

# Unbalanced Justice

Making the Case for Legal Reform in Florida

A publication of  
*Associated Industries of Florida Service Corporation*

# What is Going On With Florida's Legal System?

From Jerry Springer to reality t.v. shows such as *Surreal Life* — to our modern legal system. Americans are bombarded by the outrageous and asked to believe the unbelievable.

Tort is the term the legal system applies to an act that causes careless or deliberate harm to a person or someone's property. The tort system is supposed to help the victim of a tort recover from the injury by assessing monetary damages against the wrongdoer.

From that noble purpose, however, has arisen a system that stacks the decks against defendants, perverting the ideal cherished by all Americans: the rule of law and the promise of impartial justice.

To understand what's wrong with the tort system, consider two real, but very different sets of lawsuits arising from our state.

Love Thy Neighbor, a small Florida charity that aids the homeless ([www.lovetthyneighbor.org](http://www.lovetthyneighbor.org)), has been sued for trademark infringement by the owner of a Michigan jewelry and trinket company ([www.loveyourneighbor.org](http://www.loveyourneighbor.org)) with a variant of the same name — a biblical phrase that many thought was the exclusive property of a higher source. Arnold Abbott, who runs the Broward County charity on a budget of less than \$50,000 a year told a reporter, "I don't have the money to spend on lawyers. Whatever little money we make, we need to spend on the homeless."

And then there's the fever swamp of asbestos litigation. To date, 6,000 companies representing 91 percent of the industries in the United States have been named as defendants. Asbestos is the nation's long-running mass tort has wrested \$54 billion in damages from corporate defendants. A small group of plaintiff lawyers has captured the market on asbestos litigation, advertising on the Internet, billboards, radio, and television for clients, promising people that they don't even have to be sick to get some money. As a result of this waste, only the tiniest portion of damages goes to those who are truly suffering from asbestos-related diseases.

South Florida is a popular asbestos-lawsuit destination because Palm Beach, Broward, and Miami-Dade counties have so-called rocket docket (i.e., a separate court that handles asbestos claims). Those three counties alone account for somewhere between 7,000 and 11,000 asbestos lawsuits, most involving people with no symptoms of asbestos-related illnesses — they just simply fear that they might, one day, get sick. Thanks to the rocket docket and the sheer number of lawsuits, 99 percent of the claims settle before trial.

Both of these cases spotlight the decades-long mutilation of our tort system. Thanks to a philosophical and ideological shift by law school professors and judicial elites we've been left with a civil justice framework that encourages people to gamble that a lawsuit will net them some easy cash. It's erected for us a court system that does little to discourage unfounded lawsuits. It's created a generation of high-rollers with a legal degree, who game the system, who exploit every quirk and loophole in the law, who think of the court system as their personal ATM. This small group of "innovators" has left us with a liability crisis that puts hardworking families, teachers, business owners, and workers on the losing side of the game some refer to as lawsuit roulette.

Despite what personal-injury lawyers might say, abuse of the tort system is not a victimless crime. Every time a business is sued, it incurs unexpected costs — through judgments and settlements paid, the cost of defending itself, and assorted other expenses — even if the case is thrown out of court or the business wins at trial. This translates into higher prices for the products and services their customers rely on.

A recent study revealed that the tort system cost our nation \$246 billion in 2003, or an average of \$845 per person in the country. Almost two-thirds of this amount is attributed to commercial torts — or claims against businesses.

Don't take our word for it. Here's what Newsweek magazine, hardly a bastion of pro-business sentiment, had to say in its December 15, 2004, cover story.

"But Americans don't just sue big corporations or bad people. They sue doctors over misfortunes that no doctor could prevent. They sue their school officials for disciplining their children for cheating. They sue their local governments when they slip and fall on the sidewalk, get hit by drunken drivers, get struck by lightning on city golf courses — and even when they get attacked by a goose in a park (that one brought the injured plaintiff \$10,000). They sue their ministers for failing to prevent suicides. They sue their Little League coaches for not putting their children on the all-star team. They sue their wardens when they get hurt playing basketball in prison. They sue when their injuries are severe but self-inflicted, when their hurts are trivial and when they have not suffered at all."

