NYSBA

Staff Memorandum

House of Delegates
Agenda Item # 6

REQUESTED ACTION: Approval of the "Report of the Task Force to Consider Tort Reform Proposals Regarding The Civil Justice Reform Act" ("Report")

The Association's Task Force to Consider Tort Reform Proposals ("Task Force") was established to provide an objective analysis of tort reform proposals and to make recommendations for the purpose of developing the Association's policy regarding changes in the civil justice system. A group referred to as "New Yorkers of Civil Justice Reform," which is mainly comprised of business, insurance, and government groups and associations, has recently promoted a broad civil justice reform agenda. The legislative embodiment of that agenda is The Civil Justice Reform Act ("the Act"), introduced in the New York State Senate as S.2277 (Volker, et al) and in the New York State Assembly as A.4509 (Morelle, et al).

Attached to this Staff Memorandum is a copy of the Report, along with a copy of the Act and the "Introducer's Memorandum in Support."

The Report sets forth an "Introduction," an "Overview," brief descriptions of the substantive sections of the Act, and the positions taken regarding those sections, along with the justification for each position.

The Report states that contrary to the claim of the Act's supporters, this legislation for the most part is not 'fair' and would not effect a positive change to New York's civil justice system.

Proponents of the Act argue that it would reduce New York's so-called $14 billion annual "tort tax" by roughly $800 million a year. But the Report responds that the fundamental problem with the "tort tax" assertion is that it falsely implies that moneys paid to individuals who have been injured is unnecessary and can be eliminated. There must be some system in place to compensate injured people for their losses. New York's system is one alternative. There are other alternatives, such as self-insurance or social insurance such as found in some European countries. But these alternatives have substantial costs. Injuries can not be compensated for free. It is misleading to promote reduction of a "tort tax" as if there is some cost-free alternative to compensating injured victims. Moreover, the proponents' argument fails to recognize the benefits of the system – compensation and some measure of justice for victims, and incentives for safer business and governmental practices.

The Report also criticizes a Zogby International survey, which is relied on by the Act's proponents, and which purports to conclude that "the people overwhelmingly believe that the cost of lawsuit awards is too high, and that the current liability system needs major reform." The methodology of the Zogby poll indicates that it was not intended to survey or assess public opinion, but was intended to shape public opinion.

The Report expresses support for initiatives which reduce the cost of doing business in New York, provided that there is no adverse impact on the general public, but concludes that the Act does not meet that test. Further, it states that the ostensible justification for the Act is that it would result in social benefit; however, objective analysis indicates that it would emphasize profit over safety and would deny justice to many who are victims of unsafe practices or other wrongful conduct.

The Report then describes the various provisions of the Act and sets forth the positions of the Task Force and justification for those positions.

The provisions of the Act would:

-Expand the certificate of merit requirement to actions against all other "licensed professionals;"
-Eliminate the doctrine of joint and several liability;
-Create a Statute of Repose;
-Eliminate the right of parties not to disclose the names of their planned medical, dental, or podiatric experts;
-Reduce to $50,000 the threshold relating to periodic payment of judgments and require "four percent" as the exclusive measure of interest;
-Cap at $250,000 the award of non-economic damages ("pain and suffering");
-Eliminate strict liability in "scaffolding" cases;
-Bar recovery of damages where the contributory fault of the injured or deceased person is more than 50 percent;
-Provide immunity for disclosure of employment-related information by employers;
-Exempt from civil liability volunteers performing services for a not-for-profit corporation;
-Limit liability in relation to motor vehicles leased for twelve months or more;
-Bar actions to recover for injury or damages sustained by a person while intoxicated or while in the commission of a crime;
-Enact provisions in relation to defenses in product liability actions;
-Include municipalities, school districts, and special districts within the jurisdiction of the Court of Claims;
-Expand notice provisions regarding alleged liability of certain municipalities;

-Extend the medical malpractice contingent fee schedule to all actions for personal injury;
-Limit liability relating to farm/"u-pick" operations and "equine activity."

