Defrocking Tort Deform:
Stopping Personal Injury Lawyers From Repealing Existing Tort Reforms And Expanding Rights To Sue In State Legislatures
# TABLE OF CONTENTS

I. **INTRODUCTION** 2

II. **ROLLING BACK THE CLOCK:** 3
    EFFORTS TO “CHIP AWAY” AT OR OUTRIGHT REPEAL TORT REFORM

III. **MORE LAWSUITS** 4
    A. Explicitly Authorizing New Types Of Lawsuits
    B. Setting The Stage For Implied Causes Of Action
    C. Deputizing Private Lawyers To Sue On Behalf Of The State
    D. Hiring Of Private Lawyers By The State

IV. **MORE MONEY** 6
    A. Inflating Limitations On Damage Awards
    B. Broadening The Scope Of Consumer Laws Or Available Damages
    C. Expanding Recovery In Wrongful Death Actions
    D. Allowing Recovery For Emotional Harm In Cases Of Injuries To Animals

V. **MORE TIME TO SUE** 11
    A. Extending Statutes of Limitations
    B. Repealing or Extending Statutes of Repose
    C. Why Proposals to Extend or Eliminate Statutes of Limitations and Repose are Unsound Policy

VI. **OTHER PROPOSALS TARGETED AT CIVIL DEFENDANTS** 13

VII. **CONCLUSION** 15

VIII. **ENDNOTES** 16

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I. INTRODUCTION

In recent years, the organized personal injury bar (the newly named American Association for Justice, formerly the Association of Trial Lawyers of America, and its state sister groups) have initiated a campaign in state legislatures to increase their business. These efforts fall into two general categories. First, bills that scale back or outright repeal common-sense reforms that reeled in an out-of-control civil justice system. Second, bills that create new types of lawsuits or increase the potential for high awards.

The legislative push for expanded liability represents a more activist strategy in state legislatures. For more than 30 years, the principal manner in which personal injury lawyers attacked legislative civil justice or tort reform was through the courts. This process came to be known as “judicial nullification of tort reform.” Although some state supreme courts, including California and Michigan, have followed traditional separation of powers principles and sustained the legislature’s constitutional authority to enter and shape the civil justice arena, the personal injury bar has been successful in its judicial attacks on tort reform.

Now, the personal injury bar has opened up this second front to attack existing civil justice reforms through the legislature. The plaintiffs’ lawyers and their allies have increased lobbying efforts, which have shown particular viability where personal injury lawyer groups have contributed substantially to the election of representatives on key legislative committees and to state legislatures as a whole. Often, these efforts toward change are not overtly led by recognized personal injury groups, but by so-called “consumer groups” who help fulfill the trial-lawyer agenda. At other times, organizations like the People for the Ethical Treatment of Animals (PETA) have their own political agenda that happens to parallel the agenda of personal injury lawyers, as is the case with proposals to expand the scope of damages available for injury to an animal.

If existing rules of tort law are unfair to citizens of the state, then it may be appropriate to legislatively expand liability rules. For example, until the late-nineteenth century, actions for wrongful death were not permitted under the common law of many states. As unfair as it may sound, one was able to obtain a recovery under the common law of torts if a person was injured, but would recover nothing if the person was killed. This was obviously unfair and, after some struggle, legislatures in almost every state enacted wrongful death and survival statutes to make the situation a fair one. Likewise, nearly every state has abandoned the absolute defense of contributory negligence, which barred a plaintiff from recovery if he or she had any degree of responsibility for the injury, in favor of a system that simply reduces a plaintiff’s recoverable damages by his or her percentage of fault.

Recent personal injury lawyers’ efforts, however, are less directed at “fairness” than at expanding their ability to bring lawsuits and the profitability of claims. These efforts fall into two principal categories. The first is modification of existing civil justice reforms. The second is to open up avenues for new extensions of liability.

This paper closely examines legislation supported by the personal injury bar over the past year. Each effort to expand liability is addressed separately, with an explanation of the general issue involved, highlights of legislative attempts in the states, and a discussion of why state legislators should reject such proposals if reintroduced in the future.
II. ROLLING BACK THE CLOCK:
EFFORTS TO “CHIP AWAY” AT OR REPEAL TORT REFORM

Over the past 20 years, state legislatures have taken action to address areas of the civil justice system where the unjust assignment of liability has had a harmful effect on small businesses, the availability of health care, the economy, consumers, and basic principles of fairness.