And here's what a 2002 report from the President's Council of Economic Advisors has to say about our country's tort system.

"Incredibly, what Americans spend on lawsuits could pay for all the following government programs *combined*: Education, training, and employment; general science; space and technology; conservation and land management; pollution control and abatement; disaster relief and insurance; community development; Federal law enforcement and administration of justice; and unemployment compensation."

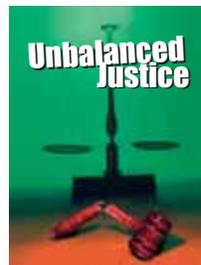
With our natural assets, Florida stands out for many companies as an attractive place to locate a business. Florida's political leaders have dedicated themselves to promoting public safety and enhancing public education at all levels. The dark spot on our economic horizon, however, is our state's legal climate.

Rather than take a piecemeal approach to reform, business owners and executives from across the state have united in a search for a comprehensive solution to Florida's tort problems. The scope of the problem is vast, but we are committed to working with the Legislature over the next two years in the effort to reform Florida's future by fixing this impediment to our state's prosperity.

The next two years offer a unique opportunity to bring about lasting and meaningful reform because our state's political leaders grasp the importance of fixing the unfairness in our tort system. But that doesn't mean victory will be easy. While the business community must argue with logic and reason, our opponent — driven by desperation — will rely on fear, sentimentality, and distortions.

How can you help? Visit [www.FlaLegalReform.com](http://www.FlaLegalReform.com) to learn more about the tort reform project. You'll also find instructions there on how to contact your senator and representative. Write them, phone them, fax them, e-mail them. Just let them know that you support AIF's proposals on tort reform and hope you can count on their vote for its passage.

Florida's business community will work together to get these significant legal reforms enacted and working for the continued economic success of this state. ■



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# Legal Reform: Fact or Fiction

**Fiction:** *Without trial lawyers, powerful corporations would be free to injure innocent people and never pay a dime. Wrongdoers would never be held accountable.*

**Fact:** Businesses want wrongdoers held accountable because sometimes businesses are the victims. Wrongdoers should be held accountable for the harm they've done — but not for the negligence of someone else. There is an extensive system of business regulation that crisscrosses national, state, and local governments. There are hefty fees for people who don't follow the rules set by bureaucrats. There is also a civil justice system that, if it operated properly, would focus on getting help to people who suffered injuries through the negligence of another. Instead, we have a tort system that tries to bypass every other branch of government, makes a few plaintiffs and their lawyers rich, and does little if anything to make the world a safer place.

**Fiction:** *The current civil justice system helps maintain the balance for plaintiffs and trial lawyers in their David-versus-Goliath battle against wealthy and powerful corporations.*

**Fact:** Trial lawyers want you to believe that they are regular people who risk everything they own, often going without payment, in the pursuit of justice. But consider one of the most notorious lawsuits in Florida history. Trial lawyers received over \$5 billion in fees for suing the tobacco companies in a slam-dunk case that never even went to trial. That's \$5 billion that could have gone to the people of Florida to pay for health care or educational programs. The tort system skews away from justice and toward unfair results.

**Fiction:** *If CEOs around the country rank Florida one of the best places to do business, how bad can the legal system be?*

**Fact:** Rankings of state business climates recognize Florida's pro-business tax structure along with its scenic beauty and balmy weather. Our state's litigation regime, however, is given little or no emphasis in these polls. Furthermore, most of the surveys involve out-of-state CEOs who are not familiar with Florida's lawsuit industry.

**Fiction:** *Lawsuits are a business expense and they cost consumers nothing.*

**Fact:** One judge involved in South Florida's asbestos litigation estimates that handling those lawsuits costs taxpayers more than \$3,000 per day. According to studies by pre-eminent consulting firm Tillinghast-Towers Perrin, litigation increases the costs of doing business by more than \$246 billion each year. In other words, every year each person in the United States pays \$854 more for goods and services because businesses ultimately must pass these added costs on to their customers.

