

## Competing in a Global Economy



**MAKING THE CASE TO IMPROVE LOUISIANA'S BUSINESS  
CLIMATE THROUGH LAWSUIT REFORM**

# THE ISSUE

**Louisiana is on track for an economic boom, but good times can fade quickly. Fundamental improvements to our legal foundation are necessary to maintain a strong business climate and promote continuous growth.**

Civil justice reform, also referred to as **tort reform**, seeks to improve the judicial climate by reducing the number of frivolous lawsuits and the associated costs to business and citizens alike. An efficient and fair civil justice system is necessary to incentivize safe products and services and to provide justice to victims when wrongdoing occurs. However, the total cost of tort cases in the United States is now estimated at a staggering \$865 billion annually – a dramatic increase over the past few decades, even when adjusted for inflation.<sup>1</sup>

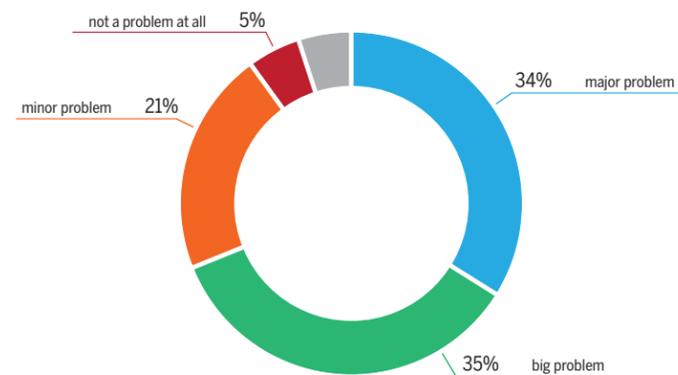
The American “tort tax” is estimated at \$9,827 for a family of four – an 8% consumption tax or a 13% income tax.

U.S. Congress, 2013 hearing

### A Runaway System, Without Relief for Victims

America maintains the most expensive tort system in the world, roughly doubling the average of other developed nations.<sup>2</sup> While the stated purpose and goal of tort cases is to make restitution to victims wrongfully injured, the personal injury legal environment has become a **thriving and self-perpetuating enterprise**. Nearly everyone in Louisiana is familiar with the billboards, radio spots, and TV ads seeking clients for a potential claim identified first by a personal injury attorney, who is seeking an actual victim after the fact. The system has turned justice on its head. Louisiana ranks third in the nation for a high concentration of lawyers for our population size and seventh nationwide on the Tort Activity Index.<sup>3</sup> As one expert notes: “It would be difficult to imagine a tort law system better designed to increase the wealth of lawyers.”<sup>4</sup>

### Americans Believe Lawsuits Are a Problem



Out-of-control lawsuits are well recognized as a problem by American citizens. Across the country, **nine in ten voters** responding to a national survey in 2012 felt “**lawsuit abuse is a problem**”, cutting across party lines and demographic groups.<sup>5</sup> Here in Louisiana, 65 percent of voters say there are too many lawsuits in the state, and 71 percent agreed that lawsuit abuse is hurting the state’s economy.<sup>6</sup>

Even still, this high level of litigation in Louisiana and across the country has not resulted in increased product safety by any account.<sup>7</sup> In fact, the system does not even seem to be working toward this end. Studies show that, in general, victims agree to pay contingency fees to lawyers amounting to one-third of the total award or settlement.<sup>8</sup> In reality, after all costs and fees are accounted for, studies indicate that **victims receive less than 15-cents** of every dollar in the tort system.<sup>9</sup> In one study of personal injury cases over two decades, 83-cents of every dollar received by the claimant filing the lawsuit was spent solely on legal and administrative costs.<sup>10</sup>

### Escalating Costs for Businesses and Citizens Alike

Excessive litigation affects the economy in numerous ways, but first and foremost, by **increasing the cost of doing business**. This is especially obvious in healthcare through high medical malpractice premiums, but also in other industries. For small business, in particular, the cost of litigating a single frivolous lawsuit can be deadly to the company. Across the country, economists estimate **small businesses bear 81 percent of tort liability costs** with a large portion paid out of pocket rather than through insurance.<sup>11</sup> True enough, when surveyed, seven in 10 American small business owners say that “a lawsuit or the potential for a lawsuit translates to increased costs that would make businesses like theirs hold back on hiring [71%], cut back on existing employees’ benefits [68%], and pass costs on to their customers [74%].”<sup>12</sup>

Similarly, nearly 60 percent of LABI members surveyed in January 2014 report that frivolous lawsuits increase the costs of doing business, savings they could otherwise re-invest in their business and in Louisiana’s economy. Businesses across the country have no choice but to share these costs with the consumer, whether through higher insurance premiums or direct costs of goods and services. When surveyed, American citizens recognize the real-world impact of excessive litigation, with a majority ranking

American small businesses believe their ideas and viewpoints are taken into account by decision makers 28% of the time, while trial lawyers’ ideas and viewpoints are considered 71% of the time.