States have enacted joint and several liability reforms to ensure that defendants are responsible for their fair share of damages, not more, not less. They have placed limits on the bond needed to stay execution of a judgment during appeal so that a defendant does not lose his or her ability to obtain judicial review of an extraordinary award. State legislatures have also placed limits on punitive damage awards that had, in the words of Supreme Court Justice Sandra Day O’Connor, “run wild,” and on the immeasurable pain and suffering damages in medical liability cases that had caused a crisis in the health care system.

In the past, plaintiffs’ lawyers concentrated their efforts on stopping such commonsense reforms in the courts. They took advantage of lengthy state constitutions that are filled with vague clauses, such as so-called “open courts” provisions, that have no comparable equivalent under the U.S. Constitution. Indeed, a number of state courts chose to “nullify,” or strike down on state constitutional grounds, the reasonable exercise of legislative public policymaking in the area of civil justice reform. These courts, often by slim majority decision, substitute their own views of public policy for those of legislatures.

While the personal injury bar continues to seek judicial nullification in the courts, it is now engaged in a frontal assault on the tort reform gains of the past two decades. They are seeking to repeal or significantly roll back such laws through their allies in state legislatures. Here are a few examples from the 2007 legislative session:

**Colorado (S.B. 129):** Increased the limit on non-economic damages in general liability cases by indexing for inflation dating back to 1998. The adjustment raises the limit from about $366,000 to nearly $500,000. Signed into law in April 2007.

**Florida (H.B. 733 / S.B. 1558):** Proposed limiting apportionment of damages among only parties named in the lawsuit, effectively repealing joint and several liability reform legislation.

**Illinois (S.B. 1296):** Proposed barring a jury from considering the responsibility of parties who settled out of the lawsuit prior to trial when allocating fault. This would effectively modify joint and several liability to force parties remaining in complex, multi-defendant litigation to potentially pay an entire judgment, even if they are only found to be responsible for a small part of the accident.

**Maryland (H.B. 495):** Proposed weakening medical liability reforms enacted by the General Assembly, including repeal of a requirement that each party’s expert in a medical injury claim file a report with the court.

**Michigan (H.B. 4044):** Proposed repeal of a statutory defense providing that manufacturers and sellers of prescription drugs are not liable when their product was approved for safety and efficacy by the U.S. Food and Drug Administration, absent a finding of fraud or bribery during the application process or the selling of the product after a recall.

**New Hampshire (H.B. 143):** Proposed limiting apportionment of fault to parties involved
in the lawsuit, which would adversely affect joint and several liability reform enacted over a decade ago. Governor John Lynch vetoed the legislation, finding that it would “prohibit the jury from apportioning fault to certain individuals or entities who carry significant degrees of fault for the plaintiff’s injuries, but who either settled claims prior to conclusion of the lawsuit, or who are not parties to a particular lawsuit for other reasons.”

Texas (H.B. 3281): Proposed requiring defendants to pay all of plaintiffs’ economic damages in medical liability cases regardless of whether claimants actually incurred that out-of-pocket medical expense, resulting in a windfall to plaintiffs. The legislation would have reversed medical liability reforms enacted in 2003 and, because the current punitive damages limit is based on the amount of economic damages awarded, also would have effectively raised the limit on punitive damages. Governor Rick Perry vetoed the bill, finding that “[t]he purpose of damages in a civil lawsuit is to make an injured individual whole by reimbursing the actual amount they have been deprived by the defendant’s actions. It should not be used to artificially inflate the recovery amount by claiming economic damages that were never paid and never required to be paid.”

III. MORE LAWSUITS

The personal injury bar is not just seeking to reverse the progress made in recent years, but in true entrepreneurial spirit, they also are attempting to create new ways to sue. This is understandable, as more lawsuits mean more profits for plaintiffs’ lawyers. Sometimes these efforts are blatant, such as broadening the scope of what are already expansive consumer laws to allow new claims against new defendants. In other cases, the effect is more subtle, such as including language in legislation that sets the stage for courts to recognize new rights to sue where not explicitly authorized by the statute. In addition, the plaintiffs’ bar has sought to empower itself to bring lawsuits as “private attorneys general,” giving it the right to sue on behalf of the state or its citizens. In some instances, legislation would increase the power of the state attorneys general, allowing them to hire friends or political donors to represent that state and keep a part of the public’s award through a contingency fee.

A. Explicitly Authorizing New Types of Lawsuits

In 2007, state legislatures considered many proposals that would create new types of lawsuits. Here are a few examples:

Alabama (H.B. 865): Proposed allowing any claim, filed or unfiled, tort or contract, to continue after the death of the plaintiff. Such a proposal would allow a personal representative of a person who chose not to sue for fraud during his or her lifetime to file a lawsuit on behalf of that person after his or her death.

Iowa (S.F. 520, formerly S.S.B. 1081): Proposed creating a new private right of action for enforcement of the state’s consumer protection act without adequate safeguards on the type of actions which could be brought.

