“Those who cannot remember the past are condemned to repeat it.”

George Santayana (1863-1952),
The Life of Reason, Volume 1 (1905).
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**About the Michigan Chamber Foundation**

The Michigan Chamber Foundation is a 501(c)(3) non-profit organization established to plan, promote and conduct non-partisan educational research and programs regarding issues facing Michigan including, but not limited to, taxation, government regulation, health care, hazardous waste, crime, tourism and recreation, welfare, government spending and transportation.

This report is the latest in a series of public policy studies that can be found on the Michigan Chamber’s web sit at www.michamber.com.
In the 1980’s, Michigan, along with many other states, was facing a litigation crisis that threatened our economic well-being. Confronted with the specter of huge unpredictable jury verdicts resulting from frivolous lawsuits, small businesses closed, physicians refused to practice specialized medicine, and larger employers struggled with an uncertain and hostile legal environment that added to the cost of everything they produced, with consumers picking up the tab.

Recognizing the extraordinary impact these costs were having on Michigan’s citizens, the Michigan Legislature passed three major legal reform packages between 1986 and 1996.

- The 1986 package included general changes to tort law (liability, venue, and damages) and specific changes to the medical malpractice area (non-economic damage caps, statute of limitation revisions, and expert witness requirements).
- The 1993 package focused on additional medical malpractice reforms in the areas of non-economic damage caps, expert testimony requirements, discovery requirements, and binding arbitration.
- The 1995–1996 package focused on product liability reforms and actions seeking awards for personal injury, property damages, or wrongful death.

The results of the legal reforms passed by the Michigan Legislature in the 1980’s and 1990’s have been real, measurable and far reaching:

- Lower medical malpractice insurance rates.
- Increased supply of physicians and medical specialists.
- Reduction in the practice of “defensive medicine.”
- Decrease in lawsuits against the State of Michigan.
- A growing life science corridor.
- The availability of commercial liability insurance for small businesses and job providers.

Despite the benefits of legal reform for the state as a whole, there are those who wish to make Michigan the first state in the nation to legislatively roll back its legal reform measures — some of which have been the law for more than 20 years, and all of which have provided real, tangible benefits to Michigan citizens.

In light of the threat to roll back legal reform measures, it is appropriate — even vital — to review why the reforms were originally enacted, and how repealing them could pull us back to an unpredictable time in history when Michigan was indeed facing a dual economic and litigation crisis.

The State of Michigan is again facing very difficult times, the toughest in a generation. A good legal climate will not in and of itself lift this economy off its knees. But to abandon it will surely put Michigan on its back. With the severe and unprecedented economic challenges that Michigan faces today, now is not the time to surrender our future by retreating to the past.

In this era of term limits, this non-partisan public policy report is intended to inform lawmakers and other opinion leaders about the legislative history, current status and future direction of the debate over legal reform.
Picture this: In the 1980’s, the courts were clogged with a flood of litigation. The solution for every bad result or accident seemed to be a lawsuit — patient against doctor, employee against employer, neighbor against neighbor. There were no longer “accidents.” More “victims” refused to accept responsibility for their own behavior. Instead, “I’ll sue you” became the common response of anyone who thought he/she was wronged in any way.

The litigation explosion was accompanied by exorbitant awards and settlements. The Michigan Lottery was joined by a new, more lucrative “litigation lottery.” Jackpot justice was born. The situation forced insurance premiums through the roof, becoming not only costly, but in some instances, impossible to obtain. Some doctors could no longer afford to treat patients, leaving large segments of our population without adequate medical care. Small businesses closed their doors. Jobs were lost. Finally, people had it. Enough was enough. It was under these circumstances that legal reform in Michigan was enacted.
A CALL TO ACTION FOR THE MICHIGAN LEGISLATURE

In the summer of 1985, the Michigan House of Representatives and the Michigan Senate reacted to the crisis facing Michigan by forming special committees — the House Special Committee on Liability Insurance and the Senate Select Committee on Civil Justice Reform — to investigate the problems and suggest solutions. At the time of the committee formation, the Republicans held a narrow margin (20–18) in the Senate, while the Democrats controlled the House with a 57–53 margin.

The resolution calling for the formation of the Senate Select Committee on Civil Justice Reform said the “explosion in the number of cases before our courts, many of which result in expensive damage awards, precludes any attempt at fair, swift, and efficient administration of justice. Additionally, this situation is detrimental to our state’s business climate and has led to the unavailability of insurance or skyrocketing premiums in numerous instances and the loss of job opportunities.” The committee was charged with the responsibility “to address, at a minimum, the issues of structured settlements, statutes of limitation, prejudgment interest, joint and several liability, caps on non-economic damages, and the collateral source rule.”

The House Special Committee on Liability Insurance was formed to “study insurance industry practices, ascertain why liability insurance is unavailable and/or unaffordable for many Michigan citizens, and make public policy recommendations.”

Understanding the urgency of the situation, these bipartisan committees immediately began their work. The seven-member Senate committee broke into three subcommittees: medical malpractice, governmental liability, and dram shop liability. In addition to committee meetings, the Senate committee held 14 public hearings throughout the state. The 16-member House committee met 10 times and heard testimony from 32 expert witnesses. In addition, the House committee heard testimony from 56 people during an all-day public hearing.

THE HOUSE AND SENATE COMMITTEE FINDINGS

The two committees met for two solid months — cooperating in a bipartisan fashion across party lines to do what was best for the citizens of Michigan. Both committees issued reports to the full legislature that fall. The Senate report concluded that “[l]iability has reached epidemic proportions and presents an emergency situation to the Legislature. There is little time for delay in addressing this crisis.” The House committee similarly urged immediate action. Samples of the findings of the House & Senate committees are noted below.

