

Retooling OHIO

A bulletin for leaders on policy issues critical to Ohio manufacturers

THE POLICY POINT: *Civil Justice System*

For manufacturers to invest and grow in Ohio, and to compete globally, Ohio's civil justice system must be rational, fair and predictable. Manufacturers must be free to innovate and pursue market opportunities without fear of unreasonable exposure to costly lawsuits, while truly injured parties must have full recourse to appropriate measures of justice.

In the last decade, Ohio made significant progress in this policy area with a number of important civil justice reforms and reinforcing court decisions. These achievements are helping to reduce the litigation cost burden on employers and, in turn, paving the way toward a more competitive business climate in Ohio and a more robust state economy.

However, work to improve Ohio's civil justice system is far from finished. An aggressive trial bar continues to push an agenda to expand liability and repeal existing tort reform law. The OMA is monitoring those efforts, at both the Ohio Statehouse and the courthouse, and advocating for additional legislative or judicial action to strengthen fairness and predictability where weaknesses exist.

Note to Readers: Tort law is extremely complex. This document necessarily uses many examples of highly technical case law and judicial rulings to illustrate how Ohio's civil justice system has improved, what threats remain and what additional improvements are needed. Readers unfamiliar with some of the legal terms used here still should be able to take away an overall perception of the legal climate in Ohio and its potential impact on the state's economy and the delivery of justice to Ohioan citizens.

The Civil Justice System & Economic Competitiveness

A state's legal climate can be a major inducement or a major deterrent to business investment, growth and job creation. It's one factor among several key ones that businesses consider when making decisions about where to expand existing operations or locate new facilities. Specifically, companies are looking for fairness and predictability.

Legal climate and tort costs also impact competitiveness—nationally and internationally. Many of the America's major global competitors and trading

partners have comparatively lower tort litigation costs, which disadvantages U.S. companies in a fiercely competitive global economy.

According to the widely respected Pacific Research Institute (PRI), which publishes an annual Tort Liability Index that measures tort liability costs and relative litigation risks across states, "An efficient tort system is an important part of a thriving free-enterprise economy. It ensures that firms have proper incentives to produce safe products in a safe environment, and truly injured people are fully compensated."

A tort is wrongful act, either intentional or negligent, for which a civil (not criminal) lawsuit may be filed, excluding "breach of contract" actions. Individuals who have been harmed by a wrongful act may use tort law to seek compensation from the legally responsible (or liable) party for the harm they have suffered. Such liability lawsuits are tried in Ohio's civil justice system.

continued inside

On the other hand, PRI notes, “A poor tort system... imposes excessive costs on society not the least of which is the cost of foregone goods and services. All of us shoulder the burden of an excessively expensive and inefficient tort liability system through higher prices, lower wages, decreased returns on investments in capital and land, restricted access to health care, and less innovation.”

During the past ten years, Ohio has come a long way in its efforts to create a globally competitive business environment through commonsense legislative reforms and a number of court decisions upholding those reforms. In PRI’s most recent Tort Liability Index¹, Ohio was one of just five states to be categorized as “saints” (the other categories being sinners, salvageables and suckers), which PRI defines as states that have relatively low monetary tort losses and/or few litigation risks and relatively strong tort rules on the books.

Overall, Ohio ranked 11th for tort outputs (number of cases and attorneys, damage awards, settlement amounts—i.e., monetary costs and litigation risks) and 3rd for tort inputs (rules on the books that shape the tort system outputs). According to PRI, Ohio and the other “saint” states are “well positioned to contain their tort liability costs in the future if the rules are implemented as written.”

Why is this important? Because businesses stay away—and move away—from states where tort liability costs and the risks of litigation are high. The bottom line: A rational, fair and predictable civil justice system that minimizes tort costs and the risk of litigation can be a competitive advantage that attracts the investments necessary to support growth and prosperity. And that’s where Ohio should aspire to be.

“A broken tort system is one of the biggest threats to entrepreneurship and free enterprise. There’s far more at stake in tort reform than just the cost of settlements and legal judgments. We’re talking about jobs, and that affects everybody.”

