liability reduces medical costs by five to nine percent within three to five years of adoption without substantially affecting mortality or medical complications.[102]

However, exploring alternate forms of collateral source rule reform is vital because of the prevalence of collateral source payments in our judicial system outside of medical liability claims. While the collateral source rule draws less attention than other reform

measures, it is arguably of greater importance, as it potentially affects nearly every lawsuit in America to some extent.[103] Imposition of the collateral source rule, or reforms that eliminate its application, have consequences for both plaintiffs and defendants.

Currently, 20 states permit consideration of collateral source payments offsetting a plaintiff's cost during trial, while 14 states require consideration of such offsets after the judgment or award. Six states require the offset to be taken after the jury's verdict but before entry of judgment by the court. New Hampshire has eliminated the collateral source rule altogether. In that state, the jury is allowed to consider evidence of insurance payments, as well as the cost of obtaining collateral source payments in medical liability cases. Evidence of government benefits such as Medicare, Medicaid, or Social Security may also be considered by the jury.

Research indicates that reforms to the collateral source rule, including outright elimination of the rule or using it to offset costs, decreases the number of lawsuits filed.[104] Elimination of the rule would allow evidence of third party payments to be admitted at trial when determining damages owed by the defendant. These reforms result in a decreased caseload because, although introducing evidence of collateral source payments or post-verdict reductions of awards based on collateral payments do not completely eliminate a defendant's payment to an injured party, there is less motivation for a potential plaintiff to file a claim when the plaintiff's primary loss is economic and has already been substantially recovered through collateral sources, such as insurance.[105]

Despite the potential for decreasing the number of tort suits as well as the costs associated with them, a major argument against reform to the collateral source rule involves the concept of subrogation. Subrogation occurs when an insurance company

recoups funds that it paid to the insured after determining that those funds should have come from another source. Opponents of reforming the collateral source rule argue that subrogation prohibits defendants from receiving duplicate damages from the defendant and the insurance company. Additionally, opponents argue that if the collateral source rule is eliminated or collateral payments are allowed to be introduced into evidence to offset costs, then plaintiffs will not be fully compensated. This would occur if an insurance company demanded that a plaintiff repay funds given to him because the costs were owed by the defendant, while the defendant was absolved of paying for the injury because he could use evidence of collateral payment to offset his costs to the plaintiff.

While subrogation issues are not particularly common, some state legislatures have reformed their collateral source rule laws and devised several remedies to deal with the subrogation issue.[106] Some states refuse to allow evidence of collateral source payments if a subrogation right exists. Other states allow the court to consider all evidence of collateral source payments, including evidence that establishes a subrogation right. When collateral source evidence is allowed at trial, plaintiffs are often allowed to present evidence of any costs or premiums paid to obtain these collateral benefits. Under statutes that allow post-verdict collateral source reductions, some jurisdictions refuse to permit such reductions when the collateral funds come from a source with a right to subrogation. A few jurisdictions provide a procedure for reducing duplicative awards by withholding a final judgment until the parties establish whether any third parties will assert subrogation rights. In cases of a post-verdict reduction, oftentimes any costs or premiums paid by or on behalf of the plaintiff to obtain the collateral benefits are offset.

Furthermore, another suggestion to account for subrogation concerns modifying the concept of subrogation itself. Rather than have the plaintiff pay the costs of subrogation, if Tennessee adopted greater collateral source rule reform, lawmakers could craft a law that the defendant would have to pay the subrogation costs back to the plaintiff's insurer if an issue of subrogation arose.[107] That way, the plaintiff would not lose out on full compensation, and the defendant would not run the risk of paying a plaintiff who was already fully compensated for his injuries by a third party.

Potential Impact of Class Action Reform in Tennessee

Class action lawsuits represent mass tort claims, where a large number of plaintiffs collectively bring a claim in court, or where a plaintiff brings a claim against a large number of defendants. Class action lawsuits are most common in the United States. Before a class action lawsuit can proceed, the "class" must be certified by the court. This process requires the court to define the class, i.e., lay out the boundaries of who can be a plaintiff in the suit, approve the figurehead person or entity who represents all other plaintiffs, evaluate the initial plausibility of the claim, etc.

