2A:15-5.9

LEGISLATIVE HISTORY CHECKLIST
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("Punitive Damages")

NJSA: 2A:15-5.9

LAWS OF: 1995 **CHAPTER:** 142

BILL NO: S1496

SPONSOR(S): Cardinale

DATE INTRODUCED: October 3, 1994

COMMITTEE: **ASSEMBLY:** Insurance

SENATE: Commerce

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Second reprint enacted

DATE OF PASSAGE: **ASSEMBLY:** June 12, 1995

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COMMITTEE STATEMENT: **ASSEMBLY:** Yes

SENATE: Yes

FISCAL NOTE: No

VETO MESSAGE: No

MESSAGE ON SIGNING: Yes

FOLLOWING WERE PRINTED:
REPORTS: Yes
HEARINGS: No

See newspaper clippings--attached:
"Lawsuit reform now law," 6-30-95, Home News.
"Whitman signs lawsuit--reform laws," 6-30-95, Asbury Park Press.

974.90 Verniero, Peter.
L514 Report to the governor on the subject of tort reform.
1994a September 13, 1994. Office of the Governor, 1994.
11, 17p. [COPY ATTACHED]

KBG:pp

L. 1995, c. 142

[SECOND REPRINT]

SENATE, No. 1496

STATE OF NEW JERSEY

INTRODUCED OCTOBER 3, 1994

By Senator CARDINALE

AN ACT concerning tort reform and the awarding of punitive damages in civil actions, amending P.L.1987, c.197 and supplementing Title 2A of the New Jersey Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. (New section) This act shall be known and may be cited as the "Punitive Damages Act."

2. (New section) As used in this act:

"Actual malice" means an intentional wrongdoing in the sense of an evil-minded act.

"Clear and convincing evidence" means that standard of evidence which leaves no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is a standard which requires more than a preponderence of evidence, but less than beyond a reasonable doubt, to draw a conclusion.

"Compensatory damages" means damages intended to make good the loss of an injured party, and no more. The term includes general and special damages and does not include nominal, exemplary or punitive damages.

"Defendant" means any party against whom punitive damages are sought.

"Nominal damages" are damages that are not designed to compensate a plaintiff and are less than $500.

"Plaintiff" means any party claiming punitive damages.

"Punitive damages" includes exemplary damages and means damages awarded against a party in a civil action because of aggravating circumstances in order to penalize and to provide additional deterrence against a defendant to discourage similar conduct in the future. Punitive damages do not include compensatory damages or nominal damages.

"Wanton and willful disregard" means a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission.

3. (New section) An award of punitive damages must be specifically prayed for in the complaint.

4. (New section) a. Punitive damages may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter
Matter enclosed in superscript numerals has been adopted as follows:
1 Senate SCM committee amendments adopted November 10, 1994.
2 Assembly AIN committee amendments adopted June 1, 1995.

willful disregard of persons who foreseeably might be harmed by those acts or omissions. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.

b. In determining whether punitive damages are to be awarded, the trier of fact shall consider all relevant evidence, including but not limited to, the following:

(1) The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct;

(2) The defendant's awareness of reckless disregard of the likelihood that the serious harm at issue would arise from the defendant's conduct;

(3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and

(4) The duration of the conduct or any concealment of it by the defendant.

c. If the trier of fact determines that punitive damages should be awarded, the trier of fact shall then determine the amount of those damages. In making that determination, the trier of fact shall consider all relevant evidence, including, but not limited to, the following:

(1) All relevant evidence relating to the factors set forth in subsection b. of this section;

(2) The profitability of the misconduct to the defendant;

(3) When the misconduct was terminated; and

(4) The financial condition of the defendant.

5. (New section) a. Any actions involving punitive damages shall, if requested by any defendant, be conducted in a bifurcated trial.

b. In the first stage of a bifurcated trial, the trier of fact shall determine liability for compensatory damages and the amount of compensatory damages or nominal damages. Evidence relevant only to the issues of punitive damages shall not be admissible in this stage.

c. Punitive damages may be awarded only if compensatory damages have been awarded in the first stage of the trial. An award of nominal damages cannot support an award of punitive damages.

d. In the second stage of a bifurcated trial, the trier of fact shall determine if a defendant is liable for punitive damages.

e. In any action in which there are two or more defendants, an award of punitive damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant.

[1][6. (New section) No defendant shall be liable for punitive damages in any action in an amount in excess of five times the liability of that defendant for compensatory damages. In cases of joint and several liability, the total award of punitive damages against all defendants may not exceed five times the amount of compensatory damages.][1]

[1][7. (New section) The jury shall not be informed of the cap on punitive damages established by section 6 of this act.][1]

[1][8.] 6.[1] (New section) [2]a.[2] Before entering judgment for an award of punitive damages, the trial judge shall ascertain that

the award is reasonable in its amount and justified in the circumstances of the case, in light of the purpose to punish the defendant and to deter that defendant from repeating such conduct. If necessary to satisfy the requirements of this section, the judge may reduce the amount of or eliminate the award of punitive damages.

[2]b. No defendant shall be liable for punitive damages in any action in an amount in excess of five times the liability of that defendant for compensatory damages or $350,000, whichever is greater.

c. The provisions of subsection b. of this section shall not apply to causes of action brought pursuant to P.L.1993, c.137 (C.2A:53A-21 et seq.), P.L.1945, c.169 (C.10:5-1 et seq.), P.L.1989, c.303 (C.26:5C-5 et seq.) or P.L.1992, c.109 (C.2A:61B-1), or in cases in which a defendant has been convicted pursuant to R.S.39:4-50 or section 2 of P.L.1981, c.512 (C.39:4-50.4a).[2]

[1][9.] 7.[1] (New section) Nothing contained in this act is to be construed as creating any claim for punitive damages which is not now available under the law of this State.

