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BUILDING ON THE FOUNDATION: MISSISSIPPI'S CIVIL JUSTICE REFORM SUCCESS AND A PATH FORWARD

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I. INTRODUCTION

Ten years ago, in the wake of Mississippi's adoption of meaningful civil justice reforms, we declared in this Law Review that the state's legal climate had been transformed and that Mississippi was "open for business."[1] Before that time, Mississippi was known as the "lawsuit capital of the world."[2] Our article documented the improvements in Mississippi's business and healthcare environment as a result of civil justice reform legislation and Mississippi Supreme Court action.[3]

This article revisits the reforms that turned the tide and explores their effect over the past decade. Today, Mississippi doctors pay malpractice insurance premiums that are, on average, one-third of the amount they paid in 2004—helping the state attract more physicians and improving access to care. Businesses that might have closed shop have instead expanded their operations in Mississippi. Mississippi courts are now focused on deciding the claims of Mississippians with potentially meritorious cases instead of spending resources on lawsuits brought by people with no connection to the state. Outlier awards have become less common. Defendants pay their "fair share" of awards, but no longer have to pay for the fault of others.

But Mississippi cannot simply rest on achievements that occurred over a decade ago. As we said in our earlier article, "gains can become ground lost if these efforts stop."[4] Mississippi has undertaken little civil justice reform since 2004. In the meantime, regional competitors, such as Tennessee, and other states that compete with Mississippi to attract jobs have enacted civil justice reforms too, and in some cases have gone further than Mississippi. In addition, some goals of Mississippi's earlier reforms have not been fully realized, and new issues have arisen that need to be addressed.

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1. Mark A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 MISS. C. L. REV. 393 (2005).
2. *Id.* at 393.
3. *Id.*
4. *Id.* at 422.

This article explores three areas for future action: facilitating representative juries, addressing asbestos and silica litigation abuses, and eliminating "phantom damages." The article then highlights some additional reforms that would help ensure that Mississippi remains competitive moving forward.

The article concludes that civil justice reform in Mississippi has been a success. As we observed earlier, Mississippi went "from being the poster child of litigation abuse to a shining example of how a state can join the legal mainstream and foster economic growth through legal reform."[5] But more is needed to take care of unfinished business from the last round of civil justice reforms and address changing circumstances.

II. ADDRESSING FORUM SHOPPING AND JACKPOT JUSTICE

Mississippi's comprehensive 2002 and 2004 civil justice reforms improved many aspects of the state's civil justice system. Here, we revisit how the Legislature addressed Mississippi's reputation as a litigation magnet known for "jackpot justice."[6] The Mississippi Supreme Court also played a significant role in the transformation of the state's legal climate, overturning outlier awards, safeguarding a defendant's ability to appeal an adverse verdict, reining in prejudicial multi-plaintiffs trials, and strengthening expert testimony standards.[7]

A. Lawsuits Must Have a Connection to Mississippi

Legislative reform significantly limited the ability of plaintiffs' lawyers to forum shop in Mississippi. Prior to reform, plaintiffs' lawyers could file a lawsuit in any county in which any defendant "may be found," the cause of action accrued or, in the case of a business incorporated in Mississippi, where the business was domiciled.[8] Mississippi's permissive venue law allowed plaintiffs' lawyers to bring their lawsuits in areas with a history of returning large awards. Often, the forum of choice was the Twenty-second Judicial District, serving counties then labeled by the American Tort Reform Foundation as Judicial Hellholes (Copiah, Claiborne, and Jefferson

5. *Id.* at 395; *see also* Stephen Moore, *Mississippi's Tort Reform Triumph*, WALL ST. J., May 10, 2008 at A9, http://online.wsj.com/article/SB121037876256182167.html; Lynn Lofton, *Medical Liability Improvements Holding Steady With Tort Reform*, MISS. BUS. J., Feb. 4, 2008 at B4, 2008 WLNR 4623679; Lex Taylor, Editorial, *Mississippi is Seeing the Benefits of Tort Reform*, SUN HERALD (Biloxi, Miss.), Sept. 29, 2006 at D2, 2006 WLNR 16871877; Lynne Jeter, *Mississippi Tort Reform: The Doctor Is In – Again*, MISS. BUS. J., July 12, 2004, at B2, 2004 WLNR 11615861.

6. *See* Nash Nunnery, *Q&A: Jim Rosenblatt, Dean Mississippi College School of Law, Jackson*, MISS. BUS. J., Apr. 11, 2010, 2010 WLNR 27779574 (according to former Dean Rosenblatt, "Tort Reform has made a difference in Mississippi and in a number of other states. The caps on damages combined with greater difficulty in aggregating cases has reduced the number of lawsuits."). Another significant reform was Mississippi's move from joint to several liability. *See* MISS. CODE ANN. § 85-5-7 (2015).

7. *See* Behrens & Silverman, *supra* n.1 at 410-12.

8. MISS. CODE ANN. § 11-11-3(1) (prior to 2002) (amended 2002).

Counties).[9] 60 Minutes crowned Jefferson County the "jackpot justice capital of America."[10] More than 21,000 people were plaintiffs in Jefferson County between 1995 and 2000, even though the county had fewer than 10,000 residents.[11] Eager for business, more out-of-state lawyers licensed in other jurisdictions took the Mississippi Bar exam in February 2004 than Mississippi residents.[12] Even a federal appellate court recognized that Mississippi's state courts were "a mecca for plaintiffs' claims against out-of-state businesses."[13]

The Legislature tightened Mississippi's venue requirements for medical malpractice claims in 2002 and for other lawsuits in 2004. Now, malpractice lawsuits against health care providers "shall be brought only in the county in which the alleged act or omission occurred."[14] Other lawsuits "shall be commenced in the county where the defendant resides, or, if a corporation, in the county of its principal place of business, or in the county where a substantial alleged act or omission occurred or where a substantial event that caused the injury occurred."[15] Product liability suits may also be brought in the county where the plaintiff obtained the product.[16] If venue cannot otherwise be asserted against an out-of-state defendant in a general civil action, the plaintiff may bring the action where he or she resides or is domiciled.[17] Mississippi courts now grant defendants' motions to transfer cases that lack a sufficient relationship to the forum.[18]

9. *See* AM. TORT REFORM ASS'N., BRINGING JUSTICE TO JUDICIAL HELLHOLES 2003 at 6-7, 15 (2003), http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2003.pdf; AM. TORT REFORM ASS'N., BRINGING JUSTICE TO JUDICIAL HELLHOLES 2002 at 10-11 (2002), http://www.judicialhellholes .org/wp-content/uploads /2010/12/JH2002.pdf.

10. 60 Minutes, *Jackpot Justice* (CBS television broadcast, Nov. 24, 2002).

11. Robert Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001, at A1, http:// www.nytimes.com/2001/08/20/us/mississippi-gaining-as-lawsuit-mecca.html.

12. *More Than Half of February Bar Exam Takers Out-of-Staters*, MISS. BUS. J., June 7, 2004, at 10.

13. Arnold v. State Farm Fire & Cas. Co., 277 F.3d 772, 774 (5th Cir. 2001).

14. H.B. 2, 3d Ex. Sess., § 1 (Miss. 2002) (codified at MISS. CODE ANN. § 11-11-3(3) (2015)).

15. MISS. CODE ANN. § 11-11-3(1)(a)(i) (2015); *see also* Med. Assurance Co. of Miss. v. Myers, 956 So. 2d 213, 219 (Miss. 2007) ("The venue statute does not allow the piling on of acts or events to establish venue. It specifically requires a substantial alleged act, omission, or injury-causing event to have happened in a particular jurisdiction in order for venue to be proper there").

16. MISS. CODE ANN. § 11-11-3(1)(a)(ii) (2015).

17. *Id.* at § 11-11-3(1)(b) (2015).

18. *See, e.g.*, Holmes v. McMillan, 21 So. 3d 614, 620 (Miss. 2009) (finding venue to be proper in Rankin County and that trial court erred in finding venue to be proper in Hinds County in action arising out of automobile accident); *Myers*, 956 So. 2d at 220 (transferring claim challenging nonrenewal of insurance policy from Holmes to Madison County where all deliberations, meetings, correspondence, and communication between the insurer and doctor occurred); Am. Home Prods. Corp. v. Sumlin, 942 So. 2d 766, 771 (Miss. 2006) (finding that patient's obtaining echocardiogram in Smith County did not establish venue in product liability claim against pharmaceutical company where plaintiff obtained the prescription, filled it, and ingested the pills in Wayne County).

Mississippi also ended the "good for one, good for all" rule, which had permitted a lawsuit to be brought in any Mississippi county in which a single plaintiff resided or where venue was otherwise proper for any party.[19] Today, "each plaintiff shall independently establish proper venue."[20] Plaintiffs' lawyers cannot use one anchor client in the desired county to file a lawsuit than includes many other plaintiffs from around the state or country.

Even with the significant limits on venue, the Legislature recognized that people who lived, worked, and were injured outside of Mississippi could file lawsuits in Mississippi against companies that do business in the state. Thus, the Legislature codified the common law doctrine of *forum non conveniens*.[21] The doctrine allows a court to transfer a case within the state or dismiss a claim more appropriately heard in another state, where the plaintiff's chosen forum is inconvenient for the parties and witnesses and a more suitable alternative forum is available.[22] Consistent with prior case law, the Legislature adopted a factor-based approach for evaluating whether an action should be transferred to a different county in the state or dismissed.[23]

The Mississippi Supreme Court has reversed trial courts that refuse to dismiss claims of nonresident plaintiffs that have no connection to Mississippi.[24] For example, in an asbestos case against a respirator manufacturer, the high court found that allowing claims by out-of-state plaintiffs "would waste finite judicial resources on claims that have nothing to do with the state."[25]

While some areas of Mississippi continue to be viewed by businesses and defense lawyers as pro-plaintiff,[26] defendants have a greater likelihood that state courts will dismiss cases that should be heard in another state or transfer cases that belong in a different county within Mississippi.

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19. *See* Senatobia Cmty. Hosp. v. Orr, 607 So. 2d 1224, 1226 (Miss. 1992) (holding proper venue over nonresident defendant makes the county of plaintiff's residence the proper venue against all resident defendants, even though they may live in different counties"), *overruled by* Capital City Ins. Co. v. G.B. "Boots" Smith Corp., 889 So. 2d 505, 517 (Miss. 2004).

20. Miss. Code Ann. § 11-11-3(2) (2015).

21. Miss. Code Ann. 11-11-3(4)(a) (2015); *see also* Alston v. Pope, 112 So. 3d 422 (Miss. 2013) (recognizing that the 2004 law codified the doctrine as first recognized in two 1943 cases).

22. Miss. Code Ann. 11-11-3(4)(a) (2015).

23. *Compare* Miss. Code Ann. 11-11-3(4)(a) (2015) *with* McWhorter v. Cal-Maine Farms, Inc., 913 So. 2d 193, 196 (Miss. 2005) (applying common law approach).

24. *See, e.g.*, 3M v. Johnson, 926 So. 2d 860, 864-66 (Miss. 2006) (finding that forum non conveniens factors required dismissal of 18 nonresident plaintiffs' asbestos claims).

25. *Id.* at 866.

26. For example, the American Tort Reform Foundation included Jones County on its "Watch List" of problem jurisdictions in 2013 largely as a result of Eighteenth Judicial District Judge Billy Joe Landrum. *See* Am. Tort Reform Found., Judicial Hellholes 2013/14 at 40 (2013), http://www.judicialhellholes.org/wp-content/uploads/2013/12/JudicialHellholes-2013.pdf. In November 2014, after 28 years on the bench, Judge Landrum was defeated in a runoff election. *See* Assoc. Press, *Runoffs Settle Judicial Races in Mississippi*, Jackson Free Press, Nov. 27, 2014 http://www.jacksonfreepress.com/news/2014/nov/27/runoffs-settle-judicial-races-mississippi/.

B. *Addressing Excessive Awards*

Prior to 1995, there were no verdicts greater than $9 million in Mississippi courts.[27] That changed between 1995 and 2001 when at least twenty-one Mississippi juries returned verdicts of $9 million or more, seven of which exceeded $100 million.[28] Only Alabama (which enacted a punitive damage limit in 1999),[29] had a higher percentage of verdicts over $100 million between 1994 and 2000.[30]

There appears to have been no rhyme or reason to some of these awards. For example, in one product liability case against a pharmaceutical company, a jury awarded ten plaintiffs $10 million each even though the plaintiffs varied widely in age, the length of time they took the pharmaceutical at issue, and in their alleged injuries.[31] Another Mississippi jury awarded $25 million each to six plaintiffs who alleged exposure to asbestos in environments ranging from schools to shipyards.[32]

Excessive awards had a spiraling effect. Reports of verdicts encouraged plaintiffs' lawyers to bring lawsuits in Mississippi.[33] One reporter wrote in 2002: "Mississippi, largely because it is one of only a few states that does not cap verdicts on noneconomic damages, has become a hotbed for [personal injury] litigation because jury verdicts have been unusually high" and "companies—fearful of paying tens of millions of dollars—are quick to settle."[34]

Nowhere was the effect of high awards more visible than in the state's healthcare environment. Mississippi was "perhaps the hardest hit of the [American College of Obstetricians and Gynecologists] 'red alert states.'"[35] Most Mississippi cities with populations of less than 20,000 people had no local obstetricians.[36] Orthopedists paying $10,000 to $15,000 annually for insurance in the late 1980s saw their rates climb to $200,000 in

27. David Clark, *Life in Lawsuit Central: An Overview of the Unique Aspects of Mississippi's Civil Justice System*, 71 MISS. L.J. 359, 362 (2001).

28. *Id.* at 362-63.

29. *See* ALA. CODE § 6-11-21(d) (2015) (limiting punitive damages in cases involving physical injuries to the greater of three times compensatory damages or $1.5 million, indexed to inflation).

30. Clark, *supra* n.27 at 363-64.

31. *See* Janssen Pharmaceutica, Inc. v. Bailey, 878 So. 2d 31, 36 (Miss. 2004) (reversing verdict due to improper joinder and due to improper transfer of venue to Claiborne County, where defendant could not receive a fair trial, and finding that damages awarded by the jury were based entirely on passion and prejudice).

32. *See* 3M Co. v. Johnson, 895 So. 2d 151 (Miss. 2005) (granting JNOV for defendant due to lack of evidence).

33. *See* Robert Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001 at A1, http://www.nytimes.com/2001/08/20/us/mississippi-gaining-as-lawsuit-mecca.html.

34. Tim Lemke, *Best Places to Sue?; Big Civil Verdicts in Mississippi Attract Major Litigators*, WASH. TIMES, June 30, 2002 at A1, 2002 WLNR 402634.

35. Sarah Domin, Comment, *Where Have All the Baby-Doctors Gone? Women's Access to Healthcare in Jeopardy: Obstetrics and the Medical Malpractice Insurance Crisis*, 53 CATH. L. REV. 499, 501 (2004).

36. *See* Mark A. Behrens, *Medical Liability Reform: A Case Study of Mississippi*, 118 OBSTETRICS & GYNECOLOGY 335, 335 (Aug. 2011).

2001 and 2002.[37] It had become "almost impossible for many doctors" to obtain affordable medical liability insurance.[38] Residents of some counties lacked a hospital with an emergency room, were hard pressed to find a neurosurgeon, and had to drive over an hour to have a doctor deliver a baby.[39]

Unchecked liability for other defendants caused employers and insurers to leave or avoid doing business in Mississippi, taking jobs with them.[40] "By the summer of 2001, at least forty-four insurance companies had left Mississippi or stopped selling certain kinds of insurance because of large jury verdicts in the state."[41] Manufacturing jobs dropped by fifteen percent (from 260,000 to 221,500) between late 1994 and May 2001.[42]

Mississippi consumers also felt the effects of excessive awards. As one commentator noted, "[t]he cost of goods and services increases more in Mississippi because companies are trying to cover money that could be lost in civil court cases."[43] Mississippi consumers paid almost $80 million more for goods and services because of the state's legal system.[44] "Plainly, the unbalanced judicial system [was] hurting the state and the prospects for more and better jobs, better incomes, and available healthcare."[45]

The Legislature took a three-pronged approach to address Mississippi's reputation for extraordinary awards. It reduced the chance that a punitive damage award would bankrupt a business operating in the state, placed reasonable limits on noneconomic damages, and eliminated duplicative "hedonic damages."[46]

These reforms, combined with other procedural safeguards, have decreased the number of outlier awards in Mississippi. In a 2011 report, NERA Economic Consulting found that Mississippi went from hosting twelve of the top 100 verdicts in 2002 to zero in each of the years from 2006 to 2008, a change NERA attributed to "an apparent improvement in the legal environment in Mississippi since 2002."[47] That trend has continued.

