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Tort Reform in the States: Protecting Consumers and Enhancing Economic Growth

*The Honorable Bill G. Batchelder, Lawrence J. McQuillan, Ph.D.,
Edwin Meese III, and Hans A. von Spakovsky*

Abstract: *The role of the states, particularly the idea that most governmental power should be in the states, is important to America's constitutional system. It has been somewhat eroded in many fields by adverse Supreme Court decisions, but the states are still where much of the innovation in governmental activity is to be found, particularly the kind of activity that assists and encourages economic growth. One of these areas of innovation is tort reform, which includes malpractice lawsuits with their enormous impact on medical care, especially the cost of medical care. Overall, it is estimated that in 2007 alone, the tort system cost an estimated \$252 billion—almost \$1,000 for every person in the United States. But states like Mississippi, Texas, and Ohio have proven that with the political will and political leadership, and if the public understands the problem and policymakers pick the right tools, this problem can be solved.*

EDWIN MEESE III: As I am sure most of you know, yesterday was Constitution Day, the 222nd anniversary of the signing of the Constitution. Carrying on the importance of the legal documents and activities that have given us a great legal system and the liberty we have had over the years, today we are talking about tort reform, particularly tort reform in the states and how this activity is going on under the leadership of people such as our keynote speaker¹ and with the support and work of the people who are on the program here in this initial panel. They have been able to work on protecting consumers

Talking Points

- The U.S. tort system costs Americans billions of dollars every year. The total estimated cost for 2007 was \$252 billion—almost \$1,000 for every person in the country.
- Every year, lawsuit abuse costs each American about \$2,000. Built into every price is a component to pay for liability insurance and lawsuit defense.
- Tort risks are the second most important factor when a company decides where to relocate or expand operations or build a new plant or introduce a new product.
- States that do a good job of tort reform will attract business and industry. Tort reform will strengthen the state's economy and have a lasting impact for those who work and live and require public expenditures. All of that follows from having a good tort system.

This paper, in its entirety, can be found at:
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and, at the same time, engineering economic growth in the states.

One of the things under our Constitution that has been important is the role of the states and particularly the idea that most of the governmental power should be in the states. While this has been somewhat eroded in many fields over the years by adverse Supreme Court decisions, the states still are where much of the innovation in governmental activity in our country is going on, particularly the kind of governmental activity that assists and encourages economic growth rather than what too often happens at the federal level, where economic growth is inhibited. That is why we are particularly pleased to have these particular speakers today.

One of the things that is very interesting, even at the federal level as the Congress debates health care reform or something that resembles reform, is the whole role of tort reform and how malpractice lawsuits have had an impact on medical care and particularly the cost of medical care in our country. So tort reform is an important subject from a number of standpoints.

To serve as moderator of our first panel and to introduce our speakers is Hans von Spakovsky. Hans is a Senior Legal Fellow and Manager of the Civil Justice Reform Initiative in the Center for Legal and Judicial Studies at The Heritage Foundation. He has a distinguished record of public service and legal practice. He was a member of the Federal Election Commission and also served four years in the Department of Justice as counsel to the Assistant Attorney General for Civil Rights. He has worked in private practice and has also been an in-house counsel for a large life and health insurance company. So he has a vast experience in this field of tort reform as well as in governmental law.

—Edwin Meese III, *Attorney General of the United States under President Ronald Reagan*, is *Ronald Reagan Distinguished Fellow in Public Policy in and Chairman of the Center for Legal and Judicial Studies at the Heritage Foundation*.

HANS A. von SPAKOVSKY: The late Senator Everett McKinley Dirksen is very famous for having once said “a billion here, a billion there and pretty soon you’re talking about real money.” When it comes to the U.S. tort system, we are talking about real money because the tort system costs us billions every year. A 2007 estimate was that the total cost was \$252 billion—almost \$1,000 for every person in the country.

It is also a very inefficient system since it only returns about 50 cents on the dollar and less than 22 cents for actual economic losses to victims. Over the past 50 years, tort liability has increased more than a hundredfold, while the GDP has increased by a factor of only 37. Class-action lawsuits in state courts have gone up by 1,000 percent over the past 10 years. They have tripled in federal courts.

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In the important area of medical liability that General Meese mentioned, the increase in medical malpractice cost has outpaced the increase in tort costs. From 1975 to 2004, medical malpractice costs increased an average of almost 12 percent per year while tort costs were going up a little over 9 percent.