**Fiction:** *New statistics show that lawsuit costs are slowing down, the number of lawsuits filed is slowing down, so how can there be a liability crisis?*

**Fact:** The volume of lawsuits filed against businesses, particularly class actions in South Florida, has risen dramatically in the past five years. For the last four decades, civil lawsuits have grown in number, cost, and complexity. Why do we continue to waste money on an inefficient legal system that returns to claimants less than 50 cents on the dollar and less than 22 cents for actual economic loss? The people of Florida deserve a civil-justice system that helps those who are injured because of someone else's negligence while creating a level playing field so that all participants are treated fairly and equally.

# How Do We Fix It?

## **Abolish Joint and Several Liability**

The doctrine of joint and several liability makes each and every defendant in a lawsuit liable for the entire amount of the plaintiff's damages, regardless of the actual degree of fault of any individual defendant. In other words, a defendant can be held one percent responsible for an accident, but still pay 100 percent of the damages. The joint and several doctrine gives plaintiff lawyers an incentive to search out so-called "deep pockets," potential defendants with the financial wherewithal to pay damages if other defendants are bankrupt or otherwise judgment proof.

This rule should be replaced with a system that holds the defendant liable only for that portion of economic damages caused by its own individual negligence.

## **Reform Class Action Litigation**

In concept, class action lawsuits are supposed to marry efficiency with justice, to the benefit of defendants and plaintiffs. Over the years, however, these lawsuits have evolved into an expensive, time-consuming morass that frequently deprives individual plaintiffs of legiti-

mate compensation, while conferring windfall fees onto lawyers. In many of these situations, the individual plaintiff has virtually no control over the outcome of his lawsuit. This results in very small awards to the individuals and outrageous windfalls to their lawyers.

Existing procedural and judicial rules are not adequate to serve the objectives that class actions were intended to achieve and need to be refined to create a more sensible approach to this legal arena.

## **Limit Lawyer Fees on All Tort Cases**

On Election Day 2004, the voters overwhelmingly supported Constitutional Amendment 3, which capped lawyers contingency fees in a claim for medical liability to not more than 30 percent of the first \$250,000 in damages and not more than 10 percent of all damages in excess of \$250,000, exclusive of reasonable and customary costs and regardless of the number of defendants. As a result patients may be able to recoup a larger share of compensation in a medical liability case and plaintiffs' counsel will be discouraged from filing frivolous lawsuits. Nearly 23 state legislatures, including Indiana, New York, California, Tennessee, Utah, Delaware, and Illinois, have also restricted lawyer fees in medical malpractice and other legal actions.

AIF supports legislation that would extend an Amendment 3-style cap to all tort cases.

## **Abolish Punitive Damages**

Punitive damages have no economic basis and serve almost like criminal punishment, even though the defendant has not committed a criminal act. Practically speaking, punitive damages are the loose cannon in the plaintiff lawyer arsenal. The threat of punitive damages is frequently used as leverage in obtaining larger settlements.

Defendants have no way to gauge their risk of punitive damages, yet the threat of this unknowable yet very real cost acts as a considerable deterrent to many companies that might otherwise relocate or expand in Florida. According to research by W. Kip Viscusi, a well-respected legal and economics scholar at the Harvard Law School, the capricious nature of punitive damages mean they rarely serve their intended affect: providing a

financial incentive for companies to protect their customers.

The availability of punitive damages should certainly be curtailed or completely abolished. The trial bar argues that punitive damages are rarely awarded and even then are frequently reduced on appeal. If these assertions hold true, then the trial bar should not be opposed to placing limits on punitive damages to eliminate the time and expense of litigating over them.

### Reforming Product and Premises Liability for Retailers

Here is a true scenario, one that illustrates the need to curb a litigation over premises liability: A retail store and the shopping center developer were sued after the plaintiff was shot by an unknown criminal assailant in their parking lot. At the trial, the jury placed all of the fault for the plaintiff's injuries on the store and the developer but none on the criminal, because the jury members were never provided with that option.

Legislation should be enacted to provide immunity to businesses for injuries that occur on their premises through the intentional or criminal act of a third-party over whom it has no control.

Florida courts also hold retailers responsible when they sell a product to a customer who subsequently uses it in a way that harms another person. In addition, plaintiffs will often sue the retailer of a defective product, while the manufacturer might not ever be held accountable for the defective or harmful product it made.