California (S.B. 388): Proposed authorizing lawsuits for any violation of privacy (revelation of personally identifiable information like name, address, phone number, ethnicity, account number) as a result of RFID (radio frequency identification) technology. A successful lawsuit would result in an award of actual damages plus $1,000 for the violation.

Maryland (S.B. 660 / H.B. 746): Proposed requiring manufacturers of lead-based paint to reimburse specified persons for damages
caused by lead-based paint and providing that specified manufacturers of lead-based paint may be held liable under any legally recognized theory of liability. This includes a market share theory of liability, which permits damages even when the plaintiff cannot identify which company is responsible for his or her injury.

**Washington (S.B. 5046):** Proposed authorizing any homeowner to sue a builder, general contractor, subcontractor, material supplier, individual product manufacturer, or design professional to recover damages arising out of, or related to deficiencies in, the construction, design, specifications, surveying, planning, supervision, or testing of the homeowner’s residence.

**B. Setting the Stage for Implied Causes of Action**

One of the more subtle attempts by the personal injury bar to expand liability occurs with implied rights of action. These are private causes of action that are not expressly stated in the law, yet can be interpreted by a court to exist given the nature and intent of a particular piece of legislation. When adopted by a court, a new avenue of relief is created. This may not necessarily follow the legislature’s design and could lead to an entirely new and unanticipated field of litigation.

Given the potential payoff, the personal injury bar has an incentive to place carefully crafted language in regulatory legislation to “set the stage” for subsequent attempts to bring a cause of action. In other words, language is inserted for the purpose of encouraging courts to interpret the statute in a way that creates a new private right of action under that statute. Often these attempts will occur in seemingly innocuous legislation, like a regulatory proposal, where the legislature’s apparent focus is elsewhere. For example, in enacting disclosure requirements about food or mandatory requirements for the strength of a roof, a legislature’s attention is on the particular safety or disclosure at issue, the law’s enforcement, and the appropriate penalties for violations; it is not on whether to vest personal injury lawyers with new ways to sue.

A court’s finding of an implied right of action can result in patent unfairness to litigants. Where unanticipated, an implied right of action amounts to a change in substantive law without opportunity for comment or debate, or adequate legislative process. Indeed, many of the legislators voting in favor of the bill may not be aware of its potential interpretation by a court. Defendants can similarly be surprised and forced to defend actions where there was no prior indication of liability exposure. Hence, implied rights of action can be said to reduce predictability and stability in the civil justice system.

There is, however, a relatively simple precautionary measure to deny implied rights of action. Language that states plainly, “No private cause of action is created by this legislation” will prevent a court from holding otherwise. Separate model reform legislation developed by the American Legislative Exchange Council provides that courts may not recognize new private causes of action unless the legislature expressly authorizes such suits. This effectively ensures that new ways to sue are created only with clear legislative intent, transparency, and close deliberation and debate.

**C. Deputizing Private Lawyers to Sue on Behalf of the State**

In 2007, spurred by financial incentives in the federal Deficit Reduction Act of 2005, many states considered adopting false claims/qui tam laws targeting Medicaid fraud. These laws generally authorize private civil actions alleging that a person knowingly presented a false claim and deceived the state for the purpose of getting a false claim paid.
Typically, the plaintiff receives a significant percentage of any amount recovered for the state treasury. For example, *qui tam* laws are a favorite tool for plaintiffs’ lawyers to sue pharmaceutical manufacturers for allegedly committing fraud against federal and state health care programs through their marketing practices. These laws turn private individuals into bounty hunters for the state, often with a multimillion-dollar return:

**New Mexico (H.B. 770):** Governor Bill Richardson (D) signed a *qui tam* bill into law on March 15, 2007.

**Oklahoma (S.B. 889):** A *qui tam* proposal became law, but only after it was amended to curtail its negative impacts.

**New Jersey (A. 3428 / S. 360):** Governor Jon Corzine signed a *qui tam* bill into law on January 15, 2008.

Several states considered, but did not pass, *qui tam* legislation: Arkansas (H.B. 2600); Colorado (H.B. 1144); Connecticut (S.B. 1428); Maine (L.D. 1187); Minnesota (S.F. 540 / H.F. 483); North Dakota (S.B. 2126); Rhode Island (H.B. 5582); South Carolina (S.B. 82); and Texas (S.B. 1309).

State legislatures also have considered other proposals that would place government enforcement in the hands of profit-driven private lawyers. For example, in California, A.B. 1554, a proposal for regulating rates of managed health care plans, included a provision that would have authorized private enforcement of these regulations by any person on behalf of himself or on behalf of the general public, and it would have required an award of attorneys’ fees to the prevailing plaintiff.