The Task Force is in opposition to all but one of the above proposals set forth in the Act. The Task Force is in support of the proposal set forth in section 8 of the Act, which would eliminate the right of parties not to disclose the names of their planned medical, dental, or podiatric experts.

This item will be presented at the meeting by David M. Gouldin, Co-Chair of the Task Force to Consider Tort Reform Proposals.

NEW YORK STATE BAR ASSOCIATION
Committee Report Cover Sheet

When submitting a report to the Executive Committee or House of Delegates, please complete and attach this form. This information should be directed to:

John A. Williamson Jr.
Associate Executive Director
New York State Bar Association
One Elk Street, Albany, NY 12207

Committee: Task Force to Consider Tort Reform Proposals

Individual completing form (name, address, telephone):

Ronald F. Kennedy
One Elk Street
Albany, NY 12207
(518) 487-5652

Recommendation:

Approval of Report of the Task Force recommending opposition to most provisions of the Civil Justice Reform Act

Position taken at meetings held on:

January 28, 1999 **at:** Marriott Marquis
March 2, 1999 via Telephone Conference Call
March 8, 1999 via Telephone Conference Call

Total membership of Committee: 12

Total in attendance: 11

(OVER)

Vote for recommendation: See attachment.

Vote against recommendation: See attachment.

Brief summary of majority opinion:*

a) Majority opinion in relation to all sections of the Act, except Section 8.

Enactment of all elements of the Act would establish a preference for financial profit over safety and would deny justice to many who are victims of unsafe practices or other wrongful conduct.

b) Majority opinion in relation to Section 8 of the Act.

Withholding the names of liability experts does not seem to prevent identification of such witnesses by an opposing party. There is no evidence that consultants in federal court cases, where disclosure of the names of such experts is already required, has caused them to withdraw as expert witnesses.

Brief summary of minority opinion:*

a) Minority opinion in relation to positions on Sections 4, 5, 6, 7, and 11 of the Act.

Enactment of some reform measures - - such as a statute of repose and a cap on non-economic damages - - would be appropriate. Such changes would improve New York State's business climate, from which the general public would derive benefit.

b) Minority opinion in relation to Section 8 of the Act.

Requiring disclosure of the name of an expert may allow peer pressure and result in the expert withdrawing from the case. Also, it may lead to the added requirement of deposing expert witneses, which will ultimately increase the cost of litigation.

Anticipated budget implications: None

Other Committees and/or Sections notified or consulted (including date):

Business Law Section
Commercial & Federal Litigation Section
Corporate Counsel Section
Food, Drug & Cosmetic Law Section
General Practice Section
Labor & Employment Law Section
Municipal Law Section
Torts, Insurance & Compensation Law Section
Trial Lawyers Section
Committee on Civil Practice Law & Rules
Committee on Tort Reparations
Committee on Civil Rights

The "Report of Task Force to Consider Tort Reform Proposals Regarding The Civil Justice Reform Act" contains the positions taken on proposals set forth in the substantive sections of the Civil Justice Reform Act. Below are brief descriptions of those proposals, arranged according to the Act's section numbers, and the votes thereon. Most votes were on motions to oppose the subject proposal(s). One vote -- regarding Section 8 of the Act -- was on a motion to support the proposal.

-**Section 2** would expand the certificate of merit requirement to actions against all other "licensed professionals;"
Vote to oppose proposal: Yes: 11; No: 0.

-**Section 3** would eliminate the doctrine of joint and several liability;
Vote to oppose the proposal: Yes: 10; No: 0; Abstain: 1.

-**Sections 4, 5, 6, and 7** would create Statutes of Repose;
Vote to oppose the proposals: Yes: 9; No: 2.

- **Section 8** would eliminate the right of parties not to disclose the names of their planned medical, dental, or podiatric experts;
Vote to support the proposal: Yes: 8; No: 2.