- **Medical Malpractice:**
  - The medical malpractice liability crisis was accepted as a “grave reality.” The committee cited a survey, conducted by Martin Block of Michigan State University, who found that in the five years preceding the study, 42 percent of Michigan’s family physicians stopped delivering babies or reduced the number of deliveries; 57.6 percent of family physicians stopped or planned to decrease their involvement in surgery, and 57.3 percent had or planned to reduce their level of involvement in intensive care services.
  - The frequency of medical malpractice claims increased from 10 per 100 physicians in 1979 to 25 per 100 in 1985. This increase in claims led one medical malpractice insurance provider (Medical Protective Services Company) to threaten to leave the state unless something was done. In fact, the availability of medical malpractice insurance coverage was becoming jeopardized.
  - Medical malpractice insurance costs doubled in the five years preceding the report, and tripled and quadrupled in some specialties. Three of the insurance companies writing policies in Michigan raised their rates by at least 49 percent in 1984.
The practice of “defensive medicine” (i.e., scheduling superfluous tests just to “be on the safe side”) was estimated to cost patients over $15 billion per year nationwide.  

In the tri-county area of Wayne, Oakland & Macomb, the number of medical malpractice lawsuits increased from just over 200 in 1970 to nearly 2,200 in 1984 (over 1,100 percent) — causing then-Attorney General Frank Kelley to call it Michigan’s “second lottery.”

“Hired guns” were brought in as expert witnesses even though they were not practicing experts in the appropriate field of medicine.

Government Liability:

Dramatic increases in suits against governmental units were escalating the cost of providing government services — with taxpayers paying the increased price.

Expenses of defending lawsuits against the state were becoming a major factor in the state budget.

The State of Michigan had a backlog of 1,400 suits against it representing claims of $2.4 billion (half of the general fund budget at that time).

The Michigan Department of Transportation’s lawsuit payments were 57 percent of state’s total payments to settle or pay off lawsuits. Thirty percent of the department’s budget for road building and improvements were paid out in Fiscal Year 1984.

Dram Shop Liability:

Michigan was one of the few states with some form of Dram Shop Law that did not set ceilings on the amount of damages that could be paid. This resulted in Michigan having the highest insurance rates among the 23 states with Dram Shop liability laws. (Michigan’s rates were seven times higher than second-ranked Minnesota, and 11 times higher than New York and New Jersey.)

A pedestrian walking along the side of the road on a rainy morning was hit by a car and awarded $500,000 in damages. The jury found the driver 90 percent negligent and the small village (pop. 1,558) 10 percent negligent for not having properly marked the side of the road. Because the driver only carried $20,000 worth of insurance, the village was forced to pay not only the $50,000 it was found responsible for, but the additional $430,000 as well.

In order to avoid a potentially high jury award, Wayne County settled a case involving an auto accident in which a man was killed when his car hit a truck as the truck entered the county road. At the time of the accident, the man was speeding in a borrowed, uninsured car; he was drunk, with a blood alcohol level twice the legal level of intoxication. The county was found partially negligent because it could have posted “Truck Crossing” signs on the road.

A plaintiff who was injured in the bathroom facilities at an elementary school contended the injury was caused by the removal of the lock from the entrance door of the commode, which allowed the door to swing inward and strike the occupant.

A plaintiff who suffered an eye injury when struck by a tennis ball during a physical education class claimed the building was defective because the school district had failed to rig safety nets between tennis courts to prevent tennis balls from crossing from one court to another.

The 1985 Senate Select Committee Cited The Following Actual Cases:
Rates for protection under the Dram Shop Act jumped from $1 to $7 per $100 in sales, while some owners were unable to secure coverage at any price. Nearly 65 percent of Michigan’s bars and taverns were going without insurance protection because of the costs.15

Under the Dram Shop Act, all liquor licensees who served an alleged intoxicated person are potentially liable for damages — even if they only serve the person’s first drink of the evening, and none others.16

- General Legal Reform:
  - Payment of large lump sum awards for future damages (e.g., future lost wages) were placing undue burden on insurance company reserves, while permitting some plaintiffs to spend the money frivolously.17
  - Plaintiffs were “double-dipping,” i.e., collecting medical benefits, no-fault benefits, etc., for certain injuries while receiving compensation as a result of tort claims for the same injuries.18
  - Defendants responsible for as little as five percent of damages were being required to pay 100 percent of the costs under the doctrine of joint & several liability.19
  - Time-consuming frivolous lawsuits were being filed, resulting in long delays for resolution of the claims.20

The Legislature Acts:
The 1986 Legal Reform Package

The work of the bipartisan House Special Committee and the Senate Select Committee resulted in the passage of Public Act 178 in 1986 (House Bill No. 5154) which amended the Revised Judicature Act (1961 PA 236). This legislation included general changes to tort law and specific changes to medical malpractice law. Much of the medical malpractice law was modeled after the law in California that was passed some 10 years earlier.

The Research Services Division of Michigan’s Legislative Service Bureau summarized the provisions of the 1986 legislation as follows:21

Provisions applying to all tort actions:
- Limit the liability of a party in an action (other than product liability) involving an at-fault plaintiff based on the party’s percentage of fault.
- Limit the liability of governmental agencies (except hospitals) even in cases involving a plaintiff without fault.
- Submit all actions in which it is claimed the damages exceed $10,000 to pre-trial mediation.
- Require future damages over $250,000 awarded by verdict to be paid in periodic payments.
- Require a court to award costs and fees in the cases of a frivolous lawsuit or defense.
- Prohibit interest on future damages before they are awarded, and index the rate of interest on judgments to U.S. treasury notes.
- Change venue requirements, so that the venue must be where cause of action arose and where defendant resides or conducts business, with certain additional exceptions.
- Modify the “collateral source rule,”22 and allow an award of economic damages to be reduced by the amount paid by a third party (a collateral source).
The following provisions apply only to medical malpractice actions:

- Place a cap of $225,000 on non-economic damages, with numerous exceptions such as death and intentional torts.
- Specify the qualifications of an expert witness in a case against a specialist, and prohibit experts from testifying on a contingency fee basis.
- Provide for the dismissal of a defendant upon affidavit of noninvolvement.
- Require each party to provide security for costs or file an affidavit of a medical opinion that the claim or defense was meritorious.
- Require every action to be mediated by a panel of three attorneys and two health care providers.
- Amend the act’s statute of limitations provisions by revising the time when a claim would accrue.

These reforms were bipartisan in nature, and reached only after a tremendous amount of public input, and much deliberation and debate by legislators. They resulted in benefits for all of Michigan, and made our state a model for other states facing similar crises.

