

JUST COMPENSATION

Restoring Fairness and Efficiency to America's Civil Justice System

Americans do not believe that corporations whose products or practices cause injury to consumers should go unpunished. Nor do they believe that negligent medical practitioners should get off scot-free. They want to see tort victims fairly compensated, and they recognize the importance of holding wrongdoers accountable for their actions. But Americans have grown frustrated with a system that often awards outlandishly high jury verdicts to those who file frivolous lawsuits against deep-pocketed defendants.¹

The public is right to expect more from our civil justice system, which is intended to achieve three primary goals: 1) fair compensation for victims; 2) effective deterrence of wrongdoing; and 3) minimization of ancillary costs. The current system is failing on all three counts.

- **Compensation is not fairly distributed.** Less than 2% of victims of medical malpractice bring a claim and receive compensation for their injuries.² Those who do, however, often receive settlements or jury verdicts that are grossly disproportionate to the injury actually suffered. The average malpractice settlement recently topped \$500,000 (up almost 50% since 1995), and the average plaintiff's verdict has grown to \$1 million (up 100% since 1995).³ The result is a highly inequitable distribution of compensation—a huge payday for a small number of plaintiffs and their lawyers, while most victims are left out in the cold.
- **Wrongful behavior is not deterred.** A system that holds accountable only a tiny percentage of wrongdoers, while at the same time encouraging risk-averse defendants to pay large settlements on meritless claims, fails to send accurate deterrent signals.⁴ In the medical malpractice context, just 5% of all potentially negligent defendants are sued, while more than two in five defendants who actually pay the victim's claim have not acted negligently.⁵ But perhaps the most compelling evidence of poor deterrence may be found in hospitals around the country; injuries caused by faulty products lead to an estimated 1 million hospital emergency room visits each year.⁶
- **Ancillary costs are unacceptably high.** The civil justice system is a highly inefficient system for compensating victims. It costs almost \$2 to deliver \$1 in compensation to an accident victim,⁷ and almost \$2.50 in claims of medical malpractice.⁸ Litigation is expensive and time-consuming, in large part due to the frivolous suits that clog court dockets. Fear of litigation restricts business, stifling the development and introduction of innovative products into the marketplace. Notwithstanding its important legal function, the tort system constitutes a multibillion dollar drag on the economy.⁹

The case of *Scott v. Blockbuster Entertainment*¹⁰ exemplifies how class action lawsuits have gone haywire. In that case, Blockbuster Entertainment agreed to a \$500 million settlement for overcharging customers for late video returns.¹¹ Victims of Blockbuster's wrongdoing received \$1.00 coupons. In the wake of the settlement, Blockbuster could claim contrition, citing

the \$500 million settlement, while the opposing lawyers walked away with \$9.25 million. Meanwhile, the majority of the coupons went unredeemed. Blockbuster got to keep the value of the unredeemed coupons while the trial lawyers took their fee on the full settlement amount—and Blockbuster customers, the all-around losers in this situation, went uncompensated.¹²

The civil justice system's dysfunction has also led to a crisis in the availability of medical care in many states. Overwhelmed by skyrocketing malpractice insurance premiums that have increased 50%, 100% or more in just a few years,¹³ doctors have staged or threatened strikes in eight states. The situation regarding the availability of medical specialists in the South is especially dire. In Mississippi, most cities with populations under 20,000 have *no* physicians willing to deliver babies, because they can't afford the malpractice premiums.¹⁴ And of the 34 neurosurgeons between Memphis, Tennessee and Jackson, Mississippi, only three have retained enough malpractice insurance coverage to work in emergency rooms.