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37. *See* Megha Satyanaryana, *Back on Doctors' Radars: Mississippi's Tort Reform Eases Medical Malpractice Blues*, SUN HERALD, Nov. 18, 2007 at G1, 2007 WLNR 22894270.

38. Lemke, *supra* n.34 at A1.

39. *See* Geoff Pender, *Mississippi Tort Reform at 10 Years*, CLARION LEDGER, May 5, 2014 at A1, http://www.clarionledger.com/story/news/2014/05/05/mississippi-tort-reform-years/8750203/.

40. *See* Sherman Joyce & Michael Hotra, *Mississippi's Civil Justice System: Problems, Opportunities and Some Suggested Repairs*, 71 MISS. L.J. 395 (2001); Clark, *supra* note 27 at 365-67.

41. Clark, *supra* n.27 at 364.

42. *See* John Porretto, *Big-Money Verdicts Challenge Rural Areas*, ROME NEWS-TRIB., July 1, 2001 at B9, http://news.google.com/newspapers?nid=348&dat=20010701&id=t_YvAAAAIBAJ&sjid=LjUDAAAAIBAJ&pg=6823,94357.

43. Timothy Brown, *Study Tallies Legal System's Cost to Consumers: Goods, Services $80M More Than in Other States, Says Economic Group*, SUN HERALD, Apr. 17, 2002 at A9, 2002 WLNR 3564329.

44. *Id.*

45. Clark, *supra* n.27 at 366.

46. The Mississippi Supreme Court also deserves credit for controlling excessive awards. *See* Behrens & Silverman, *supra* n.1 at 410-12.

47. NERA ECONOMIC CONSULTING, CREATING CONDITIONS FOR ECONOMIC GROWTH: THE ROLE OF THE LEGAL ENVIRONMENT 20 (U.S. Chamber Inst. for Legal Reform 2011), http://www.instituteforlegalreform.com/ uploads/sites/1/Economic_Growth_Working_Paper_Oct2011_0.pdf.

Only one Mississippi case made the *National Law Journal*'s list of Top 100 Verdicts for each of 2012 and 2013, and no Mississippi case made the list of Top 100 Verdicts of 2014.[48]

1. Limiting Extraordinary Punitive Damage Awards

Mississippi's reputation for extraordinarily large verdicts often resulted from punitive damages. Prior to 2002, the Mississippi Legislature adopted reforms to reduce the chance for prejudicial practices that result in large awards and limited punitive damages to instances of proven misconduct.[49] If a trial resulted in an extraordinary punitive damage award, however, Mississippi law allowed the verdict to stand unless it "[wa]s so excessive that it evince[d] passion, bias, and prejudice on the part of the jury so as to shock the conscience of the court."[50] That standard was difficult for defendants to meet. The Mississippi Supreme Court had upheld punitive damage awards as much as 150 times the amount of actual damages.[51]

The Legislature responded by enacting a sliding scale limit on punitive damages based on a defendant's net worth.[52] The cap, initially enacted in 2002 and reduced for all but the largest businesses in 2004, provides that a punitive damage award cannot exceed $20 million for a defendant with a net worth of more than $1 billion; $15 million for a defendant with a net worth between $750 million and $1 billion; $5 million for a defendant with a net worth between $500 million and $750 million; $3.75 million for a defendant with a net worth between $100 million and $500 million; $2.5 million for a defendant with a net worth between $50 million and $100 million; or two percent of a defendant's net worth for a defendant with a net worth of $50 million or less.[53]

About one-half of the states limit[54] or bar punitive damages.[55] Mississippi's approach is more modest than most other states with statutory limits

48. *Top 100 Verdicts of 2014*, NAT'L L.J., Mar. 24, 2014, http://www.nationallawjournal.com/id=1202721923983/Chart-Top-100-Verdicts-of-2014; *Top 100 Verdicts of 2013*, NAT'L L.J., Mar. 24, 2014, http://www.nationallawjournal.com/id=1202647966490/Top-100-Verdicts-of-2013?slreturn=20150110191257; *Top 100 Verdicts of 2012*, NAT'L L.J., Mar. 4, 2013, http://www.nationallawjournal.com/id=1202590584811/Top-100-Verdicts-of-2012. Two Mississippi cases made the list of Top Verdicts of 2011. *See Top 100 Verdicts of 2011*, NAT'L L.J., Mar. 12, 2012, http://www.nationallawjournal.com/id=1202544721268/TOP-100-VERDICTS.

49. For example, Mississippi law provides that "[i]n any action in which the claimant seeks an award of punitive damages, the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages." MISS. CODE ANN. § 11-1-65(b), (c) (2015). To qualify for a punitive damage award, a plaintiff must show "clear and convincing" evidence that the defendant acted with "actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." *Id.* § 11-1-65(a) (2015).

50. Cooper Tire & Rubber Co. v. Tuckier, 826 So. 2d 679, 691 (Miss. 2002).

51. *Id.* (citing Paracelsus Health Care Corp. v. Willard, 754 So. 2d 437, 445 (Miss. 1999)).

52. MISS. CODE ANN. § 11-1-65 (2015).

53. *Id.*

54. *See* ALA. CODE § 6-11-21 (2015); ALASKA STAT. § 9.17.020(f)-(h) (2015); COLO. REV. STAT. § 13-21-102(1)(a) (2015); CONN. GEN. STAT. ANN. § 52-240 (West 2015); FLA. STAT. ANN. § 768.73 (2015); GA. CODE ANN. § 51-12-5.1(f), (g) (2015); IDAHO CODE ANN. § 6-1604 (2015); IND. CODE ANN.

on punitive damages.[56] Many states, including those near Mississippi, limit punitive damages to a fixed amount or a certain multiple of compensatory damages.[57] Mississippi's cap may allow punitive damages in some cases that are significantly higher than what other states with caps would allow, but at least the law protects employers from excessive awards that could cause them to shut down or leave the state. Mississippi's punitive damages cap also helps preserve resources needed to compensate future plaintiffs by limiting the size of windfall awards to earlier-filing plaintiffs.[58]

2. Constraining Outlier Pain and Suffering Awards

Mississippi also constrained outlier pain and suffering awards. Historically, in Mississippi and nationwide, noneconomic damages were modest and large awards were typically reversed.[59] The size of pain and suffering awards took its first leap after World War II as personal injury lawyers

§ 34-51-3-4 (2015); KAN. STAT. ANN. § 60-3702 (2015); ME. REV. STAT. ANN. tit.28-A § 2-804(b) (2015) (wrongful death); MISS. CODE ANN. § 11-1-65 (2015); MONT. CODE ANN. § 27-1-220(3) (2015); NEV. REV. STAT. ANN. § 42.005 (2015); N.J. STAT. ANN. § 2A:15-5.14 (2015); N.C. GEN. STAT. § 1D-25 (2015); N.D. CENT. CODE § 32.03.2-11(4) (2015); OHIO REV. CODE ANN. § 2315.21 (2015); OKLA. STAT. ANN. tit. 23, § 9.1 (2015); 40 PA. CONS. STAT. ANN. § 1303.505 (2015) (healthcare providers); S.C. CODE ANN. § 15-32-530 (2015); TENN. CODE ANN. § 29-39-104 (2015); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (2015); VA. CODE ANN. § 8.01-38.1 (2015); W. VA. CODE § 55-7-29 (2015); WIS. STAT. § 895.043(6) (2015).

55. Nebraska bars punitive damages on state constitutional grounds. Louisiana, Massachusetts, and Washington, and New Hampshire permit punitive damages only when authorized by statute. Michigan recognizes exemplary damages as compensatory, rather than truly punitive. Connecticut has limited what they call punitive recovery to the expenses of bringing the action. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 495 (2008).

56. A few states take a similar net worth approach to limiting punitive damages. *See* MONT. CODE ANN. § 27-1-220(3) (2015) (limiting punitive damage awards to the lesser of $10 million or 3% of a defendant's net worth); OHIO REV. CODE ANN. § 2315.21 (2015) (limiting punitive damages against individuals and small businesses to the lesser of two times compensatory damages or 10% of the individual's or employer's net worth up to a maximum of $350,000); *see also* ALA. CODE § 6-11-21 (2015) (in nonphysical injury cases, limiting punitive damages against small businesses with a net worth of less than $2 million to $50,000 or 10% of net worth up to $200,000).

57. *See, e.g.*, ALA. CODE § 6-11-21(d) (2015) (limiting punitive damages in cases involving physical injuries to the greater of three times compensatory damages or $1.5 million, indexed to inflation); FLA. STAT. ANN. § 768.725 (2015) (limiting punitive damages to the greater of three times compensatory damages or $500,000 subject to certain exceptions); GA. CODE ANN. § 51-12-5.1(f), (g) (2015) (limiting punitive damages to $250,000 unless the plaintiff demonstrated that the defendant acted with a specific intent to harm); OKLA. STAT. ANN. tit. 23, § 9.1 (2015) (limiting punitive damages to the greater of $100,000 or compensatory damages, or greater of $500,000 or two times compensatory damages or the amount of the increased financial gain where the jury finds by clear and convincing evidence that the defendant acted with malice or an insurer intentionally acted in bad faith, and lifting limit when there is evidence beyond a reasonable doubt that the defendant or insurer acted intentionally and with malice and engaged in life-threatening conduct); TENN. CODE ANN. § 29-39-104 (2015) (limiting punitive damages to the greater of two times compensatory damages or $500,000 subject to certain exceptions); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (2015) (limiting punitive damages to the greater of two times economic damages plus amount equal to noneconomic damages up to $750,000, or $200,000).

58. *See, e.g.*, Mark A. Behrens & Cary Silverman, *Punitive Damages in Asbestos Personal Injury Litigation: The Basis for Deferral Remains Sound*, 8 RUTGERS J.L. & PUB. POL'Y 50 (2011).

59. *See* Ronald J. Allen & Alexia Brunet Marks, *The Judicial Treatment of Noneconomic Compensatory Damages in the Nineteenth Century*, 4. J. EMPIRICAL LEGAL STUD. 365, 379-87 (2007) (finding that there was no tort case prior to the 20th century that permitted a noneconomic damage award that exceeded $450,000 in current dollars).

became adept at enlarging these awards.[60] Because "juries are left with nothing but their consciences to guide them,"[61] the size of pain and suffering awards expanded unpredictably.[62] Early academic concern went unheeded.[63]

By the 1970s, "in personal injuries litigation the intangible factor of 'pain, suffering, and inconvenience' constitute[d] the largest single item of recovery, exceeding by far the out-of-pocket 'specials' of medical expenses and loss of wages."[64] Pain and suffering awards became the "grist for the mill of our tort industry."[65] According to the Bureau of Justice Statistics, pain and suffering awards accounted for approximately one-half of tort awards in 2005.[66]

In Mississippi, concern about outlier awards and access to care led the Legislature to limit noneconomic damages to $500,000 in medical liability actions,[67] among other medical liability reforms.[68] The 2002 law, which applied to causes of action filed on or after January 1, 2003, received overwhelming bipartisan support. Mississippi is one of many states that have adopted a noneconomic damages limit applicable to health care liability.[69]

60. *See* Melvin M. Belli, *The Adequate Award*, 39 CAL. L. REV. 1 (1951); *see also* Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective Review of the Problem and the Legal Academy's First Responses*, 34 CAP. U. L. REV. 545, 560-65 (2006) (examining post-war expansion of pain and suffering awards).

61. Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 778 (1985).

62. Commentators have noted the difficulty expressed by jurors in putting a price on pain and suffering. *See* DAN B. DOBBS, LAW OF REMEDIES § 8.1(4), at 383 (2d ed. 1993) ("Pain cannot be measured in a market . . . . The result is that there is almost no standard for measuring pain and suffering damages, or even a conception of those damages or what they represent."); Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217, 253-54 (1993) (observing different approaches by juries regarding noneconomic damages awards; *see also* RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1965) ("There is no scale by which . . suffering can be measured and hence there can only be only a very rough correspondence between the amount awarded as damages and the extent of the suffering.").

63. *See, e.g.*, Marcus L. Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200 (1958) (expressing concern over the ease of proof of pain and suffering and the unpredictability of such awards and proposing "a fair maximum limit on the award").

64. Nelson v. Keefer, 451 F.2d 289, 294 (3d Cir. 1971).

65. Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 VA. L. REV. 1401, 1401 (2004).

66. *See* Thomas H. Cohen, TORT BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 6 (U.S. Dep't of Justice, Bureau of Justice Statistics Nov. 2009), http://www.bjs.gov/content/pub/pdf/tbjtsc05.pdf.

67. H.B. 2, 2002 Leg., 3d Ex. Sess., § 7 (Miss. 2002) (codified at MISS. CODE ANN. § 11-1-60(2)(a) (West 2015)).

68. *See, e.g., id.* §§ 5 (codified at MISS. CODE ANN. § 15-1-36(15) (2015)) (requiring plaintiffs to give sixty days written notice before commencing a medical malpractice suit), 6 (codified at MISS. CODE ANN. § 11-1-58(1)(a) (2015)) (requiring plaintiffs' attorney to submit an affidavit certifying that an expect has concluded that there is a reasonable basis upon which to commence a medical negligence case).

69. *See* MISS. CODE § 11-1-60(2)(a) (2015); *see also* ALASKA STAT. § 09.55.549 (2015); CAL. CIV. CODE § 3333.2 (2015); COLO. REV. STAT. § 13-64-302 (2015); IND. CODE § 34-18-14-3 (2015); LA. REV. STAT. § 40:1299.42 (2015); MD. CTS. & JUD. PROC. CODE § 3-2A-09 (2015); MASS. GEN. LAWS ch. 231 § 60H (2015); MICH. COM. LAWS § 600.1483 (2015); MO. REV. CODE § 538.210 (2015 Mo. S.B. 239); MONT. CODE § 25-9-411 (2015); NEB. REV. STAT. § 44-2825 (2015); NEV. REV. STAT. § 41A.035 (2015); N.M. STAT. ANN. § 41-5-6 (2015); N.C. GEN. STAT. § 90-21.19 (2015); N.D. CENT. CODE § 32-42-02

In early 2004, Governor Haley Barbour said "the cap on non-economic damages should not apply just to medical liability cases . . . . We should also have a reasonable cap in general civil liability cases."[70] The Legislature responded by allowing noneconomic damages up to $1 million in civil suits not involving medical negligence. In doing so, Mississippi joined other states that have placed a ceiling on noneconomic damages in all civil cases to create predictability in the law, facilitate settlements, and promote economic growth.[71] The Legislature also removed exceptions and scheduled increases to the $500,000 cap on noneconomic damage awards in medical liability actions.

In enacting these limits, the Legislature drew a careful balance. Recoveries for past and future medical expenses, rehabilitation expenses, lost wages, or other economic damages were left uncapped. The Legislature chose a substantial, but not unlimited, remedy for the distinct minority of Mississippians who may find themselves as plaintiffs seeking extraordinary noneconomic losses. Mississippi's noneconomic damages caps help avoid inconsistent, excessive, and unpredictable awards that may raise due process issues.[72] In addition, the caps help stabilize or lower insurance costs for doctors, drivers, businesses, and homeowners.