When litigation costs like this increase unnecessarily, companies are forced to make cuts in other aspects of their businesses, such as jobs and salaries. This has an enormous impact on Florida's overall economy when one considers the millions of jobs that retailers provide across the state. Retailers need stronger protections from liability.

### Insurance Bad Faith Reform

An insurance company is responsible for dealing fairly and in good faith when it decides how to handle lawsuits on behalf of its clients. Policyholders may sue their insurance company under Florida's bad faith law, if they believe the insurance company handled a claim against them in bad faith resulting in additional damages

and legal exposure for the policyholder.

Florida courts also have allowed third parties who are not policyholders to sue the insurer if it does not offer them a policy-limit settlement as soon as the case begins, before there's been a chance for any discovery. Clearly this increases the cost of handling claims, to the great detriment to insurers and businesses.

Despite judicial recognition of the problems created by bad faith litigation, the courts have continued to expand the rights and benefits available in bad-faith cases and limit the defenses available to insurers.

Although bad faith laws are important to protect businesses and individuals from potential bad acts of insurers, court interpretations of Florida's statutory bad faith law have created an imbalance. As a result, insurers are forced to settle claims quickly or risk the unlimited liability of a bad faith lawsuit.

In 2003, the Florida Legislature revised the bad faith law for medical malpractice insurance to help correct previous imbalances and minimize its use to coerce settlements. The new law provides factors for a jury to consider when determining whether an insurer acted in good faith while handling a claim. Additionally, the new law allows an insurer reasonable opportunity to investigate a claim before making a settlement decision. Similar reforms need to be applied to all tort cases and the ability of third-parties, who are not policyholders of the original insurance agreement, must be restricted or abolished.

### Products Liability Reform

Products liability litigation has driven up the cost of product liability coverage as well as the price of products. When lawmakers enacted the 1999 Tort Reform Act they created two new defenses — the state-of-the-art defense and the government rules defense — for manufacturers in product liability cases. The courts, however, have only allowed limited use of these defenses in actual cases.

The statute should be rewritten to clarify that the state-of-the-art defense can be used by the manufacturer to show that the design of the product was the most up-to-date for its time, and, therefore not defective, or to show that any alternative design proposed by the plaintiff was not reasonably available at the time the product

was manufactured. By rewriting the statute to serve as a manufacturer's defense, the Legislature will ensure that a manufacturer will not be liable for harm caused by a product that met the prevailing standards of performance and safety at the time it was designed.

The 1999 Tort Reform Act also created the government rules defense. This defense allows a manufacturer or seller to defend itself by introducing evidence that the product complied with government regulations. This statute has not yet been construed by the courts in Florida but should be retained in the new tort reform bill because plaintiff lawyers are already allowed to argue the opposite: that a product should be presumed defective because it did not meet government standards.

One other area lawmakers need to repeal is in the 1990 Sunshine in Litigation Act, which was passed with admirable goals in mind — making sure that public hazards that result in a lawsuit do not remain hidden if the two parties settle out of court. In reality the act has provided plaintiffs with an unfair advantage in product liability cases by requiring production of a company's most sensitive proprietary documents. The defendant then has to fight that unfair discovery demand rather than moving forward with a settlement.

The act has the perverse effect of making a potential defendant less likely to settle in order to protect its proprietary secrets, another reason why it should be repealed.

### **Reverse the Recent Judicial Expansion of Duty**

As judges have developed case law over the past six decades the so-called orbit of danger has been significantly expanded for businesses that allegedly conduct their operations in a negligent manner. Under this expansion, duty has come to encompass protecting the public against any injury that could possibly happen to anyone under any circumstances.

A company's ability to foresee certain risks should not be confused with its duty to the public, yet this is exactly the legal mis-standard that the Florida Supreme Court has created and imposed on Florida's businesses. Negligence needs to be defined in statute. Without such statutory guidance the courts are free to find negligence in virtually any situation, which ultimately robs busi-

nesses of the right to function in a predictable legal environment. A misapplied standard of justice often results in unpredictably enormous jury verdicts and damage awards that, if left unchecked, will eventually cripple Florida's economy.

Offering a case in point of the judicial expansion of duty are lawsuits against public utility companies for any accident involving an interruption in electrical service. One example involves an award to a plaintiff, who was not a utility customer, for alleged failure to maintain streetlights.