The net result is a system of perverse incentives that all too often works to transfer wealth from the many to the few—a system that is the antithesis of an Opportunity Economy. When a doctor is forced to settle a baseless malpractice suit in order to avoid the risk of an irrational jury verdict, or when a group of class action lawyers colludes with corporate wrongdoers to achieve a settlement that serves only their interests, or when a jury awards a single plaintiff tens of millions of dollars in pain and suffering damages, it is consumers, shareholders, and victims who end up being hurt. Businesses are forced to raise their prices to recover the losses and pay attorneys' fees. Medical professionals order needless tests and procedures to limit the possibility of litigation, thereby driving up the cost of healthcare. Courts are gridlocked, failing to provide timely relief to deserving victims. And the public loses confidence in the justice system as a whole.

A comprehensive and balanced approach is critical to restoring fairness and efficiency to our civil justice system. Excessive awards must be scaled back and frivolous suits must be discouraged, while victims must be given a fair chance to have their cases heard. The approach proposed here has four important components:

1. ***Reining in runaway verdicts.*** Cap non-economic “pain and suffering” damages at \$250,000; limit punitive damages to three times the amount of the award for economic damages.
2. ***Broadening access to justice for victims.*** Create incentives for attorneys to represent victims with smaller claims at stake by requiring defendants found liable at trial to pay the plaintiff's attorneys' fees; create incentives for potential defendants to make early settlement offers and for victims to accept these offers.
3. ***Reducing frivolous lawsuits and disproportionate awards.*** Sanction lawyers who repeatedly bring frivolous suits; eliminate the collateral source rule (which allows double compensation for plaintiffs with insurance); curb joint and several liability (which allows plaintiffs to collect the entire judgment from defendants found to be only partially at fault).

4. ***Restoring the intent of class actions.*** Require that national class actions be brought in federal court; tie attorneys' fees to the amount of coupons actually redeemed in compensatory coupon settlements.

Policy Implementation and Details

Reining in Runaway Verdicts

□ Limit Pain and Suffering Damages

Pain and suffering damages compensate victims for the mental anguish that can result from physical injuries.¹⁵ Unlike economic damages, which compensate victims for ascertainable economic losses such as medical bills or lost wages, the amount of pain and suffering damages awarded depends only on the jury's subjective judgment. As a result, sympathetic plaintiffs represented by skillful lawyers are often awarded higher levels of compensation than other victims with similar injuries. Where punitive damages are limited or hard to prove, uncapped pain and suffering damages are often used as a guise for punishment, thereby undermining the predictability and deterrent effect of both types of damages.

Unlike punitive damages, which must be variable in order to punish defendants of varying size, pain and suffering damages should be capped at a set dollar amount. Such caps are in place in California (since 1975), Texas, and other states, and they are the most effective tool to reduce large jury awards¹⁶ and restrain the increase in insurance premiums,¹⁷ thereby limiting the tort system's drag on the economy.

Most other countries do not provide damages for pain and suffering, and neither do workers' compensation or other American injury-compensation systems. A ceiling of \$250,000 for pain and suffering damages is fair to victims and necessary to ensure rational and consistent outcomes.

□ Limit Punitive Damages to Three-times Economic Damages Award

Punitive damages are an integral part of the American judicial system because they deter potential defendants from negligent, reckless, and purposefully harmful behavior. In this way, they encourage private regulation that is parallel to, and cheaper than, government bureaucracies. But deterrence only works if punishment is regular in frequency and predictable in scope. Because of widely varying and sometimes irrational judgments, our current tort system does not provide an efficient level of deterrence. To remedy this situation, punitive damages should be limited to three times the amount of economic damages awarded or \$250,000, whichever is greater. Doing so will remove the threat of an irrational jury award, thereby reducing incentives for defendants to settle meritless cases, while more effectively deterring bad behavior.

Broadening Access to Justice for Victims

□ **Ensure that Plaintiffs with Legitimate Claims Can Assert Their Rights by Implementing a System of “One-Way Fee Shifting”**

Solving the problem of large verdict awards that are not rationally related to plaintiffs’ injuries is a serious challenge. However, the attention given to this challenge often obscures an equally prevalent problem—that of uncompensated or undercompensated victims with valid claims of a smaller scale. As noted above, less than 2% of medical malpractice victims bring a claim and receive compensation for their injuries. As a result, the vast majority of victims go uncompensated while the vast majority of wrongdoers go undeterred.