As discussed in more detail later in this article, Mississippi's limit on noneconomic damages in medical negligence cases has significantly improved the medical liability climate in the state. The general limit on pain and suffering awards in personal injury cases and other reforms also had a positive effect. For example, soon after enactment of the 2004 reforms, three major insurance companies returned to Mississippi (World Insurance Co., Equitable Life Insurance Co., and Travelers).[73] Massachusetts Mutual Life Insurance Company and its affiliates re-entered the market for municipal bonds, explaining that "[b]y enacting significant legal reform, Mississippi . . . paved the way for possible MassMutual investments supporting

(2015); OHIO REV. CODE § 2323.43 (2015); S.C. CODE § 15-32-220 (2015); S.D. CODIFIED LAWS § 21-3-11 (2015); TEX. CIV. PRAC. & REM. CODE § 74.301 (2015); UTAH CODE § 78B-3-410 (2015); VA. CODE § 8.01-581.15 (2015); W. VA. CODE § 55-7B-8 (2015); WIS. STAT. § 893.55 (2015); *see also* 27 V.I.C. § 166b (2015).

70. Hon. Haley Barbour, 2004 State of the State Address (Jan. 26, 2004).

71. *See* MISS. CODE ANN. § 11-1-60(2)(b) (2015); *see also* ALASKA STAT. § 09.17.010; COLO. REV. STAT. §13-21-102.5 (2015); HAW. REV. STAT. § 663-8.7 (2015); IDAHO CODE § 6-1603 (2015); KAN. STAT. ANN. §§ 60-19a01 to -19a02 (2015); MD. CTS. & JUD. PROC. CODE § 11-108 (2015); OHIO REV. CODE ANN. § 2315.18 (2015); 23 OKLA. STAT. § 61.2 (2015); TENN. CODE ANN. § 29-39-102 (2015).

72. *See* Niemeyer, *supra* note 65 at 1414 ("The relevant lesson learned from the punitive damages experience is that when the tort system becomes infected by a growing pocket of irrationality, state legislatures must step forward and act to establish rational rules."); *see also* Gilbert v. Daimler Chrysler Corp., 685 N.W.2d 391, 400 n.22 (Mich. 2004) ("A grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not labeled 'punitive.'"); Mark Geistfeld, *Due Process and the Determination of Pain and Suffering Tort Damages*, 55 DEPAUL L. REV. 331, 333 (2006) ("the [Supreme] Court in State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) . . . dentified four different constitutional 'concerns' that justify constraining [punitive damages] as a matter of due process. Each of these concerns also applies to pain-and-suffering damages . . . .").

73. *See* Behrens & Silverman, *supra* n.1 at 422.

Mississippi schools, roads and senior citizens."[74] George Dale, Mississippi's long-serving Insurance Commissioner, proclaimed, "[t]hose who said tort reform would do no good were wrong."[75]

3. Eliminating Duplicative "Hedonic Damages"

The 2002 tort reform law also stopped duplicative recovery of "hedonic" damages awarded for lost enjoyment of life.[76] Damages for loss of enjoyment of life are intended to compensate an injured person for the loss of quality of life or the value of life itself. Prior to 2002, the Mississippi Supreme Court considered hedonic damages appropriate to remedy the lost enjoyment of "going on a first date, reading, debating politics, the sense of taste, recreational activities, and family activities."[77] The Mississippi Supreme Court had recognized lost enjoyment of life as a separate form of damages apart from pain and suffering, which the court distinguished as "physical and mental discomfort caused by an injury, such as anguish, distress, fear, humiliation, grief, shame, and worry."[78] The court had allowed a serial expert witness, whose testimony many other courts rejected,[79] to suggest to juries how much to award for the lost value of life.[80] The court also permitted damages for lost enjoyment of life in wrongful death actions, even where death was instantaneous[81] or occurred shortly after the injury.[82]

Hedonic damages are problematic because considering lost enjoyment of life separate from pain and suffering creates a significant risk of double compensation.[83] Asking juries to reach not one, but two, subjective noneconomic damage awards raises the likelihood of excessive awards. Hedonic damages also challenge important, time-tested principles underlying wrongful death statutes and survivorship actions, which usually limit recovery to pecuniary loss.

Under Mississippi's 2002 reform law, in personal injury actions there is "no recovery for loss of enjoyment of life as a separate element of damages apart from pain and suffering damages, and there shall be no instruction given to the jury which separates loss of enjoyment of life from pain and

74. *Tort Reform Convinces MassMutual to Re-Enter Miss. Municipal Bond Market*, INS. J., June 17, 2004, http://www.insurancejournal.com/news/southeast/2004/06/17/43318.htm; *see also* Shelly Sigo, *MassMutual Ends Mississippi Boycott After Tort Reform Passes*, BOND BUYER, June 23, 2004 at 6, 2004 WLNR 1267176.

75. Jerry Mitchell, *Tort Reform Brings Insurance Firm Back to Miss., Dale Says*, CLARION-LEDGER (Jackson, Miss.), Oct. 8, 2004 at A1, 2004 WLNR 23140503.

76. *See* H.B. 19 3d Ex. Sess., § 10 (codified at MISS. CODE ANN. § 11-1-69 (2015)).

77. Kansas City S. Ry. Co. v. Johnson, 798 So. 2d 374, 381 (Miss. 2001).

78. *Id.*

79. *See* Victor E. Schwartz & Cary Silverman, *Hedonic Damages: The Rapidly Bubbling Cauldron*, 69 BROOK. L. REV. 1037, 1061-67 (2004).

80. *See Johnson*, 798 So. 2d at 382-83.

81. *See* Choctaw Maid Farms, Inc. v. Hailey, 822 So. 2d 911 (Miss. 2002) (en banc).

82. *See* Dorrough v. Wilkes, 817 So. 2d 567 (Miss. 2002) (permitting hedonic damages in a wrongful death action where the decedent was aware and conscious of her injury for 29 hours before death).

83. *See* Schwartz & Silverman, *supra* n.79 at 1044-50.

suffering."[84] The statute also provides that loss of enjoyment of life is not recoverable in wrongful death actions,[85] and clarifies that expert testimony is not admissible on the value of pain and suffering or the value of life.[86]

C. *The Judiciary Shares Credit for Mississippi's Turnaround*

While the Legislature's civil justice reform achievements receive significant attention, the Mississippi Supreme Court's role in fostering a more predictable and fair legal environment should not be overlooked.

For example, the Mississippi Supreme Court acted to protect a defendant's right to appeal an astronomical award. Prior to 2001, Mississippi court rules required a judgment debtor to post a bond in the full amount of the judgment plus interest in order to stay execution of the judgment during an appeal. This rule could leave defendants hit with run-away verdicts with a choice between filing for bankruptcy or settling, even if the judgment resulted from a prejudicial process or egregious errors. This issue came to a head in Mississippi after a $500 million verdict against a Canadian funeral home chain in an action brought by a local competitor.[87] The defendant had to settle the case for $175 million because it could not afford to post a bond equal to the company's approximate net worth.[88]

Soon thereafter, the Mississippi Supreme Court limited appeal bonds for the punitive damages part of a judgment to the lesser of 125% of the judgment, ten percent of the net worth of the defendant, or $100 million "[a]bsent unusual circumstances."[89] When the court made the change in 2001, Mississippi was among the first states to adopt an appeal bond cap that applied to all defendants in all civil actions.[90] Now, most states limit appeal bonds, and several have adopted a lower limit than Mississippi.[91]

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84. MISS. CODE. ANN. § 11-1-69(1) (2015).

85. MISS. CODE. ANN. § 11-1-69(2) (2015). The Mississippi Supreme Court recently found that it is reversible error for a trial judge to instruct the jury to consider the "value of life" in awarding wrongful death damages. *See* Laney v. Vance, 112 So. 3d 1079, 1081 (Miss. 2013) (reversing $1 million verdict in medical malpractice case based on improper jury instruction and prejudicial argument).

86. MISS. CODE. ANN. § 11-1-69(1) (2015).

87. *See* Doug Rendleman, *A Cap on the Defendant's Appeal Bond?: Punitive Damages Tort Reform*, 39 AKRON L. REV. 1089, 1128-29 (2006) (discussing O'Keefe v. The Loewen Group, No. 91-67-423 (Cir. Ct., Hinds Co., Miss. 1995)).

88. *See* Nina Bernstein, *Funeral Chain Settles, Avoiding a Big Bill*, N.Y. TIMES, Jan. 30, 1996 at D5, http://www.nytimes.com/1996/01/30/business/funeral-chain-settles-avoiding-a-big-bill.html.

89. *See* MISS. R. APP. R. 8(b)(2) (as amended in 2001).

90. Some of the early states to adopt appeal bond caps applied the limit only to tobacco companies to protect the state's recovery of funds under the Tobacco Master Settlement Agreement. *See, e.g.*, NEV. REV. STAT. § 20.035.1 (2015) (enacted 2001); W. VA. CODE § 4-11A-4 (2015) (enacted 2001).

91. Many states limit appeal bonds to $25 million. *See, e.g.*, ARK. CODE § 16-55-214 (2015); ARIZ. REV. STAT. § 12-2108 (2015); COLO. REV. STAT. § 13-16-125 (2015); GA. CODE ANN. § 5-6-46 (2015); HAW. REV. STAT. ANN. § 607-26 (2015); IND. CODE ANN. § 34-49-5-3 (2015); Mich. Comp. Laws § 600.2607(1) (West 2015); N.C. GEN. STAT. § 1-289 (2015); N.D. CENT. CODE § 28-21-25 (2015); OKLA. STAT. ANN. tit. 12 § 990.4(B)(5) (2015); S.C. CODE ANN. § 18-9-130(A)(1) (2015); S.D. SUP. CT. R. 03-13 (2015); TENN. CODE ANN. § 27-1-124 (2015); VA. CODE ANN. § 8.01-676.1 (2015); WYO. STAT. § 1-17-201 (2015); *see also* MONT. CODE ANN. § 25-12-103 (2015) ($50 million).

The Mississippi Supreme Court also amended the Mississippi Rules of Evidence to address the state's past reputation for "extremely liberal standards for the admissibility of scientific evidence."[92] The court adopted the federal court *Daubert v. Merrell Dow Pharmacueticals, Inc*[93] expert evidence standard,[94] expressing confidence that "our learned trial judges can and will properly assume the role as gatekeeper on questions of admissibility of expert testimony."[95] The Mississippi Supreme Court has continued to ensure that trial court judges fulfill this important gatekeeping responsibility.[96]

The Mississippi Supreme Court continued this progress when it held that joinder of multiple plaintiffs who had little in common beyond the product they claimed injured them would "unavoidably confuse the jury and irretrievably prejudice the defendants."[97] The court also added a comment to Mississippi's joinder rule to clarify that there must be "a distinct litigable event linking the parties."[98] The court has reversed several mass joinders of pharmaceutical claims and asbestos claims, typically requiring severance, transferring to proper venues, and dismissing out-of-state plaintiffs whose lawsuits had no connection to Mississippi.[99]

Furthermore, the Mississippi Supreme Court has demonstrated a willingness to accept and act on interlocutory appeal petitions to address misjoinder and other abuses. In July 2004, the court streamlined the interlocutory appeal process to eliminate the need to request certification from the trial court.[100] The court announced that it would rule based on

92. David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 PEPP. L. REV. 1, 27 (2004).

93. 509 U.S. 579 (1993).

94. MISS. R. EVID. 702 (amended 2003).

95. Miss. Transp. Comm'n v. McLemore, 863 So. 2d 31, 40 (Miss. 2004).

96. *See, e.g.,* Sherwin-Williams Co. v. Gaines, 75 So. 3d 41, 45-46 (Miss. 2011) (reversing $7 million judgment in case alleging brain damage from lead paint where plaintiff's expert failed to consider the dose-response ratio and instead engaged in a "classic logical fallacy: post hoc ergo propter hoc ['After this, therefore, because of this']."); McKee v. Bowers Window & Door Co., 64 So. 3d 926, 935-36 (Miss. 2011) (affirming trial court decision excluding expert witness who offered testimony that wooden windows are defective based on no outside sources, industry standards, or building codes because it was "nothing more than unsupported speculation or subjective belief, lacking any semblance of an underlying reliable principle and method") (internal quotations and alterations omitted).

97. Janssen Pharmaceutica, Inc. v. Armond, 866 So. 2d 1092, 1098 (Miss. 2004) (en banc).

98. MISS. R. CIV. P. 20 (amended 2004).

99. *See, e.g.,* Alexander v. AC & S Inc., 947 So. 2d 891 (Miss. 2007); Albert v. Allied Glove Corp., 944 So. 2d 1 (Miss. 2006); Ill. Cent. R.R. Co. v. Gregory, 912 So. 2d 829 (Miss. 2005); Amchem Prod., Inc. v. Rogers, 912 So. 2d 853, 855 (Miss. 2005); 3M Co. v. Hinton, 910 So. 2d 526 (Miss. 2005); 3M Co. v. Johnson, 895 So. 2d 151 (Miss. 2005); Janssen Pharmaceutica, Inc. v. Jackson, 883 So. 2d 91 (Miss. 2004); Culbert v. Johnson & Johnson, 883 So. 2d 550 (Miss. 2004); Harold's Auto Parts, Inc. v. Mangialardi, 889 So. 2d 493 (Miss. 2004); Janssen Pharmaceutica, Inc. v. Scott, 876 So. 2d 306 (Miss. 2004); Janssen Pharmaceutica, Inc. v. Bailey, 878 So. 2d 31 (Miss. 2004).

100. MISS. R. APP. P. 5(e) (amended 2004) ("The Court may in its discretion expedite the appeal and give it preference over ordinary civil cases. If the Court determines that the issues presented can be fairly decided on the petition, response and exhibits presented, the Court may decide those issues simultaneously with the granting of the petition, without awaiting preparation of a record or further briefing.").

petition papers in appropriate cases without waiting for a full record and further briefing, as before.[101]

II. Two Case Studies of Mississippi Civil Justice Reform Successes

A. *Limiting Noneconomic Damages Expands Access to Healthcare*

As a result of Mississippi's 2002 and 2004 civil justice reforms, "the problems in malpractice insurance seem to have abated."[102] The Mississippi State Medical Association reports that the liability climate has improved significantly since the enactment of medical liability reform.[103] Another report recently declared Mississippi to have "one of the top five most improved medical liability climates."[104]

The contrast in physician liability insurance premiums before and after the enactment of limits on noneconomic damages in medical liability cases and other civil justice reform in Mississippi is dramatic. From 2000 to 2004, insurance premiums for the Medical Assurance Company of Mississippi (MACM), the state's largest medical liability insurance carrier, increased ninety-eight percent, reflecting the frequency and costs of medical liability litigation in Mississippi before the passage of tort reform.[105] On the other hand, from 2006 to 2010, the years after tort reform in Mississippi, premiums were reduced and refunds were given to physicians each year.[106] As summarized by the American Medical Association:

> Liability premiums have decreased for the largest liability carrier by 5 percent in 2006, 10 percent in 2007, 15.5 percent in 2008, 20 percent in 2009 and 10 percent in 2010. Insured physicians also received significant refunds during this time period as well. This is in stark contrast to the crisis years when premiums increased 12.5 percent in 2000, 11.1 percent in 2001, 10 percent in 2002, 45 percent in 2003 and 19.4 percent in 2004.[107]

For a hypothetical Mississippi doctor paying $4,000 for medical malpractice insurance in 1999, the doctor's premium peaked at nearly $10,000

101. *See id.*

102. Leonard J. Nelson et al., *Medical Malpractice Reform in Three Southern States*, 4 J. Health & Biomed. L. 69, 139 (2008).

103. *See* Am. Med. Ass'n, *Medical Liability Reform – NOW!* at 19 (2015 ed.), July 21, 2014, https://login.ama-assn.org/account/login.

104. Greg Roslund, *The Medical Malpractice Rundown: A State-by-State Report Card*, Emergency Physicians Monthly, July 21, 2014, http://www.epmonthly.com/departments/subspecialties/medico-legal/the-medical-malpractice-rundown-a-state-by-state-report-card/.

105. *See* Behrens, *supra* n.36 at 338.

106. *Id.*; *see also* Clay Chandler, *MACM Has Made Good on Its Word*, Miss. Bus. J., Mar. 9, 2009 at 15, 2009 WLNR 6034179.