“My father is a retired Obstetrician/Gynecologist. He attended Notre Dame for undergraduate school and Loyola Medical School. After his residency in Chicago, he was offered a terrific position with a hospital in Chicago which would have put him on the cutting edge of Obstetrics and Gynecology at a time (the late 1960s) when that field was on the edge of extraordinary change.

“My Dad turned down that job. He decided to return to his small hometown of Escanaba, Michigan… During the late ’60s, ’70s and early ’80s, my Dad was the only Ob/Gyn specialist within a 45-mile radius of Escanaba… He delivered hundreds of babies each year and he passionately and humanely cared for women in and around Escanaba during some very traumatic moments in their lives.

“In the mid to late ’80s, his malpractice premiums became so onerous (roughly $150,000 per year) that he was forced to consider retirement. The premium problem, along with the new, awful reality of having to look at each new patient or case as a potential lawsuit, started sucking the joy and satisfaction right out of the practice for him.

“In the early ’90s, he was sued twice as a tangential defendant in two lawsuits where he had been called into difficult deliveries at the last minute because he was a specialist. In these two lawsuits, he was deposed by a plaintiff’s attorney from lower Michigan who treated my father so uncivilly and disrespectfully that my Dad finally had the joy of his practice completely taken away. The premiums were outrageous, the trial lawyers were everywhere, and the demand was for perfect babies, or else.

“Alas, in 1995, my Dad retired for good at the age of 59. The medical practice he loved became a potential exposure he could not afford; and it became an adversarial environment he would never understand. Escanaba, Michigan, sadly lost one of the finest physicians it has ever, or will ever, have the honor of calling ‘Doctor Bill.’ It was tragic and it was wholly preventable.

“Of course, we need to maintain avenues of justice for those who have been injured by the actions of others. But without some limitation, without the exercise of some prudence, without some appreciation for what we are doing to ourselves and our culture, we are in danger of suing ourselves into oblivion.”

**For the entire story, see Zandstra, Rev. Gerald, Senior Fellow “Tort Reform and the End of Heroes,” Acton Commentary (November 24, 2004) Acton Institute, Grand Rapids, Michigan.**
Though the 1986 reforms certainly helped move Michigan in the right direction vis-à-vis medical malpractice liability, communities and their doctors were still suffering under the weight of litigation and the rising costs of providing medical care. Malpractice premiums were still skyrocketing, and frivolous claims continued to clog the courts. The political landscape was different this time in Lansing — now the House was working under a “shared-power” arrangement, thus ensuring a bipartisan effort in gaining further needed reform in the medical malpractice liability field.

Again, the Legislature worked to strike a careful balance between the rights of those who suffered real injuries and were victims of legitimate malpractice, and the need to maintain affordable and accessible healthcare in communities across the state. Some of the measures adopted had been discussed during the 1985 special committee deliberations, but were not included in the final 1986 legislation, while others were included because of information learned from the enactment of the earlier legislation. The result was the passage of Public Act 78 of 1993 (Senate Bill 270). This legislation did the following:

- Provide for a cap of $280,000 (or up to $500,000) on the total amount of non-economic damages recoverable by all plaintiffs in a medical malpractice action.
- Revise regulations regarding expert witnesses in medical malpractice actions in order to set higher standards for a person to qualify as an expert witness.
- Require a 182-day notice before a medical malpractice action could be commenced and require a response to that notice within 154 days.
- Require each party to give the other access to related medical records in the party’s control.
- Require all medical malpractice plaintiffs to file an affidavit of merit and require all defendants to file an affidavit of meritorious defense.
- Permit the binding arbitration of medical malpractice actions involving damages of $75,000 or less and repeal current provisions on health care arbitration.
- Revise the statute of limitations for certain medical malpractice claims.
- Make other provisions pertaining to burden of proof, waiver of a plaintiff’s physician patient privilege, and interest on judgments.

In 1995, global and national economic competition made it apparent that additional work was required to get the legal system back into balance. In fact, in January 1995 Michigan’s Chief Justice James Brickley, considered a voice of moderation, was quoted as saying that tort reform was essential. The 12-year veteran of the high court said, “The credibility of the legal profession is at stake.” He also decried a “lottery mentality” that encourages individuals to see injuries as opportunities to strike it rich. A lot of people think, when there’s an accident or something like that, that “it’s time to get mine….That mentality gets into the jury’s thinking as well.”

This time, not only did the Legislature deal with general tort reform, it also focused on product liability. The bills passed were an effort to restore fairness and predictability in lawsuits – for all of our citizens, workers and job providers alike.

It is important to remember that this was a time when other states were trying to lure our manufacturers
away to states with lots of sunshine and right-to-work laws. To combat this, Michigan had to offer sound policy and remedies to keep the jobs here and to remain competitive. In the Midwest, Illinois and Indiana had already passed such legislation, and it was clear that others would be following suit.

Legislative efforts resulted in Public Act 249 of 1995 (Senate Bill 344) and amendments to the Revised Judicature Act (Public Act 236 of 1961) which did the following relative to product liability actions:

- Provide that a manufacturer or seller is not liable if a practical and technically feasible alternative production practice was not available.
- Create a rebuttable presumption that a manufacturer or seller is not liable if the aspect of production that allegedly caused the injury complied with federal or state standards.
- Allow the admission in evidence, for certain purposes, of subsequent changes in theory, knowledge, technique or procedure.
- Provide a manufacturer or seller is not liable if the harm was caused by alteration or misuse of the product that was not reasonably foreseeable; if the user was aware, and voluntarily exposed himself to an unreasonable risk; or if the alleged harm was caused by an inherent characteristic of the product.
- Specify that a manufacturer or seller is not liable for failure to warn if the product was provided for use by a sophisticated user.
- Specify that a defendant is not liable for failure to warn of risks that should have been obvious to a reasonably prudent product user or that are a matter of common knowledge.
- Provide that a manufacturer or seller is not liable for a drug that was approved by the Food and Drug Administration, and so long as the manufacturer or seller did not withhold valuable information or interfere with the drug approval process.

