

An Empire Disaster

Why New York's Tort System Is Broken and How to Fix It

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Contents

Acknowledgements	5
Executive Summary	7
Introduction	9
Chapter 1:	
The Broken Tort Liability System	11
The Broken U.S. System	12
The Broken New York System	16
Chapter 2:	
How New Yorkers Would Benefit from Lawsuit Reform and Who Wants to Stop It	23
The Multi-Billion-Dollar Benefits to New Yorkers from Lawsuit Reform	23
Jobs, Jobs, and More Jobs	24
Greater Output and Increased Tax Revenue	24
Greater Labor Productivity and Higher Real Personal Income	25
Net In-Migration of People	26
Lower Health Care Costs, More Physicians, and Better Access to Care	26
Lives Saved	27
Better Stock Market Returns	28
Lower Tort Losses and Tort Insurance Premiums	31
The Trial Barons Don't Want New Yorkers to Receive Multi-Billion-Dollar Benefits	33
Chapter 3:	
The Empire Strikes Back: The Lawsuit Reforms that New Yorkers Need NOW!	37
Chapter 4:	
Conclusion: Meaningful Lawsuit Reform is Long Overdue	47
Notes	49
About the Author	53
About the Pacific Research Institute	55
Statement of Quality Control	56

Tables and Figures

Tables

1. Ranking of Absolute Monetary Tort Losses	17
2. U.S. Tort Liability Index, 2008 Output Rankings	18
3. New York State's Ranking in Seven Lines of Tort Insurance and Two Categories of Tort Self-Insurance	19
4. New York State's Tort Liability System Rankings	21
5. New York State's Ranking in 28 Tort Rules	38

Figures

1. Tort Costs as a Percentage of GDP, 11 Industrialized Countries	14
2. The Distribution of Tort Costs	15

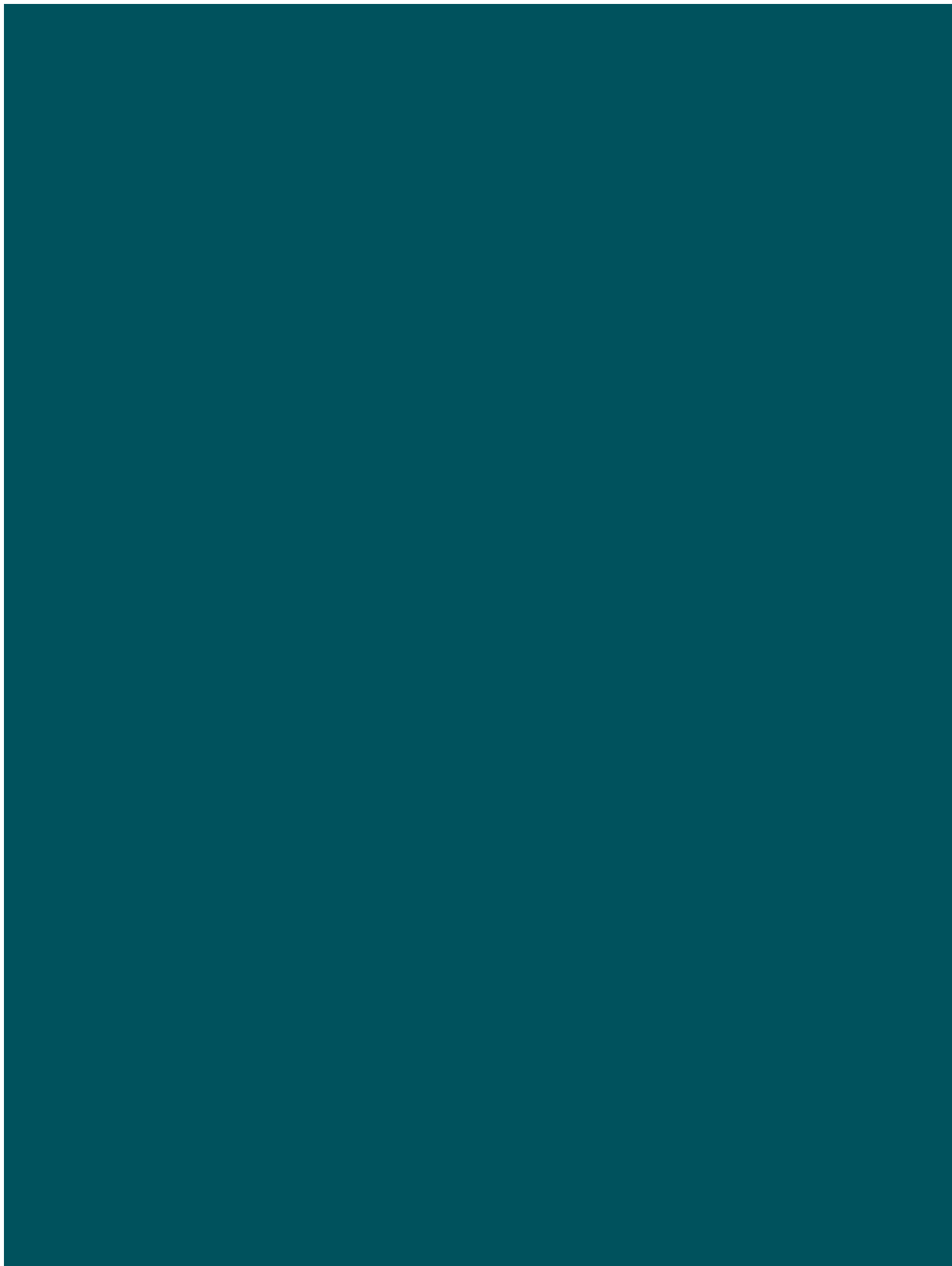
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Executive Summary

By standard measures, New York State has a failed tort liability system. Because of the enormous political influence of personal-injury lawyers in New York, the state now faces a perfect storm of high tort costs, high tort-litigation risks, clogged courthouses, and nearly no tort reforms to balance a lopsided civil justice system.

New York State is consistently at the bottom of the barrel in various measures of state tort performance. It has the second-highest direct tort losses, the fourth-worst relative tort losses, the fourth-worst relative tort-litigation risks, the third-worst tort system overall, and the third-worst tort rules and reforms on the books.

Its excessive costs and risks negatively impact individuals and businesses both in New York State and across the country. The climate of fear is forcing people and jobs from New York and particularly threatens the quality of health care.

Lawsuit reform in New York State would create new jobs (a minimum of 86,000 jobs for a typical reform); increase output (\$17 billion) and lower prices; expand the tax base and increase tax revenues (more than \$1.04 billion each year); boost productivity and personal incomes (more than \$2,600 per year); attract new customers, employees, entrepreneurs, investors, and taxpayers (more than 395,000 people each year); lower health care costs (\$11.4 billion per year) while increasing the number of doctors (by 12 percent) and improving access to health care; save lives (more than 360 people each year); increase stock market returns (more than \$720 billion nationally); and cut insurance premiums (by 16 percent) and liability losses (by nearly 50 percent). But personal-injury lawyers don't want New Yorkers to have these multi-billion-dollar benefits because lawsuit reform threatens their exorbitant fees and privileged status.

The plaintiffs' bar has used its numbers and wealth through longstanding, well-organized political campaigns to block lawsuit reform and to create new rights to sue in lawyer-influenced Albany. An unholy alliance between personal-injury lawyers and state legislators, grounded in delivering votes and campaign contributions, has successfully killed attempts to enact

commonsense reforms. In 2008, lawyers donated \$4.92 million to political activities, the sixth-largest contributor group in New York State. The New York State Trial Lawyers Association, at \$1.4 million, was the fourth-largest single contributor statewide. The return on their investment has been the death of lawsuit-reform bills.

New York State's tort rules are shockingly bad. It ranks 40th or worse in 20 of 28 common tort rules and reforms. It is dead last in 18 of the 28 variables. Overall, its tort rules rank 48th among the 50 states. These terrible outcomes reflect the state legislature's total indifference to the plight of ordinary New Yorkers because of political pandering to personal-injury lawyers.

Commonsense, meaningful lawsuit reform in New York State, long overdue, would turn the situation around. Based on a science-driven, three-part decision tree, this report arrived at the "Top 10 Lawsuit Reforms New Yorkers Need NOW!" These "best-practice" reforms target appeal bonds, non-economic damages, class actions, labor law sections 240 and 241, attorney/state contracts, juries, e-discovery, product liability, design liability, asbestos, venue, frivolous lawsuits, and evidence and witness standards.

Lawsuit reform in New York will be difficult given the political influence of personal-injury lawyers and labor unions. But multi-billion-dollar benefits await ordinary citizens of the Empire State, if they can take back Albany and elect pro-reform policy makers and judges who support a balanced and efficient civil justice system.

Introduction

A woman who laid down on New York City subway tracks and was hit by a train—police concluded that she was trying to kill herself—was awarded \$14.1 million by a Manhattan jury.

A woman sued after falling while skating at New York City's Rockefeller Center. She claimed that her fall was caused by a bump on the rink's ice. She testified that when she first started skating, the surface of the ice was smooth, but after skating for about an hour and a half, she observed that the surface was deteriorating, and there were ice chips, bumps, and wet spots on the ice.

A New York City jury awarded \$9.3 million to a man who fell on subway tracks while inebriated and lost his left arm. Another drunk on the tracks was awarded \$6 million, while a would-be suicide, who jumped on purpose, got \$1.2 million after appeal. Earlier this year, a Brooklyn resident was awarded \$2.3 million after he toppled onto the tracks and was struck by a train. His blood-alcohol level was more than double the legal limit.

A Long Island doctor, slapped with divorce papers from his cheating wife, sued her to return a gift he had given her eight years earlier: a kidney. If that wasn't possible, he would "settle" for \$1.5 million.

A New York City jury awarded \$4.3 million to a criminal shot by police after he brutally mugged a 71-year-old man on a subway platform.

An Irish tourist sued the owners of a New York City pub after she slipped while dancing on top of the bar.

A New York City jury awarded a million dollars after they decided that the city's highway and signs were more at fault for a fatal car crash than a drunk driver going the wrong way on the Hutchinson River Parkway.

A Manhattan woman sued Nike in a New York court claiming she fell while jogging after a shoelace got tangled on the back of the other shoe. The woman, who is an orthopedic surgeon, sought an award upward of \$10 million. She has reason to be hopeful since a New York City jury once awarded half a million dollars for a broken foot in a slip-and-fall lawsuit.

New York now faces a perfect storm of high tort costs, high tort-litigation risks, clogged courthouses, and nearly no tort reforms to balance a lopsided civil justice system.

There was a time when such lawsuits would have been unimaginable and laughed out of court. But now they are taken seriously by some, especially in New York State.

By standard measures, New York State has a failed tort liability system. Because of the enormous political influence of personal-injury lawyers in New York, the state now faces a perfect storm of high tort costs, high tort-litigation risks, clogged courthouses, and nearly no tort reforms to balance a lopsided civil justice system. Its excessive costs and risks negatively impact individuals and businesses both in New York State and across the country. The climate of fear is forcing people and jobs from New York. Lawsuit abuse thrives and lawyers collect their exorbitant fees while the Empire State burns.

This report chronicles New York's problems by looking at the facts. The evidence of New York's record of across-the-board failings is conclusive and sobering. But the lawsuit reforms recommended here, if adopted by the state legislature, would improve New York's tort climate and propel its economy forward, creating much needed jobs and higher incomes.

The report is divided into four chapters. Chapter 1 defines the scope of the report, gives a broad overview of America's broken tort liability system, and then spotlights New York's dismal system. Because of its size, New York contributes significantly to the national problem and has done little to correct its failings because of political pandering to personal-injury lawyers.