Why, in the midst of what many are calling a “litigation explosion,” are so many victims with strong claims for compensation unable to assert their rights? Distressingly, not many lawyers are willing to take cases with smaller dollar amount claims. Since plaintiffs’ attorneys typically get paid by taking a cut of their clients’ awards (the “contingency fee”), they are often only able to take cases they believe are feasible to them from an economic standpoint. Small-to-medium size medical malpractice suits are regularly locked out of the current system; it makes little economic sense for plaintiffs’ lawyers to accept such cases on a contingency fee basis, when the probability of obtaining a favorable judgment is uncertain and the case may consume hundreds of hours of time stretched out over several years or more.

The current system leaves most victims out of luck. To open the doors of justice to this silent majority of victims, defendants who are found liable at trial should be responsible for paying plaintiffs’ attorneys’ fees. Under this “one-way fee shifting” approach, plaintiffs’ attorneys would be paid a fair hourly rate by the defendant and reimbursed for the costs of litigation, instead of taking a cut of the award. As a result, they would be willing to accept most cases with a high probability of success, even if the injury is not catastrophic and the amount at issue is moderate. The workers’ compensation system, which also lowers plaintiffs’ transaction costs by replacing the cumbersome process of litigation with a streamlined administrative process, compensates a vastly higher percentage of workers injured on the job than are compensated through the tort system. The contingency fee system, on the other hand, deprives plaintiffs of full compensation, since they must pay their lawyers one-third of their awards. Requiring negligent defendants to pay plaintiffs’ attorneys’ fees would also provide victims with full compensation while boosting the deterrence signal sent by the tort system.

One-way fee shifting has been implemented in some areas of the U.S. with success. The Equal Access to Justice Act,¹⁸ for instance, allows certain victims suing the government to receive attorneys’ fees if successful in their claims. This has encouraged more victims of government negligence and misconduct to come forward and be compensated for their injuries.¹⁹ In addition, Florida undertook a fee-shifting regime for medical malpractice claims from 1980 to 1985. The result? An increase in the number of strong claims for moderate amounts of money—exactly the sort of influence needed in a civil justice system that now encourages weak but high-dollar claims.²⁰

□ **Implement an “Early Offer” Approach to Victim Compensation**

Our current civil justice system often allows victims with valid claims to go uncompensated for years, as the litigation process drags on and the costs associated with litigation increase for all involved. The time it takes for a case to actually go to trial varies depending upon a number of factors, including complexity of the case and the caseload of the court in which suit is brought, but frequently, the time between filing of suit and trial is entirely too long. For example, in the city of Los Angeles, it takes an average of five years for a civil suit to be brought to trial.²¹ That timeframe doesn’t take into account appeals which may take place after trial. Even if a case settles before going to trial, settlement often occurs only well into the litigation process. The average time for settling a products liability claim is two years from the occurrence.²²

Compensation for tort victims can be provided more quickly and efficiently through implementation of an “Early Offer” approach, whereby incentives are put in place that encourage potential defendants to make an offer of compensation soon after a tort event, and encourage claimants to accept that offer. Under such an approach, the tort victim would notify all potential defendants of the potential claim prior to filing suit, and would include in the notification a description of the event at issue and an estimate of economic loss. Upon receipt of this notification, each potential defendant would have ninety days in which to make an offer of compensation to the victim. Such an offer would take into account reasonable attorneys’ fees, so that the victim’s compensation is not reduced by a contingency fee. The claimant would have thirty days in which to decide whether to accept this offer. If the claimant chooses not to accept the offer and becomes a plaintiff in a lawsuit, the plaintiff’s attorney would receive fees only on the amount of an ultimate award in excess of the initial offer value.