The second part of the 1995-96 legislative package dealt with tort actions seeking damages for personal injury, property damage, or wrongful death. Public Act 161 of 1995 (House Bill 4508) amended the Revised Judicature Act (Public Act 236 of 1961) to do the following:

- Eliminate joint liability and the reallocation of uncollectible amounts, except in medical malpractice actions.
- Require the trier of fact to consider the fault of nonparties, as well as parties, in determining the percentage of total fault in an action involving fault of more than one person.
- Provide that non-economic damages may not be awarded to a party whose percentage of fault exceeds the aggregate fault of the other persons, and that the party’s economic damages must be reduced.
- Revise provisions governing venue.26
After healthy discussions and debate, these legal reform initiatives became law. Jobs were saved. Balance restored. Predictability assured. With the passage of this legislation, Michigan again brought itself into the mainstream of legal reform, joining many other states that had already passed similar reforms.

**BENEFITS OF LEGAL REFORM**

In Michigan, as across the country, the benefits of legal reform are readily apparent. From solving the medical malpractice liability crisis to capping non-economic damages and reforming product liability laws, all have helped Michigan’s job providers, workers and consumers.

- **Lower Medical Malpractice Insurance Rates:** Though national medical malpractice rates continue to climb, Michigan’s rates have stabilized. This is directly attributable to legal reform, and has resulted in doctors, general practitioners and specialists alike, to continue providing medical care to patients across the state.

- **Increased Supply of Physicians & Specialists:** Caps on non-economic damages in medical liability lawsuits have also been beneficial for healthcare. A recent study found that states with limited non-economic damages in medical malpractice liability cases have more physicians than states without limits. This was particularly apparent in rural counties where states with limits had 3.2 percent more physicians per capita, and 5.4 percent more obstetrician/gynecologists and 5.5 percent more surgical specialists per capita than rural counties in states without caps. Similarly, a study in the Journal of American Medical Association found that the physician supply increased by 3.3 percent after the adoption of direct medical malpractice which limit the sizes of awards.

- **Reduction in Practice of “Defensive Medicine”:** Direct medical malpractice liability reforms limiting awards also reduces “defensive medicine” procedures, thus resulting in lower overall medical costs.

- **Decrease in Lawsuits Against the State:** Michigan has also benefited from a decrease in payouts from lawsuits against the state itself. As the 1985 Senate report said, “Few tears are shed about the prospect of ‘government’ being sued for damages, but the dramatic increases [were] escalating the costs of providing government services, and the taxpayer [paid] the inevitable price.” This is not to say that one cannot bring a cause of action against the State; they can, and do. However, since the bills’ enactment, payouts for settlements and verdicts on questionable cases have decreased substantially.

- **A Growing Life Science Corridor:** The product liability package of 1995-96 focused on providing Michigan a competitive advantage in ensuring good paying jobs for our citizens. While trailing in other economic factors vital to job creation, the FDA defense gave Michigan a tool to compete, specifically toward the goal of developing our biotech industry in the “life science corridor.” The results were spectacular. Michigan led the nation in percentage growth of new biotech companies from 1999–2002.
HIGHWAY NEGLIGENCE PAYMENTS
FY 1983–84 through FY 2004–2005

The benefits of tort reform are real, measurable, and far reaching. Commercial liability insurance is widely available for small businesses. Many frivolous lawsuits no longer make it to trial, thus freeing up the courts to handle those with legitimate claims. Health care, while still costly, is more affordable and accessible. Reforms have protected access to the courts for those who have truly suffered an injury, but also offered some degree of predictability to the system. Most of all, reforms have helped make our economy and state stronger.

Photo by Justin Maconochie Photography
Though initially a leader in legal reform, today the majority of states have caught up by also enacting reform legislation, leaving Michigan ranking 22nd in the best-to-worst legal systems in America. Thirty-seven state legislatures have enacted reforms modifying joint-and-several liability, while 23 states have addressed the collateral source rule issue. Limits on non-economic damages and punitive damages are also in place in the majority of states as are medical malpractice liability reforms and restrictions on attorney’s fees. What once was a competitive advantage is now barely allowing us to keep up with other states.

Photo by David A. Trumpie
PERSONAL INJURY LAWYERS OPPOSITION TO LEGAL REFORM THREATENS TO TURN BACK THE CLOCK

Given the benefits legal reform brings to Michigan families, health care providers and job providers, one would wonder who would be against it in these tough economic times. The answer is simple: personal injury lawyers. Why? Because despite reforms enacted in Michigan and across the country, lawsuit abuse continues to thrive, and its growth is vital to their economic well-being. In other words, it hits them in their wallet.32

Consider the following statistics based on direct tort costs for judgments, settlements, attorney fees, and administrative expenses:

- Only 46 percent of settlement dollars ever reach the actual victims (22 percent for economic loss and 24 percent for non-economic loss), while 14 percent goes to defense costs, 21 percent for administration, and 19 percent for the plaintiff’s attorney fees. 33
- The U.S. tort system cost $261 billion in 2005, which translates into a litigation tax of $880 per person, or over $3,500 per year for a family of four. 34
- Since 1950, growth in tort costs has exceeded growth in GDP by an average of two to three percentage points. From 2001 to 2005, tort costs grew at 7.9 percent per year, while GDP grew at only 4.9 percent. 35

(Note: These figures do not include the tobacco settlements.)

![Pie chart showing the distribution of tort costs](image-url)

Past, Present and FUTURE

These numbers become even more startling when you go beyond the direct costs of the tort industry, and include indirect costs such as the effect on health care expenditures, innovation, stockholder wealth, etc. The inclusion of all such costs and foregone benefits resulted in a U.S. tort system cost of $865 billion in 2006. This translates into an even larger litigation tax of over $2,456 per person, or over $9,827 per year for a family of four. To put this number in perspective:

- The federal government currently spends about $65 billion on schools and education — less than one-tenth of the cost of lawsuits.

- In 2005, the total amount of charitable giving by Americans totaled $260 billion — less than one-third the cost of lawsuits.

- The budget for the Pentagon and conflicts in Iraq and Afghanistan totaled about $500 billion in 2006 — less than two-thirds the cost of lawsuits in America.

And the saddest part is that when you include all costs and foregone benefits, less than 15 percent of the $865 billion actually goes to compensate injured people.

Thus, despite the rhetoric from the trial bar, lawsuits are still filed and millions of dollars are still paid out in settlements and verdicts. The difference is that now, here in Michigan, and in many states across the country, a person must have an actual injury, and sue the person who caused the injury.