-**Sections 9 and 10** would reduce to $50,000 the threshold relating to periodic payment of judgments and require "four percent" as the exclusive measure of interest;
Vote to oppose the proposals: Yes: 9; No: 0; Abstain: 1.

-**Section 11** would cap at $250,000 the award of non-economic damages ("pain and suffering");
Vote to oppose the proposal: Yes: 8; No: 2.

-**Sections 12, 13, and 14** would eliminate strict liability in "scaffolding" cases;
Vote to oppose the proposals: Yes: 9; No: 0; Abstain: 1.

-**Section 15** would bar recovery of damages where the contributory fault of the injured or deceased person is more than 50 percent;
Vote to oppose the proposal: Yes: 9; No: 0; Abstain: 1.

-**Section 16** would provide immunity for disclosure of employment-related information by employers;
Vote to oppose the proposal: Yes: 10; No: 0.

-Section 17 would exempt from civil liability volunteers performing services for a not-for-profit corporation;
Vote to oppose the proposal: Yes: 10; No: 0.

-Section 18 would limit liability in relation to motor vehicles leased for twelve months or more;
Vote to oppose the proposal: Yes: 9; No: 0; Abstain: 1.

-Section 20 would bar actions to recover for injury or damages sustained by a person while intoxicated or while in the commission of a crime;
Vote to oppose the proposal: Yes: 9; No: 0; Abstain: 1.

-Section 21 would enact provisions in relation to defenses in product liability actions;
Vote to oppose the proposals: Yes: 10; No: 0.

-Sections 22 and 23 would include municipalities, school districts, and special districts within the jurisdiction of the Court of Claims;
Vote to oppose the proposal: Yes: 9; No: 0; Abstain: 1.

-Sections 24, 25, and 26 would expand notice provisions regarding alleged liability of certain municipalities;
Vote to oppose the proposal: Yes: 9; No: 0; Abstain: 1.

-Section 27 would extend the medical malpractice contingent fee schedule to all actions for personal injury;
Vote to oppose the proposal: Yes: 9; No: 0; Abstain: 1.

-Sections 28, 29, and 30 would limit liability relating to farm/"u-pick" operations and "equine activity;"
Vote to oppose the proposals: Yes: 9; No: 0; Abstain: 1.

Report of the Task Force to Consider Tort Reform Proposals

Regarding

The Civil Justice Reform Act

Introduction

The Task Force to consider Tort Reform Proposals ("Task Force") was established by the New York State Bar Association to provide an objective analysis of tort reform proposals presented to the New York State Legislature, and to make recommendations for the purpose of developing the Association's policy regarding changes in the civil justice system. The Task Force has reviewed and provides this report on the Civil Justice Reform Act, currently pending in the New York State Legislature as S.2277 (Volker, et al) and A.4509 (Morelle, et al). This report first sets forth an overview regarding the legislation, and then provides section-by-section descriptions of the proposed amendments to New York law and the positions taken by the Task Force.

Overview

According to the Memorandum in Support ("Memorandum") which accompanies this legislation, the Civil Justice Reform Act is comprehensive and omnibus legislation "intended to effect an all encompassing yet *fair* approach of modification throughout the general provisions of law for the purpose of accomplishing seriously *necessary* and *overdue reform* in the various areas of tort law." (emphasis added.) The Memorandum goes on to state that:

> According to the Public Policy Institute [report, *An Accident And A Dream*], in 1996 New York State's "Tort Tax" amounted to $14.3 Billion or a tax on every New York State citizen of $787 per person. This tort tax is equivalent to 2.35% of our state's estimated gross state product. This tort tax is approximately 28% above the national average. This bill [S.2277/A.4509], to the extent it brings New York tort law more in line with the national average, would cut this tax by roughly $800 million a year.