Chapter 2 details how New Yorkers would benefit from meaningful lawsuit reform: it would create jobs; increase output and lower prices; expand the tax base; boost productivity and personal incomes; attract new customers, employees, entrepreneurs, and taxpayers; lower health care costs while increasing doctors and access to health care; save lives; increase stock market returns; and cut both insurance premiums and liability losses. This chapter also shows how trial barons don't want New Yorkers to receive these multi-billion-dollar benefits, so they block lawsuit reform to protect their exorbitant fees and privileged status.

Chapter 3 discusses which lawsuit reforms are most needed in New York, and which would most improve the state's business climate and jobs picture. The chapter lists the "Top 10 Lawsuit Reforms New Yorkers Need NOW!"

Finally, chapter 4 summarizes the findings and explains why Texas is a blueprint for recovery that New Yorkers should follow.

Chapter 1.

The Broken Tort Liability System

A tort, French for “wrong,” is best defined as wrongful conduct by one individual that results in injury to another, including physical harm, property damage, or both. Tort law gives someone who has suffered injury the right to recover monetary damages from another person or persons if the injury was caused by the defendant’s failure to exercise a required duty of care, or, in some cases, independent of the level of care under strict-liability provisions. In essence, the goals of the tort system are to fully compensate true victims and to deter harmful events, not to punish the wrongdoer. Tort law, which covers the infringement of one person’s legally recognized rights by another, is part of civil law, not criminal law.

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 these cases is alleged wrongful conduct by one person that injures another. The law of torts covers such wrongful conduct.

A tort, French for “wrong,” is best defined as wrongful conduct by one individual that results in injury to another, including physical harm, property damage, or both.

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 and they break down into three major areas.

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 area of torts is strict liability or liability without fault. Areas of product liability apply the principle of strict liability.

This report on New York State examines 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 next section presents a macro, bird's-eye view of the nation's tort liability system to calculate important costs of the system and to provide a better understanding of how New York State fits into the overall picture.

The Broken U.S. System

The goals of tort law are to fully compensate true victims and to deter harmful events as efficiently as possible. Ideally, monetary compensation is awarded through economic and non-economic compensatory damages equal to the actual loss incurred by a true victim. When this is achieved, the tort system encourages greater economic activity and more employment, and operates to provide optimum net benefits to a state or country. It promotes higher overall production due to systematic resolution of disputes, which reduces conflict and perhaps violence and encourages production and exchange. Also, it deters the production and sale of unsafe products and deters unsafe practices, benefiting society as a whole.

There is growing evidence that today's U.S. tort system, and especially New York's, is a net cost to society at the margin.

In contrast, lawsuit abuse and the accompanying excessive litigation and damage awards act as a destructive and excessive "tort tax," which drags down the economy of a state or country. Excessive tort burdens divert resources to the lawsuit industry and away from more productive activities such as R&D or expanding access to health care. There is growing evidence that today's U.S. tort system, and especially New York's, is a net cost to society at the margin.

According to Tillinghast–Towers Perrin, which compiles the most frequently cited study on tort costs, direct U.S. tort costs were \$252 billion in 2007, or \$835 per person.¹ In contrast,

costs were only \$102 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 to 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.

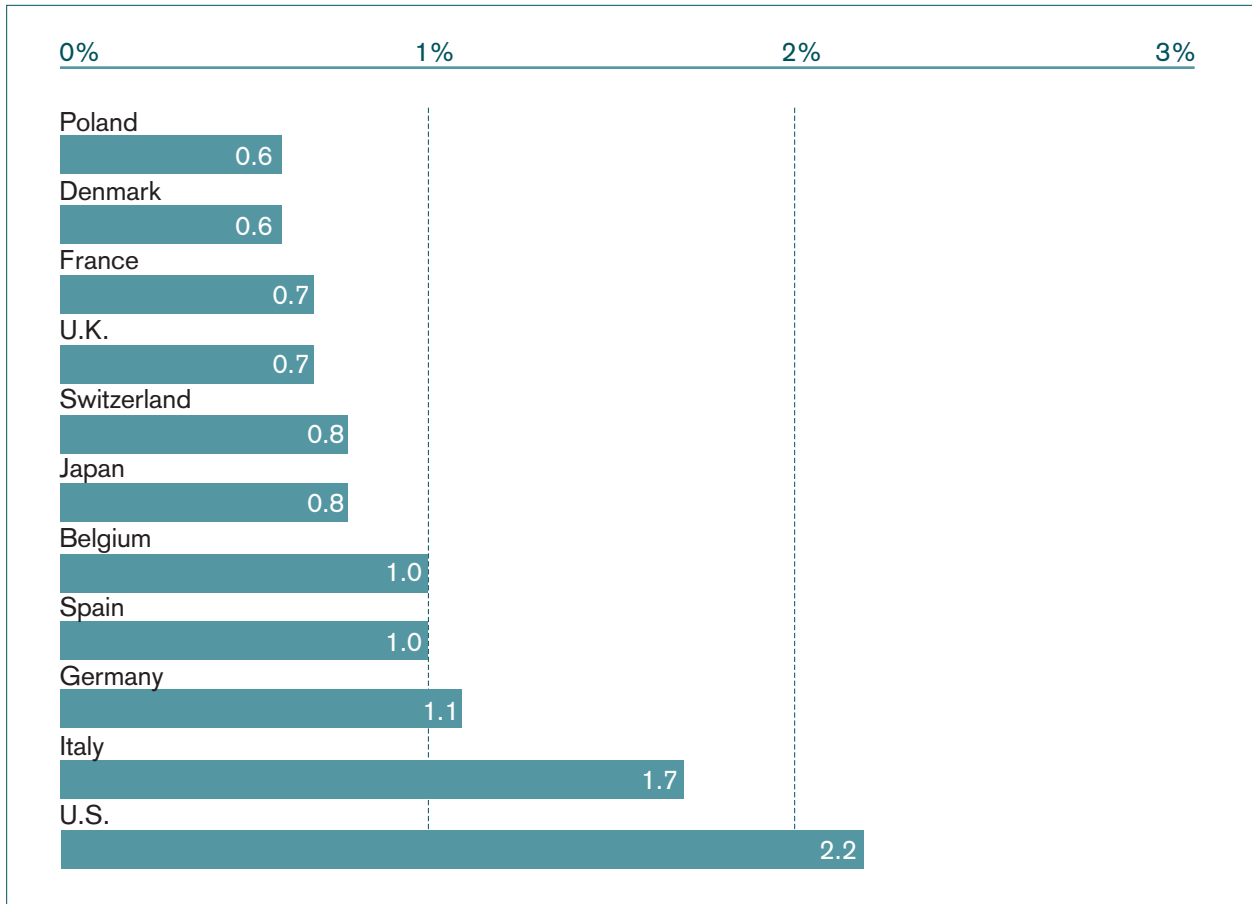
The Tillinghast report shows that on average during the past 57 years, direct U.S. tort costs have risen 9 percent a year while nominal gross domestic product (GDP) has increased 7 percent a year. As a result, tort costs have become a larger share of the U.S. economy—from only 0.62 percent in 1950 to 1.83 percent in 2007. America has become a more litigious society. In fact, the United States has the highest direct tort costs in the world.

As shown in figure 1, the U.S. tort system is the most expensive in the world, about double the average cost of other industrialized nations. In 2003, the last year that Tillinghast performed this analysis, direct tort costs as a percentage of GDP averaged about 1 percent in 11 industrialized countries with a standard of living comparable to that of the United States. In contrast, direct tort costs were 2.24 percent of GDP in the United States.

This 1.24 percent difference is a huge drain on the productive resources and economic potential of the U.S. economy. The U.S. tort system is a burden that foreign competitors do not pay. It puts American companies at a competitive disadvantage in global markets. If lawsuit reform lowered U.S. direct tort costs to levels comparable with those of other countries, it would free huge amounts of productive resources and make U.S. companies more globally competitive.

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 lawsuits, making American society poorer in the process.

Figure 1.
Tort Costs as a Percentage of GDP, 11 Industrialized Countries



Source: Tillinghast-Towers Perrin, *U.S. Tort Costs and Cross-Border Perspectives: 2005 Update* (New York: Tillinghast-Towers Perrin, 2006).

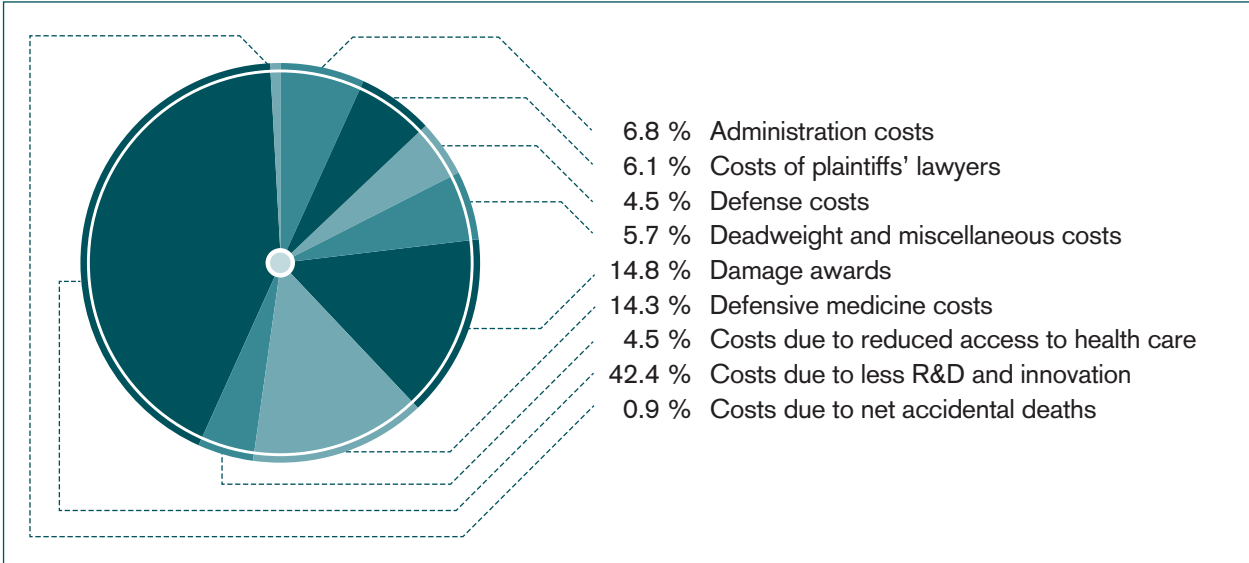
Tillinghast admittedly does not look at the indirect costs of the U.S. tort liability system. Indirect costs include such things as doctors practicing “defensive medicine” to guard against malpractice allegations, or companies refusing to introduce new products in order to guard against product-liability lawsuits. As noted by Derek Bok, president emeritus of Harvard University and former law school dean: “Lawsuits often have their greatest effect on people who are neither parties to the litigation nor even aware that it is going on.”²

In an effort to arrive at a fuller accounting of the true cost of the U.S. tort liability system, *Jackpot Justice*, a 2007 study by the Pacific Research Institute (PRI)³ built on the work of Tillinghast to measure both direct costs and indirect costs.⁴ It examined 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 spillover effects of the current abusive tort system. PRI estimated the total annual accounting cost of the U.S. tort liability system to be \$865 billion, basing its calculations on 34 scholarly studies by 52 top economists and legal scholars.

As figure 2 shows, created from data in *Jackpot Justice*, less than 15 cents of every tort-cost dollar goes to damage awards to compensate injured victims. If every time motorists filled their tanks 85 percent of the gasoline spilled to the ground, they would surely demand a better pumping system. Nevertheless, this is how inefficiently the tort transfer system works in America today.

Figure 2.
The Distribution of Tort Costs



Source: Lawrence J. McQuillan, Hovannes Abramyan, and Anthony P. Archie, *Jackpot Justice: The True Cost of America's Tort System* (San Francisco: Pacific Research Institute, 2007).