¹U.S. Tort Liability Index: 2008 Report, by Lawrence J. McQuillan and Hovannes Abramyan, Pacific Research Institute

Major Civil Justice Reform Achievements in Ohio Since 2000

Ohio’s position as a leader among states for having a legal climate that attracts investment and supports economic growth has been made possible by a number of significant legislative reforms and judicial rulings. Notable legislative victories since 2000 include the following:

- **Senate Bill 120 (joint and several liability reform).** SB 120 added fairness to Ohio’s civil justice system by modifying joint and several liability laws to apply liability more proportionately. For example, prior to SB 120, a defendant determined to be ten percent responsible for damages in a tort lawsuit could be required to pay up to 100 percent of the damages. Under SB 120, a defendant found to be 50 percent or less at fault for the harm caused to a plaintiff pays only damages commensurate with its percentage of fault. (Effective April 2003)
- **Senate Bill 281 (medical malpractice law reform).** The most notable provision of SB 281 was the establishment of caps on the amount of noneconomic damages a plaintiff can recover in a medical malpractice lawsuit. (The bill did not establish any limits on the amount of compensation a plaintiff can recover for economic

damages such as past and future wages, medical bills, etc.) SB 281 was needed to help rein in skyrocketing medical malpractice insurance rates that were forcing increasing numbers of physicians to retire early, give up high-risk practice areas or leave Ohio for other states with more favorable legal climates. (Effective April 2003)

- **House Bill 212 (prejudgment interest reform).** Among other things, HB 212 reduced the amount of interest defendants would pay in civil jury trials and provided that judgment interest does not apply to the portion of a jury award that is future damages—i.e., damages that have not yet accrued. The bill also revised the then-current interest rate of 10 percent on money due under certain contracts and judgments to a “floating” rate based on the federal short-term rate, and specified that the rate of interest shall be the rate in effect on the date of the judgment in a civil action and shall remain in effect until the judgment is satisfied. (Effective June 2004)
- **House Bill 292 (asbestos personal injury litigation reform).** HB 292 made the litigation process fairer for victims and employers in asbestos liability claims. Prior to HB 292, large numbers of asbestos-related lawsuits were being filed on behalf of plaintiffs who were not sick, forcing some companies into bankruptcy and increasing the likelihood that victims who really were sick from asbestos exposure would be unable to recover because unimpaired claimants were depleting available financial resources. HB 292 established objective medical criteria plaintiffs must meet in order to file an asbestos liability claim. The bill also suspended the statute of limitations for asbestos claims so individuals who do not yet show signs of physical impairment from asbestos exposure retain their right to file a claim if and when they ever do become ill. (Effective September 2004)

• **House Bill 342 (silica and mixed dust litigation reform).** Analysis showed that plaintiff attorneys were filling both asbestos claims and silica and mixed dust disease claims for the same alleged injury in anticipation of the likelihood that plaintiffs would not be able to meet the new medical criteria for asbestos claims established by HB 292. Much as HB 292 established clear medical criteria for filing asbestos liability lawsuits, HB 342 established minimum medical requirements for filing certain silica or mixed dust disease claims. Under HB 342, victims who truly are sick from exposure to silica and/or mixed dust have their claims processed more quickly. *(Effective September 2004)*

• **House Bill 498 (employment intentional tort reform).** HB 498 required employees suing their employers for a workplace injury to prove that the employer acted with an “intent to injure” or in the belief that an injury was substantially certain to occur. The bill was designed to address the impact on employers of the expansion of provisions for seeking damages for workplace injuries that had resulted from a series of Ohio Supreme Court decisions. In 1982 the Court created the “intentional tort” as a mechanism for workers to seek compensation for workplace injuries. Over the years, the Court relaxed the standards for intentional torts, which resulted in such suits becoming commonplace. As employers and their insurers increasingly chose to settle these cases to avoid the high costs of a trial, this in turn created a lottery atmosphere in which many employees filed intentional torts with the expectation of a windfall settlement even for minor injuries. *(Effective April 2005)*