Such an uncertain standard of negligence forces companies to incur significant costs, whether they win the case or not, which ultimately undermines their ability to provide service to Florida's residents and businesses in the most cost-effective manner.

### **Implementation of the Jury Patriotism Act**

The right to a jury trial is a fundamental tenet of the American judicial system, yet a recent news article reported that only one out of four jurors in Palm Beach County reported for jury duty. Throughout the nation, in fact, juror response rates have reached crisis levels; in some jurisdictions, fewer than ten percent of eligible jurors report for jury duty.

The Jury Patriotism Act was recently developed by the bi-partisan American Legislative Exchange Council to promote jury service. Versions of this bill have been enacted in Arizona, Louisiana, and Utah.

The Jury Patriotism Act would make several beneficial changes to Florida law to encourage jury service. The Act would lessen the burden of jury service on citizens and ensure a representative jury by requiring all people, regardless of profession or status, to serve on juries. The Jury Patriotism Act emphasizes that it is the policy of the State that all qualified citizens have an obligation to serve on juries when summoned, unless excused. The proposed changes in the jury system contemplated by the Jury Patriotism Act will ensure that cases are judged by a wide cross-section of individuals who are representative of the community. Additionally, by ensuring the diversity of the jury selection process, citizens can expect to have judgments that are fair to all parties, including the business community, which will ultimately benefit the economy of the entire state. ■

# What Can You Do?

Call your senator and representative to ask for their support of legal reform. For more information on contacting your lawmakers visit [www.FlaLegalReform.com](http://www.FlaLegalReform.com).

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# How Bad Do We Need Legal Reform?

## Exhibit A:

Each year the American Tort Reform Association ([www.atra.org](http://www.atra.org)) issues its list of **Judicial Hellholes**, jurisdictions sought out by personal injury lawyers because they know that they will get what they want — an excessive verdict/settlement, a favorable precedent, or both.

1. Madison County, Illinois
2. St. Clair County, Illinois
3. Hampton County, South Carolina
4. West Virginia (entire state)
5. Jefferson County, Texas
6. Orleans Parish, Louisiana
7. **South Florida**
8. Philadelphia, Pennsylvania
9. Los Angeles, California

## Exhibit B:

Robert L. Ripley traveled far and wide in the first half of the 20th Century, seeking material for his popular “Believe it or Not” cartoon series. Today, he’d have to journey no farther than the local courthouse to find these real lawsuits involving some surreal Floridians.

- A woman takes her granddaughter to what is described as a terrifying haunted house — then sues the amusement park for scaring her and allegedly causing severe emotional distress.
- A father, who explodes into a profanity-laced tirade because he believes his six-year old son was cheated by an arcade game, is asked to leave the family-oriented recreation center. He later sues the recreation center for the emotional trauma caused to his son for witnessing his father’s boorish behavior.
- A man goes out drinking one night. Sporting a serious case of drunkard’s courage, he decides to climb over a fence with a locked gate so that he can scale an electric tower. After sustaining injuries from his ill-fated expedition he sues the local electric company along with six bars and stores that sold him alcohol.

## Exhibit C:

Tort reform not only costs too much, it sometimes rewards people for foolish and risky behavior. Business people can no longer assume that their customers will use common sense. Michigan Lawsuit Abuse Watch ([www.mlaw.org](http://www.mlaw.org)) conducts the Wacky Warning Label Contest to demonstrate how our tort system breeds nonsense. Readers submit labels they find on actual products and judges pick the winners.

### 2004 Wacky Warning Labels

5. On a nine-by-three-inch bag of air used as packing material: **“Do not use this product as a toy, pillow, or flotation device.”**
4. On an electric hand blender promoted for use in “blending, whipping, chopping and dicing”: **“Never remove food or other items from the blades while the product is operating.”**
3. On a digital thermometer that can be used to take a person’s temperature several different ways: **“Once used rectally, the thermometer should not be used orally.”**
2. On a popular scooter for children: **“This product moves when used.”**