Under this plan, potential defendants have incentives to make a generous offer right off the bat in order to avoid the costs and risks associated with litigation, while claimants are compensated fairly and efficiently for their injuries.

Reducing frivolous lawsuits and disproportionate awards

□ **Hold Lawyers Accountable for Bringing Frivolous Lawsuits**

While small-dollar tort claims are not encouraged under the current tort system, this same system allows the filing of what are, in reality, frivolous claims for huge dollar amounts. A frivolous lawsuit is one in which a reasoned review of the case indicates absolutely no factual or legal basis for the claims made. Though certainly unethical, frivolous suits are sometimes filed as a means of intimidating defendants into settling a meritless claim to avoid prolonged and costly litigation. Frivolous suits are the antithesis of opportunity economics, draining resources from victims, increasing administrative costs, reducing shareholder value, and raising prices for consumers. The mere cost of litigation is not a barrier to frivolous suits with big settlement potential. For example, imagine a frivolous claim for \$10,000,000 in damages with only a 1% probability of success. The expected settlement value of such a claim is still \$100,000, well

worth the time of a plaintiff's attorney who can extract that value quickly from a risk-averse defendant.

To discourage frivolous suits, attorneys who are found by a judge to have filed a frivolous suit should be required to pay the defendant's expenses (including both legal and administrative costs), and any attorney who brings three such frivolous suits should be barred from the practice of law. These simple solutions will go a long way towards significantly reducing frivolous suits.

□ **Require 50% Fault for Joint and Several Liability**

Joint and several liability allows plaintiffs to recover their entire damages award from a defendant who is only partially at fault. This rule is unfair to defendants and decreases judicial efficiency. Instead, we should implement reforms that require a defendant to be found at least 50% at fault before the plaintiff can sue to recover the entire damages award. Thirty-eight states have restricted joint and several liability since 1986, protecting deep-pocket defendants from disproportionate verdicts.²³

□ **Eliminate the Collateral Source Rule**

The collateral source rule allows injured plaintiffs to be compensated twice for the same injury (once by their insurer and once by the defendant) resulting in increased litigation costs and providing some plaintiffs with awards disproportionate to their injuries. By eliminating the collateral source rule, plaintiffs will still receive full compensation, but they will be compensated by either their insurer OR the defendant—not both. Plaintiffs retain the ability to sue defendants for the difference between their actual cost of injury and the compensation provided by insurance. Eliminating the collateral source rule preserves the rights of plaintiffs to full compensation but prevents windfalls that only serve to increase litigation costs. This reform, enacted in almost half the states, has been demonstrated to significantly reduce jury awards, discourage unnecessary lawsuits, and restrain medical malpractice insurance cost increases.²⁴

Restoring the Intent of Class Actions

The rise of class action suits in the second half of the twentieth century was and remains a positive addition to the American judicial system.²⁵ Class actions allow groups of injured individuals to bring their claims collectively, thus (in theory) increasing the likelihood of compensation, ensuring greater deterrence, and lowering the cost of litigation for all. Nonetheless, the class action system is being abused in a way that undermines its inherent benefits. Trial lawyers forum-shop, frequently choosing jurisdictions that are not equipped to hear such massive suits and/or have juries that are subject to local sympathies.²⁶ This behavior results in class action judgments that are not rationally related to the injuries sustained. The cost of such judgments is passed on to consumers, while lack of predictability fails to deter wrongful corporations from repeating negligent acts.

□ **Remove Class Actions with Plaintiffs from Different States to Federal Court**

America needs a civil justice system in which victims can be confident of compensation and shareholders and consumers can be confident in rational judgments. Policymakers should therefore require that class actions involving plaintiffs from different states be removed to federal court. Federal courts have highly educated and unelected judges who are not subject to the local pressures that often predetermine outcomes. In addition, federal judges have more experience with large and complex cases, as well as more expertise in the rules of civil procedure that allow such cases to run fairly and efficiently. Finally, removal to federal court puts class actions squarely on the national stage, where Congress can be held accountable for maintaining a system consistent with opportunity economics.