**D. Hiring of Private Lawyers by the State**

With increasing frequency, state government officials are turning to outside private lawyers to pursue litigation on behalf of the state. Past experience has shown that such arrangements are too often the result of agreements made behind closed doors between public officials and private contingency fee lawyers. Attorneys may be hired by state officials primarily based on their personal and political connections and not their experience. Moreover, the use of private lawyers by the government, particularly on a contingency fee basis, raises the potential for government work to be motivated by profit, not the public interest. For this reason, it is particularly important to watch legislation that would explicitly authorize or could be used by attorneys general to hire private contingency fee lawyers.

For example, Louisiana, H.B. 360, as originally introduced, would have allowed institutions of higher education to negotiate and enter into contracts for the use of credit cards. After an amendment in the Senate, however, the bill would have authorized the state attorney general to contract with private lawyers to file suit against prescription drug manufacturers. Ultimately, the problematic language was stripped out in conference committee prior to Governor Kathleen Blanco signing the bill into law on July 11, 2007.

**IV. MORE MONEY**

While lawyers can create new business by creating new rights to sue, they can also expand their existing business by increasing the profit margin on claims already available.

**A. Inflating Limitations on Damage Awards**

One staple of the plaintiffs’ bar agenda is to lift limits on damages wherever they exist. The reason for this objective is obvious — any increase in damage limits directly serves the personal injury lawyers’ bottom line by
inflating jury verdicts and providing greater leverage in settlement negotiations.

Legislation increasing the potential size of awards can come in a variety of contexts. In states that place caps on damages, the proposed legislation routinely seeks to arbitrarily increase those statutory amounts. In other jurisdictions, proposals might more generally expand damages to require payment of attorneys' fees or other costs where such payment is discretionary for the court and authorized only as justice demands. Legislation also may attempt to force a defendant to pay more economic damages than are necessary to “make the plaintiff whole” by denying the defendant’s ability to offset expenses which are not actually incurred by the plaintiff.

During the 2007 legislative session, Colorado, Illinois, Texas, and Washington considered proposals that would have increased the potential size of awards:

**Colorado (S.B. 117):** Enacted in May 2007, this new law instructs judges presiding over employment claims to award attorneys' fees and costs to prevailing plaintiffs, but not to prevailing defendants.

**Illinois (S.B. 747):** Proposed requiring defendants to pay plaintiffs the full amount of lawsuit expenses, even if the plaintiffs themselves received a discount on those expenses. It would, therefore, allow compensation to a plaintiff (and his or her lawyers) for amounts that were not actually incurred by the plaintiff.

**Texas (discussed p. 4):** Proposed requiring defendants to pay plaintiffs the full amount of services for which they were billed, even if the plaintiffs received a discount on those services.

**Washington (S.B. 5815):** Proposed increasing the amount, from $10,000 to $50,000, that a court could award in addition to actual damages under the state’s Consumer Protection Act.

State legislatures have considered proposals that would increase potential damages beyond a reasonable adjustment for inflation. For example, the above Washington legislation would have amended the state’s consumer protection act to increase potential damages by a factor of five. Such changes are by no means minor and can encourage additional litigation when it is not appropriate. Further, these proposed increases have no economic rationale and are not based on anything other than the general desire to increase payouts.

In addition, legislation denying defendants the ability to offset damages to account for expenses that the plaintiff did not pay out-of-pocket is similarly ill-advised. When a plaintiff receives funds from the defendant and another source for the same injury, he or she obtains a double recovery. The defendant’s statutorily required payment of full damages, therefore, makes the plaintiff “more than whole.”

### B. Broadening the Scope of Consumer Laws or Available Damages

Consumer protection laws have emerged as a powerful tool for plaintiffs’ lawyers to launch new types of litigation. These laws generally prohibit “unfair or deceptive” acts in the sale of a product or service; however, because the range of consumer products is so complex and varied, these statutes are purposely vague and broadly designed. This fact makes the law an attractive means for innovative and profit-motivated personal injury lawyers to attempt to attack a wide range of conduct to circumvent traditional requirements of product liability law or to promote their own regulatory agenda.
Overexpansion of existing consumer protection acts has led to cases, such as the Washington, D.C., “lost pants” lawsuit where a plaintiff pursued a claim against a dry cleaner for years, seeking $54 million for a misplaced pair of suit pants. While the judge ultimately ruled for the defendant after trial, the broad wording of the law, which allowed individuals to sue for $1,500 “per violation” without demonstrating injury, did not allow the judge to dismiss the case at an early stage and led to thousands of dollars in defense costs for a small business. In the end, the family-owned cleaners opted to close that shop.