Bipartisan Poll, PRNewswire, September 2010

consumers as negatively affected by lawsuit abuse, followed closely by small businesses, then employees.<sup>13</sup>

With the most expensive litigation climate in the world, U.S. companies are at a clear disadvantage with competitors. When Louisiana’s businesses are not competitive and when costs are too high, **it is average citizens who suffer**. And Louisiana has not done enough to recognize and fight the costs of excessive litigation and a poor legal climate. These costs are passed to the consumer, and insurance rates go up. Workers may forego a higher salary or take on additional duties when a company is overwhelmed by frivolous lawsuits. Companies may not have the resources to invest in capital, research and development, or new technologies. One official notes this high cost is equivalent to “an annual **tort tax** of \$9,827 on a family of four, and is equivalent to an 8 percent tax on consumption or a 13 percent tax on wages.”<sup>14</sup> Ultimately, society as a whole feels the effect of excessive lawsuits, a silent weapon against job creation and economic growth.

### Killing Jobs

A litigious climate also represents **unpredictability** and can slow new investment and expansion of business. When an employer believes he or she will be unfairly targeted with lawsuits or the deck is weighted against them in court, these additional costs must be calculated in their business plan. While Louisiana has unquestionably made progress in recent years, becoming a nationally recognized state that is open for business, a poor legal climate continues to put the state in the headlines across the country for all the wrong reasons.

This reputation matters for real reasons, for real jobs. In a survey of more than 1,100 in-house general counsels, senior litigator, and corporate executives, 70 percent of respondents noted that a state’s litigation environment is “likely to impact important business decisions at their companies, such as where to locate or do business.”<sup>15</sup> Of note, this figure is on an upward trajectory from 63 percent in 2008 and 67 percent in 2010.

A national study by economic consultants reveals that the poor LABI Issue Brief 2: Civil Justice Reform

legal climate in Louisiana costs as many as **50,000 new jobs every year**.<sup>16</sup> The study goes on to estimate that an improved legal climate in Louisiana would increase employment between one percent and nearly three percent. Real jobs for real people are lost every day in this state due to excessive, costly, and unfair litigation. National experts note: “Lower tort costs can provide an economic stimulus without loss in tax receipts or an increase in spending.”<sup>17</sup>

### Louisiana Leading the Country in Excessive and Costly Lawsuits

Various states have enacted legal and policy changes aimed at creating a fair and transparent justice system for the wrongly injured. Medical malpractice is the most popular area for reform given the high volume of meritless cases and the high cost of pursuing and defending these claims. More than one-third of medical malpractice cases in a Harvard study lacked sufficient evidence of wrongdoing at an average case cost for legal and defense fees alone at \$52,000.<sup>18</sup>

Fortunately, Louisiana has already enacted a cap on non-economic damages for medical malpractice claims at \$500,000, which the state Supreme Court has upheld on several occasions.<sup>19</sup> In 1996, Governor Foster and the Legislature addressed other long-standing problem areas such as strict liability, joint and several liability, and punitive damages. In today’s law, each responsible party pays only for that portion of damages he or she caused, not for damages caused by other parties. Louisiana’s punitive damage laws are now very narrow in focus and no longer the horror they were to business prior to the 1996 reforms.

Despite some progress made in the law itself nearly 20 years ago, other states have continued to improve their legal climate. Meanwhile, Louisiana’s judges have rendered decisions un-doing some positive steps taken in the Legislature, and public officials at the state and local level have demonstrated a penchant for lawsuits and activism in the courts, as well. For example:

- In January 2013, the Louisiana Supreme Court overturned

“The challenge for states is to effect a change in the legal environment quickly so that liability risk is immediately reduced and cost savings are realized in the short term.”