[1][10.] 8.[1] Section 5 of P.L.1987, c.197 (C.2A:58C-5) is amended to read as follows:

5. a. [Punitive damages may be awarded to the claimant only if the claimant proves, by a preponderance of the evidence, that the harm suffered was the result of the product manufacturer's or seller s acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of the safety of product users, consumers, or others who foreseeably might be harmed by the product. For the purposes of this section "actual malice" means an intentional wrongdoing in the sense of an evil-minded act, and "wanton and willful disregard" means a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission. Punitive damages shall not be awarded in the absence of an award of compensatory damages.] (Deleted by amendment, P.L. , c. .)

b. [The trier of fact shall first determine whether compensatory damages are to be awarded. Evidence relevant only to punitive damages shall not be admissible in that proceeding. After such determination has been made, the trier of fact shall, in a separate proceeding, determine whether punitive damages are to be awarded. In determining whether punitive damages are to be awarded, the trier of fact shall consider all relevant evidence, including but not limited to, the following:

(1) The likelihood at the relevant time that serious harm would arise from the tortfeasor's conduct;

(2) The tortfeasor's awareness of reckless disregard of the likelihood that the serious harm at issue would arise from the tortfeasor's conduct;

(3) The conduct of the tortfeasor upon learning that its initial conduct would likely cause harm, and

(4) The duration of the conduct or any concealment of it by the tortfeasor.] (Deleted by amendment, P.L. , c. .)

c. Punitive damages shall not be awarded if a drug or device or food or food additive which caused the claimant's harm was subject to premarket approval or licensure by the federal Food and Drug Administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat.1040, 21 U.S.C.§301 et seq. or the "Public Health Service Act." 58 Stat.682, 42 U.S.C.§201 et seq. and was approved or licensed; or is generally recognized as safe and effective pursuant to conditions established by the federal Food and Drug Administration and applicable regulations, including packaging and labeling regulations. However, where the product manufacturer knowingly withheld or misrepresented information required to be submitted under the agency's regulations, which information was material and relevant to the harm in question, punitive damages may be awarded. For purposes of this subsection, the terms "drug", "device", "food", and "food additive" have the meanings defined in the "Federal Food, Drug, and Cosmetic Act."

d. [If the trier of fact determines that punitive damages should be awarded, the trier of fact shall then determine the amount of those damages. In making that determination, the trier of fact shall consider all relevant evidence, including, but not limited to, the following:

(1) All relevant evidence relating to the factors set forth in subsection b. of this section;

(2) The profitability of the misconduct to the tortfeasor;

(3) When the misconduct was terminated; and

(4) The financial condition of the tortfeasor.] (Deleted by amendment, P.L. , c. .)

(cf: P.L.1987, c.197, s.5)

2 9. (New section) The jury shall not be informed of the cap on punitive damages established by section 6 of this act.2

2 10. (New section) Upon the conclusion of any action in which punitive damages have been awarded, the court shall refer the record of that action to the prosecutor of the county in which the case was tried and to the Attorney General for investigation as to whether a criminal act has been committed by the defendant.2

1[11.] 2[9.1] 11.2 This act shall take effect 120 days after enactment and shall apply to 2[actions] causes of action2 filed on or after the effective date of this act.

Establishes standards for the awarding of punitive damages in civil cases.

regulations, which information was material and relevant to the harm in question, punitive damages may be awarded. For purposes of this subsection, the terms "drug", "device", "food", and "food additive" have the meanings defined in the "Federal Food, Drug, and Cosmetic Act."

d. [If the trier of fact determines that punitive damages should be awarded, the trier of fact shall then determine the amount of those damages. In making that determination, the trier of fact shall consider all relevant evidence, including, but not limited to, the following:

(1) All relevant evidence relating to the factors set forth in subsection b. of this section;

(2) The profitability of the misconduct to the tortfeasor;

(3) When the misconduct was terminated; and

(4) The financial condition of the tortfeasor.] (Deleted by amendment, P.L. , c. .)

(cf: P.L.1987, c.197, s.5)

11. This act shall take effect 120 days after enactment and shall apply to actions filed on or after the effective date of this act.

Sponsor STATEMENT

This bill is intended to limit the use and amount of punitive damages which may be awarded in a lawsuit. The awarding of punitive damages was originally intended to punish defendants for malicious or wanton actions and to defer others from engaging in similar activities. However, many persons believe that in recent years these damages have been awarded indiscriminately for actions that are merely careless. This has increased the number of punitive damage claims and contributed to the high cost of litigation.

This bill, the "Punitive Damages Act," establishes reasonable and fair standards with regard to the awarding of punitive damages in civil cases. Under the provisions of the bill, punitive damages could only be awarded when a trier of fact has returned a verdict awarding the plaintiff compensatory damages and the award exceeds nominal damages.

The bill also provides that no defendant would be liable for punitive damages in any action in an amount in excess of five times the liability of that defendant for compensatory damages.

In addition, the bill provides that in order to recover punitive damages, the plaintiff must prove, by clear and convincing evidence, that the defendant's acts or omissions which caused the harm were actuated by actual malice or accomplished by wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. A showing of negligence, including gross negligence, would not support a recovery of punitive damages.

Other provisions of the bill are as follows:

1. Punitive damages must be specifically requested in the complaint.

2. If requested by the defendant, any case involving punitive damages shall be conducted in a proceeding with compensatory

damages being determined in one stage and punitive damages, if warranted, in a second stage.

3. In any action in which there are two or more defendants, an award of punitive damages must be specific as to each defendant and each defendant is liable only for the amount of award made against that defendant.

Establishes standards for the awarding of punitive damages in civil cases.

ASSEMBLY INSURANCE COMMITTEE

STATEMENT TO

[FIRST REPRINT]

SENATE, No. 1496

STATE OF NEW JERSEY

DATED: JUNE 1, 1995

The Assembly Insurance Committee reports favorably and with committee amendments, Senate, No. 1496(1R).

This bill, the "Punitive Damages Act," establishes standards with regard to the awarding of punitive damages in civil cases.

As amended by the committee, the bill provides that punitive damages must be specifically requested in the complaint and, if requested by the defendant, a case involving punitive damages must be bifurcated, with compensatory damages being determined in the first stage and punitive damages, if warranted, determined in the second stage. Punitive damages may be awarded only if compensatory damages have been awarded.

The bill provides that in order to recover punitive damages, the plaintiff must prove, by clear and convincing evidence, that the defendant's acts or omissions which caused the harm were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. A showing of negligence, including gross negligence, would not be enough to support a recovery of punitive damages. Under the bill, "actual malice" means an intentional wrongdoing in the sense of an evil-minded act; and "wanton and willful disregard" means a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission.

In determining whether punitive damages are to be awarded, the trier of fact must consider all the relevant evidence, including the following: (1) the likelihood at the relevant time that serious harm would arise from the defendant's action; (2) the defendant's awareness of reckless disregard of the likelihood that serious harm would arise from his conduct; (3) the conduct of the defendant upon learning that its initial conduct would likely cause harm; and (4) the duration of the conduct or any concealment of it by the defendant.