Because of the amount of money at stake, the Center for Legal Policy at the Manhattan Institute...
has called personal injury lawyers “Trial Lawyers, Inc.,” focusing on the fact that this is a complex, multi-billion dollar industry, not a few, local, well-meaning lawyers looking out for their clients. Taken as a whole, they function much like any corporation:

- They organize along different lines of business (asbestos, pharmaceuticals, insurance, lead paint and mold, even fast food).
- They are increasingly sophisticated in targeting their “customer base” through the Internet, as well as newspaper, radio, television, and the yellow pages.
- They have paid professionals dealing with their public/government relations and lobbying efforts.

Thus, while the trial bar condemns the profits of corporations and job providers, they are understandably protecting the exorbitant profits of their own industry. And that’s why they virulently oppose legal reform, and work tirelessly to oppose even modest reform measures and to repeal those already in place.

Personal injury lawyers are a very smart and politically savvy group. For example, understanding that in public surveys, people react badly to the term “personal injury lawyers” and “trial lawyers,” they went so far as to change the name of their national organization from the Association of Trial Lawyers of America to the American Association of Justice. Rumor has it that the Michigan Trial Lawyers Association may follow suit.

Personal injury lawyers pour hundreds of thousands of dollars into campaigns through Political Action Committees and individual checks. In fact, in the 2006 election cycle, the Michigan Trial Lawyers Association/Justice PAC raised $1,062,264 for state candidates in Michigan. This does not include the massive contributions made by personal injury lawyers to candidates.

The personal injury lawyers work to get like-minded people elected to legislatures and judicial posts. They maneuver to control judicial nominating committees, state bar associations and law school faculties. They have vertically integrated the American legal system. Because of their considerable influence in Washington, D.C., legal reform at the federal level has been effectively dead for years…except for modest class action reforms passed in 2005.

Now they are taking their offensive into the states, with mixed results. In the states, they tend to be more successful in the courts, especially in courts with judges sympathetic to personal injury lawyers. In nearby Illinois, you find courts that have consistently ruled with personal injury lawyers.

On the legislative battlefield, they focus on getting legislation passed beneficial to their cause and block legislation that would affect their pocketbooks — all in the name of the “little guy.” However, despite steady opposition from the trial bar, elected officials in state after state have wisely rejected their spurious claims and passed legal reform… with bipartisan support in the legislatures and governors’ offices.
Richard “Dickie” Scruggs, Mississippi trial lawyer whose firm will collect $1.4 billion in legal fees from the tobacco settlements and has now shifted his focus to lawsuits against HMO’s and asbestos claims, perhaps said it best:

“What I call the ‘magic jurisdiction,’ [is] where the judiciary is elected with verdict money. The personal injury lawyers have established relationships with the judges that are elected; they’re State Court judges; they’re popul[ists]. They’ve got large populations of voters who are in on the deal, they’re getting their [piece] in many cases. And so, it’s a political force in their jurisdiction, and it’s almost impossible to get a fair trial if you’re a defendant in some of these places. The plaintiff lawyer walks in there and writes a number on the blackboard, and the first juror meets the last one coming out the door with that amount of money….These cases are not won in the courtroom. They’re won on the backroads long before the cases goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn’t matter what the evidence or law is.”
“...in the 2006 election cycle, the Michigan Trial Lawyers/Justice PAC raised $1,062,264 for state candidates in Michigan”

-- Michigan Campaign Finance Network
Top 150 PACS, 2006 Election Cycle
The American Tort Reform Association rates Michigan as one of the top states in which reforms are threatened. The American Medical Association still places Michigan on a watch list for stability of liability insurance rates. And while the Pacific Research Institute ranked Michigan high in terms of reforms implemented, it has also ranked Michigan high in the likelihood that such reforms will be attacked in the future.
Given the recent rhetoric and success in the 2006 elections, the future is now for Michigan personal injury lawyers. Their target will be to rollback legal reform legislation — legislation that has worked here in Michigan for years.

With each legislative initiative, they will develop populist rhetoric, supported by questionable data and sympathetic victims. They will speak as crusaders for consumer rights, to give voice to the “little guy,” but taken as a whole, they are truly an industry in pursuit of a solitary goal of wealth preservation for themselves.46

PERSONAL INJURY LAWYER ATTACK # 1: REPEAL OF THE FDA DEFENSE — A PREDICTABLE OFFENSE

The first target of the Michigan personal injury lawyers is to rollback the FDA defense. They tried to do this in 2005, but failed. Now, however, emboldened by their victories resulting from a campaign of misinformation, they are pushing for the adoption of legislation to rollback this reform in the 2007-2008 legislation session. Legislation has already been introduced. Again, they won’t let the facts of the current law get in the way; instead, they argue that victims of “deadly” prescription drugs are completely without recourse… because the drug industry has been placed above the law in the State of Michigan.
They say drug manufacturers are making huge profits by selling deadly prescription drugs. What they won’t say is that the same drug might save or better the lives of millions of other people. They won’t tell you that to get a drug approved by the FDA takes an average of 15 years and an investment of nearly $1 billion in research. They won’t tell you that the research done by these companies provides jobs, good-paying jobs, for thousands of Michigan citizens and serves as a basis for our growing life science corridor.

They will tell you that drug manufacturers have been placed above the law, and have absolute immunity from lawsuits in the state of Michigan. They won’t tell you that the law only applies to product liability lawsuits, not any other cause of action against a drug manufacturer. They also won’t tell you that the law doesn’t apply if the company engaged in fraud or misrepresentation in gaining FDA approval, or if any bribery of an FDA official was involved. Finally, they won’t tell you if a company sells drugs after the effective date of an FDA recall or withdrawal of approval, they will not be protected by this law.

Their prescription for reform jeopardizes drug research, further hindering our economy, and creates a new litigation lottery that enriches primarily personal injury lawyers. Repeal of the FDA defense is an offense to the State of Michigan.