It is also estimated that defensive medicine—ordering unnecessary tests and treatments—may cost us anywhere from \$191 billion to \$239 billion a year. Physicians are found not negligent in over 90 percent of the cases that actually go to trial, but it costs them on average about \$100,000 per case to defend.

Unfortunately, in our tort system, too many of these billions of dollars go to lawyers instead of the individuals who are really injured. The temptation of enormous riches is so great that some of the most famous (or infamous, depending on your point of view) members of the plaintiffs’ bar such

1. The remarks of the panel’s keynote speaker, Governor Haley Barbour of Mississippi, have been published separately. See The Honorable Haley Barbour and Edwin Meese III, “Tort Reform in the States: Protecting Consumers and Enhancing Economic Growth in Mississippi,” Heritage Foundation Lecture No. 1150, March 29, 2010 (delivered September 18, 2009), at http://s3.amazonaws.com/thf_media/2010/pdf/hl_1150.pdf.

as William Lerach and Dickie Scruggs are now in jail for paying bribes to plaintiffs and judges in mass litigation cases.

President Barack Obama made a somewhat dubious offer in his speech to Congress about future medical malpractice pilot projects, but he did not make any real concessions on these issues, and there is nothing that we have seen in any of the health care bills floating through Congress that will do anything to implement tort reform. In fact, there are some bills that would make the situation even worse.

The good news is that a number of states like Mississippi and Texas have been successful in changing the dynamic by instituting tort reform in their states. Those efforts are particularly important today when we are experiencing one of the most drastic downturns in our economy in a very long time. Abusive tort litigation and the underlying liability that such tort cases entail hurt the economy. They make it hard for businesses to maintain and create new jobs.

Here to discuss this, we have two experts on these issues. Our first panelist is the Honorable Bill G. Batchelder, Minority Leader of the Ohio House of Representatives. He returned to the Ohio House in 2007, having previously served there for 30 years, where he was elected by his colleagues to be the Minority Leader.

He practiced law for 31 years at Williams & Batchelder while also teaching as an adjunct professor of law at the University of Akron Law School and the Cleveland State University Levin College of Urban Affairs. He also served as a judge for the Medina County Common Pleas Court and the Ninth District Court of Appeals, where he was a presiding judge from 2000 to 2001.

During his service in the Ohio House of Representatives, he has won the coveted Watchdog of the Treasury Award numerous times as well as the Conservation Legislators Award from the League of Ohio Sportsmen and the National Wildlife Federation. He is a graduate of Ohio Wesleyan University and received his law degree from the Ohio State University College of Law.

Our second panelist is Lawrence J. McQuillan, Director of Business and Economic Studies and a

Senior Fellow in Political Economy at the Pacific Research Institute. *Human Events* has described him as a “distinguished conservative leader” in public policy. He specializes in tax, budget, regulation, and legal reform issues.

Most pertinent to what we are here to talk about today, he is the coauthor of *Jackpot Justice: The True Cost of America’s Tort System* as well as *The U.S. Tort Liability Index*, books which have reached a combined audience of over 77 million people. He is also the coauthor of *The U.S. Economic Freedom Index*, which looks at all 50 states and ranks them according to their government policies toward free enterprise and consumer choice.

He is also a well-known columnist. He has written for *The Wall Street Journal*, *USA Today*, *Forbes*, *Investor’s Business Daily*, and many other magazines. He received a B.A. from Trinity University and his Ph.D. in economics from George Mason University in Virginia. At George Mason, he was a research assistant to Nobel Laureate James Buchanan and received the H. B. Earhart Fellowship for Research Excellence.

THE HONORABLE BILL BATCHELDER: I am honored to be here with General Meese. I first met him in 1975, when we were engaged in a campaign to make a governor from California President of the United States.

I want to speak briefly with you today about what can happen in the legislative process and how judges may look at that process, since I have had the opportunity to be in both situations as an appellate judge and legislator. First of all, I think it is important that we understand that there is a built-in prejudice in the courts in favor of litigation. Do they want more work? No, but there is a feeling that perhaps judges are smarter than ordinary people and, therefore, if issues are left up to legislators and others, they may well goof things up.