Upon a determination by the trier of fact that an award of punitive damages is warranted, the trier of fact is to consider all relevant evidence in arriving at an amount of the damages, including: the factors noted in the preceding paragraph above; the profitability of the misconduct; when the misconduct stopped; and the financial condition of the defendant.

In any action in which there are two or more defendants, an award of punitive damages must be specific as to each defendant and each defendant is liable only for the amount of the award made against that defendant.

The bill provides that the trial judge may reduce or eliminate an award for punitive damages if it is unreasonable in its amount and not justified in the circumstances of the case, in light of the

purpose to punish the defendant and to deter that defendant from repeating such conduct.

The bill deletes provisions of section 5 of P.L.1987, c.197 (C.2A:58C-4) which duplicate the provisions of this bill in regard to punitive damages.

The committee amended the bill to provide that a defendant shall not be liable for more than five times the amount of compensatory damages or $350,000, whichever is greater. No cap shall apply, however, for the following causes of action: bias crimes, discrimination, AIDS testing disclosure, sexual abuse or drunk driving.

The committee also amended the bill to provide that upon the conclusion of any action in which punitive damages have been awarded, the court shall refer the record of that action to the prosecutor of the county in which the case was tried and to the Attorney General for investigation as to whether a criminal act has been committed by the defendant.

The bill takes effect immediately and applies to causes of action which are filed on or after the effective date.

As released by the committee, this bill is identical to Assembly, No. 1334(1R).

ASSEMBLY MINORITY STATEMENT FOR S-1496(1R)

Submitted By Assemblymen Pascrell and Charles

Punitive damages are designed to punish reprehensible conduct and deter such conduct in the future. Given the intent of punitive damages, the minority finds it curious that this legislation, as amended, would protect willful wrongdoers from taking responsibility for their actions.

The minority also notes that it is not easy to prove punitive damages. The act or omission by the defendant has to have been done with "actual malice" or accompanied by a "wanton and willful disregard of the safety" of the product users.

Capping punitive damages allows malicious manufacturers to budget for future fines as a cost of doing business. This would significantly reduce the current law's incentives for making products safer.

The sponsors seem to recognize the validity of the arguments made by the minority for their amendments provide certain exemptions from the cap. The minority believes that the specific exemptions listed are a sellout to corporate interests at the expense of the innocent victim. Caps are not in place for various individual defendants, such as drunk drivers and child molesters, but the caps will protect virtually every large, corporate defendant which willingly and knowingly injures innocent people.

Futhermore, the cap exemptions place the State in the untenable position of holding some victims as more important than others. A victim of bias crime or a drunk driver faces no cap on punitive damages, while a woman with silicone leaking into her body or a construction worker who can't breathe because of asbestos poisoning have their potential damages capped. The State should not be making legal distinctions between victims.

However, recognizing that the sponsors had support for their caps and exemptions, the minority offered seven additional amendments. Each of these amendments would add another exemption to the cap for death or injury caused by:

- exposure to asbestos or fiberglass;
- silicone breast implants;
- exposure to toxic or hazardous substances;
- unsafe machinery or procedures used in the workplace;
- inadequate warnings of dangers or failure to provide adequate warnings in the workplace;
- exposure to materials that cause cancer or genetic damage;
- tobacco-related products.

None of these amendments was accepted by the majority in committee.

SENATE COMMERCE COMMITTEE

STATEMENT TO

SENATE, No. 1496

with committee amendments

STATE OF NEW JERSEY

DATED: NOVEMBER 10, 1994

The Senate Commerce Committee reports favorably and with committee amendments Senate, No. 1496.

This bill, the "Punitive Damages Act," establishes standards with regard to the awarding of punitive damages in civil cases.

The bill, as amended, provides that punitive damages must be specifically requested in the complaint and, if requested by the defendant, a case involving punitive damages must be bifurcated, with compensatory damages being determined in the first stage and punitive damages, if warranted, determined in the second stage. Punitive damages may be awarded only if compensatory damages or nominal damages which exceed $500 or more have been awarded.

The bill provides that in order to recover punitive damages, the plaintiff must prove, by clear and convincing evidence, that the defendant's acts or omissions which caused the harm were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. A showing of negligence, including gross negligence, would not be enough to support a recovery of punitive damages. Under the bill, "actual malice" means an intentional wrongdoing in the sense of an evil-minded act; and "wanton and willful disregard" means a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission.

In determining whether punitive damages are to be awarded, the trier of fact must consider all the relevant evidence, including the following: (1) the likelihood at the relevant time that serious harm would arise from the defendant's action; (2) the defendant's awareness of reckless disregard of the likelihood that serious harm would arise from his conduct; (3) the conduct of the defendant upon learning that its initial conduct would likely cause harm; and (4) the duration of the conduct or any concealment of it by the defendant.

Upon a determination by the trier of fact that an award of punitive damages is warranted, the trier of fact is to consider all relevant evidence in arriving at an amount of the damages, including: the factors noted in the preceding paragraph above; the profitability of the misconduct; when the misconduct stopped; and the financial condition of the defendant.

In any action in which there are two or more defendants, an award of punitive damages must be specific as to each defendant and each defendant is liable only for the amount of the award made against that defendant.

The bill provides that the trial judge may reduce or eliminate an award for punitive damages if it is unreasonable in its amount and not justified in the circumstances of the case, in light of the purpose to punish the defendant and to deter that defendant from repeating such conduct.

The provisions of this bill will take effect in 120 days after enactment and apply to actions filed on or after that effective date.

The bill deletes provisions of section 5 of P.L.1987, c.197 (C.2A:58C-4) which duplicate the provisions of this bill in regard to punitive damages.

The committee amendments to this bill remove the cap on punitive damages of five times compensatory damages.

OFFICE OF THE GOVERNOR
NEWS RELEASE

CN-001 CARL GOLDEN
Contact: BECKY TAYLOR
609-777-2600

TRENTON, N.J. 08625
Release: THURSDAY JUNE 29, 1995

Governor Christie Whitman signed a package of five tort reform bills today that bring common sense and equity to the state's civil litigation system. The laws fulfill the Governor's 1994 promise to revamp the system and provide more access to the courts.

"The legislation enacted today strikes a fair balance between preserving a person's right to sue and controlling nuisance suits that drive up the cost of doing business in New Jersey" said Governor Whitman. "Both consumers and businesses will benefit from these reforms."