• **Senate Bill 80 (comprehensive tort reform).** SB 80 brought added levels of fairness and predictability to Ohio’s civil justice system through a comprehensive package of

commonsense award parameters that fairly compensate individuals who are injured while also providing safeguards to ensure that defendants are not unjustly penalized and plaintiffs and their attorneys are not unjustly enriched. Among other things, SB 80 (a) established reasonable caps on punitive and noneconomic damages for all tort actions, (b) established a 10-year statute of repose (i.e., time limit) within which product liability and construction-related lawsuits can be filed against the original manufacturer or designer, and (c) allowed defendants to introduce evidence that a plaintiff has received, or will receive, compensation for the same damages from other “collateral sources.” *(Effective April 2005)*

• **Senate Bill 117 (public nuisance statute reform).** SB 117 helped bring to a halt the use of “public nuisance” statutes by plaintiffs’ attorneys to file suit against one-time manufacturers of a product. The bill clarified that a city’s ability to sue product manufacturers, including paint companies alleged to have contributed to lead poisoning, can be brought only under Ohio product liability law. SB 117 was designed to thwart plaintiff attorneys who sought to circumvent the requirement of SB 80 that plaintiffs filing product liability lawsuits must prove that a specific product of a specific manufacturer or supplier caused the plaintiff’s harm. SB 117 also permitted consumers to recover up to \$5,000 of noneconomic damages, in addition to all actual out-of-pocket economic damages and attorney fees, under the Ohio Consumer Sales Protection Act. *(Effective August 2007)*

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Notable judicial rulings that have upheld key tort laws in Ohio in recent years include the following:

• **Ohio Supreme Court, *State ex. Rel. Ohio General Assembly v. Ohio Secretary of State Jennifer Brunner.***

This August 2007 ruling effectively overturned Governor Ted Strickland’s veto of SB 117, which clarified that Ohio’s product liability law, not the state’s public nuisance statutes, is the proper context for filing suit against product manufacturers (see Senate Bill 117 above). Ohio Secretary of State Jennifer Brunner had returned the bill to Governor Strickland after it had been filed unsigned by outgoing Governor Bob Taft with the Secretary of State’s office. The court ruled that Secretary of State Brunner’s actions did not pass constitutional muster, voiding Governor Strickland’s veto of this important legislation and paving the way for SB 117 clarifications to take effect.

• **Ohio Supreme Court, In Re: Special Docket No. 73958, 2007-Ohio-5268.**

This October 2007 ruling addressed procedural issues related to legal challenges brought by organized labor and the trial bar to the retrospective application (i.e., to pending cases) of HB 292's objective medical criteria for individuals filing a personal-injury asbestos claim (see House Bill 292 above). The Supreme Court held that the trial court's findings regarding the constitutionality of HB 292's prima facie filing requirements applicable to personal-injury asbestos claims constitute final, appealable orders when certain requirements are met. The Court remanded the case back to Ohio's Eighth District Court of Appeals, which in September 2008 ruled that the retroactive application of HB 292 was not in violation of the Ohio Constitution and reversed the trial court's finding.

• **Ohio Supreme Court, Arbino v. Johnson & Johnson.** In this December 2007 ruling, the Court upheld two major capping provisions of SB 80—the caps on jury awards for noneconomic damages and for punitive damages. The Court found that caps do not violate consumer rights, right to jury or separation of powers.

• **Ohio Supreme Court, Groch v. General Motors Corporation, 2008-Ohio-546.** In this February 2008 ruling, the Court held that SB 80's 10-year statute of repose applicable to product liability actions is constitutional on its face although unconstitutional as applied to the specific facts in *Groch*. The Court rejected the plaintiff's charge that the statute of repose provision in question violates the takings clause, the due process and right to remedy clauses, and the equal protection clause of the Ohio Constitution.

• **Ohio Supreme Court, Ackison v. Anchor Packing Company.** This October 2008 ruling upheld the retroactive applicability provisions of HB 292, Ohio's landmark asbestos liability reform legislation. The Court's decision affirmed that SB 292 could be applied to cases pending prior to the legislation's effective date. Days following the *Ackison* decision, the Cuyahoga County Common Pleas Court dismissed 30,000 asbestos claims, unclogging a backlog of unwarranted suits and making possible more timely consideration of, and compensation for, legitimate personal injury claims related to alleged exposure to asbestos.