### And the Wackiest Warning Label of all ...

1. On a flushable toilet brush: **“Do not use for personal hygiene.”**

## Exhibit D:

- The cost of the U.S. tort system for 2003 was \$246 billion, or \$845 per citizen.
  - U.S. tort costs increased 5.4 percent from 2002, continuing a decades-long trend.
  - U.S. tort costs have risen to 2.23 percent of gross domestic product.
  - The U.S. tort system is inefficient; it returns to claimants less than 50 cents on the dollar and less than 22 cents of actual economic loss.
- Tillinghast-Towers Perrin, U.S. Tort Costs: 2004 Update*  
([www.towersperrin.com/tillinghast](http://www.towersperrin.com/tillinghast))

# What do the Voters Say?

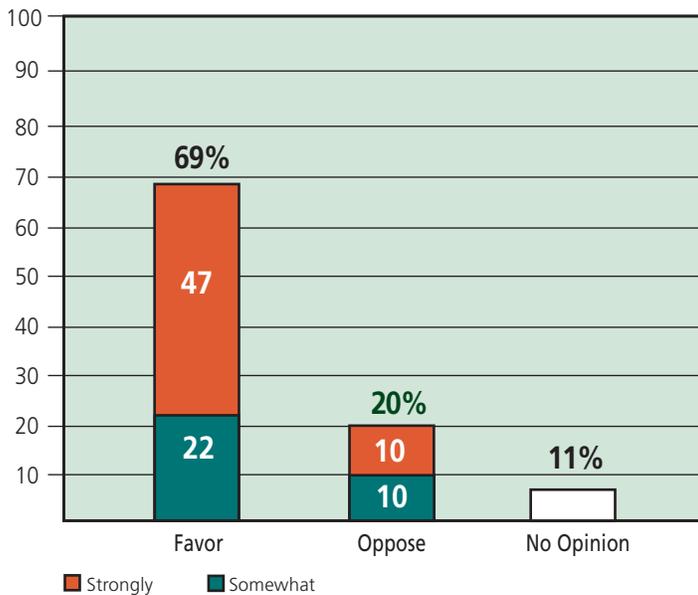
On January 18th and 19th AIF pollster Jim McLaughlin of McLaughlin & Associates, one of the nation’s premier pollsters, conducted a survey of 500 likely general election voters to find out how they felt about legal and tort reform. The survey questions were designed to provide an accurate gauge of public opinion.

The actual questions are included with the results so that readers can determine the objectivity of the results.

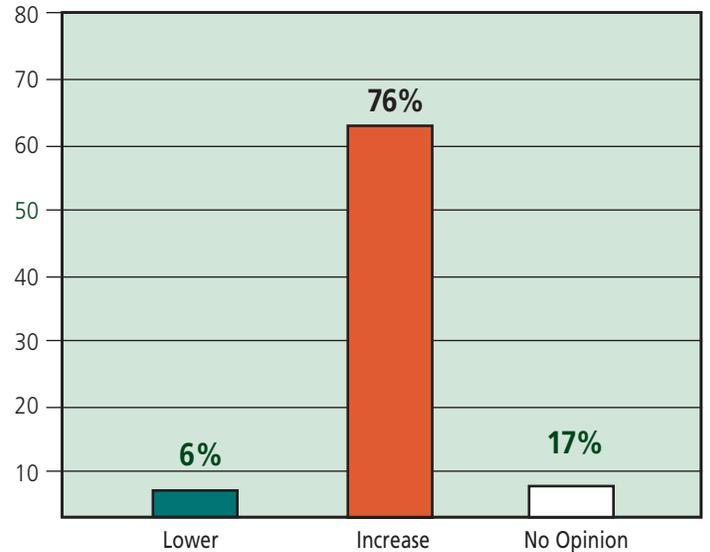
The charts combine “strong” and “some-what” responses to show overall favorable and opposed responses.

The poll is accurate to plus or minus 4.4-percentage points at a 95-percent confidence interval. Numbers may not equal 100 because of rounding.