NERA Economic Consulting 2011

much-heralded reforms passed in the 2012 Legislature to address the high costs of “**legacy lawsuits**”, which are filed by landowners alleging that property was polluted or contaminated by oil and gas operations, often many years prior to the suit. A 2012 LSU report estimates that legacy lawsuits “have led to a loss of some 1,200 new wells, translating into a total statewide reduction of about \$6.7 billion dollars in lost Louisiana drilling investment” translating to more than 30,000 lost job opportunities.<sup>20</sup>

- Also in 2013, **levee boards** within the Southeast Louisiana Flood Protection Authority-East filed a massive lawsuit on a contingency-fee basis with private attorneys against dozens of companies for damages to wetlands over decades of authorized and regulated use. This filing was swiftly followed by similar lawsuits from individual parishes – occasionally using the same private attorneys as the levee board suit – alleging site-specific damages similar to legacy lawsuits.
- At the state level, the Office of the **Louisiana Attorney General all too frequently utilizes private attorneys without competitive bids** or significant oversight in order to pursue state-led litigation. For example, the state Supreme Court overturned a \$330 million lower court ruling in such a lawsuit in January 2014, noting the Attorney General had not effectively made the state’s case against a pharmaceutical company. Of this \$330 million, an estimated \$70 million was intended for private attorneys who operated on contract with the Attorney General.<sup>21</sup>
- This **excessive litigation by public bodies** utilizing private

trial attorneys is a trend across Louisiana government agencies. Dozens of school boards have filed various suits against the state, attempting to fight recent education reforms in court after losing in the Legislature. The Attorney General recently noted he “expects to receive a virtual avalanche” of contingency-fee contract requests from school boards.<sup>22</sup> In one such contingency contract, the school boards lost their attempt in district court to make one of the lawsuits a class action case, as they seek millions of additional tax dollars in retroactive funding.<sup>23</sup>

- **Lawsuit fever extends to Louisiana’s public pension systems**, as well. In September 2013, *Fortune Magazine* named the Louisiana Municipal Police Employees’ Retirement System a “litigation machine” and “one of the country’s most voracious plaintiffs, suing companies with abandon.”<sup>24</sup> Within just ten days in February 2013, this one Louisiana retirement system sued Dell, US Airways, Hewlett-Packard, and Heinz. Deeming Louisiana’s pension funds “the most accommodating and enthusiastic plaintiffs,” national experts note: “While ostensibly intended to ferret out fraud, these cases often lack any evidence of real wrongdoing and represent merely a tax on doing business.”<sup>25</sup> Indeed, three Louisiana pension funds were reported to be among the five most active lead plaintiffs in the entire country a few years ago with the Teachers’ Retirement System of Louisiana ranked at #1.<sup>26</sup>

The result of so much litigation by public and private bodies is

“Lower tort costs can provide an economic stimulus without loss in tax receipts or an increase in spending.”

NERA Economic Consulting 2011

that today, **Louisiana remains significantly out of line with other states** in several key areas of civil justice and is consistently considered a litigious climate that is bad for business by rankings and anecdotes alike. A sample of the latest rankings are highlighted in the chart below.



# THE PATH FORWARD

**Three out of four Americans believe our country's liability system negatively affects the ability of the United States to compete in the world, raising the costs of doing business and limiting investment in on-shore jobs.**<sup>27</sup>

As a result, civil justice reform is widely supported by Americans across the political spectrum with three out of four more likely to vote for a candidate who supports liability lawsuit reform (see table below).<sup>28</sup> **In Louisiana, more than eight out of 10 voters believe lawsuit reform is needed.**<sup>29</sup> When asked about protecting small business in particular, 88 percent of Americans agreed that safeguards are needed to guard against frivolous lawsuits.<sup>30</sup>

73% of American voters are more likely to vote for a candidate who supports liability lawsuit reform, including:

86% of Republicans      73% of Independents      62% of Democrats

The good news is that the vast majority of tort lawsuits are filed in state courts (not federal), and **American tort law is generally written in state laws and can be changed by state legislatures.**<sup>31</sup> As a result, reforms to discourage meritless cases, close loopholes, reduce legal expenses, and inject fairness and transparency into the legal system will be LABI priorities in 2014 to move Louisiana toward a more efficient civil justice system.