Sponsors of the following tort reform bills are **Senators Joseph Kyrillos, Jr. (R-Monmouth) and Gerald Cardinale (R-Bergen):**

1. Certificate of Merit - Senate Bill No. 1493

This bill establishes new procedures with regard to the filing of malpractice or other professional-negligence actions against certain certified professionals in which damages are sought for personal injuries, wrongful death, or property damage. That list includes accountants, architects, attorneys, dentists, engineers, physicians, chiropractors, podiatrists, and nurses and health care facilities.

The bill requires that within 60 days after a complaint has been filed, the plaintiff must provide the defendant with an affidavit from another professional supporting the claim that the care, knowledge or treatment provided by the defendant was not up to professional standards.

2. Joint-And-Several Liability - Senate Bill No. 1494

The bill provides that a defendant who is less than 60% responsible for the plaintiff's injury is liable only for that percent of the total award that corresponds to his or her percent of fault. A party that is 60% or more responsible is jointly and severally liable for the entire award.

The bill also modifies the "environmental exception." The bill provides that pure joint-and-several liability shall apply in environmental-tort cases, but only if the negligence or fault of the parties in the case cannot be apportioned.

3. Retail-Sellers' Liability - Senate Bill No. 1495

This bill immunizes product sellers from liability for injuries caused by manufacturer's defects in products that they have sold.

4. The Punitive Damages Act - Senate Bill No. 1496

The bill provides for a cap on punitive damages. A punitive-damage award may not exceed $350,000 or five times compensatory damages, whichever is greater. In addition, there is an exclusion from the cap for the following causes of action: bias crimes, the Law Against Discrimination, AIDS testing disclosure, sexual abuse, and civil actions against defendants who were convicted of drunk-driving violations.

5. Health-Care Providers' Liability -- Medical Devices - Senate Bill No. 1497

This bill holds health-care providers responsible for defective medical devices that they provide, based only on their own negligence.

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REPORT TO THE GOVERNOR

ON

THE SUBJECT OF TORT REFORM

BY:

Peter Verniero
Chief Counsel to the Governor

Janice Mitchell Mintz
Senior Associate Counsel

Eleanor Heck
Assistant Counsel

September 13, 1994

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EXECUTIVE SUMMARY

I. PUBLIC OUTREACH

Recognizing the importance of issues relating to New Jersey's system of tort liability, you instructed us to host a series of roundtables to solicit the views of interested parties. We hosted four separate meetings attended by approximately 100 persons. Included in the discussions were representatives of consumer organizations, lawyer groups, the insurance industry, law school deans, business associations, and numerous legislators.

II. SUMMARY OF CURRENT LAW

In New Jersey the award of punitive damages is governed by both statutory and common law. The law allows for such awards but only after specific criteria are satisfied. Currently, there are no caps on punitive awards.

In 1973 New Jersey enacted legislation requiring strict adherence to the rule of joint-and-several liability. Such liability allows a plaintiff in a negligence action to recover the full amount of a damages award from any defendant, regardless of that defendant's degree of fault. In 1987 the law was modified to provide that a party is liable for full economic damages only if he or she is determined to be more than 20 percent at fault and is liable for the entire amount of the judgment (regardless of the type of damages) only if he or she is more than 59 percent at fault. The 1987 modifications retained pure joint-and-several liability for environmental tort actions involving personal injury or death.

New Jersey's frivolous lawsuit act, as originally enacted in 1988, provides that the prevailing party in a frivolous civil action may recover litigation costs and attorney's fees from the non-prevailing party. However, the act was sharply limited by the State Supreme Court in 1993. The Court ruled that any legislation sanctioning attorney conduct, including the filing of frivolous pleadings, encroaches on its exclusive power to regulate the legal profession. The practical effect of the Court's ruling is that most plaintiffs may no longer be sanctioned under the frivolous lawsuit statute.

III. SUMMARY OF TORT REFORM BILLS

Seven bills have generated the majority of the debate about tort reform. They are: S-766/A-263 (requires a certificate of merit in medical-malpractice actions); S-763/A-716 (concerns liability of certain health care providers in product liability actions); S-765/A-998 (concerns joint-and-several liability); S-290/A-999

(concerns liability of certain retail sellers in product liability actions); S-292/A-1334 (concerns punitive damages); S-423 (requires an unsuccessful plaintiff to pay defendant's litigation costs and attorneys fees); and S-424 (bans contingency-fee arrangements between a plaintiff and his or her attorney).

IV. SUMMARY OF ROUNDTABLE DISCUSSIONS

The issue of punitive damages is contested. Various interest groups represented in the roundtable discussions took opposing positions.

Another highly debated issue is joint-and-several liability. Comments ranged from the statement that there is a lack of hard evidence to support the need for any reform to the statement that joint-and-several liability is unfair because it forces some defendants to bear a disproportionate share of a damages award. Many believe the costs of litigation are ultimately passed on to the consumer.

The need to reduce frivolous lawsuits was a strong theme among the participants.

V. RECOMMENDATIONS

The twin goals of the tort system are to maintain open access to the courts and to compensate victims by holding culpable defendants liable for their conduct. After evaluating the views of all parties who participated in the roundtable discussions and the views of those who have written or spoken to us on the subject, and after conducting an independent analysis of current law, we believe reform is necessary to accomplish these goals.

Accordingly, we recommend the following:

1. New Jersey should enact a system of "apportioned damages."

This proposal, similar in concept to S-765/A-998, would amend current law by providing that a plaintiff may recover from any defendant only that percentage of the judgment that corresponds to that defendant's degree of fault. Our proposal differs from S-765/A-998 in this respect: we support, in concept, the so-called "environmental exception" because of our belief that in certain cases it may be difficult, if not impossible, to apportion each respective defendant's liability for environmental harm. However, we believe the language of this exception in the current statute may be interpreted to include a broader range of actions than is necessary to address this concern. Therefore, the Legislature may wish to consider whether categories of environmental cases could be established where it would be possible to apportion liability.

We believe this proposal flows logically from the 1987 modifications to the joint-and-several liability rules. It is consistent with the goal of maintaining a system wherein only the culpable party is held accountable.

2. The current statutory and common law rules regarding punitive damages should be maintained except that damages should be capped at no more than five times the amount awarded as compensatory damages.

We believe the current system provides adequate criteria for punitive damages awards while deterring and punishing egregious conduct. Therefore, we do not endorse the specific language of S-292/A-1334. However, with regard to capping punitive damages, we do propose an important change to current law. Consistent with other aspects of our laws that require punishments or penalties to be known in advance, our proposal would set an overall ceiling on the amount of punitive awards. We believe a ceiling established at five times the amount of compensatory damages is high enough to serve as a punishment and to deter egregious conduct.