107. Am. Med. Ass'n, *supra* n.103, at 19.

as the state enacted legal reform in 2004, and would be about $3,200 now.[108]

These findings add support to the sizable body of literature demonstrating that limits on noneconomic damages can significantly lower medical liability insurance premiums.[109] On average, internal medicine premiums are about seventeen percent less in states with limits on noneconomic damages.[110] Limits on noneconomic damages have an even greater impact on doctors practicing in critical areas. Physicians in general surgery and obstetrics/gynecology experience 20.7% and 25.5% lower premiums, respectively, in states with caps compared to states without limits.[111]

MACM data also shows that civil justice reform in Mississippi reduced the number of professional liability lawsuits, particularly with respect to OB/GYNs.[112] The average number of lawsuits per year against MACM-insured physicians dropped 277 percent (from 318 to 140) from the five-year period that preceded the reforms to the five-year period that followed.[113]

Mississippi's limit on medical liability, noneconomic damages has other benefits too, such as reducing the costs associated with defensive medicine (i.e., ordering tests out of excessive caution because of potential liability).[114] A study of malpractice lawsuits in Mississippi from 1998 to 2002—before tort reform—found that more litigious counties had higher per capita medical expenditures from defensive practices.[115] In contrast, a 2015 report on Medicare and Medicaid costs found that "[i]n Mississippi, there was a trend of decreased expenditures after medical tort reform was

108. Med. Assurance Co. of Miss., Effect of Tort Reform on Premiums (July 21, 2015) (on file with authors).

109. *See* Am. Med. Ass'n, *supra* note 103 at 10-11.

110. *Id.* at 10.

111. *Id.*; *see also* Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. LEGAL STUD. S183, S221 (June 2007) (study of more than 100,000 settled cases showed that caps on noneconomic damages "do in fact have an impact on settlement payments."); Nelson et al., *supra* note 102, at 89 ("It is clear . across a number of rigorous studies using a variety of data periods, measures and methods, damage caps have been shown to be effective in reducing medical malpractice insurance premiums."); U.S. Dep't of Health & Human Servs., CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM 15 (July 25, 2002) ("there is a substantial difference in the level of medical malpractice premiums in states with meaningful caps . . . and states without meaningful caps.").

112. *See* Behrens, *supra* n.36 at 338.

113. *Id.*

114. *See, e.g.,* MASS. MED. SOC'Y, INVESTIGATION OF DEFENSIVE MEDICINE IN MASSACHUSETTS (2008) (reporting study results finding 83% of Massachusetts physicians reported practicing defensive medicine; about 25% of all radiological imaging tests were ordered for defensive purposes, 28% of those surveyed admitted reducing the number of high-risk patients they saw, and 38% reduced the number of high-risk services performed); David M. Studdert et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293:1 JAMA 2609, 2609 (June 1, 2005) (finding that 93% of high-risk specialists in Pennsylvania ordered unnecessary tests, performed unwarranted diagnostic procedures, and referred patients for unneeded consultations to protect themselves from litigation).

115. *See* Brandon Roberts & Irving Hoch, *Malpractice Litigation and Medical Costs in Mississippi*, 61 HEALTH ECONOMICS 841 (2007).

passed."[116] Defensive medicine costs are passed to consumers directly or through insurance plans.

In addition, "[m]any studies demonstrate that professional liability exposure has an important effect on recruitment of medical students to the field and retention of physicians within the field and within a particular state."[117] States that limit noneconomic damages generally experience greater increases in the number of doctors per capita.[118] A competitive legal environment also helps states retain physicians.[119]

The President of the Mississippi State Medical Association has said that the legal reforms "made a sea-change in the practice of medicine in Mississippi," changing the litigation culture of a state where malpractice rates "went crazy" and doctors fled as a result of "jackpot justice."[120] Mississippi is no longer considered a "crisis" state for medical malpractice insurance.[121] "Medical malpractice tort reforms . . . are indeed helping Mississippians have better health care opportunities and leveling the playing field for physicians in the state's judicial system."[122]

The average citizen recognizes that constraining subjective noneconomic damage awards has significant societal value and plays an important part in safeguarding access to healthcare services. For instance, in November 2014, California voters rejected (by a two to one margin) a ballot initiative ("Prop. 46") that sought to raise California's $250,000 limit on noneconomic damages in medical liability cases to $1.1 million and index it to inflation.[123] Prop. 46 failed in every county of the state.[124]

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116. *New Findings From Institute of Rural Health in Medicare and Medicaid Provides New Insights*, ST. & LOC. HEALTH L. WKLY., Jan. 15, 2015 at 16, 2015 WLNR 671456; *see also* Donald J. Palmisano, *Health Care in Crisis: The Need for Medical Liability Reform*, 5 YALE J. HEALTH POL'Y, L. & ETHICS 371, 377 (2005) ("malpractice reforms that directly reduce provider liability pressure lead to reductions of 5 to 9 percent in medical expenditures without substantial effects on mortality or medical complications."); Nelson et al., *supra* note 102 at 84 (studies "have found a link between the adoption of malpractice reforms and the reduction in defensive medical practices.").

117. Robert L. Barbieri, *Professional Liability Payments in Obstetrics and Gynecology*, 107:3 OBSTETRICS & GYNECOLOGY 578, 578 (Mar. 2006).

118. *See* William E. Encinosa & Fred J. Hellinger, *Have State Caps on Malpractice Awards Increased the Supply of Physicians?*, 24 HEALTH AFF. 250 (2005).

119. *See* Chiu-Fang Chou & Anthony T. Lo Sasso, *Practice Location Choice by New Physicians: The Importance of Malpractice Premiums, Damage Caps, and Health Professional Shortage Area Designation*, 44 HEALTH SERV. RES. 1271 (2009); Daniel P. Kessler et al., *Impact of Malpractice Reforms on the Supply of Physician Services*, 293 JAMA 2618 (2005); *see also* Joseph Nixon, Editorial, *Why Doctors Are Heading to Texas*, WALL ST. J., May 17, 2008 at A9, http://www.wsj.com/articles/SB121097874071799863; Ralph Blumenthal, *More Doctors in Texas After Malpractice Caps*, N.Y. TIMES, Oct. 5, 2007, http://www.nytimes.com/2007/10/05/us/05doctors.html?pagewanted=1.

120. Tom Charlier, *Medical Lawsuits Radically Declining – Tennessee, Mississippi Make it Hard to Pursue Malpractice Case*, MEMPHIS COM. APPEAL, Nov. 1, 2009 at A1 (quoting Dr. Randy Easterling), http://www.commercialappeal.com/news/local-news/medical-lawsuits-radically-declining.

121. *See* Amy Lynn Sorrel, *Tort Reforms Boost Some States' Liability Outlook*, AM. MED. NEWS, Mar. 5, 2007, http://www.amednews.com/article/20070305/profession/303059955/7/.

122. Editorial, CLARION-LEDGER, Sept. 15, 2007 at A7, http://archive.clarionledger.com/article/20070915/ OPINION01/709150317/Tort-reform-Barbour-didn-t-lead-fight-alone.

123. *See* Cal. Sec. of State, Ballot Measures by County (Dec. 10, 2014) (reporting that 66.8% of voters said "no" to Proposition 46), http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/88-ballot-measures.pdf.

124. *See id.*

Plaintiffs' lawyers appear intent on challenging the constitutionality of Mississippi's noneconomic damages caps. The Mississippi Supreme Court has considered several such cases, but has not reached the merits of the constitutional issue.[125]

The vast majority of state courts have respected the prerogative of legislatures to enact reasonable limits on pain and suffering awards in medical liability cases[126] and civil actions generally.[127] Noneconomic damages caps routinely survive right to a jury trial,[128] separation of powers,[129] equal

125. *See* Sears, Roebuck & Co. v. Learmonth, 95 So. 3d 633 (Miss. 2012) (concluding that deciding certified question regarding constitutionality of the general noneconomic damages cap would have required speculation and conjecture on the court's part); Allcock v. Bannister., 106 So. 3d 790 (Miss. 2012) (affirming trial court decision to grant defendant's motion for new trial due to faulty jury instruction and not addressing plaintiffs' constitutional challenge to cap); APAC-Tenn., Inc. v. Bryant, 2009-CA-02009-SCT (Miss.) (appeal including constitutional challenge to limit voluntarily dismissed due to settlement on Nov. 3, 2011); Double Quick, Inc. v. Lymas, 50 So. 3d 292 (Miss. 2010) (reversing plaintiffs' verdict due to lack of causation and not reaching plaintiffs' constitutional challenge to noneconomic damage limit); *see also* Manhattan Nursing & Rehabilitation Ctr., LLC v. Pace, 134 So. 3d 810 (Miss. Ct. App. 2014) (reversing plaintiffs' verdict due to evidentiary error and not addressing plaintiffs' constitutional challenge).

126. *See, e.g.,* Fein v. Permanente Med. Group, 695 P.2d 665 (Cal. 1985); Chan v. Curran, 237 Cal. App. 4th 601 (2015); Stinnett v. Tam, 198 Cal. App. 4th 1412 (2011); Rashidi v. Moser, No. B237476, 2015 WL 1811971 (Cal. App. Apr. 20, 2015), *aff'd in part, rev'd in part on other grounds*, 339 P.3d 344 (Cal. 2014); Garhart *ex rel.* Tinsman v. Columbia/HealthONE, L.L.C., 95 P.3d 571 (Colo. 2004); Scholz v. Metro. Pathologists, P.C., 851 P.2d 901 (Colo. 1993), *superseded by statute on other grounds*; Kirkland v. Blaine Cnty. Med. Ctr., 4 P.3d 1115 (Idaho 2000); Miller v. Johnson, 289 P.3d 1098 (Kan. 2012); McGinnes v. Wesley Med. Ctr., 224 P.3d 581 (Kan. App. 2010); Estate of Needham *ex rel.* May v. Mercy Mem. Nursing Ctr., Nos. 303999, 304832, 2013 WL 5495551 (Mich. App. Oct. 3, 2013); Johnson v. Henry Ford Hosp., No. 250874, 251542, 2005 WL 658820 (Mich. App. Mar. 22, 2005); Jenkins v. Patel, 688 N.W.2d 543 (Mich. App. 2004); Zdrojewski v. Murphy, 657 N.W.2d 721 (Mich. App. 2002); Knowles v. United States, 544 N.W.2d 183 (S.D. 1996), *superseded by statute*; Rose v. Doctors Hosp., 801 S.W.2d 841 (Tex. 1990); Prabhakar v. Fritzgerald, No. 05–10–00126–CV, 2012 WL 3667400 (Tex. App.-Dallas Aug. 24, 2012); Judd v. Drezga, 103 P.3d 135 (Utah 2004); MacDonald v. City Hosp., Inc., 715 S.E.2d 405 (W. Va. 2011); Estate of Verba v. Ghaphery, 552 S.E.2d 406 (W. Va. 2001); Robinson v. Charleston Area Med. Ctr., Inc., 414 S.E.2d 877 (W. Va. 1991); *see also* Mizrahi v. N. Miami Med. Ctr., Ltd., 761 So. 2d 1040 (Fla. 2000) (wrongful death); Adams v. Via Christi Reg'l Med. Ctr., 19 P.3d 132 (Kan. 2001) (wrongful death); Sanders v. Ahmed, 364 S.W.3d 195 (Mo. 2012) (wrongful death); Hughes v. Peacehealth, 178 P.3d 225 (Or. 2008) (reaffirming constitutionality of limit as applied to wrongful death cases in Greist v. Phillips, 906 P.2d 789 (Or. 1995)).

127. *See, e.g.,* L.D.G., Inc. v. Brown, 211 P.3d 1110 (Alaska 2009); C.J. v. State, Dep't of Corrections, 151 P.3d 373 (Alaska 2006); Evans *ex rel.* Kutch v. State, 56 P.3d 1046 (Alaska 2002); Scharrel v. Wal-Mart Stores, Inc., 949 P.2d 89 (Colo. App. 1998); DRD Pool Serv., Inc. v. Freed, 5 A.3d 45 (Md. 2010); Oaks v. Connors, 660 A.2d 423 (Md. 1995); Green v. N.B.S., Inc., 976 A.2d 279 (Md. 2009); Murphy v. Edmonds, 601 A.2d 102 (Md. 1992); Schweich v. Ziegler, Inc., 463 N.W.2d 722 (Minn. 1990); Arbino v. Johnson & Johnson, 880 N.E.2d 420 (Ohio 2007); Samsel v. Wheeler Transp. Servs., Inc., 789 P.2d 541 (Kan. 1990), *overruled in part on other grounds*, Bair v. Peck, 811 P.2d 1176 (Kan. 1991); *see also* Phillips v. Mirac, Inc., 685 N.W.2d 174 (Mich. 2004) (auto lessors' vicarious liability); Wessels v. Garden Way, Inc., 689 N.W.2d 526 (Mich. App. 2004) (product liability actions); Kenkel v. Stanley Works, 665 N.W.2d 490 (Mich. App. 2003) (product liability actions).

128. *See L.D.G.*, 211 P.3d at 1131; *Evans*, 56 P.3d at 1051; *Chan*, 237 Cal. App. 4th at 629-30; *Stinnett*, 198 Cal. App. 4th at 1433; *Garhart*, 95 P.3d at 581; *Scholz*, 851 P.2d at 906; *Kirkland,* 4 P.3d at 1120; *Miller*, 289 P.3d at 1118; *Samsel*, 789 P.2d at 555; *Freed*, 5 A.3d at 57; *Oaks*, 660 A.2d at 429; *Murphy*, 601 A.2d at 118; *Phillips*, 685 N.W.2d at 188; *Wessels*, 689 N.W.2d at 529; *Kenkel*, 665 N.W.2d at 499; *Zdrojewski*, 657 N.W.2d at 737; *Estate of Needham*, 2013 WL 5495551 at *15; *Jenkins*, 688 N.W.2d at 544; *Johnson*, 2005 WL 658820 at *8; *Arbino*, 880 N.E.2d at 432; *Knowles*, 544 N.W.2d at 203; *Rose*, 801 S.W.2d at 846; *Judd*, 103 P.3d at 144-45; *MacDonald*, 715 S.E.2d at 415; *Robinson*, 414 S.E.2d at 888.

protection,[130] due process,[131] access to courts / right to a remedy,[132] and special legislation[133] challenges.[134]

In addition, federal courts routinely uphold state limits on noneconomic damages.[135] As the Tenth Circuit has observed, "[w]hen a legislature strikes a balance between a tort victim's right to recover noneconomic damages and society's interest in preserving the availability of affordable liability insurance, it is engaging in its fundamental and legitimate role of structuring and accommodating the burdens and benefits of economic life."[136] More recently, the Fifth Circuit upheld Mississippi's statutory limit on noneconomic damages in non-medical personal injury cases.[137]

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129. *See Evans*, 56 P.3d at 1056; *Garhart*, 95 P.3d at 583; *Kirkland*, 4 P.3d at 1122; *Miller*, 289 P.3d at 1124; *McGinnes*, 224 P.3d at 592; *Wessels*, 689 N.W.2d at 529; *Kenkel*, 665 N.W.2d at 501; *Zdrojewski*, 657 N.W.2d at 739; *Estate of Needham*, 2013 WL 5495551 at *16; *Jenkins*, 688 N.W.2d at 544; *Johnson*, 2005 WL 658820 at *8; *Arbino*, 880 N.E.2d at 438; *Judd*, 103 P.3d at 145; *MacDonald*, 715 S.E.2d at 415.

130. *See C.J.*, 151 P.3d at 382; *Evans*, 56 P.3d at 1055; *Fein*, 695 P.2d at 683; *Chan*, 237 Cal. App. 4th at 621; *Stinnett*, 198 Cal. App. 4th at 1433; *Scholz*, 851 P.2d at 907, *Scharrel*, 949 P.2d at 95; *Miller*, 289 P.3d at 1121; *Freed*, 5 A.3d at 57; *Oaks*, 660 A.2d at 429; *Murphy*, 601 A.2d at 116; *Phillips*, 685 N.W.2d at 188; *Wessels*, 689 N.W.2d at 529; *Kenkel*, 665 N.W.2d at 500; *Zdrojewski*, 657 N.W.2d at 739; *Estate of Needham*, 2013 WL 5495551 at *15; *Jenkins*, 688 N.W.2d at 544; *Arbino*, 880 N.E.2d at 437; *Judd*, 103 P.3d at 143; *MacDonald*, 715 S.E.2d at 420; *Estate of Verba*, 552 S.E.2d at 411; *Robinson*, 414 S.E.2d at 888.