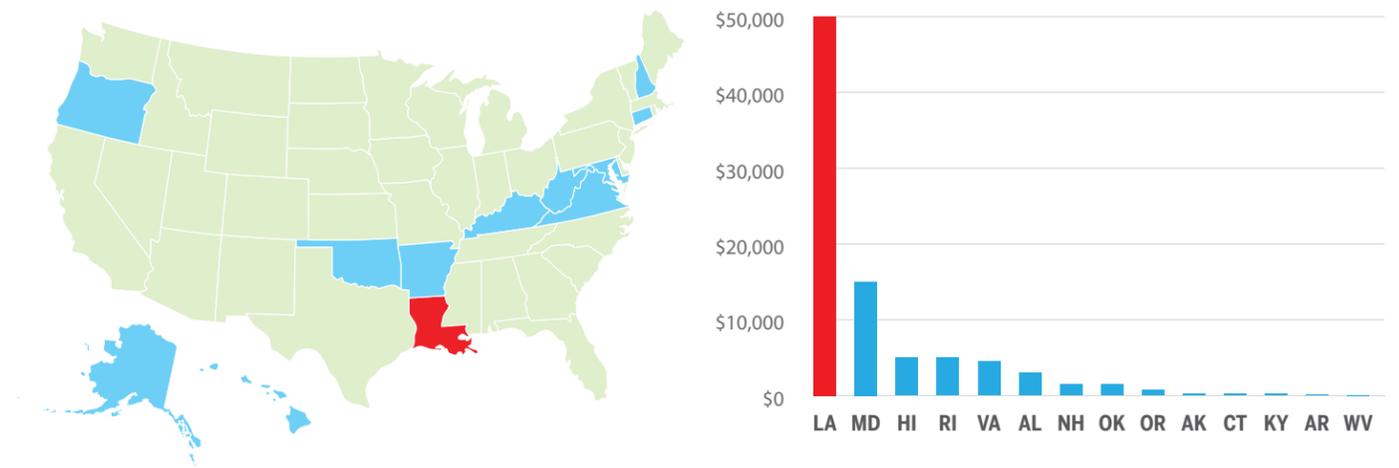
The bottom line is states with predictable and fair legal systems will be more competitive for jobs and economic growth – goals that are central to the mission of LABI and the Louisiana business community across the state. We look forward to **standing strong with our partners** across industry sectors, the statewide business community in rural and urban areas alike, and citizen watchdog and good government groups, as well. There is no shortage of solutions to make in-roads into Louisiana's litigious climate, ranging from lawsuit lending to patent trolling to legacy lawsuits and more. In addition to the recommendations contained in this report, LABI will support the efforts of our partners to enact many of the components of a comprehensive tort reform agenda. Below are **three specific proposals LABI will recommend** to the Louisiana Legislature in 2014.

## Proposal #1: Increase Citizen Access to a Civil Trial by Jury

Louisiana is one of only 14 states to place limitations on a citizen's constitutional right to a trial by jury, instead requiring a civil trial occur before an elected judge.<sup>32</sup> The other 36 states have no restrictions whatsoever. Of the 14 states with some limitations, Louisiana citizens have the highest bar to cross with a **\$50,000 minimum civil claim** in order to request a trial by a jury of our peers.<sup>33</sup> After Louisiana's jury trial threshold, the next highest state is Maryland at \$15,000, making **Louisiana's bar for a jury trial 28 times higher** than the average of other states.<sup>34</sup>

Louisiana's Constitution is one of only two in the country that is silent on the right to a jury trial, enabling an unusually high threshold to be enacted by then-Governor Edwin Edwards in 1993 at the behest of the Louisiana Trial Lawyers Association.<sup>35</sup> Putting power into the hands of an elected judge **allows entrepreneurial trial lawyers to "judge shop"** to legally and openly seek a venue with a track record that is more favorable to their clients and

## Jury Trial Thresholds



therefore more profitable for them. The most recent report from the National Center for State Courts on trends in state civil courts confirmed that "... judges are more likely than juries to award punitive damages in tort trials..."<sup>36</sup>

Out of 134,686 civil cases filed in Louisiana district courts in 2012, only 235 cases proceeded to a civil jury trial<sup>37</sup> – a number that has steadily dropped from 425 jury trials just ten years ago in 2002.<sup>38</sup> That means **just 1.8 percent of civil lawsuits result in a jury trial in Louisiana today**, re-emphasizing the fact that volumes of time, energy, and resources are wasted on unnecessary lawsuits across Louisiana.