Of course, as mentioned earlier, not all tort costs are excessive or due to lawsuit abuse. After all, a thriving free-enterprise economy depends on the rule of law, and justified tort payouts are not “wasteful,” but actually enhance efficiency and encourage exchange. An optimal 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 optimal tort system results in greater trust among market participants, which leads to more trading, and eventually a higher standard of living for individuals in the society.⁵ An efficient tort system benefits all.

A suboptimal tort system, on the other hand, encourages lawsuit abuse and imposes excessive costs on society, not the least of which is foregone production of goods and services. In *Jackpot Justice*, 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. This imposes an annual “excess tort tax” of about \$2,000 for each American.

The Empire State contributes substantially to the tort costs and litigation risks in America.

To sum up, the U.S. tort system is the most expensive in the world. Excess U.S. tort costs due to lawsuit abuse waste resources each year (\$589 billion) equal to the annual output of Illinois or about \$2,000 a year for every American. Instead of fueling the massive lawsuit-industry transfer system—roughly the same size as the U.S. restaurant industry—these resources would be better spent on productive activities to satisfy consumers. The

system is also a very inefficient method of compensating injured victims—the people that the system is intended to help. And truly injured people often wait years for compensation due to clogged courthouses and endless red tape.

Unfortunately, because of the sheer size of New York State, in population and economic activity, as well as its near total neglect of lawsuit reform, the Empire State contributes substantially to the tort costs and litigation risks in America. The next section examines the across-the-board failings of New York State.

The Broken New York System

Because of the common-law nature of tort law, states vary considerably in terms of the cost of their tort liability system, the distribution of these costs across individuals and sectors of the economy, the litigation risks faced by individuals and businesses in each state, and the rules on the books that help shape each state’s tort costs and risks. Because of pandering to personal-injury lawyers, New York faces a perfect storm of high tort costs, high tort-litigation risks, clogged courthouses, and nearly no tort reforms to balance a lopsided civil justice system. The evidence supports this dismal assessment of New York’s present situation.

PRI’s 2008 *U.S. Tort Liability Index* provides a state-by-state assessment of tort costs, tort-litigation risks, and tort rules and reforms on the books, and ranks the states accordingly.⁶ The *Index* measures which states have the highest, and the lowest, tort liability costs and tort-litigation risks

Table 1. Ranking of Absolute Monetary Tort Losses

Rank	State	Losses (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

(outputs). And it examines which states have rules and reforms 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.

The *Index* examines nine variables that track direct 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 are available. Losses measure the market's best estimate of the expected total cost of a claim at the time it is incurred; thus, losses provide a comprehensive accounting of the actual tort costs incurred. The *Index* uses the same insurance lines as Tillinghast, but the 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. These data are considered the gold standard because they are subject to audit and reviewed by state insurance regulatory agencies.

Table 1 lists total direct monetary tort losses by state. New York had the second-highest losses at \$16 billion. Only California had higher tort losses. These costs are paid for by consumers, employees, entrepreneurs, and, often forgotten, the taxpayers. For example, in fiscal year 2008, New York City's annual tort expenditures were \$528 million. These annual

Source: Lawrence J. McQuillan and Hovannes Abramyan, *U.S. Tort Liability Index: 2008 Report* (San Francisco: Pacific Research Institute, 2008), p. 20.

**Table 2. U.S. Tort Liability Index
2008 Output Rankings**

Rank	State	Source
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

costs have risen 485 percent since 1977 in inflation-adjusted dollars. Fay Leoussis, head of the New York City Law Department's Tort Division, states: "Due to the high cost of funding tort payouts, the city has advocated for numerous tort-reform initiatives that other states have already adopted, including caps on pain and suffering, medical-cost thresholds, and limited liability in cases in which the city is less than 50 percent responsible."⁷

New York's Metropolitan Transportation Authority (MTA) has about 2,750 new personal-injury claims filed against it each year, or about 60 a week or about 12 a day. In 2008, MTA paid out \$57.6 million on 1,187 personal-injury claims. Verdicts currently on appeal include a \$12.5 million award to a woman injured by a bus in 2003 and a \$7.2 million award to a biker hit by a bus.⁸

One could argue that table 1 presents a skewed picture of New York: its tort losses are high only because the state is so populous and has a high level of economic activity. To control for these influences, the *Index* also divided each state's direct tort losses incurred by a line-specific denominator that normalized the data, thus enabling comparisons across states as different in size, for example, as California and Rhode Island. Unfortunately, New York's tort performance changes little after controlling for population size and the level of economic activity.

Source: Lawrence J. McQuillan and Hovannes Abramyan, *U.S. Tort Liability Index: 2008 Report* (San Francisco: Pacific Research Institute, 2008), p. 16.

After standardizing the data across all 50 states (1 best, 50 worst), New York's relative

direct tort losses rank 47th—an improvement of only two spots. After tort-litigation risks are included, the Empire State's overall rank falls to 48th, as shown in table 2.⁹

Regarding tort-litigation risks, New York ranks 46th in total incoming civil cases per 100,000 residents (excluding domestic-relations cases) and it ranks 49th in resident and active attorneys per dollar of state GDP.¹⁰ New York juries also rendered 10 percent of the nation's 100 largest jury-verdict awards in 2006, ranking the state 35th. It is little exaggeration to say there is a lawyer on every corner in New York waiting to chase the next ambulance in the hope of filing another lawsuit and hitting the jackpot to rake in sky-high fees.

To provide a more detailed picture of New York's problems, table 3 drills down to the seven lines of tort insurance and two categories of tort self-insurance in PRI's *Index*. The table lists, for these nine areas, New York's relative ranking (1 best, 50 worst) in direct monetary tort losses standardized by population size or level of economic activity.

Table 3.
New York State's Ranking in Seven Lines of Tort Insurance
and Two Categories of Tort Self-Insurance

	<u>Rank</u>
Private and commercial automobile-liability-insurance losses / miles driven	29
Farmowners' multiple-peril [liability portion] insurance losses / number of farms	18
Commercial general-liability multiple-peril (liability portion) insurance losses / state GDP	48
Other general-liability insurance losses / state GDP	46
Homeowners' multiple-peril [liability portion] insurance losses / number of occupied housing units	27
Medical-malpractice insurance losses / projected personal health-care expenditures	50
Product-liability insurance losses / state GDP	41
Personal self-insurance losses / state GDP	12
Commercial self-insurance losses / state GDP	48

Source: Lawrence J. McQuillan and Hovannes Abramyan, *U.S. Tort Liability Index: 2008 Report* (San Francisco: Pacific Research Institute, 2008), pp. 18–19.

The state ranks in the bottom half in all but two categories: farmowners and personal self-insurance. Shockingly, in more than half the categories, New York ranks 41st or worse. It

is particularly poor in commercial liability, product liability, automobile liability, and medical-malpractice liability. Taxi and town car services in New York City; businesses throughout New York State, particularly companies that manufacture products or pharmaceuticals and deliver those products; and doctors, hospitals, clinics, and medical-device manufacturers should be particularly outraged with the state's current tort mess. Faced with medical-malpractice insurance premiums of \$200,000 or \$300,000 a year in some cases, many New York doctors are switching specialties or leaving the state. Daniel Sisto, president of the Healthcare Association of New York State, correctly notes: "Many doctors already pay more than \$200,000 each year in medical malpractice insurance premiums—a staggering number that is creating shortages of obstetricians needed to deliver babies. If these costs are not controlled, communities across the state can expect to see vital health services threatened or curtailed."¹¹

Other evaluations of New York's medical-malpractice liability system support these findings. In its last assessment, the American Medical Association (AMA) listed New York as a "crisis state."¹² A separate evaluation by NORCAL Mutual Insurance Company in San Francisco ranked New York's medical liability system 49th and gave it a grade of "F."¹³

High malpractice insurance premiums were cited for the closure of the maternity ward at Long Island College Hospital (LICH) in Brooklyn, which delivered 2,800 babies in 2007.¹⁴ Dominick Stanzione, the hospital's chief restructuring officer, said: "In this state, we have an overwhelming problem with the medical malpractice situation. This institution is a victim of that."¹⁵ Despite Brooklyn having the highest number of births each year

of any New York City borough, LICH follows the closure of three other Brooklyn maternity wards since 2004: Interfaith Medical Center, St. Mary's Hospital, and Victory Memorial Hospital.¹⁶

Especially troubling, as discussed fully in chapter 3, is the state legislature's failure to rein in excesses through meaningful lawsuit reform. PRI's 2008 *U.S. Tort Liability Index* ranks New York a dismal 48th in terms of its tort rules and reforms on the books.

This dismal record of across-the-board failings is forcing businesses and jobs from New York and particularly threatens the quality of health care.

To sum-up, New York State's tort liability system is consistently at the bottom of the barrel. As table 4 recaps, the Empire State has the second-highest direct tort losses, the fourth-

worst relative tort losses, the fourth-worst relative tort-litigation risks, the third-worst tort system overall, and the third-worst tort rules and reforms on the books. Understandably, PRI's *Index* classifies New York as a "sinner" state. This dismal record of across-the-board failings is forcing businesses and jobs from New York and particularly threatens the quality of health care. There is no good news here.

Table 4.
New York State's Tort Liability System Rankings

	<u>Rank</u>
Total direct monetary tort losses	49
Relative direct monetary tort losses	47
Relative tort-litigation risks	47
Overall relative tort system costs and risks (outputs)	48
Overall relative tort rules and reforms (inputs)	48

Source: Lawrence J. McQuillan and Hovannes Abramyan, *U.S. Tort Liability Index: 2008 Report* (San Francisco: Pacific Research Institute, 2008).

The next chapter examines the multi-billion-dollar benefits to New Yorkers if the state legislature enacted meaningful lawsuit reform, which many other states have done. Chapter 2 also looks at the organized effort by personal-injury lawyers to stop beneficial lawsuit reforms in order to protect their exorbitant fees and privileged status.

Chapter 2.

How New Yorkers Would Benefit from Lawsuit Reform and Who Wants to Stop It

New Yorkers shoulder the burden of an excessively expensive and inefficient tort liability system through higher product prices, higher insurance premiums, higher taxes, lower wages, lower returns on investments in capital and land, reduced access to health care, and less innovation.

Most people do not realize that they are paying these costs because the costs are buried in the price of every purchase or the costs are “foregone benefits” that are not tangible or transparent. Perhaps Bernie Marcus, co-founder 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].”¹⁷ Everyone is paying for lawsuit abuse whether they realize it or not. The good news, however, is that everyone can benefit from lawsuit reform—except perhaps personal-injury lawyers.

Everyone is paying for lawsuit abuse whether they realize it or not.

The next section discusses some important benefits to New Yorkers if the state legislature enacted commonsense lawsuit reform. The benefits are derived from the best available studies in the scholarly law and economics literature by the nation’s top economists and legal scholars. The results are restricted to areas where studies exist that allow for benefits to be calculated at the state level. Nevertheless, the list of benefits should be enough to make any self-respecting New Yorker angry at their state legislature for pandering to personal-injury lawyers and, as a result, doing nothing to improve the situation.

The Multi-Billion-Dollar Benefits to New Yorkers from Lawsuit Reform

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 answers are yes, the state will attract entrepreneurs and capital, foster competition, experience greater job growth and faster overall economic growth. A recent McKinsey & Co. report found that, among

In today's poor economic climate, perhaps the most important benefit of lawsuit reform is its ability to jump-start the economy and create new jobs.

executives surveyed, tort risks are second in importance in determining where to establish operations, after the availability of qualified workers.¹⁸ In today's poor economic climate, perhaps the most important benefit of lawsuit reform is its ability to jump-start the economy and create new jobs.