131. *See Evans*, 56 P.3d at 1055; *Fein*, 695 P.2d at 682; *Chan*, 237 Cal. App. 4th at 627; *Scholz*, 851 P.2d at 906; *Phillips*, 685 N.W.2d at 188; *Kenkel*, 665 N.W.2d at 500; *Estate of Needham*, 2013 WL 5495551 at *16; *Arbino*, 880 N.E.2d at 436; *Knowles*, 544 N.W.2d at 201; *Judd*, 103 P.3d at 144; *Robinson*, 414 S.E.2d at 888.

132. *See Evans*, 56 P.3d at 1057; *Scharrel*, 949 P.2d at 95; *Miller*, 289 P.3d at 1118; *Schweich*, 463 N.W.2d at 734; *Arbino*, 880 N.E.2d at 433; *Knowles*, 544 N.W.2d at 203; *Judd*, 103 P.3d at 141; *MacDonald*, 715 S.E.2d at 420; *Estate of Verba*, 552 S.E.2d at 411; *Robinson*, 414 S.E.2d at 888.

133. *See Evans*, 56 P.3d at 1057; *Kirkland*, 4 P.3d at 1121; *Green*, 976 A.2d at 289; *Wessels*, 689 N.W.2d at 529; *Kenkel*, 665 N.W.2d at 500; *MacDonald*, 715 S.E.2d at 420; *Robinson*, 414 S.E.2d at 888.

134. State courts have also upheld laws that limit a plaintiff's total recovery for economic and noneconomic losses. *See* Garhart *ex rel.* Tinsman v. Columbia/HealthONE, L.L.C., 95 P.3d 571 (Colo. 2004); Oliver v. Magnolia Clinic, 85 So. 3d 39 (La. 2012); Butler v. Flint Goodrich Hosp. of Dillard Univ., 607 So. 2d 517 (La. 1992); Ind. Patient's Comp. Fund v. Wolfe, 735 N.E.2d 1187 (Ind. App. 2000); Bova v. Roig, 604 N.E.2d 1 (Ind. App. 1992); St. Anthony Med. Ctr. v. Smith, 592 N.E.2d 732 (Ind. App. 1992); Johnson v. St. Vincent Hosp., 404 N.E.2d 585 (Ind. 1980), *overruled on other grounds*, *In re* Stephens, 867 N.E.2d 148 (Ind. 2007); Gourley *ex rel.* Gourley v. Neb. Methodist Health Sys., Inc., 663 N.W.2d 43 (Neb. 2003); Salopek v. Friedman, 308 P.3d 139 (N.M. App. 2013); Pulliam v. Coastal Emer. Servs. of Richmond, Inc., 509 S.E.2d 307 (Va. 1999); Etheridge v. Med. Ctr. Hosp., 376 S.E.2d 525 (Va. 1989); *cf.* Samples v. Florida Birth-Related Neurological Injury Comp. Ass'n, 114 So. 3d 912 (Fla. 2013); King v. Va. Birth-Related Neurological Injury Comp. Program, 410 S.E.2d 656 (Va. 1991).

135. *See* Estate of McCall v. United States, 642 F.3d 944 (11th Cir. 2011); Smith v. Botsford Gen. Hosp., 419 F.3d 513 (6th Cir. 2005); Patton v. TIC United Corp., 77 F.3d 1235 (10th Cir. 1996); Owen v. United States, 935 F.2d 734 (5th Cir. 1991); Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989); Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989); Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985); Bixby v. KBR, Inc., No. 3:09-CV-632-PK, 2013 WL 1789792 (D. Or. Apr. 26, 2013), *rev'd on other grounds*, 603 F. App'x 605 (9th Cir. 2015); Watson v. Hortman, 844 F. Supp. 2d 795 (E.D. Tex. 2012); Fed. Express Corp. v. United States, 228 F. Supp. 2d 1267 (D. N.M. 2002); Simms v. Holiday Inns, Inc., 746 F. Supp. 596 (D. Md. 1990); Franklin v. Mazda Motor Corp., 704 F. Supp. 1325 (D. Md. 1989).

136. Patton v. TIC United Corp., 77 F.3d 1235, 1246-47 (10th Cir. 1996) (internal quotations and alterations omitted).

137. *See* Learmonth v. Sears, Roebuck & Co., 710 F.3d 249 (5th Cir. 2013) (finding that noneconomic damages cap did not violate Mississippi Constitution's jury guarantee or separation of powers provisions); *see also* Rieger v. Group Health Ass'n, 851 F. Supp. 788, 793 (N.D. Miss. 1994)

A few state courts have nullified noneconomic damages limits, including the Supreme Courts of Georgia, Illinois, Missouri, and Florida[138]—contrary to the majority approach. "Over the years, the scales in state courts have increasingly tipped toward upholding noneconomic damages caps."[139]

Courts upholding limits on noneconomic damages have recognized that a court should not "second-guess the Legislature's reasoning behind passing the act."[140] For example, the Ohio Supreme Court dismissed due process and equal protection challenges and held that a noneconomic damages cap "bears a real and substantial relation to the general welfare of the public."[141] The Alaska Supreme Court also held that such laws "bear[ ] a fair and substantial relationship to a legitimate government objective."[142]

If the Mississippi Supreme Court follows its traditional respect for the Legislature's overlapping authority to decide broad tort policy rules for Mississippi,[143] it will uphold the noneconomic damage limits.[144] The alternative, removing the statutory bounds on subjective pain and suffering

("[T]his court is unwilling to conclude that Mississippi courts would find limits on noneconomic recovery in personal injury cases offensive and repugnant to fundamental public policy priorities.").

138. *See* Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218 (Ga. 2010); Lebron v. Gottlieb Mem. Hosp., 930 N.E.2d 895 (Ill. 2010); Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. 2012); Estate of McCall v. United States, 134 So. 3d 894 (Fla. 2014); *see also* Moore v. Mobile Infirmary Assoc., 592 So. 2d 156 (Ala. 1991); Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987) (prior statute); Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Lakin v. Senco Prods. Inc., 987 P.2d 463 (Or. 1999); Lucas v. United States, 757 S.W.2d 687 (Tex. 1988), *superseded by constitutional amendment*, Tex. Const. art III, § 66 (amended 2003); Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989); Ferdon *ex rel.* Petrucelli v. Wisconsin Patients Comp. Fund, 701 N.W.2d 440 (Wis. 2005) (prior statute). *But see* Bixby, 2013 WL 1789792 at *30-31 (casting doubt on viability of *Lakin* post-*Howell*, which held "the legislature is authorized to enact a limit on tort claim recovery so long as the remaining remedy is 'substantial'").

139. Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. MED. & ETHICS 515, 527 (2005).

140. *Gourley*, 663 N.W.2d at 69.

141. *Arbino*, 880 N.E.2d at 437.

142. C.J. v. State, Dep't of Corrections, 151 P.3d 373, 381 (Alaska 2006); *see also* Murphy v. Edmonds, 601 A.2d 102, 115 (Md. 1992) ("The General Assembly's objective in enacting the cap was to assure the availability of sufficient liability insurance, at a reasonable cost, in order to cover claims for personal injuries to members of the public. This is obviously a legitimate legislative objective.")

143. *See* Thomas v. Warden, 999 So. 2d 842 (Miss. 2008) (upholding pre-suit notice requirement in medical malpractice actions); Barnes v. Singing River Hosp. Sys., 733 So. 2d 199 (Miss. 1999) (upholding Tort Claims Act statute of limitations), *overruled on other grounds, recognized by* Gray v. Univ. of Miss. Sch.of Med., 996 So. 2d 75 (Miss. 2008); Vortice v. Fordice, 711 So. 2d 894 (Miss. 1998) (upholding Tort Claims Act notice requirements); Wells by Wells v. Panola Cnty. Bd. of Educ., 645 So. 2d 883 (Miss. 1994) (upholding limitation on school bus accident recoveries); Phipps v. Irby Constr. Co., 636 So. 2d 353 (Miss. 1994) (upholding statute of repose); Reich v. Jesco, Inc., 526 So. 2d 550 (Miss. 1988) (upholding statute of limitations for actions arising from improvements to real property); Moore v. Jesco, Inc., 531 So. 2d 815 (Miss. 1988) (same); Anderson v. Fred Wagner & Roy Anderson, Jr., Inc., 402 So. 2d 320 (Miss. 1981) (same); Walters v. Blackledge, 71 So. 2d 433 (Miss. 1954) (upholding Workmen's Compensation Law).

144. *See generally* Victor E. Schwartz et al., *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. VA. L. REV. 1 (2000).

awards, would be potentially catastrophic to the healthcare liability environment and business climate in the state.[145]

B. *Successor Asbestos-Related Liability Reform Leads to Investment*

Separate from its comprehensive tort reform package, in 2004 the Mississippi Legislature enacted a law limiting the asbestos-related liabilities of certain successor companies to the current fair market value of the predecessor company's assets at the time of the merger or consolidation.[146] The law was enacted to address the application of obsolete successor liability rules to companies that acquired asbestos liabilities through mergers before the emergence of mass asbestos personal injury lawsuits. Of those companies, Crown Cork & Seal Co. is the most prominent example of the unfairness of the law that used to prevail in most states, including Mississippi.

Crown, a company founded in 1892 by the inventor of the bottle cap,[147] has been named in asbestos personal injury claims even though the company never manufactured, sold, or installed asbestos-containing products in its over 100-year history.[148] Crown was swept into asbestos litigation because of its brief association with a division of a former competitor almost half a century ago.[149] In 1963, Crown purchased a majority of the stock of Mundet Cork Co., a company that made bottle caps, just as Crown did.[150] Before the acquisition, Mundet had a side business making and installing asbestos and other insulation.[151] By the time of Crown's stock purchase, however, Mundet had already closed its asbestos manufacturing operations.[152] Approximately ninety days after Crown obtained its stock ownership interest in Mundet, what was left of the Mundet insulation division—idle machinery, leftover inventory, and customer lists—was sold off by Mundet.[153] Crown itself never operated the insulation division nor ever intended to.[154] Crown subsequently acquired all of Mundet's stock, and Mundet, then having only bottle-cap operations, was merged into Crown in 1966.[155] The cost of the Mundet stock was approximately $7 million.[156]

145. *See* Commentary, *Lifting the Cap Would Be A Bad Economic Move For State*, MISS. BUS. J., June 26, 2011 (editorial board opposition to striking down general noneconomic damages cap), 2011 WLNR 27974284.

146. H.B. 1517, Reg. Sess. (Miss. 2004) (codified at MISS. CODE ANN. § 79-33-1 to -11 (2015)).

147. *See* Crown History, http://www.crowncork.com/about/about_history.php.

148. *See* Monte Burke, *An Affair to Remember*, FORBES, June 11, 2001, http://www.forbes.com/forbes/ 2001/0611/060b.html; Suzanna Cervenka, *Crown Cork: Jobs At Stake*, DAYTON DAILY NEWS, Nov. 25, 2003, at B2, 2003 WLNR 2167314.

149. *See* Michael S. Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Two*, 36 TEX. TECH L. REV. 51, 149 (2005).

150. *Id.*

151. *See* Burke, *supra* n.148.

152. *See* Mark A. Behrens, *ALEC Model Legislation to Help Sick Asbestos and Silica Claimants, Curb Fraud, and Provide Liability Fairness to Innocent Successor Companies*, STATE FACTOR (Am. Legislative Exch. Council), Feb. 2007 at 7, http://www.alec.org/wp-content/uploads/ALEC-State-Factor-Asbestos.pdf.

153. *Id.*

154. *Id.*

155. *Id.*

156. *See* Hull et al., *supra* n.149 at 149.

Between 2000 and 2004, Crown's brief relationship with Mundet resulted in plaintiffs' lawyers naming Crown as a defendant in thousands of asbestos lawsuits that cost Crown hundreds of millions of dollars.[157]

To remedy such instances of grossly disproportionate liability imposed on innocent companies by the application of outdated successor liability law, Mississippi was among the first states to enact a law that more fairly considered a business's responsibility for the conduct of a merged company.[158] Now, over twenty states have enacted similar laws, with most of those states following Mississippi's lead.[159]

As a result of Mississippi's reform, Crown expanded its operation and made additional investment in Mississippi by locating its national eight-ounce can manufacturing center in Batesville.[160] Crown manufactures all of its eight-ounce cans at the Batesville plant and ships them from Mississippi to customer locations across the United States and Canada. Crown later expanded its Batesville operation, adding the capability to manufacture sixteen ounce cans.[161] In all, the company has invested several million dollars to expand the Batesville plant. Crown has directly attributed this investment and expansion to the successor asbestos-related liability reform law that made "Mississippi a more attractive place for companies to invest and grow their operations."[162] The Batesville plant presently employs about 225 Mississippians and is Panola County's fourth largest employer.[163]

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157. *See* CROWN HOLDINGS, INC., 2004 ANNUAL REPORT 43 (2005), http://library.corporate-ir.net/library/85/ 851/85121/items/143713/2004annualfinal.pdf; CROWN HOLDINGS, INC., 2002 ANNUAL REPORT 15 (2003), http://media.corporateir.net/media_files/irol/85/85121/DataTableUpload/2002ANNUAL.pdf; *see also* Danielle Fugazy, *Environmental Issues Influence M&A Activity*, 46 MERGERS & ACQUISITIONS: DEALMAKERS J. 16 (Nov. 1, 2001), 2011 WLNR 22493390.

158. *See* MISS. CODE ANN. §§ 79-33-1 to 79-33-11 (2015). Pennsylvania (2001) and Texas (2003) were the first states to enact such reforms. *See* 15 PA. CONS. STAT. § 1929.1 (2015); TEX. CIV. PRAC. & REM. CODE §§ 149.001 to 149.006 (2015). Ohio enacted legislation along with Mississippi in 2004. *See* OHIO REV. CODE § 2307.97 (2015).

159. *See* ALA. CODE §§ 6-5-680 to 6-5-685 (2015); ARIZ. REV. STAT. §§ 12-559 to 12-559.03 (2015); ARK. H.B. 1529, 90th Leg., Reg. Sess. (2015) (to be codified at ARK. CODE §§ 16-120-601 to 16-120-606 (2015)); FLA. STAT. §§ 774.002 to 774.007 (2015); GA. CODE §§ 51-15-1 to 51-15-8 (2015); IDAHO CODE §§ 30-1901 to 30-1907 (2015); IND. CODE §§ 34-31-8 -1 to 34-31-8-12 (2015); KAN. STAT. ANN. §§ 50-1301 to 50-1307 (2015); MICH. COMP. LAWS § 600.3001 (2015); MISS. CODE §§ 79-33-1 to 79-33-11 (2015); NEB. REV. STAT. §§ 25-21,283 to 25-21,289 (2015); N.C. GEN. STAT. §§ 99E-40 to 99E-45 (2015); N.D. CENT. CODE §§ 32-46-01 to 32-46-06 (2015); OHIO REV. CODE § 2307.97 (2015); 76 OKLA. STAT. §§ 102-109 (2015); 15 PA. CONS. STAT. § 1929.1 (2015); 42 PA. CONS. STAT. §§ 8368.1-8368.6 (2015); S.C. CODE §§ 15-81-110 to 15-81-160 (2015); S.D. CODE §§ 20-9-36 to 20-9-43 (2015); TENN. CODE §§ 29-34-501 to 29-34-507 (2015); TEX. CIV. PRAC. & REM. CODE §§ 149.001 to 149.006 (2015); UTAH CODE §§ 78B-4-601 to 78B-4-607 (2015); WIS. STAT. § 895.61 (2015); WYO. STAT. §§ 1-1-131 to 1-1-137 (2015).