While this example illustrates an attempt to test the limits of the law as currently written, proposals to broaden the scope of consumer laws seek a more certain route to more claims for more money. These attempts to stretch the boundaries of consumer protection law are most often seen through amendment of statutory definitions, recognition of specific conduct as a violation, or expansion of the act to cover industries already regulated by government agencies. In the 2007 legislative session, several states considered dangerous proposals to expand already expansive consumer protection laws:

**Iowa (discussed p. 4):** Proposed creating a new private right of action.

**Michigan (H.B. 4046):** Proposed amending the state consumer protection act to include in the list of unfair acts and practices “failing to accurately represent the risks involved in the intended use of a prescription or over-the-counter drug or medication or an herbal product, dietary supplement, or botanical extract.”

**New Hampshire (S.B. 188):** Proposed creating a new private right of action against insurers under the Consumer Protection Act for violations of the Unfair Insurance Trade Practices Act.

**Washington (discussed p. 7):** Proposed increasing damages available under the consumer protection act by a factor of five.

Such legislation is over-expansive and often unnecessary. For example, the Michigan legislation would have created a new right to sue for allegedly deceptive advertising of prescription drugs, despite the fact that prescription drugs are already among the most regulated products, and their labeling and advertising are reviewed and approved by the FDA. Likewise, the New Hampshire bill would permit private lawsuits for alleged violations of the state’s insurance law, which already provides an appropriate remedy for deceptive insurance practices. Further, insurance represents another of the most heavily regulated industries in the country.

The New Hampshire and Michigan bills are an attempt to facilitate litigation against a particular industry. It is based less on fairness than on a search for “deep pockets.” Current law places reasonable limits on these types of actions that should be maintained to prevent excessive and unwarranted litigation.

**C. Expanding Recovery in Wrongful Death Actions**

An increasingly common approach by the personal injury bar to fundamentally alter and expand liability is through seeking an amendment to a state’s wrongful death statute. Such efforts generally attempt to either: (1) expand the class of persons who may recover in the event of a wrongful death; or (2) allow for non-economic recovery under the statute.

By expanding the scope of claimants in wrongful death actions, personal injury
lawyers can increase the number of potential plaintiffs in each and every case. This necessarily creates more litigation and brings more profit for the plaintiffs' bar. To compound this effect, the personal injury bar has pushed legislation to allow non-economic damages, such as pain and suffering and loss of consortium or society, in wrongful death actions. These damages are in addition to the traditional economic damages that compensate a plaintiff for all of the direct pecuniary losses incurred as a result of the decedents’ wrongful death. Non-economic damages are also more subjective in nature, which can lead to higher damages and increase the potential for excessive awards.

Over the past year, New Jersey, Illinois, Iowa, and Washington were among the states that considered expanding their wrongful death laws:

**New Jersey (A. 1511):** As passed by the legislature, the bill would have expanded the types of damages in wrongful death to include mental anguish, emotional pain and suffering, and loss of companionship. Governor Jon Corzine used a pocket veto finding that the bill did not “strike a fair balance that would avoid using a strict monetary valuation of a person’s life while also addressing the adverse effect of allowing unlimited and unpredictable damages.”

**Illinois (H.B. 1798):** A new law, enacted in May 2007, provides that the jury may award damages not only for economic loss, but also for grief, sorrow, and mental suffering.

**Iowa (S.F. 538):** A new law, enacted in May 2007, extends loss of consortium and loss of services claims to parents of adult children. The parents of a minor or adult child may recover for the expense and actual loss of services, companionship, and society resulting from injury to or death of the child.

**Washington (S.B. 5816 / H.B. 1873):** Proposed broadening the scope of beneficiaries who might recover under wrongful death statutes and permit non-economic damages for any beneficiary. These damages would include emotional distress, loss of enjoyment of life, shortened life expectancy, or humiliation.

While any wrongful death is tragic, legislative amendments, such as these, are not the answer. First, as a practical matter, no amount of money can restore a life or bring about comfort to what is a true, serious, and meaningful loss of companionship of the deceased. When wrongful death statutes originally were enacted into law, damages were often capped, and, in all cases, they were limited to economic losses. The reason for this limitation was the concern that there is no objective standard for measuring loss of companionship, particularly for the loss of a loved one. If family members were permitted to recover such damages, the emotions of the moment could result in excessive awards. At first, these statutes were narrowly construed and sometimes unfairness did result; for example, in cases of the death of a child who was never employed or a spouse who worked at home. Over time, however, courts and sometimes legislatures corrected any unfairness by providing that juries could consider losses of earnings that a child might have in the future, or, in the case of a spouse who took care of the “home front,” considering the economic value of his or her caring for children, cooking, and keeping a household afloat. In some situations where a stay-at-home spouse was, in effect, managing the family’s economics, this too resulted in what might be deemed substantial compensation. In essence, the words “economic loss” developed to broadly cover many aspects of a loss.
If and when a state considers expansion of damages, common sense and practical matters suggest that it needs to be curtailed to prevent verdicts that are based on passion and raw emotion, not facts. There needs to be a substantial showing that existing laws do not provide an adequate recovery in wrongful death actions before abandoning centuries of law.