The majority of cases certified to proceed on a class-wide basis result in settlement, not trial.[108] This is a recurring theme in civil litigation, where observations about the "vanishing trial" have become commonplace.[109] One reason for this development lies in the rights of the opposing parties during the certification process. If the court does not certify the class, the plaintiff may appeal the decision of the court in hopes of obtaining a favorable judgment by a higher court. If a favorable judgment is indeed obtained, the suit would then proceed.

However, in many states, if the class is certified by the court, the defendant may not appeal the decision to certify the class to a higher court. This puts pressure on the defendant to settle the case with the plaintiff class rather than fight an enormously expensive class action suit in court which they cannot be certain they will win. The prevailing rule of trials is that only the final decision may be appealed to a higher court. However, in some limited instances, procedural decisions made by the court during a trial may be appealed. These procedural appeals are known as interlocutory appeals. Plaintiffs are able to appeal denials of class certification easily because the denial is essentially a final judgment on the case. An appeal of a class certification, though, would be an interlocutory appeal, and is only available in a limited number of states and situations. The current law in most states allows only the plaintiff to appeal a judge's denial of class certification. A defendant is denied the right of appeal if they believe the suit is being brought without just cause and must either settle or proceed to trial. With decreasing exception, class certification sets the litigation on a path towards settlement, not a full-fledged testing of the plaintiff's case by trial.[110]

Since 1997, 10 states have enacted some type of reform surrounding class action lawsuits, most often enabling interlocutory appeal of class action certification. This gives the defendants the same rights that plaintiffs already have—the ability to appeal a judge's decision to certify a class of plaintiffs and allow a lawsuit to proceed. Class action reform tends to make appellate review of class certification easier to obtain, the rules regarding the interlocutory appeal clearer, and attempts to accelerate the process so the suit may proceed if the appeal is denied. The ultimate effect is to increase fairness and efficiency.

The federal government took action in 2005 to reform class action procedures by passing the Class Action Fairness Act. Part of the effect of the act was to make appellate review of trial court certification decisions more readily available. The act did not address every detail of the relevant civil procedure, however, leaving many decisions to the courts. In the five years since the act was passed, the courts have not been able to address every unanswered question. However, the presence of the act lends some support to states' attempts to enact their own versions of class action reform. Also, while many aspects of tort reform have faced legal challenges, class action reform has not been challenged in the states that have passed it.[111]

Potential Impact of a Loser-Pays System in Tennessee

One final topic discussed in this paper is a system known as loser-pays. Just as it sounds, the loser-pays system allows a victorious party in a civil suit to collect all or part of the costs of the suit from the losing party. This paper will examine the effect that this system has had on Alaska—the only U.S. state to use the system—as well as other states that have experimented with some modified versions of the rule.

The goals of a loser-pays system are threefold. First, a loser-pays system aims to reduce costs by controlling litigation expenses and caseloads. Second, the system aims to better compensate prevailing parties for costs incurred, such as attorney's fees. Finally, the loser-pays system aims to deter frivolous suits while promoting meritorious ones.

According to the National Center for State Courts, 27 states reduced their court systems' operating budgets due to state budgetary crises in 2009.[112] Tennessee announced a five percent reduction in its court system budget, which resulted in 29 employees losing

their jobs.[113] Accordingly, while reducing litigation costs should always be a priority, it has become even more imperative in the current economic climate.

Loser-pays is a cost-effective measure imposed primarily in European countries. Currently, Alaska is the only state with a true loser-pays system, maintaining this system since 1884. The most recent economic data for Alaska's court costs indicate that the state spent $69,040,000 on judicial expenses in 2009.[114] In the same year, the U.S. Census Bureau estimated that Alaska's population was 698,473.[115] Therefore, the cost per resident for Alaska's judicial system is approximately $99.00. On the other hand, Tennessee's budget for 2008-2009 was $116,558,700.[116] The population in Tennessee for the same year was estimated at 6,296,254.[117] The cost per resident for Tennessee's judicial system is significantly lower at approximately $19.00 per person, and the court system in Tennessee only accounts for 0.5 percent of the state budget, well below the national average.[118]