3. In recognition of the State Supreme Court's authority over attorneys, we would ask the Court to review the rules governing frivolous pleadings and summary judgment in response to the widespread belief held by roundtable participants that these rules can be strengthened.

Meritless claims not only drain the system of vital resources, but they generally bring the legal profession into disrepute. We recognize, however, that the State Supreme Court has interpreted broadly its authority to regulate the legal profession so that the Legislature's ability to enact reforms in this area is limited. Accordingly, we propose that you ask the Attorney General to request the Supreme Court to consider these issues through its committee process or however it deems appropriate.

4. New Jersey should continue to hold health care providers to a negligence standard.

This recommendation essentially endorses the concept of S-763/A-716 with the exception that we would apply this legislation prospectively so that harm occurring before the bill's effective date would not be included in its purview. The effect of this proposal would be to hold health care providers to a negligence standard. It is based on the concept that culpable parties should be held accountable for harm they cause.

5. New Jersey should hold retail sellers to a negligence standard.

This proposal essentially endorses the concept of S-290/A-999 with the exception that we would apply the legislation prospectively so that harm occurring before the bill's effective date would not be within its purview. The effect of this proposal would be to hold retail sellers to a negligence standard rather than to strict liability. It is based on the concept that parties who are culpable should be held accountable for harm they cause. Based on our observations with respect to the Supreme Court's authority over the legal profession, we believe S-290/A-999 should be rewritten to withstand judicial scrutiny.

6. New Jersey should require plaintiffs in medical-malpractice actions to file a certificate of merit demonstrating the viability of their claims.

This recommendation essentially endorses the concept of S-766/A-263, which would require a plaintiff in a medical-malpractice action to make a threshold showing that his or her claim is meritorious. Based on our observations with respect to the Supreme Court's authority over the legal profession, we believe S-766/A-263 should be rewritten to withstand judicial scrutiny.

7. New Jersey should maintain contingency-fee arrangements between a plaintiff and his or her attorney and reject the so-called "English Rule" requiring the losing party to pay counsel fees.

We believe S-423 (loser pays) and S-424 (eliminating contingency fees) would overly restrict access to the courts. Accordingly, we do not endorse them.

We believe all of these proposals strike an appropriate balance between maintaining open access to the courts and holding culpable parties liable for their actions. Our proposals are consistent with the concept that culpable parties should be held accountable for their conduct. Our proposal regarding apportioned damages is consistent with other aspects of our civil justice system. The system seeks to treat parties fairly and equitably in all cases. By supporting the concept of pure joint-and-several liability for environmental cases, we recognize the difficulty of apportioning liability in such matters.

Overall, we believe our proposals would advance the twin aims of the tort system and are the appropriate next steps along a path to true reform.

I. PUBLIC OUTREACH

Recognizing the importance of issues relating to New Jersey's system of tort liability, you instructed us to host a series of roundtables to solicit the views of interested parties. Accordingly, we hosted four meetings attended by approximately 100 persons. Included in the discussion were representatives of consumer organizations, lawyer groups, the insurance industry, law school deans, and business associations.

Senator John Adler, Senator Gerald Cardinale, Senator Joseph Kyrillos, Senator Jack Sinagra, Assemblyman Richard Bagger, and Assemblyman Gerald Zecker attended one or more of the meetings, in addition to Attorney General Poritz, Commissioner Karpinski and Commissioner Fishman.

Originally, we scheduled three roundtables but were pleased to add a fourth session to allow additional parties to attend. We accommodated all persons or groups who asked to participate.

II. SUMMARY OF CURRENT LAW

This section will discuss the current state of the law with regard to punitive damages, joint-and-several liability, frivolous lawsuits, and judicial process.

A. Punitive Damages

As you know, when a defendant is found to have engaged in conduct that is especially egregious, punitive damages may be awarded in addition to compensatory damages.

In New Jersey, the award of punitive damages is governed by both statutory and common law.

In 1986, the New Jersey Supreme Court held that when deciding whether to award punitive damages, the fact-finder should consider the following criteria:

> the seriousness of the hazard to the public; the degree of the defendant's awareness of the hazard and of its excessiveness; the cost of correcting or reducing the risk; the duration of both the improper marketing behavior and its cover-up; the attitude and conduct of the enterprise upon discovery of the misconduct; and the defendant's reason for failing to act (Fischer v. Johns-Manville Corp., 103 N.J. 643, 672-73 (1986)).

The Court also said that punitive damages should bear "some reasonable relationship" to the actual injury, noting several factors relevant to the issue, including the profitability of the misconduct, the plaintiff's litigation expenses, the defendant's financial condition, and the "total punishment" that the defendant will receive from other sources (presumably including criminal sanctions).

In 1987 New Jersey enacted the Products Liability Act (the "PLA"). This statute regulates the award of punitive damages in products liability cases. To win punitive damages, a plaintiff must show by a preponderance of the evidence both that her or his injury resulted from the product manufacturer's or seller's act or omission and that the act or omission resulted from malice or from wanton and willful disregard for the safety of anyone whom the product might harm (N.J.S.A. 2A:58C-5a). The statutory standard of conduct warranting punitive damages derives from several court decisions, including Fischer.

The PLA requires the finder of fact to conduct two separate proceedings. The first determines whether compensatory damages are justified. Evidence relevant only to punitive damages is not admissible in this phase. In the second proceeding, the fact-finder considers whether punitive damages should be awarded and, if so, how much. No punitive damages may be awarded unless there is a compensatory-damage award.

In food, drug and device cases, punitive damages are not available if the federal Food and Drug Administration has approved or licensed the drug, device, food, or food additive that caused the harm (N.J.S.A. 2A:58C-5c).

The PLA provides that in determining the amount of punitive damages, the fact-finder should consider such factors as the profitability to the defendant of its conduct, when the defendant terminated the conduct, and the defendant's financial condition.

B. Joint-and-Several Liability

As you know, "joint-and-several liability" allows a plaintiff in a negligence action to recover the full amount of a damages award from any defendant, regardless of that defendant's apportionment of fault. A defendant that pays more than her or his share may then seek contribution from the non-paying defendant(s).

In 1973, New Jersey enacted legislation requiring strict adherence to the rule of joint-and-several liability. However, in 1987 New Jersey modified the joint-and-several liability rule. Pursuant to these modifications (still the current law), the plaintiff in a negligence action may recover the full amount of damages only from a party that is adjudged to be at least 60%

responsible for the total damages (N.J.S.A. 2A:15-5.3a). A party whose share of fault is from 21% to 59% is liable for the entire economic-loss award and her or his proportional share of non-economic loss (N.J.S.A. 2A:15-5.3b). "Non-economic loss" is defined as "subjective, nonmonetary losses, including * * * pain and suffering, inconvenience, mental anguish, emotional distress, loss of society and companionship, loss of consortium, and destruction of the parent-child relationship" (N.J.S.A. 2A:15-5.3f(2)).