**PERSONAL INJURY LAWYER ATTACK # 2: AMENDING MICHIGAN’S NO-FAULT ACT — CODIFYING AN ALTERNATIVE FOR KREINER**

Personal injury lawyers will assert that the Michigan Supreme Court opinion, *Kreiner v. Fischer*, was incorrectly decided, and will prevent many injured parties from collecting the non-economic damages they are entitled to. They will argue that the Legislature should enact a “bright-line” test which will give the least restrictive definition to the “serious impairment of a body function” required under MCLA 500.3135(7) (1995)... that only then will injured parties get what they deserve by way of non-economic damages... as well as punish the person responsible. They may also ask that this threshold question be answered by the jury, instead of a judge — thus allowing the possibility for an emotional award that would undoubtedly be higher than that decided by a judge.

What won’t they tell you? Underlying Michigan’s No-Fault Act was the policy decision to limit tort actions for non-economic loss in return for providing a more certain recovery for economic losses, including unlimited and lifetime medical benefits. Up until this time, anyone involved in an auto accident would have to sue under the common law tort system resulting in protracted litigation. At the end of lengthy court cases, minor injuries were frequently overcompensated and serious injuries were undercompensated. But rest assured, if the Michigan Legislature opens up the possibility of changing Michigan’s No-Fault law, the floodgates will open.
PERSONAL INJURY LAWYER ATTACK #3: EXPANSION OF MICHIGAN’S CONSUMER PROTECTION ACT

Personal injury lawyers will urge the expansion of Michigan’s Consumer Protection Act, as they are in many other states around the country. They tried, but failed, to do this in 2005, and there is no reason to believe that they will not try again. Specifically, they will seek to expand the list of regulated entities and professions that can be sued under the Michigan Consumer Protection Act. They will target virtually every business or service regulated by state or federal law, including hospitals, employment agencies, engineers, builders, auto dealers, medical professionals, pharmaceutical companies, social workers, banks and credit unions, plumbers, etc. They will argue that this must be done to protect unsuspecting consumers. It’s not beyond their reach to even suggest that Michigan allow triple damages to be awarded in what they consider particularly egregious cases.

What they won’t tell you is that consumer protection lawsuits are one of the top growth “product lines” in the world of Trial Lawyers, Inc. Why? Because unlike other lawsuits, consumer protection laws generally do not require that an actual injury occur. In fact, frequently they don’t even require that a plaintiff relied upon any representation by a defendant. In other words, the possible causes of action are only limited by the imagination of an entrepreneurial trial lawyer. It’s good business for them; bad policy for Michigan.

PERSONAL INJURY LAWYER ATTACK #4: REMOVE OR RAISE NON-ECONOMIC DAMAGE CAPS

Personal injury lawyers will tell you that the non-economic damages caps in place are unfair, and that they should be eliminated. What they won’t tell you is the cost of doing away with these caps will be added to insurance settlements, economic damages, lost wages and medical bills. No one suggests it’s easy to measure someone’s pain and suffering. But it is necessary to establish reasonable compensation beyond an individual’s ability to recover out of pocket medical expenses and lost wages. Caps do this. They add reasonable compensation while providing a sense of stability and predictability which businesses need to operate. If these caps are removed, caps which are in place in well over half the country, Michigan health care, jobs, and family security will be at risk. A new litigation lottery will be in place. Personal injury lawyers will seek jackpot justice in the name of fairness, while Michigan will be thrust into the past, and all of the effective bipartisan reforms of the ‘80s and ‘90s will have been for naught.
PERSONAL INJURY LAWYER ATTACK #5: PUNITIVE DAMAGES

Expect the personal injury lawyers to push for the award of punitive damages in Michigan. Punitive damages are damages specifically awarded to punish wrongdoing by a defendant, and to deter such conduct in the future. Historically, punitive damages have not been available in Michigan except in a very small handful of situations (e.g., if a public body arbitrarily or capriciously refuses to comply with a valid FOIA request, if an insurer fails to pay a judgment under the Dram Shop Act, unlawful eavesdropping, etc.). The personal injury lawyers will argue that the only way to get the attention of big business is through their pocketbooks. And allowing punitive damages to punish corporate conduct is the way to do just that.

This is just more rhetoric designed to create a pro-litigation climate where a handful of personal injury lawyers get rich while we pay the bill with higher costs on goods and services.

The current law on punitive damages is working. People have access to the courts. They can be compensated reasonably for their injuries. Companies struggling in Michigan’s down economy at least have some predictability knowing that if they conduct themselves in a reasonable and fair manner they won’t be subjected to arbitrary settlements that could bankrupt them.

PERSONAL INJURY LAWYER ATTACK #6: EXPAND USE OF CLASS ACTION LAWSUITS

Also on the personal injury lawyers’ agenda is the expanded use of class action lawsuits. This should come as no surprise given that this is where much of the “real” money is in tort litigation. The class action lawsuit (sometimes now referred to as mass tort litigation) is meant to allow a large number of people whose claims surround a similar question to file an action jointly to get the claim resolved most efficiently for the court system.

And that’s just what the personal injury lawyers will say: it’s an efficient way of dealing with a number of plaintiffs with the same legal question or issue. They’ll tell you it will take less court time. That it will allow representation for people who can’t “go it alone.”

But again, key facts will be left out. They won’t tell you that class action lawsuits have become a way to “blackmail” corporate defendants. That it’s much easier to force a company to settle if there are thousands of people in a class. They won’t tell you how “injured parties” will be recruited as in recent asbestos and silica litigation — by mail, television ads, the Internet, and even by telemarketers. In other words, they won’t tell you that they will be creating victims — often people with no injury or legitimate cause of action.

The personal injury lawyers won’t tell you that when they get a company to settle, each plaintiff generally only gets a pittance, while the lawyer takes the lion’s share. Consider the Texas suit against Blockbuster Video challenging the fairness of their late fee policy even though the policy had been fully disclosed to consumers. Under the settlement negotiated by their attorneys, members of the class were eligible to receive up to $20 worth of coupons for free video rentals (excluding new releases) and certificates for $1 off non-food items. Although the total settlement had a face value of $460 million, Blockbuster estimated that fewer than 10 percent of the coupons would be used, and Blockbuster did not change its current late-fee policy. Plaintiffs’ attorneys, however, collected fees and expenses of $9.25 million. They got a big check, while their clients got a handful of coupons.
With Michigan suffering its worst economic crisis in years, it makes more sense to consider additional legal reform measures... rather than repealing successful ones already in place. Many of these reforms were suggested in 1985, and remain legitimate reforms for consideration today.