In Ohio’s Supreme Court case testing a massive tort reform bill, the court struck down an entire piece of legislation of almost 100 pages which included, among many other subjects, the collateral source rule, liability and immunity for government entities, and medical malpractice. Putting all of that tort reform in one bill was probably a mis-

take. The bill involved over 100 sections of the Ohio Revised Code; 18 separate titles were involved, including the Health Title—38 chapters of the code. That bill produced a response from the Ohio Supreme Court, a reaction of 90 pages of opinions and dissents that is not the usual run of the mill in the Ohio Supreme Court.

In the tort reform area, we have a difficult subject because the complexity of the insurance industry and the economic importance of the industry are not understood by most people. Insurance makes the construction and operation of the capitalist system possible; the investment foundation of the insurance companies, coupled with the asset valuation of the risks of the insurer's liabilities, makes capitalism possible.

In the case of Ohio's omnibus bill, as overwhelming in its scope as the legislation was, and given how the Supreme Court found it, the result was truly bizarre.

Addressing Judicial Activism

One of the things that has to be addressed in any kind of legislation that deals with tort reform is judicial activism, because a lot of the law that is involved is court-generated, not statutory, which was particularly so in Ohio up until the early 1990s. We had a Supreme Court that consisted of judges who were favorably disposed toward organized labor and plaintiff attorneys, and as a result, the courts were prejudiced when they approached the problem of expanding tort law.

In Ohio, our judges are elected. Ohio became a state in 1803, and Jeffersonianism was the order of the day. Elected judges run against other candidates for judgeships. There is an effort on the part of many entities within society to control the Supreme Court.

Ohio also has a very strong "open court house doors" clause in its Constitution and Bill of Rights, Article 1, Section 16. That alone affects any impartial person looking at the propriety of the respective branches.

The problem of tort reform, in my experience, is a long-standing one. The first time that I was involved was in 1971 as a member of the Insurance Committee. I was the youngest member of the House for four-and-a-half years, so given the oppor-

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tunity to learn, I visited insurance companies to find out what kind of problems they had.

In a small Ohio domestic carrier, I encountered a situation in which doctors of osteopathy and other family doctors were facing increased claims. I asked the president of the company that insured this group, "What does that mean?" He said it means that patients are losing the close relationship with their physician. I introduced legislation to provide an alternative to classic liability coverage, which established a no-fault workers compensation-like system that provided compensation for economic loss only.

Four years later, we had to go into special session to deal with the fact that because of claims, the insurance industry was leaving Ohio. Some of the biggest companies were leaving the state; that included most major carriers. The result was that for the first time in Ohio's history, we had to pass legislation to remedy this issue.

Ohio, among other states, set up a new insurance company, which was a state insurance company to insure physicians and hospitals who could not otherwise get insurance. We put a cap on damages, which was a very important part of that legislation. That was passed in 1975 and signed by the governor.

By 1991, plaintiff lawyers got to the caps portion of the 1976 malpractice bill in the Supreme Court, and the court struck down the caps. Again we started to have an increase in litigation in malpractice areas.

That is important anywhere, but it is particularly important in Ohio because we have the Cleveland Clinic and University Hospitals with 56,000 employees. We have some of the finest medical facilities in the country and in the world. So this was a big problem when litigation increased. I have been told by national carriers that Chicago, Cleveland, and Philadelphia had the highest rates on medical malpractice insurance.

As a matter of fact, in Ohio, the medical profession is doing the kind of work that you particularly want to have done. The Cleveland Clinic undertakes neurosurgery and other activities that will, in the end, be life-giving, life-preserving for people. But in the absence of some general test as to whether or not it is safe and the propitious thing to be doing, you end up with lawsuits and even judgments. Unfortunately for Cleveland Clinic, they are in Cuyahoga County, which is the highest jury verdict county in the state.

We came back after the striking down of that cap and introduced this omnibus bill. Every liability situation known to man was addressed in that bill. I had actually drafted it in the first instance. I was Speaker Pro Tem at that time, and I could not really take the detailed time to spend in committee hearings, so I gave it to a very promising young freshman who wanted to be a Member of Congress—Pat Tiberi.

He did a great job with the bill. It then went over to the Ohio Supreme Court very quickly, because they filed a whole bunch of pleadings that indicated they were entitled to an immediate judgment. The court, which was 4 to 3 pro-activist, actually struck down the whole bill in a package. They basically did not deal with individual parts of it. The bill was so disparate that no ruling could have raised all issues that were decided in that Ohio Supreme Court opinion.