Jobs, Jobs, and More Jobs

Lisa Kimmel, an economist at the University of California, Berkeley, examined the effect of lawsuit reform on employment.¹⁹ She looked at six common 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. Overall, an additional tort reform increased employment in a state, on average, by 1 percent. This means that New York could expect to create 86,716 jobs from just one tort reform, 173,432 jobs from two reforms, 260,148 jobs from three reforms, etc.²⁰

Greater Output and Increased Tax Revenue

Another study has confirmed the link between a state's legal climate and its economic output. Todd G. Buchholz and Robert W. Hahn examined the effect of a state's legal environment on the growth rate of its per capita real GDP.²¹ They used the *State Liability Systems Ranking Study* conducted for the U.S. Chamber of Commerce 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 corporations.

The researchers found that real state GDP per capita increased by 0.75 percent for every 10 percent improvement (or five-place jump) in a state's legal ranking. 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." In today's dollars, New York's annual state output would increase by \$17 billion if the state's tort ranking improved 10 places, an optimistic, but not unreasonable, goal.²² This

increase in output would be roughly equivalent in size to the state's education sector. This expansion in output would drive prices down for consumers and make New York businesses more globally competitive. It would also add much needed tax revenues to state and local coffers.²³

The Koester-Kormendi procedure can be used to estimate the marginal tax rate (MTR): the change in total state tax revenue in response to a change in output. MTR approximates the marginal tax rate for the average individual in the state. W. Mark Crain used the Koester-Kormendi procedure to estimate the MTR for New York using 30 years of data.²⁴ He arrived at a MTR of 6.13 percent. Applying this rate to the \$17 billion increase in annual output yields an estimated yearly tax haul for New York State of \$1.04 billion.²⁵

Greater Labor Productivity and Higher Real Personal Income

Thomas J. Campbell, Daniel P. Kessler, and George B. Shepherd examined the impact of liability reforms on labor productivity.²⁶ 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.

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." Business resources that would have been spent on legal defense were now free to purchase new plants and equipment. Labor-productivity gains in those states that enacted reform were about 2 percent greater between 1972 and 1990. In today's dollars, this would translate into a \$2,646 increase in output per worker per year in New York State.²⁷

Over time, real personal incomes would rise to reflect this higher rate of labor productivity. Productivity in manufacturing increased even more, about 2.7 percent.

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Net In-Migration of People

States with better tort systems at the beginning of 2008 had higher domestic net in-migration rates. Looking at census data on net state-to-state migration rates from July 1, 2007, to July 1, 2008, the top 10 tort states had an average net inflow of 2.03 people per 100 residents.²⁸ In contrast, the bottom 10 tort states had an average net outflow of 1.65 people per 100 residents (New York State bled –6.50 people per 100). The health of a state's tort system was determined by its ranking in PRI's *2008 U.S. Tort Liability Index*. People are fleeing predatory legal environments such as New York State and moving to less threatening locations. A healthy civil justice system expands economic opportunities and attracts new customers, employees, entrepreneurs, investors, and taxpayers—people that New York State desperately needs. If New York was a top 10 tort state, it would add an average of 395,653 people each year.

Lower Health Care Costs, More Physicians, and Better Access to Care

According to one estimate, every year one out of eight doctors is sued personally for alleged medical negligence.²⁹ Even more frightening for doctors, however, is that 28 percent of insurance malpractice claims where there is no identifiable medical error still result in a malpractice payment.³⁰ The fear factor caused by excessive medical-liability burdens, therefore, often prompts health care providers to order more tests, referrals, and procedures than warranted by evidence-based medical need. This practice is commonly referred to as “defensive medicine.” According to a survey, 93 percent of physicians report practicing defensive medicine.³¹ Daniel Kessler and Mark McClellan found that medical-liability concerns prompted defensive hospital costs of 5 to 9 percent.³²

Applying this methodology to New York State, eliminating defensive medicine yields a conservative annual savings estimate of \$11.4 billion (2009 dollars).

When Kessler and McClellan's findings are generalized to all health care spending, defensive medicine increased health care expenditures by 8 percent or more than \$191 billion in 2008.³³ In other words, lawsuit reforms targeted to eliminate unnecessary, defensive medicine would cut health care costs by \$191 billion a year, enabling greater access to health care through more affordable treat-

ments and lower-priced health insurance.³⁴ Applying this methodology to New York State, eliminating defensive medicine yields a conservative annual savings estimate of \$11.4 billion (2009 dollars).³⁵

Another added benefit is that states with medical-liability reform have more doctors and better access to health care. An analysis by Fred J. Hellinger and William E. 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.³⁶ 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.

Lives Saved

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.³⁷ 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 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 impose 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, 24,314 lives. The results disprove a recent statement by Linda Lipsen, senior vice president of public affairs for the trial lawyers' Washington, D.C., trade lobby, the American Association for Justice: "Changing the legal system will not make anyone healthier or save one life."³⁸ She is wrong.

Rubin and Shepherd concluded that the U.S. tort system “is an extremely expensive system and can be justified only if it provides substantial deterrence.”³⁹ But the current U.S. tort system costs lives at the margin—liability burdens exceed the tipping point. Such is the case in New York State as well.

The U.S. tort system “is an extremely expensive system and can be justified only if it provides substantial deterrence.”

In 2006 (the most recent year with data), there were 3,636 accidental, non-motor-vehicle deaths in New York State.⁴⁰ Based on the average annual percentage reduction in deaths for the three statistically significant tort reforms not adopted in New York by 2006 (cap on non-economic damages, higher standard of evidence to impose punitive damages, and product liability reform), New York State could have reduced these deaths by 9.94 percent, or 361 deaths, by enacting these lawsuit reforms. If these 361 people had not died

needlessly, and assuming they were all working, they would have produced in 2006 alone, on average, \$44 million in additional output.⁴¹

Better Stock Market Returns

New York City is one of the world’s financial centers. And because the state’s economy is so dependant on the fortunes and misfortunes of the Big Apple’s financial sector, it is particularly important to understand how tort lawsuits impact the stock market. Although the methodology explained below yields a “macro” number, not a New York State-specific number, this sector is too vital to the Empire State to ignore just because the existing studies are macro in nature.

One strategy of plaintiffs’ lawyers (Mel Weiss and Bill Lerach are examples—both are in federal prison now, but others are still engaged in the same practice today) is to file a lawsuit against a publicly traded company, driving down its stock price and forcing the company to the bargaining table to settle the case in order to stop the bleeding. Since this is a common strategy, we decided to isolate the impact of tort lawsuits on stockholder wealth to better understand the phenomenon. All costs are in 2009 dollars, unless otherwise noted, and thus might not equal the costs reported in the original studies cited.

If the economic costs associated with tort claims are real and significant, these costs will lower investors’ expectations of a sued company’s future profitability and will decrease the company’s stock price. The total tort costs, therefore, will fall partially on stockholders. In order for tort claims

to affect a company's stock price, there must be an unanticipated event that conveys new tort-claim information to potential purchasers of the stock that alters their assessment of the company's value. Economists have examined the impact of litigation on stock prices using "event analysis."

The total tort costs, therefore, will fall partially on stockholders.

After an extensive literature review first presented by the authors of *Jackpot Justice*, they concluded that four studies have received the most peer recognition for their efforts to measure the effect of civil litigation on stockholder wealth. W. Kip Viscusi and Joni Hersch examined 77 events regarding 29 products-liability lawsuits. They reported that, on average, stock prices fell 2.12 percent on the date of the initial announcement of the lawsuit.⁴² Nancy D. Ursel and Marjorie Armstrong-Stassen looked at 84 events regarding age-discrimination lawsuits against 46 exchange-traded companies. They reported that, on average, stock prices fell 2.43 percent on the date of the initial filing of the lawsuit.⁴³ Though both studies are well conducted, neither result reflects the overall stock-price effect of tort litigation because each looked at only one type of lawsuit that has a disproportionate stock-price effect. Also, they examined only initial announcement effects. The following two studies correct for these limitations.

Sanjai Bhagat, John Bizjak, and Jeffrey L. Coles examined 618 lawsuit filings involving a wide spectrum of legal issues. They reported that, on average, stock prices of publicly traded companies fell 0.97 percent on the date of the lawsuit filing.⁴⁴ Notice that this stock-price effect is smaller than in the two studies discussed above. This is likely due to the larger, more diverse, and more representative sample. This is confirmed by Bhagat et al. since their stock-price decline for products-liability lawsuits is 1.46 percent—larger than the overall decline and closer to the result reported by Viscusi and Hersch. The stock-price effect for products-liability lawsuits alone is not representative of the overall effect.

Finally, Jonathan M. Karpoff and John R. Lott Jr. examined 351 events involving a similarly wide spectrum of legal issues. They reported that, on average, stock prices fell 0.45 percent after all announcements for cases in which plaintiffs sought punitive awards from 235 publicly traded companies.⁴⁵ Notice that this study uses a large, representative sample. Also, the study tracks all announcements: specifically, the initial lawsuit filing, verdict or settlement, and post-verdict adjustments. For these reasons, this stock-price loss estimate is the most reliable and generalizable. The stock-price decline reported by Karpoff and Lott for the initial announcement of a lawsuit (1.02 percent) is strikingly close to the effect reported by Bhagat et al. (0.97 percent), lending further credibility to the Karpoff and Lott results. Across all

companies, the median loss in the market value of equity due to a lawsuit was \$2.9 million (\$4.07 million in 2009 dollars).⁴⁶

These studies show that plaintiffs damage defendant companies with a lawsuit. The evidence also shows that plaintiffs gain far less than defendants lose. In other words, the civil justice system, which is intended simply to transfer wealth from defendants to injured plaintiffs, consumes far more resources in the process of making the transfer. The additional losses to companies beyond the mere transfer include legal costs, lost customers and high-skilled workers, management time devoted to the lawsuits, potential “follow-on” lawsuits, and damaged company reputation.

To calculate the total loss of market value of equity due to tort lawsuits, \$4.07 million is multiplied by the number of tort lawsuits against publicly traded companies. Tort claims can be filed in state or federal court. The National Center for State Courts reports in its Court Statistics Project that 530,455 tort cases were filed in 2004 in state courts across the country.⁴⁷ Tort filings in federal

district courts totaled 2,536 in a one-year period ending March 31, 2004, according to the federal judiciary’s caseload statistics.⁴⁸ The total number of tort filings, therefore, equaled 532,991 in 2004, the most recent year with calculated statistics.

The civil justice system, which is intended simply to transfer wealth from defendants to injured plaintiffs, consumes far more resources in the process of making the transfer.

How many of these tort filings were against publicly traded companies? This number is not easily determined. As noted by Bhagat et al., “Even so rudimentary a statistic as the total number of lawsuits filed each year against the major exchange-listed firms is unknown.”⁴⁹ The percentage of state-court tort cases filed against corporations, however, is available from the *Civil Justice Survey*

of State Courts, which is conducted by the National Center for State Courts for the U.S. Bureau of Justice Statistics.⁵⁰ Of the total cases in the survey, 5,451 were tort cases. Sorting the sample of tort cases by defendant type, we found that 1,812 were filed against corporations. In other words, 33.24 percent of tracked tort cases were filed against corporations. This was used as a proxy for the percentage of tort filings against publicly traded companies. Applying this percentage to the total tort filings in state and federal courts, 532,991, yielded 177,166 tort cases filed against publicly traded companies in one year.

Finally, multiplying the 177,166 tort cases by \$4.07 million—the median loss in stockholder equity due to a lawsuit—yields a total annual wealth loss to U.S. stockholders of

\$721 billion in 2009 dollars. This hits families, pension funds, 401(k) accounts, small investors, and large investors—anyone who owns stocks either directly or indirectly. To put this into perspective using wealth terms, stockholder losses due to tort lawsuits are equivalent to wiping out the net worth of more than 5.8 million U.S. families.⁵¹

This massive wealth loss to U.S. stockholders disproportionately impacts New York State because of the Big Apple's status as an international financial hub. And things are likely to get worse.