The Task Force has determined that this legislation for the most part is not "fair" and would not effect a positive change to New York's civil justice system. Further, the above-referenced report and this legislation are based upon misinformation, misstatement, and misunderstandings about the civil justice system.[1]

The fundamental problem with the "tort tax" assertion is that it implies that the moneys paid to individuals who have been injured is unnecessary and can be eliminated. This is a fallacy because if people are injured, there must be some system in place to compensate their losses. The experience in New York State regarding the workers' compensation system and the no-fault automobile insurance system indicates that savings achieved in one area were offset by other expenses. Similarly, any savings resulting from this legislation would also be offset by additional expenses incurred.

The tort system that we currently have is one alternative, and there are some others, such as a nationwide system of self-insurance, or a system of social insurance such as found in some European countries. But these alternatives have substantial costs. Injuries can not be compensated for free. Thus, to pitch the "tort tax" as if there is some cost-free alternative to compensating injured victims is misleading. The concept is not only unbalanced in looking at the costs of the tort system without considering the costs of an alternative system; it is also deceptive because it overstates the costs of the system. Moreover, it fails to recognize the obvious benefits of the system -- compensation to and some measure of justice for victims, and incentives for safer business and governmental practices.

The Memorandum and the Public Policy Institute report rely heavily on a survey by Zogby International which purports to conclude that "the people overwhelmingly believe that the cost of lawsuit awards is too high, and that the current liability system needs major reform." While reliance on any single poll is probably risky, reliance on this particular poll is especially inappropriate. A mere reading of the Zogby poll reflects that the methodology employed by Zogby was not intended to survey or assess public opinion, but was in fact intended to shape such public opinion.

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[1] See, *"An Accident and a Dream": Misinformation, Misstatement, and Misunderstandings About the Civil Justice System*, by Daniel J. Capra, Philip Reed Professor of Civil Justice Reform, Fordham University School of Law. Professor Capra provides an objective, fact-based analysis of the arguments set forth by the Public Policy Institute, Inc., an affiliate of the Business Council of New York State, Inc.

The legislative purpose of accomplishing so-called "necessary" and "overdue" reform is not based on legitimate information or objective facts. The legislation is not a product of public expressions of concern, but appears to be another means by which business and/or government might conceivably reduce costs. All New York residents need to support those legislative initiatives which will reduce the cost of doing business in New York where such initiatives will not adversely impact the general public. This legislation does not meet that test.

While there may be some modest savings achieved in certain areas for business and insurance interests, it does not appear that there will be significant savings, and they will be offset by new and unanticipated expenses on other lines of the balance sheet or budget.

The ostensible justification for this legislation is that it would result in social benefit; however, objective analysis indicates that it would result in financial benefits to the business community, government bureaucracies, and insurance industry. It clearly would establish preference for the corporate bottom line over safety and would deny justice to many who are victims of unsafe practices or other wrongful conduct.

Proponents of the legislation make unsubstantiated claims that the tort system is "out of control." However, the empirical data suggests otherwise. While there are anecdotal reports of tort recoveries that are greeted by everyone with some measure of incredulity, so-called studies like *An Accident And A Dream* fail to relate the full story. In some instances the flaw is as basic as failing to acknowledge a reversal of a particular jury verdict on which the report is relying to support a specific premise. Furthermore, we all recognize that decisions of law or policy should not be driven by exceptional and isolated reports which have little or no overall effect on the tort system. They should in fact be motivated by consideration for the greater good of the public as a whole and not what may be perceived by a particular special interest group to represent reform which will work to its advantage.

Each section of the Civil Justice Reform Act was considered and acted on as follows:

> **Section 2** would expand the certificate of merit requirement to apply to civil actions against not only doctors, dentists, and podiatrists, but all other licensed professionals.
>
> **The Task Force is in opposition to this proposal.**

The Task Force was in favor of requiring a Certificate of Merit in regard to a specified group of professionals where expert testimony would be necessary at trial. However, the Task Force was opposed to the overly broad proposed legislation which extends to all licensed professionals set forth in Title 8 of the Education Law. Title 8 currently governs 26 licensed professionals including massage therapists, interior designers and athletic trainers. It would needlessly increase the cost of litigation to suggest that the actions of any licensed professional are beyond the evaluation of ordinary lay people and therefore require expert evaluation..