160. *See* Press Release, *Crown Holdings Upgrades Batesville Plant, and Adds New 8 oz. Can-Making Capability*, Sept. 9, 2004, http://www.crowncork.com/press_room/press_release.php/20040909.

161. *See* Press Release, *Crown Increases Capability for the Manufacture of Specialty Beverage Cans at Two North American Plants*, Mar. 21, 2006, http://www.crowncork.com/press_room/press_release.php/20060321.

162. Lynne W. Jeter, *Crown Makes $7.2M Investment in Batesville Plant*, MISS. BUS. J., Mar. 13, 2006 http://msbusiness.com/blog/2006/03/13/crown-makes-72m-investment-in-batesville-plant/ (quoting William Gallagher, Vice President, Secretary & General Counsel for Crown Cork & Seal Company, Inc.).

163. *See id.*

III. BUILDING ON PROGRESS: THE PATH FORWARD

Mississippi has not enacted significant civil justice reform since 2004, with the exception of a law that requires a measure of transparency when the state's attorney general hires contingency fee lawyers to enforce Mississippi law.[164] Meanwhile, other states, including regional competitors such as Tennessee,[165] have enacted civil justice reforms to attract employers. There are also some goals of the earlier reforms that have not been fully realized and new issues that need to be addressed. Below are some additional civil justice reforms that Mississippi should adopt.

A. Strengthen the Jury Service System

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community."[166] This "fair cross-section" aspect of the jury-trial system is rooted in fundamental fairness and has deep-seated constitutional underpinnings.[167] History has demonstrated that unrepresentative juries can lead to miscarriages of justice.[168]

In recognition of the significance of representative juries, Mississippi's 2004 reforms instituted several "best practices" for jury service in Mississippi courts. For example, the law gave each person summoned a one-time right to reschedule—choosing another date within the next six months—simply by contacting the court clerk.[169] This provision was intended to make jury service more flexible and to encourage people to serve rather than ask to be excused. The 2004 law also strengthened employment protections for jurors[170] and increased the penalty for failure to appear.[171] The Mississippi Legislature and courts have more work to do, however, with respect to excusing jurors from service based on hardship and implementing an innovative Lengthy Trial Fund that was enacted in 2004.

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164. *See* H.B. 211 (Miss. 2012) (codified at MISS. CODE ANN. §§ 7-5-1 to -8, 7-5-21, 7-5-39 (2015)).

165. See Tennessee Civil Justice Act of 2011, H.B. 2008, 107th Leg., Reg. Sess. (Tenn. 2011) (including venue reform, appeal bond limit, limit on noneconomic damages in healthcare liability actions, limit on punitive damages, product-seller liability reform, regulatory compliance defense to punitive damages, class action and consumer litigation reforms).

166. Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946)

167. *See, e.g.*, Holland v. Illinois, 493 U.S. 474 (1990); Taylor v. Louisiana, 419 U.S. 552 (1975).

168. For example, in another era, two all-white, all-male Mississippi juries deadlocked in the 1964 trials of white supremacist Byron De La Beckwith for the murder of African-American civil rights leader Medgar Evers. Beckwith was convicted and given a life sentence by a racially diverse jury in 1994.

169. MISS. CODE ANN. § 13-5-33 (2015). The law also requires courts to reschedule the service of an employee of a small business if another employee of that business is summoned to appear during the same period. *Id.* § 14-5-35(4).

170. *See* MISS. CODE ANN. § 13-5-35 (2015).

171. The law increased the maximum penalty for failing to appear for jury service from $100 to $500 and authorized courts to require a prospective juror who fails to appear to complete community service in addition to, or in lieu of, a fine. MISS. CODE ANN. § 13-5-34 (2015). Mississippi law also authorizes imprisonment for up to three days for failing to appear for jury service, a punishment that was not altered by the 2004 law. *See id.*

1. Mississippi Courts Must Properly Apply the Hardship Standard

In addition to instituting a new procedure to facilitate rescheduling jury service and other provisions intended to alleviate the burdens of such service, the 2004 law strictly limited the ability of jurors to be excused because of "undue or extreme physical or financial hardship."[172] The Legislature tightly defined this standard to give courts a solid basis on which to reject flimsy excuses when rescheduling service would suffice. Presently, Mississippi courts may excuse jurors for hardship in only three narrow circumstances: (1) when it would be impossible for a summoned juror to obtain an appropriate substitute caregiver for a person under his or her care; (2) when the juror shows that he or she would "[i]ncur costs that would have a substantial adverse impact on the payment of the individual's necessary daily living expenses or on those for whom he or she provides the principal means of support;" or (3) when jury service would lead to illness or disease.[173]

Mississippi law has long required individuals who seek to be excused from jury service to make their requests in open court, before a judge, and under oath.[174] This requirement serves a vital public purpose. As the Mississippi Supreme Court observed, "[i]t is much easier and less embarrassing to present a feigned excuse in private than in public."[175] An individual may also be more reluctant to beg off if it appears to fellow citizens that he or she is trying to shirk a public duty.[176]

For these reasons, the 2004 law retained the requirement that only a judge—and not a court clerk—may grant a request for an excuse.[177] Clerks may grant postponements and reschedule service by phone, but only judges can excuse a prospective juror for hardship. The legislation also explicitly forbade a court from granting a hardship excuse "solely based on the fact that a prospective juror will be required to be absent from his or her place of employment or business."[178]

Unfortunately, anecdotal evidence indicates that some Mississippi courts are not faithfully adhering to the statutory hardship standard. Attorneys report that in some counties, clerks, rather than judges, routinely excuse prospective jurors from service, often with no record other than a vague handwritten notation (for instance, "hardship") on the juror list. In addition, in many cases only about one-half of summoned jurors even appear for court. Accordingly, by the time the venire is assembled from

172. MISS. CODE ANN. § 13-5-23 (2015).

173. MISS. CODE ANN. § 13-5-23(3)(a) (2015). Mississippi law also includes separate exemptions for jurors who are incapable of service due to illness, breast-feeding mothers, and senior citizens. *See* MISS. CODE ANN. §§ 13-5-23(1)(c), 13-5-25 (2015).

174. *See* Parker v. State, 29 So. 2d 910, 911 (Miss. 1947). The lone exception to this open-court requirement allows a summoned juror who cannot serve due to an illness to submit a physician's certificate to the clerk without appearing before a judge. *See id.*; *see also* MISS. CODE ANN. § 13-5-23(2) (2015).

175. Parker v. State, 29 So. 2d. at 912.

176. *Id.*

177. MISS. CODE. ANN. § 13-5-23(3)(c), (d), (e) (2015).

178. MISS. CODE ANN. § 13-5-23(3)(b) (2015).

which the lawyers in a given case can choose their jury—taking out the no-shows and those impermissibly excused by court clerks—there are instances in which three out of four summoned jurors are not present. As a result, the litigants' right to a representative jury is severely threatened.[179]

In the past, the Mississippi Supreme Court has intervened when trial courts refuse to follow the jury service laws. In 1989, for instance, the high court in *Adams v. State*[180] warned trial courts that although they have some discretion in implementing the jury selection laws, "we have never condoned a venire selection process completely contrary to them wherein the clerk did that which the law expressly prohibits."[181] In that case, the Mississippi Supreme Court reversed a criminal conviction arising from a case in which the Carroll County Circuit Court had unilaterally struck senior citizens from the jury list even though Mississippi law gives them the option to serve.[182]

Ten years later, in *Page v. Siemens Energy & Automation, Inc.*,[183] the Mississippi Supreme Court found that its admonition had gone "unheeded" in Jackson County, where the clerk automatically excluded all jurors who had been summoned in the preceding two years regardless of whether they had actually served and claimed the privilege not to serve again, as required by statute.[184] Holding that such practices were not just unlawful but "unconstitutional," the Mississippi Supreme Court ordered a new trial of a product liability case that had resulted in a defense verdict. The court explained that Mississippi law requires a jury drawn from a "fair cross section" of the population, because "[t]here is no question that plaintiffs and defendants are entitled to a fair and impartial jury."[185] Pervasive irregularities in the jury selection process "tend[ ] to threaten public confidence in the fairness of jury trials," and thus "tend[ ] to threaten one of our sacred legal institutions."[186] The Mississippi Supreme Court also "reemphasized" that clerks must follow the jury service laws.[187]

Notably, in *Page*, the plaintiffs alleged that "the circuit clerk also excused individuals who claimed medical conditions, financial hardships, and work hardships without requiring them to provide an affidavit or an excuse in open court."[188] Although the Mississippi Supreme Court found that the record was unclear on this point, the court specifically cautioned that "if true, such exclusion by anyone except the circuit court judge would also be

179. As Mississippi law recognizes, a jury that is a "fair cross section" of the community requires "*all* qualified citizens" to fulfill their "obligation to serve as jurors when summoned for that purpose." MISS. CODE ANN. § 13-5-2 (2015) (emphasis added).

180. 537 So. 2d 891 (Miss. 1989).

181. *Id.* at 893-94.

182. *Id.* at 895.

183. 728 So. 2d 1075 (Miss. 1999).

184. *Id.* at 1078, 1080.

185. *Id.* at 1081.

186. *Id.* at 1082.

187. *Id.* at 1081.

188. *Id.* at 1081 n.2.

problematic."[189] If this warning has gone unheeded, and Mississippi trial courts are not following the proper excusal procedures and hardship standard, the Mississippi Supreme Court should once again step in to ensure that Mississippi law is being honored, not ignored.

2. The Legislature Should Implement the Lengthy Trial Fund

The 2004 law also attempted to make it easier for any person to serve on a lengthy civil trial by making additional compensation available to jurors who do not receive their regular wages during service. Petit jurors in Mississippi now receive between $25 and $40 per day for their service.[190] While the most civil jury trials conclude within three or four days, complex civil cases can take more time. For example, asbestos personal injury trials usually take about two weeks, according to the Bureau of Justice Statistics.[191] Jurors typically devote six to eight days in court to decide non-asbestos product liability cases as well as medical and other professional malpractice claims.[192] These are averages. Trials occasionally go significantly longer, particularly when they involve multiple plaintiffs and defendants, expert witnesses, multiple claims, or requests for punitive damages. The average Mississippian making approximately $40,000 per year would lose over $2,500 each month as a juror on a lengthy trial, even after collecting a $40 per diem.

Presently, jurors summoned for lengthy trials are placed in a difficult situation. They may face a choice between fulfilling their civic duty at an extraordinary financial loss and requesting a hardship excuse.[193] Mississippi judges are likely to excuse such individuals for hardship.[194] Courts do not want jurors who are distracted by concerns about how they will pay their bills.[195] As one judge put it, jurors concerned about lost income during trial could be "too eager to reach a quick verdict instead of engaging in a full and careful deliberation."[196] "That's not the juror you want," he said, "That's not justice."[197]

In complex civil cases, the result of the lack of available compensation to those who would not earn their regular income during jury service is the systematic exclusion of the perspectives of whole categories of people, such as owners and employees of small businesses, and occupations, such as taxi

189. *Id.*

190. MISS. CODE. ANN. § 25-7-61(1)(a) (2015).

191. *See* Thomas H. Cohen, *Tort Bench and Jury Trials in State Courts*, 2005, at 8 (U.S. Dep't of Justice, Bureau of Justice Statistics Nov. 2009), http://www.bjs.gov/content/pub/pdf/tbjtsc05.pdf.

192. *See id.*

193. *See, e.g.*, John Schwartz, *Call to Jury Duty Strikes Fear of Financial Ruin*, N.Y. TIMES (Sept. 2, 2009) http://www.nytimes.com/2009/09/02/us/02jury.html (documenting how summoned jurors for a four to five-week trial in Florida were forced to request hardship exemptions, which the court felt compelled to grant).

194. *See, e.g.*, Lynne W. Jeter, *Businesses Feel Bite of Jury Duty*, MISS. BUS. J. (Aug. 3, 1998), http://msbusiness.com/blog/1998/08/03/businesses-feel-bite-of-jury-duty/.

195. *See id.*

196. Schwartz, *supra* n.193 (quoting Judge Robert A. Rosenberg of Florida).

197. *Id.*

drivers, plumbers, and construction workers. While the right to trial by jury drawn from a cross-section of the community "does not mean, of course, that every jury must contain representatives from economic, social, religious, racial, political and geographic groups of the community," a jury selection system that systematically excludes any group is impermissible.[198]

To help achieve more representative juries in lengthy trials, the Mississippi Legislature directed the Administrative Office of Courts to promulgate rules to establish a Lengthy Trial Fund ("LTF"). The Fund was intended to provide individuals who do not receive their usual income during jury service with supplemental compensation. When a civil trial continues longer than ten days, the court would provide jurors with up to $300 per day based on documentation of the amount of income lost. The law also authorizes courts to provide jurors with up to $100 per day for the fourth through tenth day of service if the trial lasts longer than ten days.

In a recent program that aired on National Public Radio on "Jury Duty in America Today," Paula Hannaford-Agor, the Director of the National Center for State Court's Center for Jury Studies, discussed the success of a LTF in place in Arizona since 2004. The program is so successful in Arizona that it was reauthorized by the legislature, and juror eligibility for compensation has been expanded several times.[199] Ms. Hannaford-Agor called the percentage of jurors who can serve on lengthy trials "amazing" as a direct result of the program.[200] Oklahoma also has a LTF, she noted, along with "one other state . . . [that has not] actually put in place the mechanics to fund it."[201] That other state is Mississippi, where the 2004 legislation stated that the LTF would take effect only upon allocation of funding.

Arizona funded its LTF through a $15 fee placed on civil complaints and answers, as well certain other filings.[202] That fee not only funds the program for jurors serving on civil and criminal cases, but has resulted in surpluses that have allowed jurors on shorter trials to access funds too. The Arizona program now provides jurors who serve more than five days and who do not receive their usual income to receive up to $300 for each day of service beginning on the first day.[203] The Oklahoma system, which has eligibility closer to the Mississippi statute, is funded through a $20 fee placed

198. Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946) (reversing defense judgment in negligence case due to jury commissioner's practice of excluding from jury lists all persons who work for a daily wage).

199. *See generally* G. Thomas Munsterman, *Arizona's Experience with the Jury Patriotism Act: Assessing the First Year of New Jury Reforms*, 45 JUDGES' J. 18 (2006); *see also* S.B. 1248, 51st Leg., 2d. Reg. Sess. (Ariz. 2014) (reauthorizing Lengthy Trial Fund for an additional five years); H.B. 2133, 50th Leg., 2d. Reg. Sess. (Ariz. 2012) (amending LTF codified to allow jurors who serve on a trial lasting more than five days to receive wage supplementation beginning on the first day of service).

200. *Jury Duty in America*, THE DIANE REHM SHOW (Nat'l Pub. Radio, Nov. 3, 2014), http://thedianerehmshow.org/shows/2014-11-03/jury_duty_in_america_today.

201. *Id.*

202. ARIZ. REV. STAT. ANN. § 12-115(B) (2015) (authorizing the clerk of the Arizona Supreme Court to establish, collect, and remit, the additional fee to fund the LTF); *see also* Ariz. Jud. Branch, Superior Court Filing Fees (eff. May 19, 2014), http://.azcourts.gov//.aspx.

203. ARIZ. REV. STAT. ANN. § 21-222 (2015).

on civil complaints.[204] Since 2005, Oklahoma's LTF has provided up to $200 per day after the fourth day of jury service for those who serve on a civil or criminal trial lasting more than ten days.[205]

Mississippi should enact legislation providing for a court filing fee that will fully fund the LTF without any state allocation. Currently, the fee for filing a civil complaint in a Mississippi Circuit Court is about $160, composed of various charges set by the legislature and courts.[206] Increasing this fee by about $10 would allow implementation of the LTF, significantly reducing financial barriers to serving on a jury, allowing more citizens to fulfill their civic duty to serve, and promoting more representative juries.[207]

B. Address Asbestos and Silica Litigation Abuses

1. Require Plaintiffs to be Sick to Bring or Maintain an Asbestos or Silica Action

Since the asbestos litigation began over four decades ago, hundreds of thousands of lawsuits—if not more—have been filed by plaintiffs who were not sick.[208] A decade ago, there were reports that up to ninety percent of plaintiffs were unimpaired.[209] Cardozo Law School Professor Lester Brickman, an expert on asbestos litigation, has said, "the 'asbestos litigation crisis' would never have arisen" if not for the claims filed by the non-

204. OKLA. STAT. tit. 28, § 86(D)(2) (2015).

205. *See* OKLA. STAT. tit. 28, § 86(D)(4) (2015). The Oklahoma law also allows the court to pay replacement wages of up to $50 per day for the fourth through tenth day of jury service when a juror serves more than ten days if it finds that jury service for a particular individual is a significant financial hardship. *See id.*

206. *See* MISS. CODE ANN. § 25-7-13 (2015); *see also* Hinds County, Mississippi, Circuit Clerk, http://www.hindscountyms.com/elected-offices/circuit-clerk (providing for $160 civil complaint filing fee).