**REFORM # 1: LIMIT CONTINGENT ATTORNEY FEES**

The prospect of high attorney’s fees creates an incentive for lawyers to pursue frivolous lawsuits. Personal injury lawyers often bring weak or meritless cases in the hope that the cost and uncertainty of litigation will drive the defendant to settle. In essence, the lawyers become financial “investors” in the outcome of the case. These tactics harm Michigan’s economy, its judicial system, and its citizens.

We propose legislation that strengthens Michigan’s legal system and Michigan’s economy by reducing the incentive for personal injury lawyers to bring meritless lawsuits. Under the proposed bill, personal injury lawyers would receive fair compensation: a maximum of 40 percent of the first $50,000 recovery; 33 percent of the next $50,000 recovery; 25 percent of the next $50,000 recovery; and 15 percent of any additional recovery. This sliding scale for contingent fees would make it more likely that a potential claim will generate a fee, rather than a potential fee generating a claim.

Moreover, this type of fee arrangement protects injured claimants from receiving an inadequate recovery due to lawyers’ demands for an unjustified or unreasonable portion of an award or settlement. For example, under the current law, an attorney who settled a claim for $1 million after just one week of work could receive whatever share of the recovery he or she could negotiate with the claimant, often 40 percent, except in medical malpractice cases where total fees cannot exceed 33.3 percent of the award.

Under the proposed legislation, the most an attorney could receive for that single week of work would be 22.2 percent of the $1 million. Further, the supervising court would have the authority to limit the fee “based upon the interests of justice and principles of equity.” Similar sliding scale fee arrangements are currently in place in at least 11 other states.53

The proposed legislation is a critical step in ensuring that injured plaintiffs receive a maximum recovery, while protecting potential defendants from frivolous and expensive litigation.

**REFORM # 2: PROVIDE INCENTIVES TO SETTLE**

Under Michigan Court Rule 2.405, if a defendant makes a settlement offer that is rejected by the plaintiff, the plaintiff must pay the defendant the costs incurred in defending the suit if the verdict is less favorable to the plaintiff than the defendant’s settlement offer. The costs include reasonable attorneys’ fees. If the Michigan Legislature expands tort liability, this provision becomes important as a means of discouraging frivolous lawsuits and encouraging the resolution of disputes prior to litigation.

However, the current version of MCR 2.405 has several problems:

1. It applies only when there is an offer to stipulate to the entry of judgment in a certain sum. There are adverse consequences to such a stipulation. The rule should apply to any settlement offer that properly invokes this procedure.

2. The offeree has to pay only if the verdict falls short of the offer. The current rule thus encourages people to reject a settlement offer in favor of litigation that might result in, for example, a 10 percent premium over the offer. Further, the rule applies only if the verdict exceeds the average offer, i.e., the offer and the counter-offer divided by two. As a consequence, a plaintiff can potentially avoid the application of the rule by making a low counter-offer.
3. If the verdict exceeds the average offer, the offeree must pay costs. This discourages settlement offers. Allowing either plaintiffs or defendants to make settlement offers, rather than penalize a party for making an offer, would be more inherently fair.

4. Under Michigan court rules, judges have discretion to refuse to award attorneys’ fees.

The proposed legislation preempts MCR 2.405 and replaces it with a provision that addresses the problems with the current rule.

**REFORM # 3: ENACT “LOSER PAY” LAW**

Michigan, along with the majority of states, follows the “American Rule” regarding attorneys’ fees. Under the American Rule, each party to a civil suit is responsible for his or her own legal fees. In contrast, under the “English Rule,” employed in virtually every other western nation, the prevailing party’s attorneys’ fees are paid by the non-prevailing party as part of the judgment.

The “American Rule” is heralded by some for providing open access to the courts, regardless of the strength or merits of a claim. As a practical matter, the American rule has resulted in a number of problems:

1. It denies access to courts for individuals who have valid, but not lucrative, claims.
2. It provides no disincentive for personal injury lawyers to flood the courts with frivolous claims.
3. It prevents injured plaintiffs from receiving full compensation for the harm inflicted because a portion of any recovery obtained must be dedicated to pay attorneys’ fees.

The proposed legislation would implement the “English Rule” (sometimes referred to as a “loser pays” law) in Michigan. This legislation would discourage meritless claims and introduce fairness to our legal system by permitting the prevailing party in a civil suit to recover attorneys’ fees. If enacted, Michigan courts would be open to all valid claims, regardless of the size of the monetary recovery at stake or the ability of a party to afford attorneys’ fees. More importantly, injured plaintiffs would be able to obtain full vindication of the harm suffered.

**REFORM # 4: PROVIDE FOR SANCTIONS FOR MERITLESS/FRIVOLOUS CLAIMS**

Despite many reforms, our system continues to provide incentives for opportunistic personal injury lawyers to file meritless claims against hapless defendants. Meritless claims overburden Michigan’s courts, undercut those with legitimate grievances, mock our legal system, and harm our economy. We must do more to minimize incentives for litigation abuse.

MCL 600.2591 provides an important mechanism to discourage meritless claims. Under MCL 600.2591, the prevailing party in a civil action may recover attorneys’ fees if the court finds that the claim, or a defense to a claim, was frivolous. We propose legislation that strengthens MCL 600.2591 by permitting a court to impose additional sanctions upon the lawyer, law firm, or party that advocates a frivolous claim or defense in a civil action. The proposed legislation is an important step to ensuring that Michigan’s judicial resources are available for and dedicated to adjudicating valid claims, rather than consumed by groundless litigation by either plaintiffs or defendants.
A recent study by the Pacific Research Institute quantified what many believed intuitively all along – “A state’s legal climate directly affects the economic well-being of its residents and employers.” We are facing very difficult times in Michigan, the toughest in a generation. A good legal climate will not in and of itself lift this economy off its knees. But to abandon it will surely put Michigan on its back. With the severe and unprecedented economic challenges that Michigan faces today, now is not the time to surrender our future by retreating to the past.
Past, Present and Future

Senate Resolution 204 (1985), A Resolution Creating a Senate Select Committee on Civil Justice Reform, offered by Senator John Engler (R-Mt. Pleasant).

