

**PROFESSOR PERRY BINDER COMMENTS
ON HOT TORT REFORM PROPOSALS**

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Tort reform is a battle fought across the country by businesses, insurance companies, and doctors on one side versus plaintiff/tort attorneys on the other side. This fight has been raging for years.

Businesses and doctors want cost certainty, and for their insurance rates to go down. Insurance companies routinely state that high jury awards are responsible for high insurance rates. Finally, plaintiff/tort attorneys feel that the merits of each case should follow the facts, and that it is unfair to consumers to place any cap on cases where the conduct of a defendant might be egregious.

What a mess! Below, I address some of the hottest proposed tort reform measures. The great debate will be whether any of these proposals put forth by various Chambers of Commerce [1] will actually lower insurance rates.

BINDER WEIGHS IN ON TORT REFORM:

***Proposal 1. Cap on non-economic damages.** While a plaintiff who wins his/her case should most certainly be compensated for all present and future economic losses, a ceiling on pain and suffering type losses is in order. With the current unlimited cap, huge awards based on emotional jury decisions can force companies into bankruptcy*

BINDER DISAGREES – Cases rarely make it to a jury (they usually settle beforehand). As the facts of each case vary, so should Pain and Suffering awards, as a jury assesses the facts. In addition to the appellate process, a defendant has a trial motion available after a verdict to request a judge to throw out or lower an emotional jury verdict if it “shocks the conscience of the court.”

***Proposal 2. Joint and Several Liability.** The court should hold multiple defendants liable only for the percentage each is found liable. Currently, a defendant 10% responsible can be held responsible for all liability if the other defendant is unable to pay.*

BINDER AGREES – If a jury finds that a defendant is liable to a plaintiff for a certain percentage, it is unfair for that defendant to pay the entire verdict simply because a plaintiff is allowed to collect from a deep pocket defendant. Consider the following hypothetical:

A plaintiff obtains a judgment against two defendants, as a jury assesses responsibility:

Plaintiff versus Defendant 1 (80% responsible) & Defendant 2 (20%)

If the jury verdict in the above case was \$100,000, Defendant 1 should only be responsible for \$80,000 and Defendant 2, \$20,000.

Under the current law of many states, a plaintiff can pick and choose which defendants to collect the entire verdict from; then it is up to the defendant who paid the full amount to try and collect its percentage from the co-defendant (\$20,000) who has not paid anything. The remedy available to Defendant 1 above (a right of “contribution” from co-defendants) is insufficient since Defendant 2, like many co-defendants, may be out of business or without assets.

Proposal 3. Comparative Negligence. *The defendant and the plaintiff should share liability based on their individual responsibility. For example, if the defendant is only 75% liable, he should pay based only on 75% and not held responsible for all.*

BINDER AGREES (but that’s already the existing law) Under most state laws, if a jury finds a plaintiff at all responsible in an accident, his/her verdict is reduced by that percentage. If that percentage is 50% or higher, a plaintiff in Georgia, for example, receives zero dollars on any verdict rendered.

Proposal 4. Collateral Source. *Current law does not allow the jury to hear about the collateral (other) award sources that a plaintiff may have available to him. The jury should have access to this information.*

BINDER DISAGREES – It is the jury’s province to assess the facts of a case surrounding an injury, not to assess whether other sources of income can defray damages in a case.

Proposal 5. Dismissal Rule - a focus on one state. *In Georgia, a plaintiff can bring suit against a defendant and then dismiss the case just before the jury goes out if the plaintiff thinks the case will lose. However, current law entitles the plaintiff to do this twice without penalty against the same defendant. This quirk in Georgia law encourages frivolous lawsuits.*

BINDER AGREES AND DISAGREES – The Georgia rules permit a plaintiff to file and then voluntarily dismiss a Complaint twice without prejudice (meaning it can be re-filed or re-activated), even after a trial begins. The plaintiff may exercise this right any time before it “rests” its case at trial (prior to the defendant presenting its case). Even after the plaintiff rests, it can petition the court to dismiss the action, but the discretion to permit dismissal at this point is up to the judge. I believe that a plaintiff’s right to voluntarily dismiss a case should be cut off just prior to the jury selection process.

Under the current rules, if a plaintiff exercises this right to dismiss, it is not required to pay reasonable court costs laid out by the defendant during a case, unless the plaintiff re-files a Complaint for a second time. I believe that a plaintiff should be responsible for reasonable costs

even if it does not re-file a second time. Finally, I do not believe that the rule encourages frivolous lawsuits, if plaintiffs are required to pay costs any time it voluntarily dismisses a Complaint.

Proposal 6. Periodic payments. *This would allow a company to make periodic payments to the plaintiff over a reasonable length of time rather than a lump sum payment, which could force bankruptcy.*

BINDER DISAGREES – This is an issue which can be negotiated if the parties settle, and should not be imposed by a court after a jury verdict.

STATEMENTS THAT REQUIRE FURTHER STUDY:

Proposal 7. Expert Witness. *To be recognized as an expert witness, the witness should be from the same field. A retired pediatrician should not be deemed an expert witness against a brain surgeon, for instance.*

Proposal 8. Legal rate of interest. *The current rate is 12% in Georgia for cases with awards on appeal. The rate should be indexed, such as "prime rate plus 1%," to be more closely aligned with changing economic conditions.*

Proposal 9. Forum non-conveniens. *Current law allows out-of-state plaintiffs to file cases in Georgia courts when the alleged harm, or cause of action, originated outside Georgia. It has been estimated that over 2,900 plaintiffs in the 3,000 asbestos related cases filed in Georgia originated outside the state. Forty-seven other states allow their judges to send the case back to the state where the cause of action originated. Georgia judges should be allowed to do the same, which would help unclog Georgia courts and save money for Georgia taxpayers.*

1 The nine proposals listed in this position paper are excerpted from The Georgia Chamber of Commerce's 2003 Legislative Agenda, which may be found at: <http://www.gachamber.com/govaffairs/legagenda.html>.

Professor Perry Binder's Bio: <http://www.rmi.gsu.edu/legal/faculty/pzbinder.htm>

Professor Binder has written a detailed position paper on 9-11 & Airline Tort Liability, which may be found at: <http://www.gsu.edu/~rmipzb/9-11.htm>