According to a May 2009 report by Advisen, a company that collects information for the insurance industry, securities class actions are declining as a percentage of all cases filed, but tort lawsuits are rising: "In an effort to distinguish themselves in the competitive securities litigation marketplace, plaintiffs' attorneys increasingly have been filing securities lawsuits alleging common law torts, contract law violations, and breach of fiduciary duties."⁵²

This massive wealth loss to U.S. stockholders disproportionately impacts New York State because of the Big Apple's status as an international financial hub. And things are likely to get worse.

New York City's financial-services sector, hit hard by the financial meltdown, would benefit from the boost provided by lawsuit reform. An end to meritless lawsuits against publicly traded corporations would increase stockholder wealth, boost Wall Street employment, and expand New York's tax base—all good things.

Lower Tort Losses and Tort Insurance Premiums

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 and an ever-increasing household expense for individuals. *Tort Law Tally*, a new report from PRI, identifies which state tort reforms reduce tort losses and tort insurance premiums the most and by how much.⁵³

Tort Law Tally uses a quantitative analysis that compares losses and premiums in states that have implemented a particular tort reform to losses and premiums in states without this

reform. The study assesses 25 specific reforms. Multivariate regression analysis controls for a number of factors that cause tort losses and premiums to vary among U.S. states.

The statistical analysis identifies 18 reforms to state civil justice systems that significantly reduce tort losses and/or tort insurance premiums. The cumulative effect of reforms across all tort categories is a 47 percent reduction in losses and a 16 percent reduction in annual insurance premiums for consumers.

Tort-loss savings from reforms are particularly large in commercial, private automobile, commercial automobile, medical-malpractice, and product liability. These are some of the areas with the highest relative tort losses in New York State, as noted in chapter 1. In other words, if reforms were passed, New Yorkers would benefit greatly, especially health care providers and patients. Based on the overall results, New Yorkers could save \$8 billion in tort losses annually (2009 dollars) if lawsuit reforms were enacted (after these savings, New York would still have the nation's fifth-largest direct tort losses).

The state could save even more if it cherry-picked the correct reforms for the specific problems it faces. Some lawsuit reforms are highly effective at reducing losses and premiums in certain tort categories, but are ineffective in other tort categories; so it is important that tort reformers pick the right tool for the problems facing New York State (more on this in chapter 3).

Without reforms, the state might as well hang a sign at the state line saying “Businesses Not Welcomed; People Go Away.”

The message is clear: lawsuit reform in New York State would create jobs; increase output and lower prices; expand the tax base and increase tax revenues; boost productivity and personal incomes; attract new customers, employees, entrepreneurs, investors, and taxpayers; lower health care costs while increasing the number of doctors and improv-

ing access to health care; save lives; increase stock market returns; and cut insurance premiums and liability losses.⁵⁴

Given these profound and sweeping multi-billion-dollar benefits, all self-respecting New Yorkers should be outraged at the state legislature's refusal to enact lawsuit reforms that would yield these benefits. If meaningful lawsuit reforms were enacted and defended, the Empire State would become 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. Without reforms, the state might as well hang a sign at the state line saying “Businesses Not Welcomed; People Go Away.” Kenneth Adams, president and CEO of The Business Council of New York State, hits the nail on the head: “New York needs to lower the cost of doing business to become competitive with other states and nations. The hidden ‘tort tax’ in New York drives up costs and must be lowered to make New York competitive again.”⁵⁵

The benefits from lawsuit reform add up to real economic stimulus that does not cost a single taxpayer dollar—in fact, it would generate greater state and local tax revenue. But personal-injury lawyers don’t want New Yorkers to have these multi-billion-dollar benefits because lawsuit reform threatens their exorbitant fees and privileged status.

The Trial Barons Don’t Want New Yorkers to Receive Multi-Billion-Dollar Benefits

In 2008, three “Kings of Tort”—Bill Lerach, Dickie Scruggs, and Mel Weiss—were marched off to federal prison after pleading guilty to various crimes that corrupted the civil justice system and parasitically sucked vast amounts of money out of the productive sectors of the economy. Weiss, for example, the fourth named partner in the New York law firm that carried his name for many years, pleaded guilty to participating in an \$11.7 million kickback scheme government prosecutors said began in 1979 and resulted in more than \$200 million in tainted legal fees in an estimated 150 cases filed by the New York law firm. Some of that money ended up in the pockets of political candidates (former San Francisco Mayor and former California Assembly Speaker Willie Brown referred to the plaintiffs’ bar as one of the “anchor tenants” of the Democratic Party). Such corruption continues to erode the public’s respect for both the law and lawyers.

Between 1960 and 1990, the single largest profession produced in Japan was engineers. During this same period in the United States, the single largest profession produced was lawyers. The country is now seeing the effects of past, massive investment in lawyer human capital with an explosion of new lawsuits, new rights to sue, and a criminal arrogance in the legal community. The United States is now a nation of lawyers, instead of a nation of laws. Citizens are subject to the rule of lawyers, instead of the rule of law. Perhaps no state has been affected by this more than New York.

From 1996 through 2005, more than 135 million civil lawsuits were filed in U.S. state courts: an average of 52,000 incoming cases every business day. Approximately 15 percent of these

civil cases were defined as torts.⁵⁶ PRI's *2008 U.S. Tort Liability Index* shows that New York is fifth-worst among all states in total incoming civil cases per 100,000 residents. And it is second only to Massachusetts in having the most attorneys per dollar of state GDP. The plaintiffs' bar in New York State has used its numbers and wealth through longstanding, well-organized political campaigns to block lawsuit reform and to create new rights to sue in lawyer-influenced Albany.

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The plaintiffs' bar's commitment to killing lawsuit reform is made evident by the many donors "clubs" that exist in New York and are advertised in the legal community. These clubs funnel money to legislative lobbying activities and the election campaigns of politicians. One such club is the "Champions of Justice" that has various donation levels starting with the "Amicus" level for \$100 per month up to the "President's" level for \$5,000 per month.

The New York State Trial Lawyers Association (NYSTLA) operates something called the "Partnership for Justice." In a recent advertisement proclaiming "We Support Each Other!," the club offered donor levels starting at "Copper Partners" for \$250 per month up to "Diamond Partners" for \$8,333 per month.

Overall in 2008, lawyers invested \$4.92 million, the sixth-largest contributor group in New York State.⁵⁷ NYSTLA, at \$1.4 million, was the fourth-largest single contributor statewide. In 2006, lawyers invested \$7.17 million. The return on their investment has been the death of lawsuit-reform bills.

The plaintiffs' bar has many motives for opposing lawsuit reform: protecting their exorbitant fees is chief among them. Lawsuit abuse fattens their wallets. But another self-interested reason for blocking lawsuit reform is that meaningful reform kills jobs for personal-injury lawyers. Economist Lisa Kimmel of the University of California, Berkeley, found that each additional tort reform cuts employment in the legal sector by 1 percent, which explains the continued opposition by personal-injury lawyers to meaningful lawsuit reform.⁵⁸ Most residents of New York, however, would gladly substitute doctors for lawyers.

New York's self-interested and politically generous litigation-industry titans have succeeded in using their political clout to block needed lawsuit reform in Albany. But as personal-injury lawyers are laughing all the way to the bank, the price tag for their obstruction is a damaged state economy. It is time that ordinary workers, taxpayers, and voters recognize this multi-billion-dollar damage and take back Albany, beginning with the lawsuit reforms discussed in the next chapter.

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Chapter 3.

The Empire Strikes Back: The Lawsuit Reforms that New Yorkers Need NOW!

The New York state legislature has not acted to stop the damage being inflicted on New Yorkers and the state economy by lawsuit abuse. Lawmakers are ignoring the plight of ordinary citizens and pandering to the political influence of personal-injury lawyers.

It is time that ordinary New Yorkers take back Albany with an action agenda beginning with meaningful, comprehensive lawsuit reform. The people deserve the multi-billion-dollar benefits.

But where to begin? Fortunately, PRI's 2008 *U.S. Tort Liability Index* provides a roadmap to recovery. The *Index* examines 28 tort rules that shape each state's tort-system costs and risks. 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 tort costs and litigation risks.

Table 5 lists the 28 variables used to rank New York State's tort rules along with its ranking for each variable. The variables are grouped into three categories: monetary caps, substantive-law rules, and procedural and structural institutions.

New York State's tort rules are shockingly bad. It ranks 40th or worse in 20 of the 28 variables. It is dead last in 18 of the 28 variables. Overall, its tort rules rank 48th among the 50 states. New York's last tort reform, as listed on the website of the American Tort Reform Association, was a full six years ago.⁵⁹ New York is stuck in the mud as other states speed ahead. The state legislature is indifferent to the plight of ordinary New Yorkers, because of political pandering to personal-injury lawyers.

The state legislature is indifferent to the plight of ordinary New Yorkers, because of political pandering to personal-injury lawyers.

As noted in chapter 1, New York State has particularly high tort losses in commercial liability, product liability, automobile liability, and medical-malpractice liability. So, of the tort rules where New York ranks poorly (see table 5), reforms should target those rules that most improve these liability areas. And of these reforms, it would be best to emphasize those that yield the biggest bang for the buck, as shown in *PRI's Tort Law Tally*. This three-part decision tree yields the "Top 10 Lawsuit Reforms New Yorkers Need NOW!" (see page 39).

Table 5.
New York State's Ranking in 28 Tort Rules

	<u>Rank</u>
Monetary Caps as of 2007	
Appeal-bond caps	50
Caps on non-economic damages (excluding medical-malpractice lawsuits)	50
Caps on punitive damages (excluding medical-malpractice lawsuits)	50
Caps on damage awards in medical-malpractice lawsuits	50
Substantive-Law Rules as of 2007	
Class-action rules	50
Attorney contingency-fee limits (excluding medical-malpractice lawsuits)	50
Does the state generally use a contributory, comparative, or modified-comparative standard for negligence?	50
Rules on joint and several liability	25.5
Rules on early offers of settlement	25.5
Does the state have an "Illinois Brick repealer" statute?	50
Attorney-retention sunshine rules	50
Reform of the collateral-source rule	1
Jury-service rules	40.2
Medical Malpractice	
Attorney-fee limits	15
Pre-trial screening or arbitration	40.2
Product Liability	
Asbestos- and silica-liability rules	50
Construction-liability rules	50
Does the state allow a "FDA defense" or "FTC defense"?	50
Does the state provide guidelines for general-manufacturer liability or retailer liability?	50
Does the state provide civil-liability exemptions for claims concerning junk food or obesity?	50
Procedural and Structural Institutions as of 2007	
Are state-supreme-court justices appointed or elected?	1
Does the state have a harmful attorney general?	1
Venue rules	50
What is the standard for scientific review of evidence by expert witnesses?	50
Conditions on the use of expert witnesses in medical-malpractice lawsuits	50
Statute of limitations on medical-malpractice lawsuits	13.25
Size of juries in general-jurisdiction courts multiplied by the percentage of jurors needed to reach a verdict	50
Does the state have a complex-litigation court?	1

Source: Lawrence J. McQuillan and Hovannes Abramyan,
U.S. Tort Liability Index: 2008 Report
(San Francisco: Pacific Research Institute, 2008), pp. 40–45.