In cases where more than 50% of class action plaintiffs are from the same state, plaintiffs could continue to file suit in the state court. Such a policy conforms to traditional values of federalism, allowing individual states to vindicate wrongs that are particular to their state.

□ **Eliminate Incentives for Collusion in Compensatory Coupon Awards**

Policymakers must address the problem of collusion in the award of compensatory coupons in class action settlements. Currently, the value of unclaimed coupons given as compensation for injuries goes back to the wrongful corporation, the trial lawyers, or both. As the Federal Trade Commission has noted, this creates an incentive for “plaintiffs’ attorneys and corporate defendants to collude to benefit themselves through a settlement that provides weak relief for consumers and substantial attorneys’ fees.”²⁷ Such collusion lessens both victim compensation and deterrence.

To reduce the possibility of collusion in class actions, the portion of any settlement involving compensatory coupons that goes to the plaintiffs’ attorneys should be based solely upon redeemed coupons. This creates a heightened incentive for plaintiffs’ attorneys to ensure compensation for the victims they purport to represent. Additionally, the value of unclaimed coupons should not benefit the corporate wrongdoer. Instead the value of such coupons should be placed in trust for the benefit of victims of corporations that are now bankrupt and unable to compensate those they injured. In this way, deterrence is maintained and the unclaimed value is put to productive and compensatory use within the tort system.

Political Issues

The American public supports tort reform.

Americans understand that frivolous lawsuits and irrational jury verdicts are harmful to the economy as a whole. They feel this harm directly in the form of increased costs of goods and services, and decreased availability of affordable health care. The public is frustrated by the current system and is ready to demand a change. This is a balanced set of proposals that Americans can support. These policies protect and strengthen victims’ rights while at the same

time reigning in the unacceptably high costs of the current civil justice system that are hurting the economy.

Individual victims will benefit from these reforms.

This set of proposals will level the playing field for individuals by creating a more equitable distribution of compensation to tort victims. Under the current system, a small number of victims receive huge payouts, while most victims can't even open the door to the courthouse. Our proposal for one-way fee shifting will broaden access to justice for victims of wrongdoing by making it economically feasible for plaintiffs' attorneys to take cases involving smaller monetary claims. At the same time, requiring defendants found liable at trial to pay the plaintiffs' attorneys' fees will increase deterrence to corporate bad actors. Our early offer proposal will help ensure that victims are compensated quickly and fairly for their injuries. Reforming the compensatory coupon remedy will restore the intent behind class actions by increasing the likelihood of meaningful compensation to large numbers of victims, while also ratcheting up deterrence levels.

The economy as a whole will benefit from these reforms.

Our current civil justice system is highly inefficient and very costly, creating a drag on the economy. Reducing frivolous lawsuits that drain valuable resources will allow corporations to put the time and money wasted on these suits to much better use in developing new and innovative ways to serve consumers. Our proposal to cap punitive damages and pain and suffering damages will help reign in runaway jury verdicts, thereby reducing the incentive for a risk-averse company to settle a meritless case. These reforms will put resources back into the market, resulting in a healthier economy overall.

Health care providers and health care consumers alike will benefit from our proposals.

Doctors and hospitals have been among the most vocal advocates for relief from excessive litigation. One in seven doctors is now sued *each year*, and the cost of litigating and paying malpractice claims has climbed sharply.²⁸ As a result, malpractice premiums have skyrocketed, and many doctors (particularly doctors in certain specialties) find it economically infeasible to maintain their practices.²⁹ Not coincidentally, the price of healthcare has risen dramatically. The reforms advocated here are among the medical community's highest priorities, and should result in reduced malpractice premiums – thereby reducing costs and expanding access to health care.