207. The Mississippi LTF provides compensation to jurors serving on lengthy *civil* trials. It does not extend to jurors selected for criminal trials. Arizona and Oklahoma, while funding their systems through civil filing fees, makes LTF funds available to jurors on both civil and criminal cases. If Mississippi were to expand the LTF to criminal cases, then a higher filing fee, in the $20 range, might be needed.

208. *See* STEPHEN J. CARROLL ET AL., Asbestos Litigation xxiv (2005); Owens Corning v. Credit Suisse First Boston, 322 B.R. 719, 723 (D. Del. 2005) ("Labor unions, attorneys, and other persons with suspect motives [have] caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms."); Eagle-Picher Indus., Inc. v. Am. Employers' Ins. Co., 718 F. Supp. 1053, 1057 (D. Mass. 1989) ("[M]any of these cases result from mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed."); James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 823 (2002) ("By all accounts, the overwhelming majority of claims filed in recent years have been on behalf of plaintiffs who . . . are completely asymptomatic.").

209. *See* Roger Parloff, *Welcome to the New Asbestos Scandal*, FORTUNE, Sept. 6, 2004, at 186, http://archive.fortune.com/magazines/fortune/fortune_archive/2004/09/06/380311/index.htm ("According to estimates accepted by the most experienced federal judges in this area, two-thirds to 90% of the nonmalignants are 'unimpaireds'—that is, they have slight or no physical symptoms."); *see also* Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002 at A1, http://www.nytimes.com/2002/04/10/business/ a-surge-in-asbestos-suits-many-by-healthy-plaintiffs.html ("Very few new plaintiffs have serious injuries, even their lawyers acknowledge . . . . 'The overwhelming majority of these cases . . . are brought by people who have no impairment whatsoever.'").

sick.[210] Most of these filings were generated through lawyer-sponsored screenings that are notoriously unreliable.[211]

Mass filings by the non-sick pressured many primary historical defendants to seek bankruptcy court protection in the early 2000s. Plaintiffs' lawyers then "shifted their litigation strategy away from the traditional thermal insulation defendants and towards peripheral and new defendants associated with the manufacturing and distribution of alternative asbestos-containing products such as gaskets, pumps, automotive friction products, and residential construction products."[212] According to one Mississippi plaintiffs' lawyer, the asbestos litigation became an "endless search for a solvent bystander."[213]

Some plaintiffs' lawyers responded to the loss of viable asbestos defendants by diversifying their practices and filing silica exposure claims.[214] Silica—quartz in its most common form—is a ubiquitous mineral.[215] When fragmented into tiny particles, such as through abrasive blasting or in foundry operations, silica can be dangerous if inhaled in excess of certain levels for a prolonged period of time.[216] "The health risks of inhaling silica dust have been well known for a very long time."[217]

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210. Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 273 (2001).

211. *Owens Corning*, 322 B.R. at 723 (stating that many x-ray readers hired by plaintiffs' lawyers were "so biased that their readings were simply unreliable."). Researchers at Johns Hopkins University compared the X-ray interpretations of B-readers employed by plaintiffs' counsel with the subsequent interpretations of six independent B Readers who had no knowledge of the X-rays' origins. The study found that, while the B Readers hired by plaintiffs' counsel claimed asbestos-related lung abnormalities in almost 96% of the X-rays, the independent B Readers found abnormalities in less than 5% of the same X-rays—a difference the researchers said was "too great to be attributed to inter-observer variability." Joseph N. Gitlin et al., *Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 ACAD. RADIOLOGY 843, 843 (Aug. 2004).

212. Marc C. Scarcella et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010*, 27:1 MEALEY'S LITIG. REP.: ASBESTOS 1 (Oct. 10, 2012), http://www.bateswhite.com/media/publication/11_media.617.pdf; *see also* Charles E. Bates et al., *The Naming Game*, 24:1 MEALEY'S LITIG. REP.: ASBESTOS 4 (Sept. 2, 2009), http://www.bateswhite.com/media/pnc/9/ media.229.pdf ("As the bankrupt companies exited the tort environment, the number of defendants named in a complaint increased, on average, from fewer than 30 on average to more than 60 defendants per complaint."); S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 WIDENER L.J. 299, 306 (2013) ("Defendants who were once viewed as tertiary have increasingly become lead defendants in the tort system, and many of these defendants have also entered bankruptcy in recent years.").

213. Richard Scruggs & Victor Schwartz, *Medical Monitoring and Asbestos Litigation – A Discussion with Richard Scruggs and Victor Schwartz*, 1-7:21 MEALEY'S ASBESTOS BANKR. REP. 5 (Feb. 2002) (quoting Mr. Scruggs); *see also* Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander,"* 33 WIDENER L.J. 59, 61 (2013).

214. *See* Mark A. Behrens & Corey Schaecher, *RAND Institute for Civil Justice Report on the Abuse of Medical Diagnostic Practices in Mass Tort Litigation: Lessons Learned from the "Phantom" Silica Epidemic That May Deter Litigation Screening Abuse*, 73 ALB. L. REV. 521, 524 (2010).

215. *See* U.S. Dep't of the Interior & U.S. Bureau of Mines, *Crystalline Silica Primer* at 2 (1992), http://minerals.usgs.gov/minerals/pubs/commodity/silica/780292.pdf.

216. *Id.* at 1-2.

217. Humble Sand & Gravel, Inc. v. Gomez, 146 S.W.3d 170, 174 (Tex. 2004); Dresser Indus., Inc. v. Lee, 880 S.W.2d 750, 751 (Tex. 1993) ("Inhaling silica dust may cause respiratory disease, a risk that has been recognized for more than a century."); Urie v. Thompson, 337 U.S. 163, 180 (1949) ("It is a matter of common knowledge that it is injurious to the lungs and dangerous to health to work in silica dust, a fact which the defendant was bound to know.").

Like asbestos actions, many lawsuits alleging exposure to silica have involved persons with no demonstrable impairment.[218] Claimants have been identified through the use of interstate, for-profit, screening companies.[219] Silica screening processes have been found subject to substantial abuse and potential fraud.[220] Some plaintiffs' lawyers have filed claims against both asbestos and silica defendants, although leading medical experts agree that it is a medical rarity for someone to have both asbestos and silica-related impairments.[221]

Silica litigation abuse received national attention in 2005 when the manager of the federal silica multi-district litigation, U.S. District Judge Janis Graham Jack, recommended that all but one of 10,000 federal court silica claims should be dismissed because the plaintiffs' silicosis diagnoses were "fatally unreliable."[222] Judge Jack said, "these diagnoses were driven by neither health nor justice: they were manufactured for money" and were "more a creation of lawyers than of doctors."[223] Many of the cases originated in Mississippi.

Many state legislatures and courts have responded to these abuses by requiring plaintiffs to present credible and objective evidence of a present physical impairment in order to bring or maintain an asbestos or silica action.[224] These laws exist in Texas, Georgia, South Carolina, Tennessee (silica), Ohio, West Virginia, Oklahoma, and Kansas.[225] Mississippi should join them.

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218. *See* Lester Brickman, *Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screenings and Clinical Studies*, 29 CARDOZO L. REV. 513, 519-21 (2007).

219. *See* David Maron & Walker W. (Bill) Jones, *Taming an Elephant: A Closer Look at Mass Tort Screening and The Impact of Mississippi Tort Reforms*, 26 MISS. C.L. REV. 253 (2007).

220. *See In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563 (S.D. Tex. 2005); Stephen J. Carroll et al., *The Abuse of Medical Diagnostic Practices in Mass Litigation: The Case of Silica* 2, RAND INST. FOR CIVIL JUSTICE (2009), http://www.rand.org/pubs/technical_reports/2009/RAND_TR774.pdf.

221. *See* Mike Tolson, *Accusations of 'Double Dipping' Trying to Use the Same Client for 2 Different Claims - Surface / Silicosis Attorneys in Cross Hairs*, HOUSTON CHRON., Sept. 10, 2006 at B1, 2006 WLNR 15713259; David Hechler, *Silica Plaintiffs Suffer Setbacks: Broad Effects Seen in Fraud Allegations*, 27:25 NAT'L L.J., Feb. 28, 2005 at 18 ("One of the most explosive revelations that has emerged from the [federal court silica litigation] is that at least half of the approximately 10,000 plaintiffs . . . had previously filed asbestos claims . . . ."), http://www.nationallawjournal.com/id=900005424203/Silica-plaintiffs-suffer-setbacks?slreturn=20150204123513.

222. *See In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 675.

223. *Id.* at 635.

224. This approach finds support in an American Bar Association resolution calling for the enactment of federal asbestos medical criteria legislation to advance only those cases of individuals with demonstrated physical impairment. *See* Comm'n on Asbestos Litig., Am. Bar Ass'n, Report to the House of Delegates (2003), http://www.abanet.org/leadership/full_report.pdf.

225. *See* GA. CODE ANN. §§ 51-14-1 to 51-14-13 (2015); KAN. STAT. ANN. §§ 60-4901 to 60-4911 (2015); OHIO REV. CODE ANN. §§ 2307.91-.96 (2015); OKLA. STAT. tit. 76, § 90 (2015); S.C. CODE ANN. §§ 44-135-30 to 44-135-110 (2015); TENN. CODE ANN. §§ 29-34-301 to -309 (2015); TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.001-.012 (2015); W. VA. CODE §§ 55-7G-1 to 55-7G-10 (2015). Similar procedures exist by court rule in Chicago, New York City, Baltimore City, and Boston, among other jurisdictions. *See* David C. Landin et al., *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Public Policy in Asbestos Litigation*, 16 BROOK. J.L. & POL'Y 589, 614 (2008) (listing courts with inactive asbestos dockets).

2. Transparency in Asbestos Litigation

Approximately 100 companies have been forced into bankruptcy at least in part due to asbestos-related liabilities.[226] Today, many of the companies that filed for bankruptcy protection due, in part, to asbestos litigation "have emerged from the 524(g) bankruptcy process leaving in their place dozens of trusts funded with tens of billions in assets to pay claims."[227] Over sixty trusts have been established to collectively form a *$36.8 billion* privately-funded asbestos personal injury compensation system that operates parallel to, but wholly independent of, the civil tort system.[228] Consequently, compensation for asbestos-related injuries has morphed into a two-tiered system of asbestos bankruptcy trust claims and civil tort actions.[229]

The lack of transparency between the bankruptcy trust and tort systems has led to abuses.[230] A widely-reported example occurred in *Kananian v. Lorillard Tobacco Co.*,[231] where Cleveland Judge Harry Hanna barred a prominent California asbestos plaintiffs' firm from his court after he found that the firm and one of its partners failed to abide by the rules of the court proscribing dishonesty, fraud, deceit, and misrepresentation.[232] An Ohio Court of Appeals and the Ohio Supreme Court let

226. *See* Lloyd Dixon et al., ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS 25 (Rand Corp. 2010); *see also* Lloyd Dixon & Geoffrey McGovern, ASBESTOS BANKRUPTCY TRUSTS AND TORT COMPENSATION xi (Rand Corp. 2011).

227. Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12:11 MEALEY'S ASBESTOS BANKR. REP. 33, 33-34 (June 2013), http://www.bateswhite.com/media/publication/7_media.745.pdf.

228. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-819, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 3 (Sept. 2011), http://www.gao.gov/assets/590/585380.pdf.

229. In a recent bankruptcy proceeding involving gasket and packing manufacturer Garlock Sealing Technologies, LLC, a typical mesothelioma plaintiff's total recovery was estimated to be $1-1.5 million, "including an average of $560,000 in tort recoveries and about $600,000 from 22 trusts." *In re* Garlock Sealing Tech., LLC, 504 B.R. 71, 96 (W.D.N.C. Bankr. 2014). Most recently, an unsealed database from the Garlock bankruptcy estimation trial showed that awards to asbestos claimants represented by a dominant plaintiffs' law firm in one of the most active asbestos "magnet" jurisdictions in the U.S. (Madison County, Illinois) have received on average more than $800,000 apiece, with a substantial portion of those funds (approximately 41%) from bankruptcy trusts. *See* Heather Isringhausen Gvillo, *Database Provides Insight Into How Much Asbestos Claims Are Worth*, MADISON-ST. CLAIR RECORD, May 14, 2015, http://madisonrecord.com/issues/302-asbestos/270770-database-provides-insight-into-how-much-asbestos-claims-are-worth (38 plaintiffs in Madison County, Illinois, had lawsuits with a total value of $21.7 million and also received $8,859,879 from various bankruptcy trusts). The recently unsealed database also showed that a sample of 850 asbestos claimants from across the country—"representing just a sliver of the asbestos claimant universe—have so far been awarded $334,711,143 in the court system and $182,259,276 from the bankruptcy trust system, for a total of $516,970,419." *Id.*

230. *See* Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 TUL. L. REV. 1071 (2014); Peggy L. Ableman, *The Garlock Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases*, 37 AM. J. TRIAL ADV. 479 (2014); Daniel Fisher, *Double-Dippers*, FORBES, Sept. 6, 2006, at 136, 2006 WLNR 14482372.

231. No. CV-442750 (Ohio Ct. Com. Pl. Cuyahoga County Jan. 17, 2007).

232. *See* Thomas J. Sheeran, *Ohio Judge Bans Calif. Lawyer in Asbestos Lawsuit*, CIN. POST, Feb. 20, 2007, at A3 ("A low-key judge fed up with disrespectful behavior and alleged lies by an attorney created a stir with a courtroom ban on the lawyer from a nationally known San Francisco-area law firm that handles asbestos-related lawsuits coast-to-coast."), 2007 WLNR 3480283.

Judge Hanna's ruling stand.[233] In *Kananian*, Lorillard was sued over an asbestos-containing filter in a brand of cigarettes sold for a short time many decades ago. When Judge Hanna allowed Lorillard's lawyers to obtain copies of asbestos bankruptcy trust claims filed by the plaintiff they discovered inconsistencies between allegations made by the plaintiff in the court case and in his trust claims.[234] The *Cleveland Plain Dealer* reported that Judge Hanna's decision to order the plaintiff to produce his trust claim forms "effectively opened a Pandora's box of deceit."[235] Judge Hanna later said, "I never expected to see lawyers lie like this . . . . It was lies upon lies upon lies."[236]

Most recently, in a January 2014 ruling involving gasket and packing manufacturer Garlock Sealing Technologies, LLC, a federal bankruptcy judge found that the company became a target defendant for asbestos plaintiffs' lawyers after many of the primary historical asbestos insulation defendants exited the tort system through bankruptcy.[237] Judge George Hodges found that Garlock's participation in the tort system then became "infected by the manipulation of exposure evidence by plaintiffs and their lawyers."[238] Evidence that Garlock needed to attribute plaintiffs' injuries to the insulation companies' products "disappeared."[239] Judge Hodges said this "occurrence was a result of the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants)."[240] The court found that "[t]he withholding of exposure evidence by plaintiffs and their lawyers was significant and had the effect of unfairly inflating the recoveries against Garlock."[241]

The *Garlock* case has "laid bare the massive fraud that is routinely practiced in mesothelioma litigation," says Cardozo Law School Professor Lester Brickman.[242] Together with other documented instances of

233. *See* Kananian v. Lorillard Tobacco Co., No. 89448 (Ohio Ct. App. Feb. 21, 2007) (dismissing appeal as moot sua sponte), *review denied*, 878 N.E.2d 34 (Ohio 2007).