The 1987 modifications retained pure joint-and-several liability for environmental tort actions (N.J.S.A. 2A:15-5.3d). An environmental tort action is defined as "a civil action seeking damages for personal injuries or death" caused by "the negligent manufacture, use, disposal, handling, storage or treatment of hazardous or toxic substances" (N.J.S.A. 2A:15-5.3f(1)).

C. Frivolous Lawsuits

One point of agreement in the tort-reform debate has been the need to reduce frivolous litigation. Although representatives of business believe that a tort-reform package is necessary to reduce the number of meritless lawsuits, representatives of consumer groups and trial lawyers believe that the problem can be addressed by strengthening legislation that prohibits the filing of frivolous lawsuits.

The prohibition on frivolous lawsuits derives from both legislation and judicially-enacted rules. The Frivolous Lawsuit Act was enacted in 1988. It provides that the prevailing party in a civil action may recover litigation costs and attorney fees from a nonprevailing party determined by the judge to have filed a frivolous complaint, counterclaim, cross-claim, or defense (N.J.S.A. 2A:15-59.1a).

The New Jersey Supreme Court has sharply limited the application of the Frivolous Lawsuit Act. In McKeown-Brand v. Trump Castle Hotel and Casino, 132 N.J. 546 (1993), the Court ruled that any legislation sanctioning attorney conduct, including the filing of frivolous pleadings, encroaches on the Court's exclusive power and violates the separation-of-powers doctrine. The Court explained that the New Jersey Constitution allocates to the Court the exclusive power to regulate attorneys. Because the Court attributed lawsuit filings to the conduct of attorneys rather than to their clients, the practical effect of the McKeown-Brand case is that most plaintiffs may no longer be sanctioned under the Frivolous Lawsuit Act.

The New Jersey Court Rules and the Rules of Professional Conduct address the issue of frivolous pleadings. For example, Conduct Rule 3.1 prohibits lawyers from filing frivolous pleadings. However, although New Jersey Court Rules include a prohibition similar to the

one found in Federal Rule of Civil Procedure 11, there is no State analogue to Federal Rule 11's express allowance of sanctions against attorneys and, under certain circumstances, their clients who file frivolous federal lawsuits.

D. The Judicial Process

Several roundtable participants advocated the use of the summary judgment process for disposing of meritless cases.

Summary judgment procedure is governed by New Jersey Court Rules. A judge is supposed to grant summary judgment if the moving party demonstrates that "there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law" (R. 4:46-2). It was the consensus of many roundtable participants that trial judges do not grant summary judgment in nearly enough cases and that when they do, the appellate courts tend to reverse.

Many participants stated that tort reform can be brought about by a more liberal interpretation of the standards for summary judgment. Many also noted, however, that the Legislature lacks authority to dictate procedure to the courts. The New Jersey Supreme Court has held that it has exclusive rule-making power over practice, procedure, and administration in the courts and that the Legislature may not interfere with that power (See Winberry v. Salisbury, 5 N.J. 240, 255 (1950)).

III. SUMMARY OF TORT REFORM BILLS

Seven bills have generated the majority of the debate about tort-reform. They are:

1. S-766/A-263 (requires a certificate of merit in medical-malpractice actions);

2. S-763/A-716 (concerns liability of certain health-care providers in product-liability actions);

3. S-765/A-998 (concerns joint-and-several liability);

4. S-290/A-999 (concerns liability of certain retail sellers in product-liability actions);

5. S-292/A-1334 (concerns and limits punitive damages);

6. S-423 (requires that an unsuccessful plaintiff in a negligence or products-liability action pay the defendant's litigation costs and attorney fees); and

7. S-424 (bans contingency-fee arrangements between a plaintiff and his or her attorney).

The first five bills comprise a package that has received considerable public attention. For purposes of this report, we will refer to these bills collectively as the "five-bill package." The bills relating to joint-and-several liability and to punitive damages seem to be of most importance to both supporters and opponents of the five-bill package.

S-423 (loser pays) and S-424 (eliminating contingency fees) are also the subject of discussion.

An analysis of each bill in the five-bill package follows. The bills are pending in both houses of the Legislature before various committees. None of the committees has voted on any of the bills.

S-766/A-263 Certificate of Merit

This bill requires plaintiffs in medical-malpractice actions to file a certificate of merit. Specifically, within 60 days of filing a complaint, the plaintiff must provide the defendant(s) with an affidavit from a practicing physician or surgeon that there exists a reasonable probability that the medical treatment at issue in the lawsuit fell outside acceptable professional standards or treatment practices. The plaintiff's failure to produce the affidavit would entitle the defendant(s) to move for summary dismissal, which the court must grant.

The physician or surgeon signing the affidavit must be neutral, with no financial interest in the case. He or she must also be licensed in New Jersey or in any other state; have expertise in the area involved in the litigation, including board certification and devotion of his or her practice substantially to that area, and be actively involved in the practice of medicine.

A plaintiff is exempted from the affidavit requirement by providing a sworn statement that the defendant withheld medical records or other information with a "substantial bearing" on the affidavit's preparation, that the plaintiff made a written request by certified mail for the records or other information, and that at least 45 days have passed since the defendant received the request.

S-763/A-716 Health Care Providers

This bill would immunize health-care providers from liability for harm allegedly caused by manufacturing or design defects in medical devices or for harm caused by failure to warn about dangers related to the use of medical devices. It has the effect of holding health-care providers to a negligence standard.

Immunity would be contingent on four conditions: (1) at the time the provider provided the device, she or he had no reason to believe that the device was defective or inappropriate for its intended use; (2) the provider was not negligent in installing or providing the device; (3) the provider had recommended and provided the device in accordance with prevailing medical standards at the time she or he provided the device; and (4) at the time she or he provided the device, the provider informed the patient of all known risks and alternatives to the device and the patient consented in writing.

The bill would be effective immediately and would apply to all actions commenced thereafter, even if the harm occurred before the bill's effective date.

S-765/A-998 Joint-and-Several Liability

This bill would eliminate joint-and-several liability in both negligence and strict-liability actions. As noted, joint-and-several liability requires that all defendants in an action are liable for the entire amount of any judgment regardless of their degree of fault. A paying party could recover the excess paid by suing his or her non-paying co-parties for contribution.