Second, with regard to expanding the scope of wrongful death beneficiaries, state legislatures have carefully limited those who recover in wrongful death to immediate family, such as husbands, wives, parents, children, and sometimes grandparents and grandchildren. Some state laws set an order of priority as to who may bring the suit, permitting only the closest family members to bring a claim. More distant relatives, however, historically have not been included. As a practical matter, wrongful death statutes have been parallel to persons who might recover if a person died without leaving a will. The general policy behind such laws is an appreciation that a defendant has only a finite amount of assets from which to compensate family members when a death occurs. Thus, claims should be limited to those who have had a relationship recognized by the state in other contexts as an appropriately close blood relationship or other legal relationship.

D. Allowing Recovery for Emotional Harm in Cases of Injuries to Animals

In the search for new business opportunities, the personal injury bar has identified expanded pet damages as a potential well of litigation and concentrated efforts to pass legislation where formidable barriers to sue exist under state common law. These efforts are designed to either create a new cause of action for the injury or death of a companion animal or to expand existing remedies to include non-economic losses such as pain and suffering or loss of companionship.

Over the past year, the District of Columbia, New Jersey, and New York were among the jurisdictions that considered such legislation:

**District of Columbia (B17-089):** Proposed subjecting veterinarians and individuals to liability for an owner’s non-economic damages, such as loss of companionship and pain and suffering, for a pet’s death.

**New Jersey (A. 4217):** Proposed authorizing a civil action for pet injury or death from consuming or coming into contact with adulterated pet food. Damages would include loss of companionship up to $15,000.

**New York (A. 2610):** Proposed establishing a tort cause of action for the wrongful injury or death of a companion animal and provide for non-economic damages, including the owner’s loss of companionship, society, comfort, protection, and services.

For more than 200 years, the laws governing animal ownership and animal care in this country have been remarkably consistent. These laws have created a stable legal system that promotes responsible animal ownership, deters animal abuse, and promotes innovative, affordable, and quality animal care. Under this system, which includes tort and products liability laws, pet owners are able to receive full and fair compensation when their pets are injured. States generally allow pet owners to recover all of their economic losses, including veterinarian bills and other costs incurred from an injury, as well as costs of any special training or income or services a pet may have provided to its owner. In many states, an owner also can collect the costs that might be involved in obtaining a new pet. In addition, punitive damages provide an available means to punish those who commit egregious intentional wrongful acts.
against pets.

Non-economic damages, however, are not permitted. These tort rules are understandable, particularly when one realizes that if a person’s best friend is injured, no pain and suffering type claims are allowed. Further, when an immediate family member is injured, recovery for emotional harm is rarely permitted except in narrowly defined extreme circumstances. Indeed, an overwhelming majority of Americans, including pet owners, responded to a Gallup poll in the spring of 2007 that owners should not be entitled to pain and suffering type damages in animal injury and death cases.\(^3\)

Most important to debates in state legislatures, and perhaps to the general public, is that introducing pain and suffering and other non-economic damages in animal injury cases will strain not only caregivers, but also animals owners. Veterinary care and boarding services, for example, will become more expensive because even highly responsible pet care providers will have to pay much higher insurance costs because of increased liability risk. Increasing potential liability may also compromise the incentive to develop pet and animal medicines.\(^4\)

V. MORE TIME TO SUE

Statutes of limitations and statutes of repose place time limits on the filing of lawsuits. Once this period expires, a person can no longer bring a claim for the injury at issue. These limitations ensure predictability and finality in the civil justice system.

Legislatures carefully determine statutes of limitations and repose to provide plaintiffs with fair and ample opportunity to file claims. Nevertheless, the plaintiffs’ bar continually pushes to extend these time limits, leaving many defendants with tremendous uncertainty of their exposure to liability. In the past year, at least eight states considered legislation to arbitrarily increase statutes of limitation or repose.

A. Extending Statutes of Limitations

Statutes of limitations provide a deadline for bringing a lawsuit. These laws prohibit plaintiffs’ lawyers from reviving old claims under new legal theories, bringing cases in light of new court rulings or other developments, or sitting on a case for so long that the opposing party has a more difficult time defending itself.