Response to Counterarguments

“Are the ideas presented here any different from the tort reform proposals that serve only the interests of the business community at the expense of victims?”

This package of reforms is driven not by interest group politics, but by the conviction that the civil justice system can and must perform all of its tasks—compensation, deterrence, and efficiency—more effectively. By balancing sensible existing proposals for reform such as damage caps with the innovative idea of one-way fee shifting, the result is a balanced approach

likely to provide greater compensation to victims *and* greater certainty and fairness to defendants. Most importantly, these proposals will help consumers, by reducing the expensive burden of unjustifiable judgments and frivolous litigation currently weighing down American business.

“Doesn’t removal to federal court severely threaten this country’s tradition of federalism?”

No. Many class actions currently brought in state court are truly national cases. They are brought by attorneys who forum shop for sympathetic judges and juries. National cases should be recognized for what they are and removed to federal court. Where 50% of class actions of plaintiffs are from one particular state, this proposal retains the value of federalism by allowing the case to be tried in that state.

“Wouldn’t it place an undue burden on plaintiffs’ attorneys to require that they claim their fee only on redeemed coupons?”

Our policy on class action coupons will no doubt lessen the fees attorneys can collect in such cases. Nonetheless, these attorneys represent a class of victims, and it is only fair that they be paid when the victims they represent are paid. Our policy breaks the collusion between trial attorneys and negligent corporations that risks preventing fair victim compensation.

“Doesn’t one-way fee shifting fundamentally alter the nature of civil justice in the United States?”

The American civil justice system is deeply flawed, and big new ideas are needed. Our hybrid, one-way fee-shifting proposal would address an unappreciated but crippling problem: the denial of justice to thousands of relatively small-dollar victims. While it is easy to dwell on plaintiff windfalls—a problem our proposals address—this proposal also recognizes the need to fully compensate those victims who are currently excluded from the tort system.

“There is nothing to stop defendants from offering to settle a case at the outset now. Isn’t the ‘Early Offer’ proposal just maintaining the status quo?”

While it is true that, under the current system, there is nothing to stop defendants from making a settlement offer soon after a tort event occurs, this does not often happen in practice because defendants fear that making an early offer simply signals a willingness to pay more further along the process. Limiting plaintiffs’ attorneys’ fees to the amount of an ultimate award that is above the initial offer takes away the disincentive for defendants to make early offers by creating an incentive for claimants to accept fair offers at the outset.

¹ See, e.g., Kevin B. O'Reilly, "Tort Reform Advocates Strike While Iron Is Hot," *Insurance Journal* (May 5, 2003). Available at <http://www.insurancejournal.com/magazines/west/2003/05/05/features/28729.htm>; Iver Peterson, "Medical Malpractice Mess Is One Huge Headache," *New York Times*, February 16, 2003 (reporting that 82% of NJ residents blame the state's medical liability insurance crisis on frivolous lawsuits, and 75% on high jury awards).

² Two percent of victims of medical malpractice bring a legal claim (see David Hyman, *Medical Malpractice and the Tort System: What Do We Know and What (If Anything) Should We Do About It?*, 80 *Texas Law Review* 1639, 1643 (June 2002)). Since many of these cases are dropped or settled before trial, and defendants win most medical malpractice trials (see Patricia Danzon, *Medical Malpractice: Theory, Evidence, and Public Policy*, 38 (1985)).

³ Monique Anawis, *Tort Reform 2003*, 6 *DePaul Health Care Law Journal* 309, 310 (Spring 2003).

⁴ For an in-depth treatment of the civil justice system's deterrence impact, see Gary Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 *UCLA Law Review* 377 (1994).

⁵ David Hyman, *Medical Malpractice and the Tort System: What Do We Know and What (If Anything) Should We Do About It?*, *Texas Law Review*, June 2002.

⁶ Michael Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 *University of Pennsylvania Law Review* 1147, 1259 (April 1992).