One of the things that is most important in tort reform is to protect our businesses and industries.

It was the most unusual opinion, I think, that I have seen from the Ohio Supreme Court. As a result of that, newspapers came to arms, and people were upset by what had occurred. This unusual ruling gave us a lot more leverage politically. At the end of the day, the court was changed. It is now all seven Republicans, and of those, only one is an activist judge. That is one way to get reform.

The story today, however, is that once again, we are starting to have excessive medical malpractice claims. Medical malpractice seems to be the leader, and we are starting to have problems in terms of insurance. A lot of the hospitals are actually covering

the doctors who have privileges at the hospital. In the case of the Cleveland Clinic and others that are employers of the physicians, they are buying their insurance because individual insurance is too costly.

The difficulty now is that we have to start over again in the area of medical malpractice. Caps have now been upheld in Ohio. They have been upheld on a kind of graduated scale. If you have a certain amount of a judgment, you can have a certain amount added to that for pain and suffering.

Protecting Businesses and Industries

I think one of the things that is most important in tort reform is to protect our businesses and industries. We have had, for example, legislation that struck down the lead paint lawsuits. There was an effort to bring litigation against all the paint companies. Ohio happens to have three of those big paint companies. Because there was lead in the paint at one time, now people want to bring class action so that local governments can get the money.

It is true the local governments do not have enough money, but it does not have anything to do with lead paint. It has to do with the fact that some of them are badly run. It has to do with the economy. The result of that is that we have had to address singly some of these things and not grant local government the power to alter public policy through lawyers and courts.

But medical malpractice is just an incredible problem. It has been fascinating to watch what is going on here in the nation's capital as people discuss why medical costs rise so much, why costs are what they are, and pay no attention to the medical malpractice insurance premiums.

We had some physicians practicing together, two-person physician practices, in the area of delivering babies and gynecology who were paying \$360,000 a year. When you worked it out per baby, that was a ton of money that obviously could not be paid by the doctors if they were going to continue to practice. It had to be paid by the patients. That is an example of the kind of problem that you face in this area.

We also engaged in an examination of other methods of trying to solve these kinds of problems

through alternative dispute resolution. Then, of course, the question is, can you admit the results of arbitration and mediation in court so that the jury knows what the people who looked at this before thought about it? That is always a big problem, and it is one that we have not really addressed very well in our state.

I want to indicate to you why courts have problems in this particular area, having served as an appellate judge. First of all, in Ohio at least, most of the appellate judges come from the ranks of the prosecutors. Prosecutors are wonderful people. I am all for them, but their background in insurance law is pretty thin. I had the privilege of serving on the insurance committee for 32 years and served as chairman of it. That gives you a real introduction to tort liability. Prosecuting criminals does not.

Understanding the Insurance Industry

So sometimes the views that judges have in these areas are really not very deep. As a result, one of the things that we need to be doing under a continuing legal education that involves judges is getting into discussions of how the insurance industry works. The insurance industry essentially tries to figure out what a future risk is going to be—not what it is now, but what it is going to be in the future—and to project that to come up with rates. Then they have to build reserves against future potential loss.

Right now in Ohio, homeowners coverage, for example, is 134 percent of the premium. That is, for every dollar that the carrier takes in, they pay out \$1.34. This is not going to last as a practical matter. We have a distinguished governor here with us who is in an area where you have hurricanes. Obviously, that is something you have to take into account when you are setting reserves and underwriting risk.

Insurance is so central to the economy of this nation that its practices ought to be known by those who are interpreting and applying the law. What do I mean by that? Well, you cannot do anything in this country anymore without insurance. If you are going to build a building, if you are going to engage in farming, all of these things require protection with insurance. So it is central to the economy.

In addition, the monies that are taken in and held to pay claims are invested. So insurance carri-

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ers are a very important part of the investment posture of the country. For our economic future, we have to have healthy insurance companies, just given the nature of our capitalist economy.

Some people do not seem to want to look at the necessity of that kind of understanding, both on the courts and in legislative bodies. This subject is not particularly exciting, but for a non-exciting subject area, it does generate a lot of heat. The reason that we have these big disputes in legislative bodies and in the courts arises from the size and enormous impact it has on our economy.