Statutes of limitations recognize that, over time, memories fade, witnesses become hard to find or pass away, and documents are discarded or lost. The clock ordinarily begins to run when the injury occurred or when the claimant knew or should have known of the injury giving rise to the action. Typically, these periods are several years in duration. Where the individual who is harmed is a minor, under a disability preventing him or her from pursing a claim, or the injury is latent, the period is often tolled. Without fair time limitations on lawsuits, potential liability
never ends, and individuals and businesses are placed in the difficult situation of defending against charges when those who were involved and the evidence are long gone.

In 2007, several states considered extending statutes of limitations in a variety of areas:

**California (A.B. 435):** Proposed extending the statute of limitations from two to four years for civil action by an employee to recover wages, and from three to five years for actions where there is willful misconduct of the employer.

**California (A.B. 437):** Proposed to undo the statute of limitations for employment-related claims by effectively restarting the clock every time an employee receives a paycheck or his or her pay or benefits are affected.

**Maryland (S.B. 309):** Amended the statute of limitations to allow commencement of a new civil action where a prior action for the same cause was commenced within the period of limitations and was dismissed or terminated in a manner other than a final judgment. Enacted May 2007.

**Michigan (H.B. 4045):** Proposed a three-year window to retroactively sue drug manufacturers if the suit had been previously prohibited by a Michigan law prohibiting lawsuits challenging FDA-approved prescription drugs as defective unless there was fraud during the approval process.

**Oregon (H.B. 2448):** Extended the statute of limitations on claims related to COX-2 inhibitor drugs to four years for injuries and six years for death. Enacted June 2007.

**South Carolina (H.B. 3965):** Proposed extending from one to two years the time period for requesting a change in the amount of a workers’ compensation award.

**Washington (S.B. 5044):** Proposed extending the statute of limitations applicable to construction defect claims from 6 years to 10 years.

**Washington (S.B. 5048):** Proposed tolling the statute of limitations in construction defect actions for 60 days when a homeowner’s case is dismissed without prejudice for failure to give notice and opportunity to cure.

**B. Repealing or Extending Statutes of Repose**

A statute of repose sets a time limit for bringing a claim based on the expected lifespan of a product or benefit of a service. Statutes of repose recognize that certain products have a finite lifetime during which the manufacturer is responsible for defects. After that period expires, it is much more likely that any failure of the equipment is a result of ordinary wear and tear than any defect in the design. For example, federal law provides that small airplane manufacturers are not subject to lawsuits related to crashes after 18 years, a measure that helped save the industry in the United States:

**Nebraska (L.B. 65):** Proposed doubling the Hospital Medical Liability Act’s 10-year statute of repose to 20 years.

**North Carolina (S.B. 969 / H.B. 1343):** Proposed extending the statute of repose from 6 years to 15 years. This would have made North Carolina one of three states in the country with the longest period for filing these claims.

**Oregon (S.B. 444):** Proposed eliminating the state’s 10-year statute of repose.
**Oregon (H.B. 2909):** Proposed eliminating the state’s 10-year statute of repose. Amended to establish a statute of repose equal to the defined useful safe life of the product.

**C. Why Proposals to Extend or Eliminate Statutes of Limitations and Repose are Unsound Policy**

The primary purpose behind statutes of limitation or repose is to settle expectations so that ordinary people and businesses can get on with their lives, without fear of prolonged and unbounded legal exposure for actions allegedly committed years before. No one can make business and personal plans or borrow money when faced with the indefinite risk of litigation or bankruptcy. This drain on initiative and enterprise is hard to quantify, but impossible to ignore.

Statutes of limitation and repose also serve a gatekeeper function in the civil justice system. They avoid trials based on evidence whose reliability necessarily deteriorates with time: recollections fade, witnesses die, and documents are misplaced or lost. Consequently, the key factual findings needed to resolve litigation become ever more untrustworthy. Without time limits, the ordinary “he said–she said” of litigation can turn into a one-sided allegation by a plaintiff that an event happened because the person says it happened, while the defendant lacks the ability to appear or muster facts that might disprove the allegation. Innocent people can be wrongly accused and have their reputations ruined.

The legislation proposed in many of these states would alter reasoned and balanced limitation periods, which have provided a sense of predictability and certainty in the civil justice system for centuries. They also would lead to greater injustice for civil defendants less able to defend accusations after considerable passage of time. Lastly, some proposals are retroactive: they could revive many time-barred claims, potentially violating the constitutional rights of civil defendants.