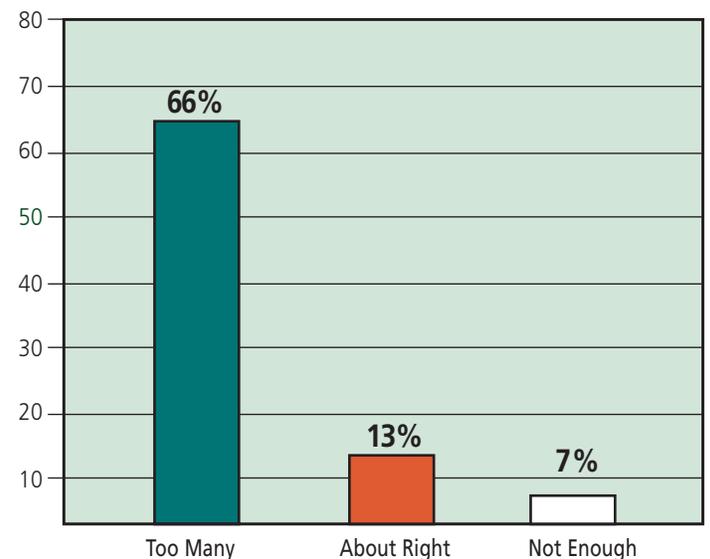
Do you favor or oppose the Florida Legislature passing significant legal and tort reform, which includes lowering lawyers’ fees and decreasing the number of lawsuits filed in Florida?



Overall, do you believe the number of lawsuits filed against businesses in Florida lower or increase the prices Florida’s middle class families have to pay for products and services?

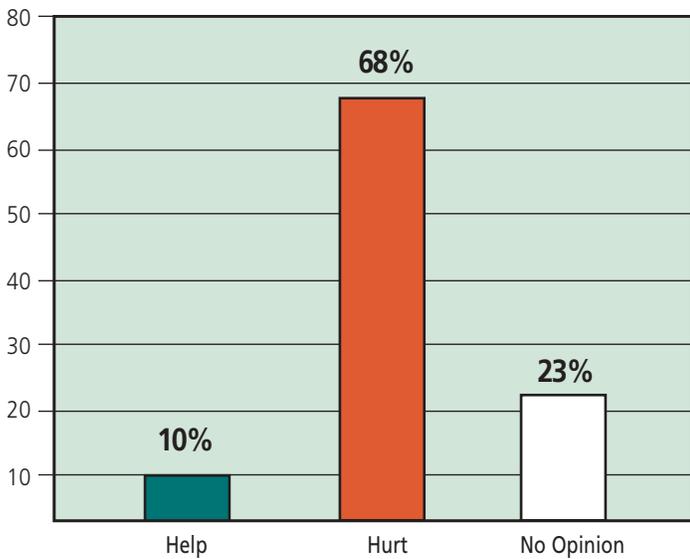


In general, do you feel that personal injury trial lawyers and other individuals are filing too many, about the right amount, or not enough of lawsuits against businesses in Florida?