Judicial rulings have played a vital role in protecting the integrity and intent of legislative reforms. . . balancing the need to protect companies from frivolous lawsuits with the need to compensate victims fairly for any legitimate liability claims.

• **Ohio Supreme Court, DiCenzo v. A-Best Products Co.** In October 2009, the Court ruled that a seller's or supplier's liability for defective product sales does not apply to pre-1977 sales. Prior to 1977, Ohio did not permit claims against sellers/suppliers for defective products. The Court's ruling in *DiCenzo* held that retroactive application of a 1977 Court decision allowing such suits would impose a significant financial burden on defendants without promoting the purpose of making products safer since the products in question had not been sold for nearly three decades.

• **Ohio Supreme Court, Oliver v. Cleveland Indians Baseball Co. Ltd., Slip Opinion No. 2009-Ohio-5030.**

In October 2009, the Court ruled that the \$250,000 cap on noneconomic damages awarded against political subdivisions (Chapter 2744 of the Ohio Revised Code) is constitutional because it is rationally related to the purpose of preserving the financial integrity of political subdivisions. The Court also held that the cap does not violate a plaintiff's right to a jury trial or the right to equal protection under the law. The Court's decision in this case drew attention to the fact that it's not just private businesses but also the public sector that can be the victim of irrational, lottery-style jury awards.

• **Franklin County Court of Appeals, Hanners v. Ho Wah Genting Wire & Cable SDN BHD, 2009-Ohio-6481.** This December 2009 ruling upheld the constitutionality of the punitive damages bifurcation provision included in SB 80, which protects the right of a defendant to a separate trial on the issue of noneconomic damages without evidence related to possible punitive damages being considered at the same time.

These judicial rulings have played a vital role in protecting the integrity and intent of legislative reforms that improved the fairness and predictability of Ohio's civil justice system, balancing the need to protect companies from frivolous lawsuits with the need to compensate victims fairly for any legitimate liability claims.

Scanning the Civil Justice Reform Landscape, 2010 and Beyond

For all the progress we have made in Ohio, additional improvements are needed and several important civil justice reform proposals are being advanced. At the same time, it's important to understand that there also is no shortage

of counterproductive efforts underway threatening to undermine and undo key reforms of recent years

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Opportunities for Improvement: Priority Advocacy Issues

Three major priorities for legislative action merit mention here:

• Asbestos Bankruptcy Transparency.

In Ohio, asbestos claimants have two potential means of recovery—by making a claim against an asbestos bankruptcy trust fund or by filing a civil suit against a solvent company in a state court. Frequently, judges and juries in civil suits do not have access to information disclosed in the bankruptcy system (a federal court jurisdiction). This lack of transparency and coordination compromises the ability of judges and juries to render justice on a consistent basis. Companion legislation introduced in 2008 (SB 370/HB 631) would have required asbestos claimants to make certain disclosures pertaining to claims that have been submitted to asbestos bankruptcy trusts. By providing for greater transparency, this OMA-supported legislation would have helped prevent “double dipping” without limiting or delaying the ability of asbestos claimants to seek recovery for their injuries. *Status: SB 370 passed the Ohio Senate and the particular House committee but never went to a floor vote; HB 631 went to a House floor vote and was defeated by a vote of 48 to 45 in December 2008. To date, no new bill has been introduced.*

• Private Attorney Retention Sunshine Act (PARSA). In Ohio and across the country, government officials increasingly are outsourcing legal work to private-sector personal injury attorneys on a contingency fee basis. The practice of entering into such contracts has raised legitimate questions about the propriety of contingency-fee arrangements for the prosecution of public claims. PARSA is model legislation developed by the American Legislative Exchange Council (ALEC) that would require greater transparency and accountability when such agreements are made. PARSA would require legislative approval of most large contingency-fee contracts between government and personal injury attorneys; require personal injury attorneys to keep track of their time spent on government cases; and reassert the legislature’s regulatory oversight. *Status: To date, no PARSA legislation has been introduced in the Ohio General Assembly.*

• CSPA “Right to Cure” Provision.