**VI. OTHER PROPOSALS TARGETED AT CIVIL DEFENDANTS**

State legislatures also considered many other proposals pushed by the personal injury bar that would have made it more difficult to mount a defense in civil litigation. Such measures include eliminating defenses, making it more difficult to keep sensitive records and trade secrets confidential during litigation, and voiding contractual rights. They also have set their sights on creating new ways to sue insurers for more money:

**Colorado (H.B. 1338):** Made waivers of certain basic statutory rights and remedies by residential property owners in their transactions with construction professionals void as against public policy, retroactively changing the terms of contracts already signed. Signed into law by Governor Bill Ritter on April 20, 2007.

**Maryland (S.B. 368):** Increased the period during which a signed release of claims for damages could be voided by increasing from 5 to 30 days the period during which a release of a claim for tort damages signed by an injured individual is voidable. Increased from 5 to 30 days the period during which a specified power of attorney or employment contract signed by an injured individual is voidable. Governor Martin O’Malley signed the legislation into law on April 24, 2007.

**Nevada (A.B. 519):** Proposed prohibiting a district court from sealing judicial records unless it holds a hearing, provides notice of the hearing to the parties and the public, and allows both the parties and the public to present evidence and written briefs at the hearing.
The bill would make it nearly impossible to keep sensitive documents or trade secrets confidential during litigation.

**Texas (S.B. 346 / H.B. 1152):** Proposed subjecting property owners to a new risk of liability and dramatic increases in litigation costs by eliminating the ability of a property owner to require in a construction contract that a person performing construction-related work on the property defend the owner from a lawsuit arising from the contractor’s conduct.

The plaintiffs’ bar has attacked the insurance industry by providing new private rights of actions and special rules singling out insurers for punishment. Here are a few examples:

**Louisiana (S.B. 107):** Proposed authorizing punitive damages in cases involving an act or omission of an insurer. The legislation was amended to include the language “willful and wanton misconduct” in reference to insurers’ liability and language that would have required insurers to pay an additional one-half of an assessed penalty to the state to be used to offset costs of the Louisiana Citizens Property Insurance Corporation.

**Oregon (H.B. 3075):** Proposed creating a private right of action for an insurer’s alleged violation of an unfair claims settlement practices standard. It would have allowed a claimant who sustains any “ascertainable” damages as a consequence of an alleged violation to seek recovery of actual and consequential damages, punitive damages, and attorney fees. Agents and claim representatives, as well as insurers, would face new liability.

**Washington (S.B. 5726):** Provided that a court may award three times policyholder’s actual damages, and must award attorneys’ fees and litigation costs if it finds that an insurer unreasonably denied a claim or broke a state rule governing settlement practices. Governor Christine Gregoire (D) signed the bill into law on May 16, 2007.
VII. CONCLUSION

It is now more important than ever to be on guard against legislative attempts to expand liability. Plaintiffs’ lawyers are not only threatening to undo recent progress towards a more stable and predictable civil justice system, but also to expand liability in a drastic and unprecedented manner. The personal injury bar and its allies are well organized, well funded, and have teamed up with their members and supporters in state legislatures. Rather than play defense, as they have over the past two decades by seeking to overturn rational tort reform measures in the courts, they are now on the offensive with a massive legislative and public relations campaign.

Going forward, it is particularly important to:

- Keep a close watch for legislation that rolls back enacted tort reforms, such as attempts to limit apportionment of damages, lift limits on non-economic damages, or repeal laws that limit liability when a defendant has faithfully adhered to government regulations.

- Closely examine legislative language to determine whether it might create a new private right of action, either explicitly or implicitly. Demand transparency.

- Scrutinize proposals that would deputize private profit-driven lawyers to sue on behalf of the state to ensure that the claims brought are in the public interest and do not provide a windfall in fees.

- Ensure that consumer protection laws continue to serve their intended purpose: to compensate individuals for actual losses caused by their reliance on a deceptive business practice. Guard against legislation that expands their reach into already-regulated industries, allows lawsuits without injury, or permits damages far in excess of financial loss.

- Stop attempts to expand liability in wrongful death actions, such as proposals to allow recovery by distant family members or immeasurable emotional harm. Such changes will dramatically increase the potential for excessive awards.

- Adhere to traditional principles of law with respect to damages in cases involving the injury or death of an animal. Proposals that would permit recovery for an owner’s emotional harm would lead to more lawsuits, higher insurance rates for veterinarians, and ultimately increase the cost of veterinary care, threatening its affordability.

- Prevent the chipping away of statutes of limitations and repose, which ensure that lawsuits are timely brought with the benefit of the most reliable evidence.

- Resist efforts to target particular industries that are driven by politics and profit, not sound public policy.
VIII. ENDNOTES