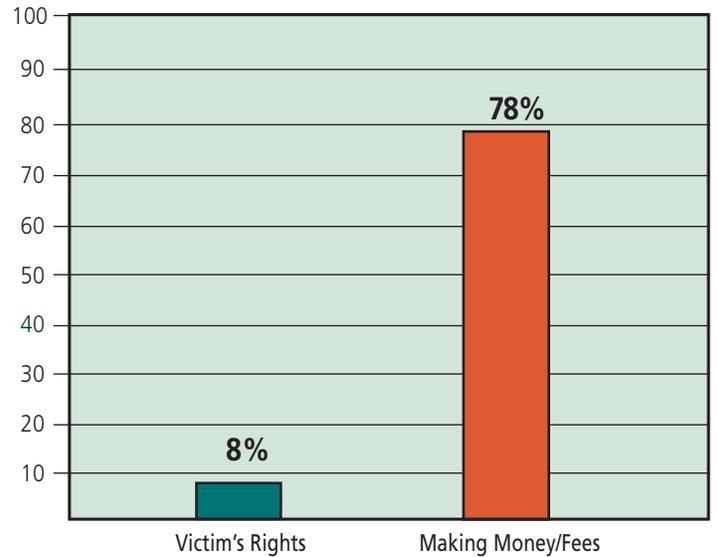




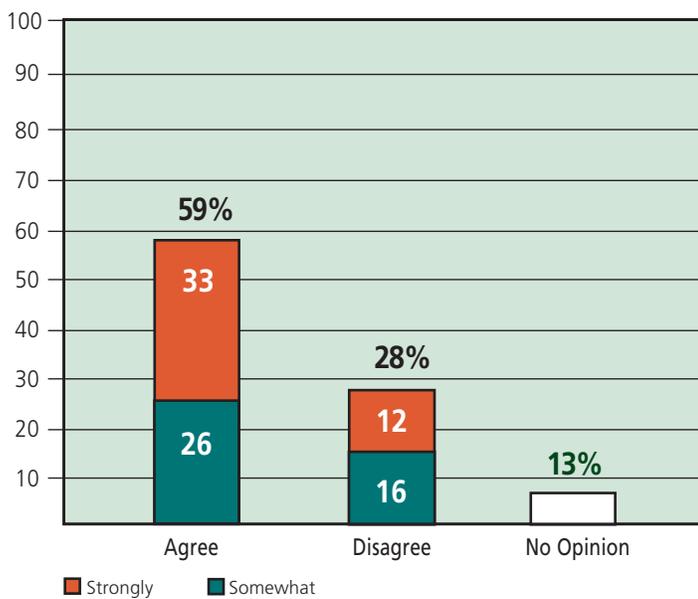
Overall, do you believe the number of lawsuits filed against businesses in Florida help or hurt Florida's economy?



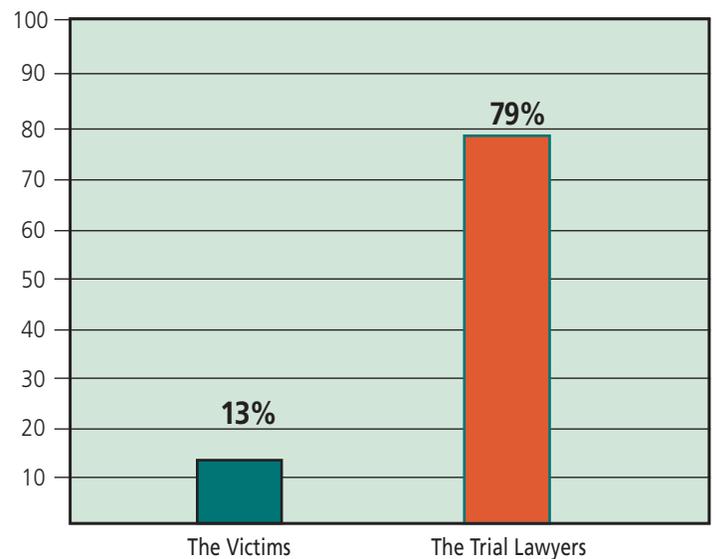
In your opinion, do you believe the trial lawyers are more concerned with the victim's rights or making money from their lawyers fees?



Do you agree or disagree with the following statement? "Without legal and tort reforms, Florida will have a harder time keeping businesses from leaving the state and attracting new businesses to Florida."



In your opinion, who benefits more from the lawsuits filed against businesses in Florida, the victims or the trial lawyers?



# **The Florida Coalition for Legal Reform is a group of Florida companies and associations working together for reason, sanity, and equity in our state's legal system.**

Coalition members belong to every segment of Florida's economy, employing millions of workers and serving residents and visitors alike.

- We believe Florida deserves a legal system that treats defendants and plaintiffs impartially, one that makes sure the truly injured get the help they need without wasting time and money on cases that don't belong in the courthouse.
- We believe that Florida deserves a legal system that doesn't drive up the cost of goods and services simply to line the pockets of a few plaintiffs and their lawyers.
- We believe that Florida deserves a legal system that protects citizens by punishing wrongdoers, not one that operates like a game of chance, dispensing justice by the luck of the draw, where companies have no way of knowing whether a court will find them negligent for something they are doing with all good intentions.
- We believe that Florida deserves a legal system that is a model for the rest of the nation and the world.

To find out more about the Coalition and its 2005 Legislative Proposal, log onto [www.FlaLegalReform.com](http://www.FlaLegalReform.com).

Also available on the Web site is the Coalition's 10-minute DVD presentation on Florida's legal system and the problems it creates for employers.

**“Striving for an Equitable Legal System”**