In Ohio, we were losing businesses. We were losing businesses simply because of liability problems, which is something that states ought to take into account. Insurance liability is a big piece of the economy, and I think we all ought to be looking at it when considering tort liability and tort reform. We have to keep focusing on this area and working on it. As one who has spent a lot of time since 1971 doing this, I can assure you that however it works out, it is going to be difficult. There are going to be states that do well with it and states that do not.

“Laboratories of Government”

As a final word, let me simply suggest this: It is crucial that the states address tort reform. Justice Brandeis said, “Let the states be laboratories of government.” If states make blunders and errors in this particular field, we will know about it in a hurry. Businesses will leave. Insurance companies will quit underwriting. It will make a big difference in that state’s future.

But for those states that do a good job, it will attract business and industry. It will strengthen the state’s economy, and it will make a long-lasting impact for those who work and live and require public expenditures for schools and so forth. All of that follows from having a good tort system. As a state legislator and a state judge, I can say without contradiction that we need to focus on this particular issue.

As much as I respect my friends who have gone to Congress, I do not think Congress is the right place to solve these problems. There is a sense of detachment that to me is absolutely unreal. We need to have people dealing with this who go home every weekend and listen to people complain about the fact that there are not enough jobs in their area, complain about the fact that the doctors are leaving the state, complain about the fact that they cannot get decent rates on homeowners insurance.

The federal government cannot address tort reform by uniform, national law identical in every state.

It is a state issue. The federal government cannot address tort reform by uniform, national law identical in every state. I am proud of what Ohio has done. It has moved way up in the rankings by virtue of the tort reform that has occurred, but we still face challenges. It seems to me if it is not handled at the state level, then it will not be handled at all.

LAWRENCE J. McQUILLAN, Ph.D.: I am an economist. I focus on this issue as an economic issue, an economic problem. I have been working on this issue for about four years as a full-time project, and the first study that we did in 2006 was *Jackpot Justice*, which Hans mentioned earlier.

In this study, what we set out to do is measure the total cost of the U.S. tort liability system and put that cost in perspective. Hans mentioned a figure of \$252 billion a year. That is the direct cost of the tort liability system, but what we wanted to do in this study is also measure the indirect cost. When we crunched the numbers, we arrived at a total of \$865 billion annually as the cost.

It is a lawsuit industry. That's really the way to look at it. It truly is an industry in terms of the size, scope, and amount of resources devoted to it. To put it in perspective, it's roughly the size of the U.S. restaurant industry: About 6.5 percent of GDP would be the equivalent. It is about 30 times what the National Institutes of Health spends each year on finding cures for deadly diseases. It's a huge amount of resources that are diverted toward, basically, a transfer system.

The Costs of Lawsuit Abuse

Every year, lawsuit abuse costs each American about \$2,000. That is the cost that is factored into all the goods and services that we buy, from ladders to lawnmowers. Built into every price is a component to pay for liability insurance and lawsuit defense.

We estimated the wasteful part of that \$865 billion to be about \$589 billion a year. In other words, you could remove that part from this total cost and not change manufacturers' incentives to produce safe products. You could still fully compensate truly injured individuals.

These numbers that I am presenting to you are quoted today by *The Wall Street Journal*, *The Economist*, and the National Federation of Independent Business, so I think they are being more widely received and accepted as a full accounting of the cost rather than just looking at the direct costs. So of that \$865 billion, we estimate, \$128 billion is judgment and settlement damage awards. To put that in perspective, less than 15 cents of every tort-cost dollar actually goes to compensate injured parties. It is an incredibly inefficient system for compensation.

If we went to pump gas into our car and 85 percent of what we tried to pump into the car spilled to the ground, we would consider that a very inefficient transfer system for getting gas into a gas tank. Yet we put up with the tort litigation system, which is incredibly inefficient.

Less than 15 cents of every tort-cost dollar actually goes to compensate injured parties. It is an incredibly inefficient system for compensation.

Another way to look at the inefficiency: We calculated that the middlemen get about \$151 billion a year. If you remember that the awards and judgments were \$128 billion, then it actually costs more to transfer the money than the amount of money that is being transferred. So, again, it is an incredibly inefficient system for accomplishing what we set out to do, which is fully compensate truly injured victims.