1. **Appeal-Bond Cap.** Cap at \$25 million the amount a defendant is required to post in a bond to appeal damages (a *Tort Law Tally* top 8 pick, especially effective at reducing auto and medical-liability losses).⁶⁰ 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. Reasonable appeal-bond caps protect defendants' due process rights by allowing them to appeal decisions without putting them out of business.
2. **Cap on Non-Economic Damages and Pilot Health Courts.** Cap at \$250,000 (the same as California's highly-successful MICRA law) the amount that a plaintiff may recover in non-economic damages in all lawsuits, especially medical-malpractice lawsuits (a *Tort Law Tally* top 8 pick, especially effective at reducing commercial and medical liability losses).⁶¹ Caps limit the amount awarded for impossible-to-quantify "pain and suffering" or "mental distress." The state legislature should also fund a pilot program for special health courts in New York State. Specialized courts have worked well in other areas of complex litigation such as bankruptcy. Health courts would provide faster proceedings, more medically knowledgeable judges and staff, certificates of merit, consistent application of medical standards, more reliable and consistent awards, neutral experts, and written rulings on standards of care that could be used to guide treatments by doctors and hospitals going forward. The result would be fairer trials and more consistency in awards.⁶²
3. **Class-Action Lawsuit Reforms.** Require all plaintiffs in a class-action lawsuit to "opt-in" to the lawsuit as well as require majority approval, in advance, of the representing law firm and the contingency-fee percentage. Permit interlocutory appeal of class certifications. 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.⁶³ *Tort Law Tally* shows that this reform is especially effective at reducing product liability insurance premiums.
4. **Absolute-Liability Reform.** End absolute liability on building owners, contractors, and subcontractors for elevation-related damages and injuries to workers such as falls from scaffolds or from rooftops. New York is the only state that imposes absolute liability for these types of accidents (New York State Labor Law Sections 240 and 241) and allows for civil lawsuits outside of the normal workers' compensation system. For actions arising under sections 240 and 241, the worker's comparative negligence is currently not considered. As a result, insurance costs throughout New York State, and in New York City in particular, are measurably higher by factors surpassing 1,000 percent for some

construction classes. Many insurance companies refuse to write general-liability policies in New York State. The increased cost for construction is passed on by the contractor and property owner to all New Yorkers, reducing business opportunities and jobs. New York State Assembly bill A1895 would simply substitute a comparative negligence standard for absolute liability for actions arising under Labor Law Sections 240 and 241.

5. **Attorney-Retention Sunshine Rules.** Enact attorney-retention sunshine rules that require open, competitive bidding between private lawyers and New York State; make public the amount and type of work that private lawyers do for the state, and require that any fees a private attorney receives be approved by an emergency commission or a judge (a *Tort Law Tally* top 8 pick, especially effective at reducing auto, commercial, and product liability losses).⁶⁴ This helps prevent unholy alliances between the state and private-attorney cronies and ensures that government's role and authority are not abused for personal profit. This reform is especially needed given New York's history of activist state attorneys general.
6. **Jury Reform.** To help resolve the problem of losing representative juries, New York State should increase juror compensation to reduce the number of residents who ignore jury summonses, and set stricter criteria for excusal from jury service and provide protections for small businesses that might suffer financially from a temporary loss of employees (a *Tort Law Tally* top 8 pick, especially effective at reducing homeowners and commercial liability losses).⁶⁵ The state should also require 12-person juries and unanimous verdicts, as recommended by the American Bar Association.⁶⁶ This reform is especially effective at reducing auto, medical liability, and product liability losses. Requiring more people to reach a verdict helps guarantee fairer trials for defendants and maintains good faith in court operations.
7. **E-Discovery Reform.** Current discovery rules date to the era of carbon paper, not today's world of electronically stored information (ESI). Some litigants are using the cost and volume of e-discovery to force favorable settlements. Internal company data estimates that ESI discovery for a midsize lawsuit costs a large company between \$2.5 million and \$3.5 million, which, in many cases, exceed the damages sought in a lawsuit. New York State should enact balanced e-discovery provisions designed to prevent an inequitable allocation of compliance costs. New York State Assembly bill A6000 recognizes the need to address e-discovery abuses; however, the bill requires amendments to provide additional safeguards. While currently inadequate, the bill could serve as a vehicle for change with appropriate amendments and refinements.

8. **Product-Liability and Design-Liability Reforms.** Allow product manufacturers immunity from liability in state court if the product meets mandatory U.S. Food and Drug Administration (FDA) safety standards or if the product's advertising complies with U.S. Federal Trade Commission standards. Health care providers should not be liable for personal injuries caused by prescribed drugs or medical devices used in accordance with FDA regulations.⁶⁷

Also, allow a “junk food” or obesity civil-liability exemption 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. Exempt 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.⁶⁸ Bill A5216 is based on the American Legislative Exchange Council's Common Sense Consumption Act model legislation and would stop obesity-type lawsuits.

Also in the area of product liability, New York State should enact a statute of repose for design liability lawsuits. Under current New York law, engineers, architects, builders, and other design professionals can be sued for negligence and professional malpractice for an indefinite time span. A statute of repose establishes a time frame in the law, starting at the date of completion of a project, within which third parties may file a claim of negligence or malpractice against the designer. Seven years is a commonsense standard. After this period, the design professional is no longer liable for damages under the reasoning that after that period any damages are the responsibility of those who maintain, inspect, or make design changes after the project was completed and after the designer had any control. All other states have enacted some form of statute of repose applicable to design liability lawsuits. Without it, design professionals often choose to work elsewhere because of the high cost of professional liability insurance, exacerbating the shortage of engineers in New York.

Finally in the area of product liability, unlike Texas which has dealt with its problem,⁶⁹ New York continues to have major problems with abusive asbestos and silica lawsuits. The abuses in New York stem from three main areas: (1) reverse bifurcation; (2) consolidated trials; and (3) trial readiness issues.

In an attempt to unfairly coerce unreasonably high settlements totaling millions of dollars, the plaintiffs' bar often seeks to try asbestos personal-injury cases in a reverse bifurcated format, in which the question of damages is tried before liability. In

a reverse bifurcated trial, the jury hears the best part of a plaintiff's case first without hearing any evidence favoring the defendants. The procedure—by having the jury first consider pain and suffering evidence—prevents defendants from obtaining a fair trial with respect to liability because it greatly interferes with the jury's ability to consider the merits of the case dispassionately. Empirical evidence confirms the resulting prejudice to defendants. For example, based on a review of approximately 5,200 asbestos verdicts from 1987 through 2003, Michelle J. White, an economics professor at the University of California, San Diego, concluded that reverse bifurcation increases a plaintiff's chance of prevailing after trial by 27 percent and significantly increases plaintiff damage awards.⁷⁰

In the guise of fostering judicial economy, New York asbestos plaintiffs' lawyers also seek to gain an unfair advantage by joining several unrelated, separately filed asbestos personal-injury lawsuits for trial. This is becoming more common. In a joint trial, the jury hears day-after-day and week-after-week emotionally-charged testimony concerning the pain and suffering of the plaintiffs, which effectively merges cases together, making it impossible for the jury to consider each case independently from the others as required by the law. The problem is exacerbated when, as frequently happens, the group of cases involves living and deceased plaintiffs, because the testimony of the living plaintiffs inevitably "spills over" to the cases of the deceased plaintiffs. The unfair prejudice to defendants is further compounded by the fact that plaintiffs' counsel are more frequently forcing the mass settlement of inventory cases with little or no merit by otherwise refusing to settle the trial cases.

Plaintiffs' asbestos lawyers also seek to maximize their settlement leverage by improperly seeking an early trial date for patently unprepared cases. In the most egregious instances, cases have been sent to trial judges even though neither the plaintiff nor a co-worker has been deposed, thereby depriving defendants of the most basic discovery information necessary to understand the nature of the claims against them. Frequently, cases are sent out for trial before defendants obtain the medical records required to determine whether a plaintiff has sustained an asbestos-related injury or the employment records relevant to plaintiff's alleged exposure. Absent this information, it is impossible for a defendant to assess the merits of plaintiff's claims or develop a meaningful case-specific defense strategy. As a result, defendants often face the Hobson's choice of agreeing to settle cases in which they cannot meaningfully assess either their potential liability or the plaintiff's true damages, or trying the case on the same incomplete record. When the court system presents plaintiffs' lawyers with this gift, they do not hesitate to take full advantage.

Given these inequities, New York State should adopt asbestos and silica lawsuit reforms that require individual trial assignments, enforcement of a fair discovery schedule, end to reverse bifurcation, and creation of statewide medical criteria by statute, as opposed to the current county-by-county medical criteria contained in certain case management orders (CMOs).

9. **Venue and Frivolous-Lawsuit Reforms.** Prevent plaintiffs from filing 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. Each plaintiff must establish state venue independently. 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.⁷¹ Venue reform is especially effective at reducing commercial and medical-liability losses. Judges should also be given more discretion to toss out frivolous lawsuits and sanction the plaintiff and plaintiff's lawyer (a *Tort Law Tally* top 8 pick, especially effective at reducing auto and homeowners liability losses).
10. **Evidence and Witness Standards.** New York is one of the states that still uses the *Frye* standard, which holds that new scientific evidence is permissible in court if the method has gained "general acceptance" in the relevant field. Instead, New York State should adopt statutorily the stricter *Daubert* standard, which requires that expert testimony reflect a method not only generally accepted, but also supported by "good grounds" (a *Tort Law Tally* top 8 pick, especially effective at reducing commercial, homeowners, and medical-liability losses). *Daubert* raises the bar for expert review of evidence and testimony and reduces the influence of interest groups in the content of testimony by requiring pre-trial hearings on the admissibility of expert witness evidence.⁷² New York State should require expert witnesses in medical-malpractice lawsuits to be licensed and board-certified in a specialty similar to that of the defendant and either in active practice or engaged in teaching medicine during the year preceding the action. Tough validation criteria disallow expert views outside the mainstream and keep defendants accountable to accepted medical standards in their field.⁷³

These are the reforms most needed by New Yorkers today and should be at the top of the list of every New York state legislator.

In contrast, several current New York State bills and proposals violate the "First Rule of Holes," which is: When you're in a hole, stop digging! These measures would exacerbate the liability mess in New York State and must be defeated. They include:

- S417 / A767, which would impose extra-contractual tort liability on health care plans, subject plans to non-proportional-fault damage payments, and cost families an extra \$1,500 per year in health insurance expenses
- A608 / S4507, which would eliminate the right of two or more parties to freely contract the terms governing liability for simple negligence
- S3203-A / A8964 / A1254 / S1514 which would bar the use of informal discovery techniques in civil litigation, techniques that are recognized by New York State's highest court
- S1729 / A4627, which would amend the civil-practice law and rules in relation to the limitations of time within which an action for medical, dental, or podiatric malpractice accrues and provides for a one-year revival of previously dismissed actions (see also A4627)
- A2579 / S2390, which would amend the general obligation law in relation to settlements in tort actions to require that a defendant decide *before trial* whether he wants the eventual jury verdict to be reduced by: (1) the settlement dollars paid, (2) the amount stated in settlement releases, or (3) the percentage of liability of all settled parties
- A2874, which would, for the first time, impose interest costs of 9 percent on defendants for post-settlement delay due solely to conduct beyond the control of the defendant
- A7504-B / S6004 / S4080 / A2875 / S2393, which would prohibit insurers and others (subrogees) from recovering medical and other expenses in the settlement of an action where another party (a tortfeasor) is liable for the losses
- S3157 / A5201, which would repeal the learned intermediary doctrine in pharmaceutical cases involving advertising disclosures and subject manufacturers of prescription drugs or medical devices who engage in direct-to-consumer advertising to liability
- S5374-B / A9014-A, which would allow insolvent insurers to continue writing coverage with inadequate rates, thus, putting off the day of reckoning
- S2391 / A2872, which would expand damages in wrongful-death lawsuits to include recovery of emotional damages by relatives
- S6365 (2007), which would permit pre-judgment interest in personal-injury lawsuits

- A8646 / S5768, which would authorize private rights of action pursuant to New York State securities law (Martin Act)
- A2596-B / S5893 / S2568, which would extend and reopen the statute of limitations in specified cases
- S5065 / A6709, which would permit first-party, extra-contractual damages respecting insurers, leading to significant increases in the cost of liability insurance across all lines of insurance
- A2711, which would establish a cause of action for wrongful death or injury to a pet and allow for *punitive* damages

There are very serious concerns relative to draft bill 12035-02-9, which would impose two additional insurance taxes to subsidize the cost of medical-malpractice liability insurance for physicians and indirectly subsidize the exorbitant damage awards and attorney fees in medical-malpractice lawsuits. The Empire State needs true lawsuit reform such as a cap on non-economic damages, not a subsidy paid for by higher insurance taxes on businesses, automobile owners, homeowners, non-profits, and municipalities and their taxpayers, which will only funnel more money into the state's already broken medical-liability system.