As discussed above, these costs resulting from excessive litigation are passed to the consumer across the board. To be more specific, insurance rates go up. **Louisiana has the most expensive car insurance in America**, and experts note that is, in part, due to excessive litigation and the fact that claims under \$50,000 go before judges instead of juries.<sup>39</sup> When announcing planned rate increases in January 2014, a spokesman for a major car insurer in Louisiana noted "a very high litigation ratio in Louisiana ... Millions of dollars paid on lawsuits in Louisiana every year are part of the 'costs' that are covered by insurance, and that directly influences the liability insurance costs in the states."<sup>40</sup> Coincidentally this month, Louisiana also ranked in the top ten states on the *2014 Roadmap of State Highway Safety Laws*, in recognition of state efforts to keep roads safe and accidents down.<sup>41</sup>

STATE	AVERAGE ANNUAL AUTO PREMIUM	RANK
Louisiana	\$2,699	#1
Texas	\$1,545	#19
Arkansas	\$1,545	#20
National Average	\$1,510	-
Mississippi	\$1,345	#35

Unsafe roads are not driving costly insurance premiums for Louisiana families, rather it is the excessive and frivolous litigation occurring in a judicial system that limits citizen access and participation. It should be noted that because Louisiana is such an outlier with the highest threshold in the country for a jury trial, there are no studies that can quantitatively demonstrate the timing or impact of lowering that threshold on auto insurance rates. However, while acknowledging data is hard-to-find and complex, the US Congressional Budget Office examined the effects of tort reform on liability insurance and wrote that "in the long run, diminishing loss ratios would exert downward pressure on premiums."<sup>42</sup>

## Proposal #2: Curb the Practice of “Judge Shopping”

Two of the longest-running and costliest forms of lawsuits in America are **latent diseases and asbestos exposure**, arising from hundreds of thousands of claims dating back to the 1970s.<sup>43</sup> By its nature, exposure to asbestos does not manifest itself into a disease for some time, and millions of Americans were exposed to it throughout the 20th century. As a result, individuals have sued companies for potential exposure to asbestos for nearly four decades, and more than 100 companies have filed for bankruptcy as a result.<sup>44</sup> These bankrupt companies seeking to re-organize must create trusts to pay asbestos victims, which now total \$37 billion and are generally controlled by the plaintiff’s own lawyers.<sup>45</sup>

Year	Number of Asbestos Personal Injury Trusts	Assets in the Trust <sup>46</sup>
2000	16	\$4.2 billion
2011	60	\$36.8 billion

Real victims of asbestos exposure deserve justice and compensation as they face debilitating and deadly diseases such as mesothelioma. Yet this compensation system of bankruptcy trusts runs *parallel* to the tort system; it does not replace it. And litigation has not slowed down. Trial attorneys have created a **massive industry based purely on asbestos litigation**, spending millions annually on advertising, financing exploratory investigations, and aggressively seeking out clients to file lawsuits against every company that might have utilized or transported this legal product. In recent years, “new legal theories are being asserted to ensnare low-dose and remote defendants” to keep the gravy train flowing for trial lawyers who rely on this form of litigation.<sup>47</sup> It is no surprise then that the property casualty insurance industry still pays out an estimated \$2.5 billion in claims every year.<sup>48</sup>

A number of states have begun to take action to curb abuse of asbestos lawsuits. National experts note that tort reforms made in our neighboring states (Texas and Mississippi) have lowered frivolous claims substantially. One leading insurer recorded **drops in claims of 90 percent in Mississippi and 65 percent in Texas after they adopted statutory and judicial reforms** related to asbestos litigation.<sup>49</sup> Experts report these claims are now likely being made in states friendlier to trial lawyers<sup>50</sup> - and Louisiana fits the bill.

**Louisiana is ranked #47** on having and enforcing meaningful

venue requirements, confirming the notion that plaintiffs can “judge shop” to find the most favorable judge or jurisdiction for their case.<sup>51</sup> These so-called “magic jurisdictions”, as termed by plaintiffs, are often well-known for leniency to the plaintiff and can lead to excessive filings and inefficient court systems, burdening a particular area and its taxpayers in addition to being unfair. **Tightening up venue requirements in state law so that the lawsuit must take place where the injury occurred is a common-sense way** to address fraudulent and excessive litigation related to asbestos claims in Louisiana, leaving resources and space for real claims to be filed and real victims to be compensated.