As also noted, in 1987 the Legislature limited joint-and-several liability by providing that a party is liable for full economic damages only if he or she is determined to be more than 20% at fault, and that a party is liable for the entire amount of the judgment (regardless of the type of damages) only if it is at least 60% at fault.

In 1987, the Legislature also added a provision that is informally known as the "environmental exception." That provision mandates joint and several liability in environmental tort actions involving personal injury or death, regardless of fault -- that is, without the 20% and 60% limitations that otherwise control the impact of joint-and-several liability.

This bill would amend current law by providing that a plaintiff may recover from any defendant only that percentage of the judgment that corresponds to that defendant's degree of fault. The finder of fact would apportion liability among all persons or entities who

caused the plaintiff's harm, regardless of whether they are or could have been named defendants. The bill would also eliminate the environmental exception.

S-290/A-999 Retail Sellers

This bill would immunize retail sellers from strict liability for harm allegedly caused by manufacturing or design defects in retail products unless they helped design the product, knew or should have known of the defect, or created the defect, or the manufacturer would be unable to satisfy a judgment.

Specifically, a retail seller who is named as defendant in a product-liability action in which the manufacturer is not a named defendant may file an affidavit certifying the identity of the manufacturer. Once a complaint has been filed against the manufacturer, the court must dismiss (without prejudice) the strict-liability claim against the seller. The bill lists circumstances under which the plaintiff may move to vacate such an order of dismissal.

The bill would be effective immediately and would apply to all actions commenced thereafter, even if the harm occurred before the bill's effective date.

S-292/A-1334 Punitive Damages

This bill would change the way courts and juries assess punitive damages in civil actions and would cap punitive-damage awards. To receive punitive damages, a plaintiff would be required to request them specifically in the complaint, but would not be permitted to request a specific amount.

As is the case with punitive damages pursuant to the Product Liability Act, a defendant would be able to request a bifurcated trial (before the same fact-finder). In the first stage, the fact-finder would determine liability and the amount of compensatory or nominal damages. Evidence relating only to punitive damages would be inadmissible.

The trial would proceed to the second phase -- determining punitive damages -- only if the fact-finder awarded compensatory damages; nominal damages would not support an award of punitive damages. The plaintiff would be required to show, by clear and convincing evidence, that the defendant acted out of malice; gross negligence would not support an award of punitive damages.

Any award of punitive damages would be reduced according to comparative-negligence principles, i.e., any defendant's share of punitive damages would be proportional to that defendant's share of

fault. The amount of punitive damages would be limited to three times the amount awarded as compensatory damages.

Punitive damages would not be awarded against any defendant that had already been assessed them for the same conduct. In certain circumstances, punitive damages could be awarded if the court were to determine, beyond a reasonable doubt, that the plaintiff would offer new and substantially additional evidence that the defendant's malice was more egregious than previously determined. In that situation, the court would be required to reduce the amount of punitive damages by the amount previously assessed against that defendant.

The bill would become effective 120 days after enactment and would apply to all actions commenced thereafter, even if the harm occurred before the bill's effective date.

IV. SUMMARY OF ROUNDTABLE DISCUSSIONS

Discussion at each of the roundtables centered on several key issues.

The issue of punitive damages is one of the most contested in the tort-reform debate. The various interests represented in the roundtable discussions took opposite positions. The representatives of consumer groups and of the trial bar expressed opposition to limiting punitive damages. They stressed the punitive nature of the remedy and stated that only the threat of dire monetary consequences forces corporations to do what is "right." Many of them believed that punitive damages are an important deterrent against producing unsafe products. Several speakers also expressed the belief that the current common-law and statutory limitations on punitive damages are sufficient.

Representatives of business, however, found punitive damages to be anti-competitive, aberrational, and unpredictable. Many of them called punitive damages a "quasi-criminal" remedy, but with a more lenient burden of proof and the risk of multiple jeopardy. One participant contended that punitive damages drive the litigation and reduce the true merits of a plaintiff's case to an irrelevancy. They are also concerned by a perceived tendency by plaintiffs' counsel to include pleas for punitive damages as a routine matter. They tend to see pleas for punitive damages as devices intended to force settlement, even in meritless cases.

Another highly debated issue is joint-and-several liability. Some participants believe there is a lack of evidence that any reform is needed. Some consumer advocates oppose eliminating joint-and-several liability because that would force victims to absorb the costs of damages not paid by defaulting defendants.

Environmental representatives are also concerned about S-763/A-998, which would eliminate pure joint-and-several liability in all cases, including environmental tort cases. They discussed the problem of apportioning liability in cases involving chemicals that mix in the air or water, because such chemicals change composition and it is difficult to determine the comparative fault of the various polluters. They said that without pure joint-and-several liability in environmental tort cases, it will be impossible to prosecute civil actions for environmental torts.

Various business representatives expressed the opinion that joint-and-several liability is unfair because it forces the financially-solvent defendant to bear the burden of a damages award. Many believe the costs of litigation are ultimately passed on to the consumer. In addition to cost pass-throughs to the consumer, these companies claim they pay the cost of lost opportunities and often cut back on research and development to avoid litigation.

There was a widespread belief that frivolous lawsuits must be reduced. Several people suggested that the Frivolous Lawsuit Act be given more teeth but no one offered specific suggestions.

Some participants expressed their concern that the five-bill package might be a somewhat piecemeal approach. They also suggested focusing on the judicial system as a means to provide a more comprehensive way to repair the tort system. Some believe that trial judges in New Jersey are reluctant to grant motions for summary judgment, keeping defendants in a case far longer than is necessary. It was theorized that if a way could be found to establish less-lenient standards for summary judgment, much litigation expense could be avoided.

Representatives of hospitals, medical professionals, and medical-malpractice insurers support the certificate-of-merit requirement as a way of weeding out meritless lawsuits (and of identifying truly culpable defendants). Some members of the trial bar believe that with fine-tuning they might find the bill acceptable. Trial-bar representatives objected to the fact that the certifying professional may not be a witness at trial, and some expressed the belief that the bill's scope should be expanded to include other professionals. (Representatives of engineers' and architects' associations expressed the same belief.) Members of the bar also expressed concern about the 60-day time limit for filing a certificate of merit because they fear that 60 days is not enough time to gather sufficient evidence to support the necessary certification.