Letter from Representative Lewis N. Dodak (D-Birch Run), Chair of the Committee to Study Liability Insurance, to Speaker Gary M. Owen (D-Ypsilanti), dated October 31, 1985.


Id. at 12.


Supra at 4.

Id. at 4-5.


1985 Senate Report, p.5.

Id.

Id.

Id. at 8-9.

Id. at 9.

Id. at 9-10.


Id.

Id. at 2.

Id. at 4.


The Collaborative Source Rule bars defendants in tort claims from introducing evidence to show that a plaintiff has already received collateral source benefits (i.e., from a party not involved in the lawsuit). This essentially allows a plaintiff to recover damages twice.

23 Id. at p. 3-4.
25 History of Tort Reform in Michigan, supra at p. 4.
26 Id., p.4.
27 Health Tracking (5/31/05), Center for Delivery, Organization and Markets Agency for Healthcare Research and Quality.
28 Medical Society News, 5/25/05.
30 For more information on Michigan’s life science corridor, and the critical role it plays in Michigan’s economy, see the Michigan Economic Development Corporation’s web site at http://www.michigan.org/medc/tc/LifeSciences/.
31 See 2006 U.S. Chamber of Commerce State Liability Systems Ranking Study, conducted by the Harris Poll. Table 3A – Overall Ranking of State Liability Systems, p. 15.
32 “Another of the year’s remarkable performers was plaintiffs’ personal injury, which came in with the fourth highest average net income of $195,731, and the fifth highest average hourly billing rate of $228 . . . . However, not every field of law had such a good year . . . personal injury defense [was] hit especially hard. . . . Notably, plaintiffs’ personal injury attorneys described 2006 as a less-than-outstanding year in spite of their reportedly high net income and hourly billing rate.” Michigan Lawyers Weekly’s Flash Report on the Economic of Law Practice in Michigan, Lawyers Weekly, December 18, 2006.
33 In fact, one of the consistent complaints referenced in the 1985 House and Senate committees was the fact the lawyers, not the injured, were the ones who were being compensated in personal injury cases.
35 Id.
37 http://www.ed.gov/about/overview/budget/budget08/summary/edlite-section1.htm - 2007 budget for Dept. of Education is $56.7 billion.
40 Here in Michigan, hundreds of Internet Web site domains are being snatched up and used as a tool to market the services of personal injury lawyers. For example, if you access the Web sites www.birtherror.com or www.unjust-death.com, you will find yourself at the law firm of Buchanan & Beckering, the firm of Jane Beckering, candidate for Michigan Supreme Court in 2006, while www.cerebralpalsyinfo.com will direct you to the Detroit firm of Charfoos & Christensen.
45 Id., p. 61.

Note: All Internet citations were valid as of the publication of this report.
LEGALE REFORM in Michigan

ENDNOTES

46 See Steven B. Hantler, “The Seven Myths of Highly Effective Plaintiffs’ Lawyers,” Civil Justice Forum, Center for Legal Policy at the Manhattan Institute (No. 42, April 2004). In this white paper, Mr. Hantler exposed and explained the following “myths” of plaintiffs’ lawyers:
1. Corporations put profits ahead of safety and honesty, and large damage awards are needed to force corporations to act responsibly.
2. The so-called “liability crisis” is an invention of corporations eager to limit their liability for wrongful conduct.
3. Punitive damages are rarely awarded; those that are awarded are almost always substantially reduced in post-trial proceedings.
4. Class action lawsuits always serve the public good by marrying efficiency with justice.
5. Litigation protects consumers when regulators fail to act.
6. Corporations settle lawsuits to cover up their wrongdoing.
7. Like David-against-Goliath, the trial lawyer is outgunned and outclassed by powerful and resourceful corporations.

47 The FDA Defense refers to the legislation that states that a manufacturer/seller will not be liable for problems from a drug that was approved by the Federal Drug Administration, unless the manufacturer obtained approval through false representations or incomplete information, by bribing an FDA official, or if a specific drug was sold after a recall of that drug, or after FDA approval was repealed. It’s part of a product liability package enacted to improve Michigan’s business climate and attract/maintain jobs.

48 Kreiner v. Fischer, 471 Mich 109 (2004). Kreiner addresses the “serious impairment of body function” threshold of Michigan’s No-Fault Act. The Court held that to meet this threshold, a person’s injuries must affect his general ability to live his normal life. In making this determination, one must examine a person’s entire life. The Court held that a negative impact on a particular aspect of an injured person’s life is not sufficient in itself to meet the threshold as long as the injured person is still generally able to lead his normal life. In the cases presented in Kreiner, the Court found the threshold had not been met.


50 In 2005, Rep. Lipsey introduced HB 4981 which would have essentially repealed the “regulated entity” exemption of the Michigan Consumer Protection Act (“MCPA”), thus allowing virtually every profession regulated under state or federal law to be under the MCPA.

51 Non-economic damages include things such as pain and suffering, emotional distress and loss of consortium or companionship, things which are impossible to assign a cash value to. As a result, these awards tend to be erratic and because of the highly charged environment of personal injury trials, they are often excessive. Michigan’s non-economic damages are limited to $280,000 in product liability cases and $500,000 in certain disabling personal injuries. Twenty-two other states also limit non-economic damages.

52 It is important to distinguish punitive damages (not generally allowed in Michigan) from exemplary damages (allowed in Michigan). As noted above, punitive damages are awarded solely to punish or make an example of a defendant because of the maliciousness or recklessness with which he acted. Exemplary damages, on the other hand, are awarded to compensate the plaintiff for injuries to feelings and for the sense of humiliation and indignity because of injury maliciously and wantonly inflicted. The purpose of exemplary damages is not to punish the defendant, but to make the plaintiff whole. Veselenak v. Smith, 414 Mich. 567, 573, 327 N.W.2d 261 (1982).

53 States with some form of sliding scale contingency fees include: California, Connecticut, Delaware, Florida, Illinois, Maine, Massachusetts, New Jersey, New York, Wisconsin, and Wyoming.

## OTHER RESOURCES

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