## Proposal #3: Reduce Excessive Litigation by Public Bodies

As noted above, Louisiana’s public agencies at the state and local level are regularly solicited by private attorneys to pursue litigation, often on a **contingency-fee basis** whereby the outside lawyers are compensated by a pre-determined percentage of the award when the case is won. This phenomenon is not unique to Louisiana, as experts point to the trend whereby “private lawyers have enticed states to bring novel or speculative lawsuits that seek to expand liability rather than enforce existing law”.<sup>52</sup> Others note that a “perfect storm of litigation” takes place when “the far-reaching prosecutorial power of the AG is combined with the profit-motivated rather than taxpayer-motivated incentives of a private attorney.”<sup>53</sup>

While the ability to utilize approaches with no financial risk may be understandably attractive to public entities experiencing tight budgets, a contingency-fee arrangement between the state and private trial lawyers can incentivize a range of activities of concern to business and taxpayers, such as:

- State overreach and regulation of private industry through litigation,
- The commandeering of the taxpayers’ interest by a handful of private attorneys with their own agenda and strategies,
- Violations of due process rights of defendants if the contracted attorneys have personal stakes in the outcomes of the litigation, and
- Well-financed relationships with lawyers who may be campaign donors of public officials seeking outside counsel.

Furthermore, such awards to attorneys can mean “the state is literally taking money away from its citizens and funding potential

*“Many state AGs still show a reflexive allegiance to the plaintiffs bar. Let’s hope that the makers of laws in the various states – the legislatures – take further steps to rein in those who are supposed to be no more than the law’s enforcers.”*

Manhattan Institute for Policy Research

future litigation that may not be brought on the state’s behalf and may not be in the state’s best interest.”<sup>54</sup> Similar concerns led to a **presidential executive order** by then-President George W. Bush to prohibit contingency-fee contracts by federal agencies in order “to help ensure the integrity and effective supervision of the legal and expert witness services provided to or on behalf of the United States...”<sup>55</sup> President Obama has allowed this Executive Order to stand to date.

In Louisiana, **the Attorney General is prohibited** from utilizing contingency-fee contracts in accordance with a 1997 ruling by the Louisiana Supreme Court. The justices found that “unless the Attorney General has been expressly granted the power in the Constitution to pay outside counsel contingency fees from state funds, or the Legislature has enacted such a statute, then he has no such power.”<sup>56</sup> Attempts to authorize this practice have failed in the Legislature in recent years. Still, the Attorney General frequently pursues litigation using private attorneys who receive their payment in a court settlement negotiation, following the letter of the law on the prohibition on contingency-fee arrangements, but not its spirit. The pharmaceutical case mentioned above is just one example; \$70 million of the settlement for taxpayers would have gone instead to private attorneys (21 percent) had the Supreme Court not intervened. A Loyola University professor of constitutional law commented: “They’re trying to make it work despite the significant limitations imposed by the Ethics Laws and by the Louisiana Constitution.”<sup>57</sup>

The state Attorney General also has a legal mandate to **review and approve the use of private attorneys** by

- 1) state agencies, boards, or commissions; and
- 2) non-state public agencies including parish governing authorities, levee boards, and school boards.

In the first category, Louisiana law requires the Attorney General and the Governor to provide written approval for hiring private attorneys and to direct the compensation level in their approval. In the second category, Louisiana law requires only the Attorney General to review and approve a local resolution seeking the ability to obtain private legal services. The current Attorney General has opined informally and publicly that this review is essentially procedural in nature and that his office “does not advise, approve or reject the state or local entity’s decision to use a contingency fee contract.”<sup>58</sup> This process calls out for clarity, as the Attorney General’s approval of the contingency-fee contract signed by the Southeast Louisiana Flood Protection Authority-East is now being contested in court, as well.

Across the country, **state legislatures are moving to restrict the use of contingency-fee contracts by public entities**. In general, such reforms include public bidding requirements, transparency efforts such as the online posting of contracts, legislative oversight, and fee schedules with maximum caps on fees provided to private attorneys. Legal scholars also suggest training programs and improved record-keeping and standards.<sup>59</sup> Alabama, Mississippi, Florida, Texas, and others have taken significant steps in this direction.<sup>60</sup> Louisiana should do the same and not risk falling again behind our neighbors in yet another important aspect of our business climate.

## CALL TO ACTION

“Tort reform” is easy to ignore and push to the backburner. It is complicated, full of legal terminology, and highly technical. Those that defend the current litigation climate generally stand to benefit from it, while those citizens losing opportunities for jobs and prosperity are consumed with day-to-day life and may not easily recognize the culprit.

Louisiana should no longer stand by and allow such abuses to continue. The business community is uniting behind concrete and pragmatic steps to address our litigious climate. The situation will not address itself, as noted by experts: “The current tort law system seems almost purposefully designed to maximize liability, damages, and the complexity of the tort system... This means that if tort reform is to occur it will have to come from external legislative intervention rather than through judicial self-correction.”<sup>61</sup> It is up to the Legislature and the Governor to act and help put Louisiana on a path to economic growth and prosperity.

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