Moreover, legislators need to address the critical and persistent issue of unaffordable medical-malpractice insurance for doctors and other health care providers through comprehensive, meaningful lawsuit reform, not subsidies and rate freezes. The rate freeze on medical-malpractice insurance premiums, while recognized for having temporarily averted a major crisis in New York's health care delivery system, is blamed for contributing to the state's second-largest medical-malpractice insurer becoming insolvent in May 2009.⁷⁴

All of the bad measures above would fatten the wallets of personal-injury lawyers by increasing liability costs, making it easier to sue, and worsening New York State's tort mess. They must be defeated.

Chapter 4.

Conclusion: Meaningful Lawsuit Reform is Long Overdue

New York State's failed tort system brings to mind a famous quote on our nation's education system: "If an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today, we might well have viewed it as an act of war. As it stands, we have allowed this to happen to ourselves."⁷⁵ The same holds for New York's dismal tort system.

New York State is consistently at the bottom of the barrel in various measures of state tort performance. It has the second-highest direct tort losses, the fourth-worst relative tort losses, the fourth-worst relative tort-litigation risks, the third-worst tort system overall, and the third-worst tort rules and reforms on the books. Because of this, PRI's *Index* classifies New York as a "sinner" state. It is a perfect storm of across-the-board failings that is forcing people and jobs from New York and particularly threatens the quality of health care.

Lawsuit reform in New York State would create new jobs (a minimum of 86,000 jobs for a typical reform); increase output (\$17 billion) and lower prices; expand the tax base and increase tax revenues (more than \$1.04 billion each year); boost productivity and personal incomes (more than \$2,600 per year); attract new customers, employees, entrepreneurs, investors, and taxpayers (more than 395,000 people each year); lower health care costs (\$11.4 billion per year) while increasing the number of doctors (by 12 percent) and improving access to health care; save lives (more than 360 people each year); increase stock market returns (more than \$720 billion nationally); and cut insurance premiums (by 16 percent) and liability losses (by nearly 50 percent). But personal-injury lawyers don't want New Yorkers to have these multi-billion-dollar benefits because lawsuit reform threatens their exorbitant fees and privileged status.

The plaintiffs' bar has used its numbers and wealth through longstanding, well-organized political campaigns to block lawsuit reform and to create new rights to sue in lawyer-influenced Albany. An unholy alliance between personal-injury lawyers and state legislators, grounded in delivering votes and campaign contributions, has successfully killed attempts to enact commonsense reforms. In 2008, lawyers donated \$4.92 million to political activities, the sixth-largest contributor group in New York State. NYSTLA, at \$1.4 million, was the fourth-largest single contributor statewide. The return on their investment has been the death of lawsuit-reform bills.

New York State's tort rules are shockingly bad. It ranks 40th or worse in 20 of the 28 variables. It is dead last in 18 of the 28 variables. Overall, its tort rules rank 48th among the 50 states. These terrible outcomes reflect the state legislature's total indifference to the plight of

Lawsuit reform is possible in New York, but it will be difficult given the political influence of personal-injury lawyers and labor unions.

ordinary New Yorkers, because of political pandering to personal-injury lawyers. Common-sense, meaningful lawsuit reform in New York State, long overdue, would turn the situation around. Based on a science-driven, three-part decision tree, this report arrived at the “Top 10 Lawsuit Reforms New Yorkers Need NOW!” These “best-practice” reforms target

appeal bonds, non-economic damages, class actions, Labor Law Sections 240 and 241, attorney/state contracts, juries, e-discovery, product liability, design liability, asbestos, venue, frivolous lawsuits, and evidence and witness standards.

Lawsuit reform is possible in New York, but it will be difficult given the political influence of personal-injury lawyers and labor unions. Ordinary citizens will have to take back Albany and elect pro-reform policy makers and judges who support a balanced and efficient civil justice system. One blueprint for recovery is Texas.

Before 2003, the Lone Star State faced a Texas-sized medical-liability problem that was forcing doctors to flee. Sixty percent of Texas counties lacked a single obstetrician. Fifty percent of Texas counties did not have a pediatrician. There were no neurosurgeons south of Corpus Christi.

But ten-gallon tort reform in 2003, advanced by Gov. Rick Perry, created a rapid Texas turnaround. Medical-malpractice insurance premiums have fallen by as much as 42 percent. More than 16,500 physicians have moved to Texas, many of them now practicing in previously underserved rural, low-income, and minority areas, and also in high-risk medical specialties.

This turnaround came about from only five lawsuit reforms: capping medical-malpractice awards for non-economic damages at \$250,000; changing the burden of proof for claiming injury for emergency room care from simple negligence to “willful and wanton neglect;” requiring that an independent medical expert file a report in support of the claimant; consolidating in one court pre-trial discovery in asbestos lawsuits; and creating minimum medical standards to prove an injury in asbestos and silica cases.⁷⁶ These five reforms worked medical miracles. And Texas is now home to more Fortune 500 companies than New York and California.

New York should follow Texas’ lead. This report offers a roadmap to recovery.

Notes

¹ Tillinghast-Towers Perrin, *2008 Update on U.S. Tort Cost Trends* (New York: Tillinghast-Towers Perrin, 2008). In insurance-industry parlance, the sum of judgments, settlements, attorney fees, and administrative expenses for tort claims is called “direct tort costs.” The term is used to represent this sum, which measures payouts and expenses by injurers or their insurance companies. These payouts do not measure the actual costs of all tort accidents because, for example, some true victims are uncompensated, for a variety of reasons, under any set of tort rules and in any system of dispute resolution.

² Philip K. Howard, “Making Civil Justice Sane,” *City Journal* (spring 2006).

³ The *Journal of Empirical Legal Studies* calls PRI one of America’s “leading organizational proponents of tort reform.”

⁴ Lawrence J. McQuillan, Hovannes Abramyan, and Anthony P. Archie, *Jackpot Justice: The True Cost of America’s Tort System* (San Francisco: Pacific Research Institute, 2007).

⁵ See Lawrence J. McQuillan, Michael T. Maloney, Eric Daniels, and Brent M. Eastwood, *U.S. Economic Freedom Index: 2008 Report* (San Francisco: Pacific Research Institute, 2008).

⁶ Lawrence J. McQuillan and Hovannes Abramyan, *U.S. Tort Liability Index: 2008 Report* (San Francisco: Pacific Research Institute, 2008).

⁷ E-mail correspondence between Fay Leoussis and Lawrence J. McQuillan, June 1, 2009.

⁸ Tom Namako, “MTA Spends Millions Each Year in Suit Loot,” *New York Post*, May 26, 2009.

⁹ The U.S. Chamber of Commerce Institute for Legal Reform (ILR) publishes an annual national survey of in-house general counsel or other senior corporate litigators to determine their *perceptions* of how reasonable and balanced each state’s tort liability system is to U.S. businesses. The *2008 State Liability Systems Ranking Study* ranked New York 25th, falling from 19th in 2007. The ILR ranking is based on survey data, not actual data on tort costs and risks, as are the PRI studies.

¹⁰ While it is true that many lawyers in New York State work on so-called “national” cases, not “state” cases, this indicator still has value because: (1) the human capital of lawyers is transferable from national work one day to state work the next day, (2) national lawyers often hear about events or potential clients and refer them to state lawyers for lawsuits, (3) the number and wealth of national lawyers are tapped to deliver votes and campaign contributions at the state level for political influence, and (4) so many companies across the country have a presence in New York State that New York lawyers working on national cases still have a major impact on the economic performance of New York State. For these reasons, the number of resident and active attorneys per dollar of state GDP in New York is an important relative indicator.

¹¹ E-mail correspondence between Daniel Sisto and Lawrence J. McQuillan, May 29, 2009.

¹² American Medical Association, *Medical Liability Reform—NOW!* (Chicago: American Medical Association, 2008), p. 8.

¹³ Philip R. Hinderberger, *Medical Liability Report Card 2005* (San Francisco: NORCAL Mutual Insurance Company, 2007).

¹⁴ Anemona Hartocollis, “Community Hospital in Brooklyn is Closing Maternity Ward and Selling the Space,” *New York Times*, July 31, 2008.

¹⁵ E. B. Solomont, “Hospital Obstetrics Ward Will Close Amid Malpractice Crisis,” *New York Sun*, July 31, 2008.

¹⁶ “Another Brooklyn Hospital Announces Closing of Maternity Ward,” http://www.lichmedicalstaff.org/doc/HealthyBeginningsSept08_summary.pdf/.

¹⁷ Interview between Bernie Marcus and the American Justice Partnership titled “Declaring War on Lawsuit Abuse,” <http://www.legalreforminthenews.com/>.

- ¹⁸ Editorial, "Schumer's Tort Epiphany," *Wall Street Journal*, January 29, 2007, p. A16.
- ¹⁹ Lisa Kimmel, *The Effect of Tort Reform on Economic Growth* (Berkeley: Economics Ph.D. Dissertation at the University of California, Berkeley, 2001).
- ²⁰ Calculated using U.S. Bureau of Labor Statistics data on employees on nonfarm payrolls in New York State, seasonally adjusted, February 2009.
- ²¹ Todd G. Buchholz and Robert W. Hahn, *Does a State's Legal Framework Affect Its Economy?* (Washington, D.C.: U.S. Chamber Institute for Legal Reform, 2002).
- ²² Calculated using U.S. Bureau of Economic Analysis data on real GDP for New York State, all industry total, 2007.
- ²³ A healthy tort climate 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. See Lawrence J. McQuillan and Hovannes Abramyan, "To Shore Up State's Economy," *The Times of Trenton* (New Jersey), August 18, 2007; and "A Better Legal Climate Promotes Prosperity," *The Hall Institute of Public Policy*, August 23, 2007, <http://www.hallnj.org>.
- ²⁴ W. Mark Crain, *Volatile States: Institutions, Policy, and the Performance of American State Economies* (Ann Arbor, Mich.: University of Michigan Press, 2003), table 4.4, p. 61.
- ²⁵ Independent research adds greater confidence to this estimate. New York and Texas have roughly the same annual GDP: \$1.10 trillion and \$1.14 trillion, respectively (see U.S. Bureau of Economic Analysis, 2007). The Perryman Group calculated that Texas' comprehensive tort reforms increased annual state tax revenue by \$2.6 billion, compared to the estimate here for New York of \$1.04 billion per annum for more modest reforms. See The Perryman Group, *A Texas Turnaround: The Impact of Lawsuit Reform on Business Activity in the Lone Star State* (Waco, Texas: The Perryman Group, 2008), p. 33.
- ²⁶ Thomas J. Campbell, Daniel P. Kessler, and George B. Shepherd, "The Link between Liability Reforms and Productivity: Some Empirical Evidence," *Brookings Papers on Economic Activity, Microeconomics* (1998), pp. 107–148.
- ²⁷ Calculated using U.S. Bureau of Economic Analysis data on the average dollars of output per worker in New York State, 2007, of \$128,950. See Federal Reserve Bank of San Francisco, Center for the Study of Innovation and Productivity, <http://www.frbsf.org/csip/>.
- ²⁸ Calculated using U.S. Bureau of the Census data on domestic net migration, July 1, 2007 – July 1, 2008, <http://www.census.gov/popest/states/tables/NST-EST2008-06.xls/>.
- ²⁹ Paul C. Weiler, Howard H. Hiatt, Joseph P. Newhouse, William G. Johnson, Troyen A. Brennan, and Lucian L. Leape, *A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation* (Cambridge, Mass.: Harvard University Press, 1993), p. 69.
- ³⁰ David M. Studdert, Michelle M. Mello, Atul A. Gawande, Tejal K. Gandhi, Allen Kachalia, Catherine Yoon, Ann Louise Puopolo, and Troyen A. Brennan, "Claims, Errors, and Compensation Payments in Medical Malpractice Litigation," *New England Journal of Medicine* 354, no. 19 (May 2006), pp. 2024–2033.
- ³¹ David M. Studdert, Michelle M. Mello, William M. Sage, Catherine M. DesRoches, Jordon Peugh, Kinga Zapert, and Troyen A. Brennan, "Defensive Medicine among High-Risk Specialist Physicians in a Volatile Malpractice Environment," *Journal of the American Medical Association* 293, no. 21 (June 1, 2005).
- ³² Daniel Kessler and Mark McClellan, "Do Doctors Practice Defensive Medicine?" *Quarterly Journal of Economics* 111, no. 2 (1996), pp. 353–390.
- ³³ Lawrence J. McQuillan and Hovannes Abramyan, *The Facts about Medical Malpractice Liability Costs*, Pacific Research Institute "Health Policy Prescriptions," vol. 7, no. 10 (San Francisco: Pacific Research Institute, October 2009).
- ³⁴ According to estimates by PRI in *Jackpot Justice* (2007), increased health-care costs due to defensive medicine have added 3.4 million Americans to the rolls of the uninsured. 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). PRI's methodology yields a "macro" cost, which cannot be disaggregated by state; so, future research is needed to calculate New York State-specific costs in this area.