234. Editorial, *Cuyahoga Comeuppance*, WALL ST. J., Jan. 22, 2007 at A14, http://www.wsj.com/articles/ SB116942159908683141; Kimberley A. Strassel, Opinion, *Trusts Busted*, WALL ST. J., Dec. 5, 2006 at A18, http://www.wsj.com/articles/SB116527814374340591.

235. James F. McCarty, *Judge Becomes National Legal Star, Bars Firm from Court Over Deceit*, CLEVELAND PLAIN DEALER, Jan. 25, 2007 at B1, 2007 WLNR 1527886.

236. *Id.*

237. *In re* Garlock Sealing Tech., LLC, 504 B.R. 71 (W.D.N.C. Bankr. 2014).

238. *Id.* at 82.

239. *Id.* at 84.

240. *Id.*

241. *Id.* at 86-87.

242. Sara Warner, *Court Order Disrupts Asbestos World, but What of the 'Perjury Pawns'?*, HUFFINGTON POST, Feb. 28, 2014, 2014 WLNR 5632432 (quoting Prof. Brickman); *see also Bankruptcy Judge: Plaintiffs, Lawyers Covered Up Evidence in Garlock Mesothelioma Cases*, LITIG. RESOURCE CTR., Jan. 13, 2014, 2014 WLNR 1048954; Mark D. Plevin, *The* Garlock *Estimation Decision: Why Allowing Debtors and Defendants Broad Access to Claimant Materials Could Help Promote the Integrity of the Civil Justice System*, 23 No. 4 J. BANKR. L. & PRAC. NL ART. 2 (Aug. 2014); Peggy L. Ableman, *A Case Study From a Judicial Perspective: How Fairness and Integrity in Asbestos Tort Litigation Can Be Undermined by Lack of Access to Bankruptcy Trust Claims*, 88 TUL. L. REV. 1185 (2014).

evidentiary abuses in asbestos cases,[243] it is becoming increasingly clear that the problems described by Judge Hodges are not rare outliers.

Legislatures are responding to these problems by providing defendants with greater access to plaintiffs' asbestos bankruptcy trust claim submissions. Asbestos bankruptcy trust claim transparency laws now exist in Texas, Arizona, Ohio, Oklahoma, West Virginia, and Wisconsin.[244] Mississippi should join these states and enact legislation to require or provide a mechanism to require plaintiffs to file and disclose all asbestos bankruptcy trust claims before trial. Plaintiffs would not face new burdens under such legislation; the reform would simply change the timing of asbestos bankruptcy trust claim filings to prevent gamesmanship and promote honesty in litigation.

C. *Eliminate Phantom Damages*

Just as Mississippi acted to curb separate awards for "hedonic" damages that duplicated pain and suffering awards in 2004, the Legislature should address excessive damages in the form of recovery of medical expenses that neither the plaintiff nor that person's insurer ever paid. The Mississippi Supreme Court has allowed plaintiffs to introduce evidence of the full amount of billed medical expenses and recover that amount even if the healthcare provider accepted a significantly discounted rate as full payment and wrote off the remainder of the bill.[245] The difference between the full price listed and the amount actually paid or the reasonable value of the service have become known as "phantom damages."[246]

The issue of phantom damages is rising in importance as the practice of hospitals and other healthcare providers of writing off or discounting rates becomes more commonplace and the gap between amounts charged and paid continues to grow. The gap between a healthcare provider's list price and the amount actually paid by a patient or that person's insurer is often dramatically different. It is common for list prices to be three, four, or even six times higher than the amount actually paid through Medicare,

243. *See* William P. Shelley et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update – Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 WIDENER L.J. 675 (2014).

244. *See* TEX. H.B. 1492 (2015) (to be codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.051-.058 (2015)); ARIZ. REV. STAT. § 12-782 (2015); OHIO REV. CODE §§ 2307.951 to 2307.954 (2015); OKLA. STAT. tit. 76, §§ 81 to 89 (2015); W. VA. CODE §§ 55-7F-1 to 55-7F-11 (2015); WIS. STAT. § 802.025 (2015).

245. *See* Wal-Mart Stores, Inc. v. Frierson, 818 So. 2d 1135, 1139-40 (Miss. 2002); Brandon HMA, Inc. v. Bradshaw, 809 So. 2d 611, 619-20 (Miss. 2001).

246. About one-third of the states permit plaintiffs to recover phantom damages, while about the same number limit or bar such recoveries. The law is inconsistent or uncertain in the remainder. *See* Cary Silverman, *Reducing Wasteful Spending on Litigation: ALEC's Model Phantom Damages Elimination Act*, INSIDE ALEC (Am. Legislative Exch. Council), Jan. 2012 at 15, http://www.alec.org/docs/Jan2012_InsideALEC. Most recently, the high courts of West Virginia and Wisconsin allowed recovery of phantom damages. *See* Kenney v. Liston, 760 S.E.2d 434 (W. Va. 2014); Orlowski v. State Farm Mut. Auto. Ins. Co., 810 N.W.2d 775, 781 (Wis. 2012).

Medicaid, or a private insurer.[247] Healthcare providers often discount or write off charges when a patient is uninsured.[248] In addition, the list price for a treatment often varies among healthcare providers—"even on the same street, hospitals can vary by upwards of 300 percent in price for the same service."[249] In sum, listed rates for medical treatments are more a matter of internal billing practices unique to the healthcare system than a reflection of the reasonable value of medical services. Tort damages, however, are built on this foundation.

Whether a plaintiff in a personal injury lawsuit can recover the "billed amount" or the "amount actually paid" for medical expenses can significantly impact the size of the person's recovery. . For example, in *Wal-Mart Stores, Inc. v. Frierson*, a person who slipped-and-fell when entering a store on a rainy day was allowed to present evidence of $16,574.07 in medical bills even when the hospital accepted $5,327.60 from Medicare and Medicaid as full payment for the services.[250] The jury, allowed to only consider the billed rate, awarded the plaintiff $100,000, including pain and suffering, plus an additional $25,000 in loss of consortium damages to the plaintiff's wife.[251]

In cases involving more substantial injuries, the difference between the amount billed and amount paid can reach into the hundreds of thousands of dollars. In *Brandon HMA, Inc. v. Bradshaw*, a case against a hospital for brain damage from alleged inadequate treatment, the court allowed the plaintiff to introduce $326,258.28 in medical bills when Medicaid paid $78,204.95 as payment in full for her medical treatment.[252] The jury returned a $9 million verdict.

In both cases, the Mississippi Supreme Court found the introduction of the billed rate permissible and the amount of damages not excessive.[253] Considered in the aggregate, allowing use of a billed rate that does not

247. *See, e.g.*, Press Release, *National Nurses United and Institute for Health and Socio-Economic Policy, New Data – Some Hospitals Set Charges at 10 Times their Costs*, Jan. 6, 2014, http://www.nationalnursesunited.org/ press/entry/new-data-some-hospitals-set-charges-at-10-times-their-costs/ and chart of average cost-to-charge ratio by state http://nurses.3cdn.net/966a1174efbe3f9ad1_39m6bntzv.pdf.

248. *See* Glenn A. Melnick & Katya Fonkych, *Hospital Pricing and the Uninsured: Do the Uninsured Pay Higher Prices?*, 27 HEALTH AFFAIRS 116, 118 (2008); see also Steven Brill, *Bitter Pill: Why Medical Bills Are Killing Us*, TIME, Feb. 20, 2013, http://www.uta.edu/faculty/story/2311/Misc/2013,2,26 ,MedicalCostsDemandAnd Greed.pdf.

249. Wilson Andrews et al., *Disparity in Medical Billing*, WASH. POST, May 8, 2013, http://www .washingtonpost.com/wp-srv/special/national/actual-cost-of-medical-care/; *see also* Sarah Kliff & Dan Keating, *One Hospital Charges $8,000 — Another, $38,000*, WASH. POST, May 8, 2013, http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/08/one-hospital-charges-8000-another-38000/.

250. *See* Brief of Appellant at *2, Wal-Mart Stores, Inc. v. Frierson, 818 So. 2d 1135 (Miss. 2002) (No. 00-CA-364), 2001 WL 34643421 at *2.

251. *Frierson*, 818 So. 2d at 1137.

252. *See, e.g.*, Brief of Appellant at *38, Brandon HMA, Inc. v. Bradshaw, 809 So. 2d 611 (Miss. 2001) (No. 00-CA-00735), 2000 WL 3449859 at *38.

253. *Frierson*, 818 So. 2d at 1145; *Bradshaw*, 809 So. 2d at 622. The Mississippi Supreme Court subsequently recognized an exception to its rule allowing awards of phantom damages. In Gee v. River Region Medical Center, 59 So. 3d 575 (Miss. 2011), the Court ruled in a medical malpractice case that a plaintiff cannot recover from a hospital amounts that the hospital had written off because the write off was not wholly independent of the tortfeasor. Nevertheless, the Court found that that the billed amounts are admissible. *See id.* at 581-82.

reflect the actual amount paid for the treatment means that defendants in Mississippi courts are likely paying millions of dollars in personal injury judgments and settlements each year that serve no compensatory purpose.[254]

A growing number of courts and legislatures are rejecting phantom damages.[255] For example, Oklahoma and North Carolina enacted legislation in 2011 to provide that the amounts actually paid for medical expenses are admissible at trial, not the amounts billed for treatment.[256] These states followed Texas, which enacted a similar law in 2003.[257] Mississippi should join them.

D. Other Reforms for Mississippi

There are other ways that the Mississippi Legislature can build on prior reforms to address obsolete rules. For example, Mississippi's pure comparative fault rule, which allows plaintiffs to recover damages even when they are substantially at fault for their own injuries, is an outlier among the states.[258] This rule rewards risky behavior and may encourage frivolous litigation by people who are largely responsible for their own injuries. Pure comparative fault can also open the door to punitive damages claims, complicating settlement negotiations.[259] Mississippi should adopt a modified comparative fault system. Modified comparative fault facilitates settlements because plaintiffs' lawyers realize that there is at least some

254. California insurers estimated that requiring compensation based on the amount billed, rather than the amount paid based on negotiated rates and discounts, would have cost them $3 billion annually. *See* Dan Walters, *California Supreme Court Plays Role in Tort War*, SACRAMENTO BEE, Aug. 15, 2011, http://www.modbee.com/ 2011/08/15/1816272/dan-walters-california-supreme.html.

255. *See, e.g.*, Howell v. Hamilton Meats & Provisions, Inc., 257 P.3d 1130, 1144 (Cal. 2011).

256. *See* H.B. 2023, 51st Leg., Reg. Sess. (Okla. 2011) (codified at OKLA. STAT. tit 12, § 3009.1 (2015)); H.B. 542, Reg. Sess. (N.C. 2011) (codified at N.C. GEN. STAT. ch. 8C, Rule 414 (2015)).

257. *See* TEX. CIV. PRAC. & REM. CODE § 41.0105 (2015); *see also* MO. REV. STAT. § 490.715.5 (2015) (enacted 2005) (creating a rebuttable presumption that the amount actually paid represents the reasonable value of medical expenses received); MD. CODE ANN., CTS & JUD. PROC. § 3-2A-09(d) (2015) (enacted 2005) ("A verdict for past medical expenses shall be limited to: (i) The total amount of past medical expenses paid by or on behalf of the plaintiff; and (ii) The total amount of past medical expenses incurred but not paid by or on behalf of the plaintiff for which the plaintiff or another person on behalf of the plaintiff is obligated to pay."). The Texas Supreme Court resolved a split among its appellate courts in 2011 by interpreting its statute to find that evidence of billed amounts of medical expenses that cannot actually be recovered by the plaintiff are irrelevant and therefore admissible evidence is limited to amounts actually paid or are payable by or on behalf of the plaintiff after any contractually or statutorily required reductions, write-offs or write-downs. Haygood v. De Escabedo, 356 S.W.3d 390 (Tex. 2011).

258. *See* MISS. CODE ANN. § 11-7-15 (2015). Most states have adopted "modified" comparative fault, which reduces a personal injury plaintiff's damages by that person's percentage of fault, and does not permit the person to recover if he or she is 50% or 51% at fault for the harm. *See* VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE (5th ed. 2010). The few states that apply pure comparative fault, such as California and Florida, are known for having excessive litigation.

259. In most states, punitive damages are not subject to comparative fault. A person who is largely responsible for his or her own injury can sue an unpopular corporate defendant with the hope of receiving a windfall award. *See* Victor E. Schwartz & Christopher E. Appel, *Two Wrongs Do Not Make a Right: Reconsidering the Application of Comparative Fault to Punitive Damage Awards*, 78 MO. L. REV. 133 (2013).

risk that if a plaintiff is found mostly at fault for his or her own harm that plaintiff may recover nothing.

In addition, Mississippi presently bars automobile accident defendants from informing the jury that the occupants of the plaintiff's vehicle were not wearing seatbelts.[260] This year, a unanimous Texas Supreme Court abandoned this practice, calling it "a vestige of a bygone legal system and an oddity in light of modern societal norms" in which seatbelt use is mandated by law and has become "an unquestioned part of daily life for the vast majority of drivers and passengers."[261] Mississippi should do the same.

Furthermore, the Legislature could constrain punitive damages in a manner more closely aligned with other states. Such a limit could require proportionality between the harm caused by the defendant and the punishment imposed.

The Legislature might also consider ways to further address the Mississippi Attorney General's practice of hiring private contingent fee attorneys to bring lawsuits on behalf of the state. The *New York Times* has reported that "[i]n no place has the contingency fee practice flourished more than in Mississippi, where lawyers hired by Attorney General Jim Hood have collected $57.5 million in fees during the last two years—three times as much as Mr. Hood has spent on running his state office during the same period."[262]

IV. CONCLUSION

Before civil justice reform in Mississippi, the state's perception as an unfair legal jurisdiction hurt its competitiveness. Businesses and consumers were harmed by the state's reputation for jackpot justice. Legislative and judicial reforms made Mississippi's legal climate more fair and predictable. The state's legal, business, and healthcare climate have improved.[263]

Mississippi should continue to build on its strong foundation for legal reform, ensuring that the state continues to be viewed as "open for business." For example, the jury service system needs further improvements.

260. MISS. CODE ANN. § 63-2-3 (2015) (prohibiting introduction of seatbelt evidence for the jury's consideration in evaluating comparative fault or deciding whether the plaintiff mitigated damages). Mississippi courts have allowed introduction of such evidence in highly limited circumstances where not deemed prejudicial to the plaintiff. *See, e.g.,* Palmer v. Volkswagen of Am., Inc., 904 So. 2d 1077 (Miss. 2005) (admissible to show plaintiff did not follow warnings); Herring v. Poirrier, 797 So. 2d 797 (Miss. 2000) (use of seat belts admissible on the issue of injuries and their severity).

261. Nabors Well Servs., Ltd. v. Romaro, No. 13-0136 (Tex. Feb. 13, 2015). The Texas Legislature repealed a statutory rule prohibiting introduction of seatbelt evidence in 2003, effectively restoring the common law prohibition and allowing the state's high court to change the law. *See id.* In Mississippi, the Legislature must amend MISS. CODE ANN. § 63-2-3 (2015) to permit juries to consider the use of seatbelts in allocating comparative fault for an injury.

262. Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. TIMES, Dec. 18, 2014, http://www.nytimes.com/2014/12/19/us/politics/lawyers-create-big-paydays-by-coaxing-attorneys-general-to-sue-.html.

263. Reflecting on the state's progress in 2011, Governor Barbour viewed tort reform as "a major factor in economic growth and job creation" in Mississippi. Hon. Haley Barbour, 2011 State of the State Address (Jan. 11, 2011).

Asbestos and silica lawsuits have been plagued by abuses that need to be addressed. The increasing divergence between rates billed and amounts paid for medical treatment has exacerbated the "phantom damage" problem. Other reforms are needed to address issues such as pure comparative fault and the prohibition against admission of "seatbelt evidence" at trial. It is also vital that the Mississippi Supreme Court uphold the constitutionality of the state's limits on noneconomic damages.