Despite Tennessee's modest court costs, awards given in tort suits rose sharply between 2008 and 2009. In 2009, total awards given for tort suits in Tennessee totaled $83.6 million, up $25.6 million from the previous year.[119] Advocates of the loser-pays system posit that adopting it would increase the likelihood of settlement, and that those settlements will be more aligned with the true harm incurred by plaintiffs. Research concerning settlements in a loser-pays system, however, is deeply split on the validity of this claim.[120] Furthermore, while there is evidence to suggest that loser-pays may cause litigants to weigh the merits of their claim more thoroughly, there is also evidence suggesting that loser-pays can result in a settlement in cases where a risk-averse defendant is worried about paying court costs on a frivolous claim.[121]

Based on the evidence above, there is no clear proof that the loser-pays system either reduces the cost to the state or increases the likelihood of meritorious settlements. The most comprehensive study of Alaska's loser-pays system indicates that is has had no discernable effect on reducing the number of suits filed. Alaska recorded 5,793 civil filings per 100,000 inhabitants in 1992.[122] This number was only slightly below the national median of 6,610 per 100,000 that year and was very close to the filing rates of other relatively rural states.[123]

While Alaska is the only state to employ a true loser-pays system, Florida attempted a suit-specific loser-pays system exclusively for medical malpractice claims from 1980 to 1985. During that time, the percentage of malpractice suits that went to trial was cut nearly in half, and the plaintiffs in cases that went to trial prevailed more often as weak cases were eliminated. Despite this apparent success, the policy was repealed because of the frequent inability of victorious plaintiffs to collect their awards from insolvent defendants.[124]

Despite Florida's mixed results with a partial loser-pays system, seven states currently have a variety of modified loser-pays systems.[125] While true loser-pays systems are generally subject to heavy criticism, states that have selected specific types of suits for loser-pays have seen greater success. For example, small claims cases are often cost prohibitive for poorer plaintiffs with meritorious claims; however, numerous studies have shown that loser-pays systems targeted at small claims cases have been successful at encouraging meritorious suits among people who could not otherwise afford them.[126]

Based on the preceding data collected from Alaska's experience with a true loser-pays system, as well as a survey of several states with modified systems, evidence suggests that a modified loser-pays system is more effective at meeting the goals of loser-pays than a

system like the one in Alaska. However, if a modified loser-pays system is going to be effective, there are multiple points to consider.

First, to deter frivolous lawsuits, the losing party should compensate the winning party in full for the winning party's court costs. Alaska's system has likely been ineffective at achieving most of its goals as a result of the fact that Alaska's system only awards 20 to 30 percent of court costs to the victorious party. Such a small percentage has not been proven to have the desired deterrent effect. Therefore, if Tennessee were to adopt a modified system, it should include a greater percentage of the court costs when compensating the winning party.

Second, the loser-pays system should be suit-specific and should target those types of lawsuits that are particularly prone to abuse. As previously explained, small claims cases seem well-suited for the loser-pays system, and reforms in this area have shown an increase in meritorious suits and a decrease in frivolous filings.

Third, to avoid the problem of non-paying losing parties that Florida encountered when using the loser-pays system, if Tennessee implements a modified loser-pays system it should consider litigation insurance. There are two types of litigation insurance that loser-pays jurisdictions in Europe use. The first is known as legal-expenses insurance (LEI) and works like a regular insurance premium, where the insured pays a monthly premium that covers that individual if they are ever involved in a lawsuit.

LEI insurance, however, only covers expenses in suits that are brought by a covered party. The second type of insurance is after-the-event (ATE) insurance that is purchased at the time a lawsuit is filed. ATE insurance relieves a plaintiff of the obligation to pay a

defendant in the event that the plaintiff's suit is unsuccessful. ATE premiums can be advanced by the plaintiff's lawyer as costs, or they can take a percentage stake in any recovery; either way, an up-front contribution by the plaintiff, particularly one of limited means, is not required.

Finally, a modified loser-pays system should be accompanied by an offer of judgment policy, which has been adopted by a number of states with successful results. Offer of judgment rules impose court costs on plaintiffs who reject settlement offers in order to obtain a favorable judgment that turns out to be the same or less than the settlement offer.