Many states across the nation have added “right to cure” (or “expedited remedy”) provisions to their Consumer Sales Practices Acts (CSPAs). “Right to cure” allows the defendant in a CSPA claim to voluntarily offer to remedy the problem before going to trial. If the plaintiff declines the offer and then is awarded a smaller award at trial, the defendant is not liable for paying the plaintiff’s attorney fees incurred after the offer was made, as currently required under the CSPA. “Right to Cure” provides an incentive to defendants to quickly and voluntarily step up to the plate to offer legitimate remedies to plaintiffs when issues arise, while the incentive for plaintiffs is a fair and quick resolution without waiting on a lengthy legal process to deliver an award that may be less than the original remedy offered by the defendant. The Ohio General Assembly should give consideration to amending Ohio’s CSPA

with some comparable “right to cure” or “expedited remedy” provisions. *Status: To date, no CSPA legislation has been introduced in the Ohio General Assembly.*

The Legislative Arena: Recent Setbacks & Imminent Threats

Ohio has come a long way in developing a competitive business environment—in part through various tort reforms that have created a fairer and more stable and predictable legal environment. But make no mistake about it: Substantial efforts are underway to try to whittle away at those reforms and roll back the progress we have made as a state. Personal injury trial attorneys have been among the most active parties in trying to reverse gains that have helped make Ohio a fair place for businesses and injured parties alike.

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Following is a list of recent setbacks and specific imminent threats that make it clear this is no time for Ohio manufacturers—or the broader business community—to be complacent about the tort landscape in our state:

• House Bill 631 (disclosure requirements in asbestos claims).

This OMA-supported bill would have required asbestos claimants in civil suits to make certain disclosures pertaining to claims that have been submitted to

asbestos bankruptcy trusts. *Status: As noted above, HB 631 was defeated in a floor vote in the Ohio House in December 2008.*

• **Senate Bill 309 (consistent language for creating private rights of action).**

This OMA-supported proposal would have required consistent language when statutes intend to explicitly create a private right of action (i.e., a right to file suit), helping to curtail court rulings that result in unexpected liability for companies. *Status: SB 309 cleared committee but never came up for a floor vote by the time the 127th General Assembly adjourned in 2008.*

• **House Bill 361 (collateral source rule).**

This OMA-opposed legislative proposal would reverse the effect of a key provision of Senate Bill 80 (see p. 3) related to the accuracy of evidence presented to a jury. Specifically, HB 361 addresses the admissibility of evidence of a write-off—i.e., the amount of compensation accepted by a medical provider from an insurer as full payment for medical or hospital treatment—in personal injury or wrongful death lawsuits. HB 361 would limit evidence of medical damages to only the amount of the plaintiff's original, pre-write-off medical bill. As such, HB 361 would enable plaintiff attorneys to create fictional damages that a claimant did not in fact incur, thereby confusing juries trying to determine appropriate damages and deliver fair and equitable results. If enacted, HB 361 would greatly increase litigation damages awards. *Status: The bill has been referred to the Ohio House Civil & Commercial Law Committee.*

• **Senate Bill 36 (rejection of settlement offers & post-offer costs).**

This legislation requests the Ohio Supreme Court to amend Rule 68 of the Ohio Rules of Civil Procedure to mirror Rule 68 of the Federal Rules of Civil Procedure. Intended to encourage settlements, Federal Rule 68 allows a

defendant to make a settlement offer and makes the plaintiff who rejects such an offer liable for the defendant's post-offer costs, as well as the plaintiff's own costs and attorney fees, if he or she does not improve on the offer at trial. As originally introduced, this bill was supported by the business community; however, SB 36 was amended to go beyond the scope of Federal Rule 68 (by expanding the defendant's offer of judgment to offers made by plaintiffs), and it was weakened by carving out exceptions for tort or medical malpractice actions in which noneconomic damages are capped. *Status: The Ohio Senate Judiciary-Civil Justice Committee approved this bill in June 2009. The bill is pending a full Senate floor vote.*