Indirect Costs: Defensive Medicine

Next, we wanted to look at indirect costs. I think it really gets at the heart of the problem that most of us are affected by excessive lawsuit abuse, and yet we do not even know it. It has an impact on all of our lives, yet we do not probably see it on a day-to-day basis. So it is important to also look at the indirect costs, which we do in *Jackpot Justice*. I am going to mention a couple here, but there are others too.

The first one that gets talked about a lot these days is defensive medicine. Ninety-three percent of all physicians report practicing defensive medicine. These are basically unnecessary tests, procedures, referrals that they know are not really medically necessary to protect the patient, but they do them anyway to protect themselves from litigation. About 25 percent of all procedures, according to a survey last year by the Massachusetts Medical Society, are deemed by the physicians themselves to be unnecessary defensive medicine procedures.

We crunched the numbers in terms of how much this defensive medicine costs the economy. We arrived, in 2007, at \$124 billion a year, which is about 8 percent of total health care expenditures. Today, that number would be roughly about \$191 billion a year.

You also have to remember that these defensive medicine expenditures get passed along to all of us. We all end up paying for this in terms of our insurance. So insurance premiums go up, which then

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crowds out a lot of people from being able to afford insurance that they normally would be able to afford. We wanted to estimate what that costs. After crunching the numbers, we estimate that about 3.4 million Americans would have insurance today but do not because of the higher premiums due to just defensive medicine: today about \$191 billion.

I think yesterday there was a report that came out that showed something like 14,000 people a year

die because they do not have health insurance. It would not surprise me if a lot of these 14,000 people that die every year are part of those 3.4 million people. They could have had insurance if not for defensive medicine expenditures. It is an important additional factor that I think needs to be discussed more widely.

Indirect Costs: Research and Development

Another indirect cost of the excessive tort liability system is R&D impact. Of course, businesses have to spend a lot more money on legal defense that would otherwise go to product research and development, new product innovation, and new products being introduced. We estimated that total at about \$367 billion a year of lost sales of new products that would otherwise come to market but do not because of the diversion of resources basically away from R&D and new product development toward legal defense: again, another huge indirect cost where it is hard to measure what would have been but is not.

Basically, the vaccine industry has fled the country. It is hard to find a manufacturer anymore in the U.S. that does vaccine development and manufacturing, primarily because of liability concerns. It was reported that the FDA granted the H1N1 virus vaccine to four companies to be manufactured, and without much of a surprise, three of the four companies are actually located outside the U.S.: Swiss, Australian, and French companies were all awarded the vaccine licenses.

There is one company in the U.S. in Maryland, but I think it got the license to manufacture only because they have a technological advantage. They are going to produce an inhalable version of the vaccine rather than the standard injectable version. I think that is probably why they got a license. Otherwise, I think all of the manufacturers would have come from Europe or Australia.

That is a great example of how it really does impact U.S. business and how the liability system is forcing more and more business overseas. As a result, it hurts us in terms of the economy and job growth.

As another example, Volkswagen was going to introduce a three-wheel vehicle, very green technology, that gets about 49 miles per gallon. They were

going to sell it in the U.S. for about \$17,000 a vehicle. Probably most people in this room would not want to drive this vehicle, but I can tell you that where I come from in California, it would have sold well. It would have had a big market. It actually got qualified, too, to use the HOV lanes in California.

At the last minute, Volkswagen decided to pull it from the U.S. and not market it here because of liability concerns, but it is available in Europe. So once again, another example where European markets are perceived to be more favorable in terms of liability than the U.S.

Compared to other countries of comparable standards of living, the estimate is that we have about 59 percent higher tort costs.

I do not think it is any accident, too, that they tend not to have punitive damages in Europe and, also, that they have the loser pay system. This is another example of the indirect costs, fewer products available in the U.S. A lot of people probably would have loved to buy this car, but it is not available.

In terms of how expensive the U.S. system is compared to other countries of comparable standards of living, the estimate is that we have about 59 percent higher tort costs. These are direct costs. These are awards, attorneys' fees, and administrative expenses. This does not include the indirect costs that I just talked about, but it gives you a good indication of our system compared to other systems in the world. It is just much more expensive for compensating injured individuals.