Researchers at PRI totaled the “macro” 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. This is in addition to the defensive-medicine expenditures.

³⁵ Calculated using data from the U.S. Department of Health and Human Services on personal health-care expenditures by state of provider for New York State, 2004, http://www.cms.hhs.gov/NationalHealthExpendData/05a_NationalHealthAccountsStateHealthAccountsProvider.asp#TopOfPage/. A 2006 study found that caps on non-economic damage payments in malpractice cases reduce average personal health-care expenditures per state resident by 3 to 4 percent. See Fred J. Hellinger and William E. Encinosa, “The Impact of State Laws Limiting Malpractice Damage Awards on Health Care Expenditures,” *American Journal of Public Health* 96, no. 8 (August 2006), pp. 1375–1381. A November 2008 report by the Massachusetts Medical Society examined defensive medicine in Massachusetts and, using a survey methodology of physicians’ self-reports, arrived at an annual cost estimate for the state of nearly \$1.4 billion. The researchers admit, however, that their total “represents a small percent of actual defensive medicine costs” in Massachusetts because of the study’s limited coverage (p. 6). See Massachusetts Medical Society, *Investigation of Defensive Medicine in Massachusetts* (Waltham, Mass.: Massachusetts Medical Society, 2008).

³⁶ Fred J. Hellinger and William E. Encinosa, *The Impact of State Laws Limiting Malpractice Awards on the Geographic Distribution of Physicians* (Washington, D.C.: U.S. Department of Health and Human Services, 2003).

³⁷ Paul H. Rubin and Joanna M. Shepherd, “Tort Reform and Accidental Deaths,” *Journal of Law and Economics* 50, no. 2 (2007), pp. 221–238.

³⁸ Erica Werner, “Health Debate Could Spur Malpractice Changes,” *Washington Times*, March 17, 2009.

³⁹ Rubin and Shepherd, p. 235.

⁴⁰ WISQARS Injury Mortality Report, 2006, Centers for Disease Control and Prevention, http://webapp.cdc.gov/sasweb/ncipc/mortrate10_sy.html/.

⁴¹ Based on calculations using U.S. Bureau of Economic Analysis data on the average dollars of output per worker in New York State, 2006, of \$121,990. See Federal Reserve Bank of San Francisco, Center for the Study of Innovation and Productivity, <http://www.frbsf.org/csip/>.

⁴² W. Kip Viscusi and Joni Hersch, “The Market Response to Product Safety Litigation,” *Journal of Regulatory Economics* 2, no. 3 (1990), p. 218. Another excellent study on product-liability litigation is David W. Prince and Paul H. Rubin, “The Effects of Product Liability Litigation on the Value of Firms,” *American Law and Economics Review* 4, no. 1 (2002), pp. 44–87.

⁴³ Nancy D. Ursel and Marjorie Armstrong-Stassen, “How Age Discrimination in Employment Affects Stockholders,” *Journal of Labor Research* 27, no. 1 (2006), p. 94.

⁴⁴ Sanjai Bhagat, John Bizjak, and Jeffrey L. Coles, “The Shareholder Wealth Implications of Corporate Lawsuits,” *Financial Management* 27, no. 4 (1998), p. 15.

⁴⁵ Jonathan M. Karpoff and John R. Lott Jr., “On the Determinants and Importance of Punitive Damage Awards,” *Journal of Law and Economics* 42, no. 1, part 2 (1999), p. 560.

⁴⁶ *Ibid.*, p. 564. The median loss was used, rather than the mean loss, because the median loss is less sensitive to outlier values that might not be typical of any given year’s experience. The median loss is more representative of a typical year’s loss experience than the mean loss.

⁴⁷ National Center for State Courts, Court Statistics Project, http://www.ncsconline.org/D_Research/csp/CSP_Main_Page.html/.

⁴⁸ U.S. Courts, Federal Judiciary Caseload Statistics, <http://www.uscourts.gov/caseload2004/contents.html/>.

⁴⁹ Bhagat, Bizjak, and Coles, p. 6.

⁵⁰ U.S. Department of Justice, Bureau of Justice Statistics, *Civil Justice Survey of State Courts*, 2001, <http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/03957.xml/>.

⁵¹ Based on a median net worth for all U.S. families in 2009 dollars of \$123,311. See the Federal Reserve Board’s *2007 Survey of Consumer Finances Chartbook*, <http://www.federalreserve.gov/PUBS/oss/oss2/2007/2007%20SCF%20Chartbook.pdf/>.

⁵² John W. Molka III, *Securities Litigation Surges in 2009: An Advisen Quarterly Report – Q1 2009* (New York: Advisen, May 2009), p. 3.

- ⁵³ Nicole V. Crain, W. Mark Crain, Lawrence J. McQuillan, and Hovannes Abramyan, *Tort Law Tally: How State Tort Reforms Affect Tort Losses and Tort Insurance Premiums* (San Francisco: Pacific Research Institute, 2009).
- ⁵⁴ As noted earlier, these results are restricted to areas where studies exist that allow for benefits to be calculated at the state level. Because of this restriction, the list of New York benefits is not exhaustive. For example, U.S. product-liability law often discourages innovation and research and development (R&D). PRI concluded that the suppression of product R&D and process R&D due to excessive liability resulted in lost new product sales of more than \$367 billion in 2006 alone. This result is a “macro” result and cannot be disaggregated to the state level due to the methodology of the analysis. See Lawrence J. McQuillan, Hovannes Abramyan, and Anthony P. Archie, *Jackpot Justice: The True Cost of America’s Tort System* (San Francisco: Pacific Research Institute, 2007).
- ⁵⁵ E-mail correspondence between Kenneth Adams and Lawrence J. McQuillan, June 1, 2009.
- ⁵⁶ National Center for State Courts, *Court Statistics Project: Examining the Work of State Courts, 2006*.
- ⁵⁷ All the data on political contributions come from <http://www.followthemoney.org/>.
- ⁵⁸ Kimmel, 2001.
- ⁵⁹ <http://www.atra.org/states/NY/>.
- ⁶⁰ McQuillan and Abramyan, 2008, pp. 25–26.
- ⁶¹ *Ibid.*, p. 26.
- ⁶² Philip K. Howard, “Just Medicine,” *New York Times*, April 2, 2009.
- ⁶³ McQuillan and Abramyan, 2008, pp. 27–28.
- ⁶⁴ *Ibid.*, pp. 30–31.
- ⁶⁵ McQuillan and Abramyan, 2008, p. 31.
- ⁶⁶ *Ibid.*, p. 38.
- ⁶⁷ *Ibid.*, p. 33.
- ⁶⁸ *Ibid.*, p. 34.
- ⁶⁹ See Joseph Nixon, “Why Doctors Are Heading for Texas,” *Wall Street Journal*, May 17, 2008.
- ⁷⁰ Michelle J. White, “Asbestos Litigation: Procedural Innovations and Forum Shopping,” *Journal of Legal Studies* 35, no. 2 (June 2006): pp. 365–398.
- ⁷¹ McQuillan and Abramyan, 2008, p. 36.
- ⁷² *Ibid.*, p. 36–37.
- ⁷³ *Ibid.*, p. 37.
- ⁷⁴ Gale Scott, “Big Malpractice Insurer Is Bust,” *Crain’s New York Business*, May 20, 2009.
- ⁷⁵ National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform* (Washington, D.C.: U.S. Government Printing Office, 1983).
- ⁷⁶ Nixon, 2008.

About the Author

Lawrence J. McQuillan is director of Business and Economic Studies and senior fellow in political economy at the Pacific Research Institute (PRI) in San Francisco. *Human Events* magazine describes him as a “distinguished conservative leader” in public policy.

Since joining PRI in 2001, Dr. McQuillan has specialized in tax, budget, regulation, and lawsuit reform issues. He is co-author of the 2007 study *Jackpot Justice: The True Cost of America’s Tort System*, the 2006 and 2008 *U.S. Tort Liability Index*, and the 2009 study *Tort Law Tally: How State Tort Reforms Affect Tort Losses and Tort Insurance Premiums*. He is also co-author of the 2004 and 2008 *U.S. Economic Freedom Index*, published in association with *Forbes*, which ranks the 50 states according to how friendly or unfriendly their state-government policies are toward free enterprise and consumer choice.

McQuillan speaks regularly to civic and policy groups across the country and with the national news media. His television appearances include FOX, 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.

McQuillan has more than 125 articles in such outlets as the *Wall Street Journal*, *USA Today*, *Forbes*, *Investor’s Business Daily*, *National Review Online*, *Los Angeles Times*, *New York Times*, *San Francisco Chronicle*, *Washington Times*, and *Weekly Standard*. He has written on such topics as tax and spending limits, lawsuit abuse, pensions, workers’ compensation, the housing crisis, and economic freedom. His recent writings include “Ambulance Chasers Bad for Our Health,” “Make a Bad Mortgage: Take the Hit,” and “Live Free or Move.”

McQuillan created the quarterly *California Golden Fleece Awards*, exposing fraud and abuse in California government. Cited in *The Nation* and the *Los Angeles Times*, these awards led to the overhaul of the California Victim Compensation Program and helped reform California’s workers’ compensation system in 2003 and 2004.

From 1998 until 2001, McQuillan was a research fellow at the Hoover Institution, Stanford University, where he specialized in international economics. He edited the book *The International Monetary Fund—Financial Medic to the World?* (translated into Japanese) and wrote the study *The Case against the International Monetary Fund*, which Nobel laureate Milton Friedman reviewed as “excellent.”

From 1993 until 1997, McQuillan was the founding publisher and contributing editor of *Economic Issues*, a national subscription newsletter based in Chapel Hill, North Carolina, that reviewed economic journal articles relevant to current public-policy issues.

While in graduate school at George Mason University in Fairfax, Virginia, where he earned a M.A. and Ph.D. in economics, McQuillan was a research assistant for Nobel laureate James M. Buchanan and received the H. B. Earhart Fellowship for research excellence. Trinity University in San Antonio, Texas, awarded him a B.A. in economics and business administration.

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