⁷ Michael Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 *University of Pennsylvania Law Review* 1147, 1282 (April 1992).

⁸ Paul Weiler, *Medical Malpractice on Trial*, 51-58 (1991).

⁹ According to an estimate quoted by the Manhattan Institute, a group that advocates tort reform, the cost of the tort system has risen to \$200 billion a year. See <http://www.triallawyersinc.com/html/part01.html>.

¹⁰ No. D162-535 (Jefferson County, Texas, 2001).

¹¹ Dan Ackman, *Bogus Blockbuster Settlement*, *Forbes*: <http://www.forbes.com/2001/06/06/0606topblock.html> (June 6, 2001).

¹² See Pete Williams, *Civil Wars: Class Actions*, MSNBC: <http://msnbc.msn.com/Default.aspx?id=3670358&p1=01%7C%7C%7C%7C003> (Dec 12, 2003).

¹³ In Florida, Nevada, Pennsylvania, and Texas, malpractice rates increased an average of 55% from 1998 to 2001 (most states were not included in the report). In parts of Pennsylvania, the increase has been even more dramatic: OB/GYN rates are up 165%, general surgery 130%, and internal medicine 130%. See General Accounting Office, *Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates* (June 2003). Available at <http://www.gao.gov/new.items/d03702.pdf>.

¹⁴ Monique Anawis, *Tort Reform 2003*, 6 *DePaul Health Care Law Journal* 309, 310 (Spring 2003).

¹⁵ Pain and suffering does not include psychological or psychiatric treatment, which fall under medical compensation

¹⁶ "The payoff from conventional tort reform ... is more likely to be realized in the damages area." Paul Weiler, *Medical Malpractice on Trial*, 34-37 (1991). See also Patricia Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 *Law & Contemporary Problems* 57 (1986).

¹⁷ The General Accounting Office, a nonpartisan agency of Congress, found that doctors in states with a cap on pain and suffering damages experienced a significantly slower increase in medical malpractice premiums compared to states with no caps—as a result, states with damage caps do not tend to have shortages of specialists. See United States General Accounting Office, *Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates*, Testimony before the Committee on Government Reform, House of Representatives, available at <http://www.gao.gov/new.items/d04128t.pdf>.

¹⁸ 5 U.S.C. 504 (2000); 28 U.S.C. 2412(d)(a) (2000).

¹⁹ Herbert Kritzer, "Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?" 80 *Texas Law Review* 1943, 1960 (June, 2002).

²⁰ Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 *Texas Law Review* 1943 (2002).

²¹ Committee for Economic Development, *Breaking the Litigation Habit: Economic Incentives for Legal Reform*, April 2000, http://www.ced.org/docs/report/report_legal.pdf

²² *Id.*

²³ http://www.atra.org/files.cgi/7668_Record12-03.pdf

²⁴ See Patricia Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 *Law & Contemporary Problems* 57 (1986).

²⁵ Federal Rules of Civil Procedure 23, as adopted in 1966 and subsequently amended.

²⁶ It is not possible to empirically assess the role local sympathies play in the tort system. Evidence indicates, however, that a small number of jurisdictions receive a disproportionately high number of class action suits. This does not empirically prove, but clearly suggests, the impact of local bias. John H. Beisner and Jessica Davidson Miller, *Class Action Magnet Courts: The Allure Intensifies*, Civil Justice Report No. 5 (New York: Center for Legal Policy, Manhattan Institute, July 2002).

²⁷ Pete Williams, *Civil Wars: Class Actions*, MSNBC: <http://msnbc.msn.com/Default.aspx?id=3670358&p1=01%7C%7C%7C%7C003> (Dec 12, 2003).

²⁸ See Monique Anawis, *Tort Reform 2003*, 6 *DePaul Health Care Law Journal* 309, 310 (Spring 2003).

²⁹ See notes 13 and 14.