State-by-State Breakdown

How does it look across the U.S.? There is a study that I do every two years, the *U.S. Tort Liability Index*, with a colleague of mine, Hovannes Abramyan, who is also co-author of *Jackpot Justice*. We are updating it right now for an early 2010 release. This study looks at a state-by-state breakdown of tort costs, tort litigation risks, and tort reforms across the U.S.

In 2008, we released this, and it turns out that California comes in the highest and North Dakota the lowest. This gives you the total amount that is spent in the state on tort losses, monetary payouts

to compensate injured individuals. It does not really come as a surprise; it kind of corresponds with the size of the state. California has the most people, about 38 million, so you would expect it has more economic activity, more people, more torts, and more tort payouts. It makes sense, but we also wanted to adjust or standardize the data for the size of the population and the level of economic activity.

We also include what we call litigation risks. We look at not just the monetary payouts, but also litigation risks: How much at threat are you of being sued? How many lawsuits are filed? How many attorneys are practicing in your state? We look at judicial hellhole rankings from the American Tort Reform Association. We look at huge outlier verdicts: How often do your state juries render these outrageous verdicts?

When you look at all those things and control for the size of the state, the top-ranked states are North Dakota, Alaska, and North Carolina. The two states represented here today on the panel, Mississippi and Ohio, do very well: 9th and 10th (one being the best). The worst are Florida, New Jersey, and New York. I think it is an effective way to get people to think about these things. When I do talk radio, the first thing everybody wants to know is where does your state rank?

The second thing everybody wants to know is where do the neighboring states rank? Nobody likes to be beaten by their neighbor in college football or anything else, so it really does get people focused on it as a competitive thing. It is an effective way to get people's attention. In terms of medical malpractice, which is being discussed a lot today and over the last few months, the highest in terms of relative losses are New York, New Jersey, and Delaware; the lowest are Vermont, Oklahoma, and Alaska.

We also have a table in the *U.S. Tort Liability Index*, so you can see where your state ranks. Again, 40 percent of medical malpractice lawsuits contain no medical error or physical injury, according to the *New England Journal of Medicine*. It costs a lot of money to defend yourself even when you have done nothing wrong. I think it is over \$100,000 even when you win. When you lose, it costs \$150,000 to defend a medical malpractice case. It is an incredibly expensive process.

Why should you care where your state ranks? According to a recent McKinsey and Company survey, tort risks are the second most important factor when a company decides where to relocate or expand operations or build a new plant or introduce a new product. It is an incredibly important factor when businessmen decide what to do and where to invest their next dollar.

[A national study] estimated that there are about 12 percent more doctors per capita in states that have passed caps on non-economic damages in medical malpractice lawsuits.

A great example of that, in terms of a problem and how it can be solved, is Texas. Before 2003, they truly had a medical malpractice and medical access crisis. Doctors were fleeing the state, particularly in rural areas, low-income areas, and minority-population areas. People were driving hours to get health care across state lines to Louisiana and Oklahoma. It was truly a crisis, especially in particular high-risk specialties. So it was difficult in certain areas of the state to get access to health care.

One important question to ask yourself, too, is how many people died en route to a doctor that would still be with us if not for the liability crisis that drove the doctors out of their region of the state? I know that there is a group that has been tracking this in Pennsylvania, which is having a severe crisis, particularly in Philadelphia where a lot of maternity wards are closing. They have documented five deaths in Pennsylvania alone where people have died that would have not had to die if there was a local specialty physician in their area.

So before 2003, it was a huge problem, and after the reforms in 2003 and 2005, medical malpractice insurance premiums fell dramatically. At least 16,500 new physicians are practicing in Texas now, a lot of them in the rural areas, especially in south Texas, areas that did not have doctors before, where people were having to drive hours to see a physician. It really has been a huge benefit overall for the state of Texas.

The Perryman Group estimated that there is now an additional \$26 billion in new output in Texas just

due to the tort liability reforms that they passed there. It has been a huge boost to the economy. I think something like one-third or one-half of all new jobs created in the last few years have been in Texas. It is a staggering number just because the rest of the country is not producing jobs either. I think a lot of it has to do with tort reform, because it has really been a magnet for drawing companies to the state and physicians in particular.

Nationally, a study looked at what the effect of medical malpractice reform has been, and they estimated that there are about 12 percent more doctors per capita in states that have passed caps on non-economic damages in medical malpractice lawsuits. That is a huge change in terms of health care access in the states that have taken the initiative and passed tort reform in the medical malpractice area.