• **Senate Bill 157 (Cy pres doctrine).**

Under SB 157, undistributed class action proceeds must be donated to a charity or nonprofit organization. Enacting SB 157 would codify existing *cy pres* doctrine in Ohio, which allows—but does not require—distribution of unclaimed settlement funds in this manner. Currently, when defendants agree to out-of-court settlements, the amount of the total settlement fund they actually pay out is determined by the number of class action claimants who come forward to claim their award. Under SB 157, defendants would pay the full amount of the settlement fund regardless of the number of claimants who are identified. There is no need to codify *cy pres* in statute, because it already exists as a discretionary tool that judges and parties to the class action can use to reach a settlement and designate part or all of any unclaimed funds to charity. Codifying *cy pres* would likely increase the number of class action lawsuits filed in Ohio (making the state less attractive to businesses); it would discourage companies from entering into settlement agreements (driving up legal costs for everyone and clogging the court system); and it could inflate plaintiff attorney fees

in claims-made settlements (thereby encouraging frivolous lawsuits). For these reasons, Ohio's business community is united in its opposition to SB 157. *Status: SB 157 is pending before the Ohio Senate Insurance, Commerce and Labor Committee. A similar proposal, HB 427, was introduced in the Ohio House of Representatives in January 2010.*

**The Judicial Arena:
Defense of Achievements to Date**

In addition to imminent threats at the Statehouse, there are a number of tort reform challenges working their way through lower courts, as well as some reform provisions that are likely to face future judicial challenges. These include, but are not limited to, the following:

- Ban on multiple punitive damage awards
- Ban on prejudgment interest on punitive damage awards
- Government standard defense against punitive damage awards
- Statute of repose for construction
- Successor liability provisions for successor-asbestos related liability
- Product liability provision that eliminates the consumer expectation test as a stand-alone test for design defect causes of action and creates an additional factor, which requires a "reasonable alternative design" analysis, to be considered in the risk-utility test for design defect causes of action

The OMA-supported reforms described in this document strike a reasonable balance between protecting consumers and workers without overly burdening businesses, while positioning Ohio advantageously relative to other states.

The Stakes Are High for Ohio—and for Ohio Job Creators

A rational, fair and predictable civil justice system pays substantial dividends. It attracts investment, removes barriers to innovation, promotes growth and stimulates job creation. The OMA-supported reforms described in this document—those enacted as well as those currently being advanced—strike a reasonable balance between protecting consumers and workers without overly burdening businesses, while positioning Ohio advantageously relative to other states.

To help protect and further strengthen this competitive advantage, and to advance manufacturing in Ohio, the OMA will continue its vigilant monitoring of, and advocacy in response to, the efforts of personal injury attorneys and judicial activists who seek to undo Ohio's tremendous civil justice reform achievements of the past decade. Essential partners in this work are state policymakers whom we encourage to ask the following questions of every civil justice reform bill introduced in the General Assembly or challenged in the courts:

- Will these policies fairly and appropriately protect and compensate injured parties without creating a lottery mentality?
- Will these policies increase—or reduce—litigation burden and costs?
- Will these policies promote—or thwart—innovation?
- Will these policies attract—or discourage—investment?
- Will these policies stimulate—or stifle—growth and job creation?

The OMA encourages its public-sector partners to ask themselves, “Will my position on critical tort reform issues enhance—or undermine—Ohio’s competitiveness in the global economy?”

Most importantly, we encourage our public-sector partners to ask themselves, “Will my position on critical tort reform issues enhance—or undermine—Ohio’s competitiveness in the global economy?” That’s the OMA’s—and Ohio’s—bottom line.

*The mission of The Ohio
Manufacturers' Association is to
protect and grow Ohio manufacturing.
Through the OMA, manufacturers
and manufacturing stakeholders
work directly with the members of
the Ohio General Assembly, state
regulatory agencies, the judiciary
community and statewide media with
the sole focus of improving business
conditions for manufacturers in Ohio.*



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