Several participants discussed the economics associated with both litigation and enactment of the five-bill package. Several consumer-group representatives noted that if defendants do not pay damage awards, then injury victims become the responsibility of the State and, therefore, the taxpayer ultimately pays.

Business representatives noted that the "costs" of litigation include intangible costs. Several of them, especially in the pharmaceutical field, noted that their companies have cut back on research and development, and have also stopped marketing products entirely. One participant gave the example of oral contraceptives, a market that he alleges several manufacturers have abandoned due to liability risks.

Business representatives also pointed to statistics showing New Jersey second only to Massachusetts in the number of tort filings per 100,000 population. According to a report published by the National Center for State Courts, New Jersey had 865 tort filings per 100,000 population in 1992, with Massachusetts the only state that had a greater number (1,139). The business representatives pointed to these figures to illustrate what they perceive as a disadvantage of doing business in this State.

V. RECOMMENDATIONS

The twin goals of the tort system should be to maintain open access to the courts and to compensate victims by holding culpable defendants liable for their conduct. A person or entity who causes harm should pay the cost of that conduct. Conversely, one who is not responsible should not be held accountable unless the system is incapable of apportioning blame. After evaluating the views of all parties who participated in the roundtable discussions and the views of those who have written or spoken to us on the subject, and after conducting an independent analysis of current law, we believe our recommendations are necessary to accomplish these goals. We believe reform would flow logically from the 1987 modifications to the joint-and-several liability rules.

Accordingly, we recommend the following:

1. New Jersey should enact a system of "apportioned damages."

As noted, pursuant to the 1987 modifications of the joint-and-several liability rules, a party is liable for full economic damages only if he or she is determined to be more than 20 percent at fault and is liable for the entire amount of the judgment (regardless of the type of damages) only if he or she is more than 60 percent at fault. Our proposal, similar in concept to S-765/A-998, would amend current law by providing that a plaintiff may recover from any defendant only that percentage of the judgment that corresponds to that defendant's degree of fault. This proposal would, subject to the existing comparative negligence statute, limit a party's obligation to pay damages to no more than its pro-rata share of liability. It is consistent with the goal of maintaining a system wherein the culpable party is held accountable.

Our proposal differs from S-765/A-998 in this respect: we support, in concept, the so-called "environmental exception" because of our belief that in certain cases it may be difficult, if not impossible, to apportion each respective defendant's liability for environmental harm. However, we believe the language of this exception in the current statute may be interpreted to include a broader range of actions than is necessary to address this concern. Therefore, the Legislature may wish to consider whether categories of environmental cases could be established where it would be possible to apportion liability.

2. The current statutory and common law rules regarding punitive damages should be maintained except that punitive damages should be capped at no more than five times the amount awarded as compensatory damages.

As noted above, the award of punitive damages is governed by both statutory and common law. We believe the current system provides adequate criteria for such awards while deterring and punishing egregious conduct. Therefore, we do not endorse the specific language of S-292/A-1334. However, with regard to capping punitive damages, we do propose an important change to current law. Consistent with other aspects of our laws that require punishments or penalties to be known in advance, our proposal would set an overall ceiling on the amount of punitive awards. We believe a ceiling established at five times the amount of compensatory damages is high enough to serve as a punishment and to deter egregious conduct.

3. In recognition of the State Supreme Court's authority over attorneys, we would ask the Court to review the rules governing frivolous pleadings and summary judgment in response to the widespread belief held by roundtable participants that these rules can be strengthened.

As noted, many roundtable participants stated that tort reform can be brought about by addressing frivolous litigation and the standards for summary judgment.

Meritless claims not only drain the system of vital resources, but they generally bring the legal profession into disrepute. We believe New Jersey would be well served by enacting its own version of Federal Rule 11, which would expressly allow judges to sanction attorneys and, under certain circumstances, their clients who file frivolous pleadings, as well as by revisions to the rules governing summary judgment. We recognize, however, that the State Supreme Court has interpreted broadly its jurisdiction to regulate the legal profession so that the Legislature's ability to enact reforms in this area is limited. Accordingly, we propose that you ask the Attorney General to request the Supreme Court to consider these issues through its committee process or however it deems appropriate.

4. New Jersey should continue to hold health care providers to a negligence standard.

This recommendation essentially endorses the concept of S-763/A-716 with the exception that we would apply this legislation prospectively so that harm occurring before the bill's effective date would not be included in its purview. The effect of our proposal would be to hold health care providers to a negligence standard. It is based on the concept that only those parties who are truly liable should be held accountable for harm.

5. New Jersey should hold retail sellers to a negligence standard.

This proposal essentially endorses the concept of S-290/A-999 with the exception that we would apply the legislation prospectively so that harm occurring before the bill's effective date would not be within its purview. We recommend other technical changes to withstand judicial scrutiny. The effect of our proposal would be to hold retail sellers to a negligence standard rather than strict liability. It is based on the concept that only those parties who are truly liable should be held accountable for harm they cause.

6. New Jersey should require plaintiffs in medical-malpractice actions to file a certificate of merit demonstrating the viability of their claims.

This recommendation essentially endorses the concept of S-766/A-263, which would require a plaintiff to make a threshold showing that his or her claim is meritorious in a medical-malpractice action. Based on our observations with respect to the Supreme Court's asserted authority over the regulation of the legal profession, we believe S-766/A-263 should be rewritten to withstand judicial scrutiny.

7. New Jersey should maintain contingency-fee arrangements between a plaintiff and his or her attorney and reject the so-called "English Rule" requiring the losing party to pay counsel fees.

S-423 (loser pays) and S-424 (eliminating contingency fees) have been the subject of discussion. We believe these measures would overly restrict access to the courts. Accordingly, we do not endorse them.

To summarize: we endorse certain aspects of the five-bill package as noted above. We believe the Supreme Court should review those aspects of the system over which it asserts exclusive jurisdiction. In many instances we suggest modifications or amendments to improve the bills.

Further, we believe our proposals strike an appropriate balance between maintaining open access to the courts and holding culpable parties liable for their conduct. Our proposals are consistent with the fundamental concept that the truly culpable party should be held accountable for his or her conduct. Our proposal regarding apportioned liability is consistent with other aspects of our civil justice system. The system seeks to treat parties fairly and equitably in all cases. By supporting the concept of pure joint-and-several liability for environmental cases, we recognize the difficulty of apportioning liability in certain cases. We believe our proposals would advance the twin aims of the tort system and are the appropriate next steps along a path of true reform.

We are available to discuss any aspect of this report at your convenience. We thank you for the opportunity to serve you in this capacity.