Economic Impact of Tort Reform

As the previous speaker said, tort reform is an important part of the economy, so I also wanted to look at the overall effects of tort reform on the economies in the various states that have enacted tort reform. I looked at the differences and various factors between the top 10 tort liability states and the 10 worst. After you crunch the numbers, labor earnings growth is 5 percent greater in the best tort states. Gross state product growth is 25 percent greater. With job growth, there is a huge difference: 57 percent greater job growth in the tort reform states.

Next is state migration: a 232 percent difference. In other words, people are flocking to the states with the best tort climates and leaving the most repressive states.

I also looked at things like tax revenues because tort reform really does have a big supply-side impact. It really widens your tax base and generates more economic activity. There are 24 percent greater tax revenues in the best tort states than in the worst. It is not because they have higher tax rates; they actually have lower tax rates. But it really does point to the supply-side boost that you get from tort reform as you get more investment, more job creation, and more tax revenue coming into the states. It really is a big gain for the state overall, not just in jobs and in the private sector in terms of investment, but also in the public sector.

We also looked in the *U.S. Tort Liability Index* at which states tend to have the best tort reform rules on the books. In terms of best rules, Ohio has some of the best rules on the books thanks to the work that has been going on with Bill and others there. It has been fantastic. They have really turned it around. Now the job is to defend what you have achieved. That is always the big challenge. It is the same thing Georgia is facing right now, a lot of threats from the trial bar to try to go to court and undo the reforms that have been passed.

Tort Law Tally is my newest study that came out earlier this year. I co-authored it with Hovannes Abramyan and also a former professor of mine at George Mason, Mark Crain. What we wanted to do in this study is measure which tort reforms give you the biggest bang for the buck. Which seem to be the most effective at reducing losses and premiums?

Tort Reform Works

Of course, the tort bar says that tort reform does not work. This is a quote from last year from the CEO of the American Association for Justice. They state one of two things: Either tort reform does not work or tort reform is really effective and “bars the courthouse doors” (their favorite phrase). They really talk about it out of both sides of their mouth.

After we crunched the numbers, we found they are wrong: 18 of the 25 tort reforms that we looked at significantly reduced (in the statistically significant sense) either tort losses or tort insurance premiums. Overall, if a state were to adopt all these reforms that were proven to be effective, you would reduce your tort losses by 47 percent and your premiums by 16 percent per year.

The states have proven...that if you have the political will and the political leadership, if the public understands the problem and you have picked the right tools to fix it, you can solve the problem.

So there is a huge, significant impact from tort reform. They cannot use that argument anymore.

In terms of jobs, a University of California Berkeley economist looked at the six most common tort reforms that states have adopted across the country.

Overall, you get about a 1 percent increase in employment per tort reform that states have adopted. In California, for example, if we would adopt one additional tort reform, we would bring in 152,000 jobs. It would be a huge job boost for California, but it makes too much sense, so our legislature will not do it.

And this is U.C. Berkeley—no haven for conservative economics. Even Berkeley admits that tort reform increases jobs.

Interestingly enough, they also found that for every tort reform, you get a 1 percent reduction in the legal sector. So you get fewer lawyers but probably more doctors. I think that is an exchange most people would be willing to make.

Overall, in terms of which reforms proved to be most effective, reforms such as attorney-retention sunshine (limits on the attorneys’ fees that can be paid to a private attorney retained by a state attorney general), a Daubert rule (setting strict standards for expert witnesses), and caps on certain types of damages are the ones that tended to have the biggest impact, although it really does depend on which area you are looking at. Every state is different. Every state has a different problem. I agree that this is a state issue and best handled as a state issue, although I understand it is a big federal question right now for the medical malpractice side especially.

I think the states have proven—Mississippi, Texas, and other states—that if you have the political will and the political leadership, if the public understands the problem and you have picked the right tools to fix it, you can solve the problem. These are some of the areas that we showed are probably the most effective ones to focus on, although it depends on which issues you have the biggest problems with in your state.

I have been working with various groups around the country to tailor packages for future reform based on the results here, but *The Wall Street Journal* tells us tort reformers will have to push back in the face of all the challenges, especially by the trial bar, including legal challenges around the country. I think this is probably a good list of some of the areas that we would want to focus on for defending and make sure that we do not lose what we have already accomplished.