Conclusion

While the above analysis does not cover every single proposed or discussed reform measure that the General Assembly is likely to consider, it does highlight the main measures often proposed and for which there is the most statistical data.

As the data above indicates, by following the lead of other states such as Texas and Mississippi, which have implemented broad-based reform, Tennessee could reap significant economic and legal benefits while maintaining a civil justice system that is fair to both plaintiffs and defendants and serves Tennesseans well.

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[105] *Id*. at 1179-80.
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[107] Rubin, supra.
[108] Thomas E. Willging, et al. “An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges.” 71 N.Y.U. L. Rev. 74 (1996).
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[110] Richard A. Nagareda. “Class Certification in the Age of Aggregate Proof.” 84 N.Y.U. L. Rev. 97 (2009); Vanderbilt Public Law Research Paper No. 08-42.
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[117] “State and County QuickFacts: Tennessee.” U.S. Census Bureau. 2009. <http://quickfacts.census.gov/qfd/states/47000.html>.
[118] *Ibid*.
[119] “Tennessee Court System: 2008-2009 Annual Report.” <http://www.tsc.state.tn.us/geninfo/Publications/AnnualReport/2008-2009/TN%20Court%20System%20Annual%20Report%2008-09.pdf>.
[120] Studies suggesting that a loser-pays rule would raise settlement rates include: Michael R. Baye, “Comparative Analysis of Litigation Systems: An Auction-Theoretic Approach,” Economic Journal 115 (2005): 583–601; and Snyder and Hughes, “The English Rule for Allocating Legal Costs.” Studies suggesting that a loser-pays rule would lower settlement rates include: Lucian Arye Bebchuk and Howard F. Chang, “An Analysis of Fee Shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and the Role of Rule 11,” The Journal of Legal Studies 25, no. 2 (June 1996): 371–403; Keith N. Hylton, “An Asymmetric Model of Litigation,” International Review of Law and Economics 22 (May 2002): 153–75; McCabe and Inglis, Using Neuroeconomics Experiments to Study Tort Reform; and Shavell, “Suit, Settlement, and Trial.”
[121] Kevin McCabe and Laura Inglis. “Using Neuroeconomics Experiments to Study Tort Reform.” Mercatus Center at George Mason University. Policy Comment No. 16, p. 18.
[122] Susanne Di Pietro, Teresa W. Carns, and Pamela Kelley. “Alaska's English Rule: Attorney's Fee Shifting in Civil Cases.” Alaska Judicial Council. October 1995.
[123] *Ibid*.
[124] Staff Analysis of HB 1352, Committee on Health Care and Insurance, Florida House of Representatives. June 4, 1985, Doc. No. PCB85-02/BS.
[125] Oregon and Oklahoma have enacted statutes that apply loser-pays principles to many areas of litigation. In Oklahoma, a defendant can choose an “offer of judgment” provision. Oregon has converted numerous one-way loser-pays statutes into two-way loser-pays statutes. Texas has an offer of settlement system in which the defendant must state that the case is subject to this system. If an offer is objected and the ultimate

judgment is significantly less favorable, the offering party can recover certain costs since the offer. However, in certain situations such provisions are not allowed, for example, in class action lawsuits, worker's compensation cases and family law cases. California and New York use a loser-pays system when a plaintiff sues for unfair and deceptive business practices. Both states also have an offer of settlement system if the final outcome is worse than a settlement offer. Illinois has a loser-pays system when suing for unfair and deceptive business practice. Florida has an offer-settlement system if the final outcome is worse than a settlement offer.

[126] Increase in the number of highly meritorious small claims suits. Bebchuk, "A New Theory Concerning the Credibility and Success of Threats to Sue"; Keith N. Hylton, "Litigation Cost Allocation Rules and Compliance with the Negligence Standard," The Journal of Legal Studies 22, no. 2 (1993): 457–76; Katz, "Measuring the Demand for Litigation"; Shavell, "Suit, Settlement, and Trial"; and Tullock, Trials on Trial. But cf. Edward A. Snyder and James W. Hughes, "The English Rule for Allocating Legal Costs: Evidence Confronts Theory," The Journal of Law, Economics, & Organization 6, no. 2 (fall 1990): 345–80.

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