Section 3 would repeal Article 16 of the Civil Practice Law and Rules and eliminate the joint and several liability doctrine.

The Task Force is in opposition to this proposal.

The problem with repealing the doctrine of joint and several liability is that an injured plaintiff will have to assume the risk that all wrongdoing defendants will be able to pay their share of the plaintiff's full recovery. In many cases, injured parties will not be able to obtain recovery from all the wrongdoers—due to limited resources and/or insurance. The question is, who should assume the risk of loss when one of the wrongdoers cannot be held accountable – the innocent victim or the other wrongdoers? Simply to state the question indicates the fairness of the joint and several liability rule --it makes far more sense to make the wrongdoers pay, since by definition their wrongful conduct has injured the plaintiff.

Yet despite the inherent fairness of the rule, the Legislature has placed substantial limitations on joint and several liability in personal injury cases. Under CPLR 1601, certain tortfeasors who are less than 50% at fault cannot be held liable for a disproportionate amount of the plaintiff's non-economic injury (pain and suffering). There is no need to go farther.

The instant proposal would fully repeal the doctrine of joint and several liability. All this will do is shift the cost of injury from wrongdoing defendants to either innocent victims, or to society by way of public compensation. It is difficult to see what is gained from such a change.

Sections 4, 5, 6, and 7 would create a ten-year Statute of Repose for construction defects, products defects, and a twenty-five year statute of Repose for any claim.

The Task Force is in opposition to these proposals.

Unlike a statute of limitations—which limits the period in which a lawsuit may be filed **after** an injury has occurred, or after an injury is discovered—a statute of repose bars the right to sue **before** the harm has occurred.

As a practical matter, a law that creates a date certain after which a bad act has no consequences may ultimately put consumers' safety at risk. Such a law would encourage less attention to design considerations and material selection that might enhance product safety and longevity. It would also create a more hazardous environment—in the home, the workplace, on highways, in schools and playgrounds, in buses and airplanes. Further, many of those most at risk by the effects of such a law are those in socio-economic groups who often need to keep older products because they cannot afford to buy new ones.

It would also wipe out many cases involving latent diseases, including those caused by asbestos and tobacco.

Section 8 would require parties in medical, dental or podiatric cases to disclose the identification of their liability experts.

The Task Force is in support of this proposal.

Experts on liability do not now have to be identified in these actions. Withholding the name of an expert witness does not seem to prevent identification of that witness by an opposing party in current New York Supreme Court matters. In addition, in the federal courts, where disclosure of the names of such experts is already required, there is no evidence that identification of consultants has caused them to withdraw from service as expert witnesses.

Sections 9 and 10 would amend Subdivisions (b) and (e) of Section 5031 of the Civil Practice Law and Rules and Subdivisions (b) and (e) of Section 5041 of the Civil Practice Law and Rules, to reduce from $250,000 to $50,000 the threshold relating to periodic payment of judgment for personal injury or wrongful death, and to make the addition of four percent the exclusive measure of interest, etc.

The Task Force is in opposition to these proposals.

The New York State Bar Association has a long-standing position that Articles 50-a and 50-b of the CPLR are so complex as to be unworkable, are of dubious constitutional validity, and are punitive to plaintiffs. Therefore, those articles should be repealed. The Task Force reaffirms the position of the Association on that issue, and submits that the statute is difficult to understand and increases the costs of litigation for all parties.

In addition, the Task Force strongly opposes reduction of the subject threshold. Such a reduction would simply serve to increase hardships for those who are most severely injured.

Section 11 would add a provision to the Civil Practice Law and Rules to cap at $250,000 the award of non-economic damages (pain and suffering).

The Task Force is in opposition to this proposal.

From its origins under the common law, the purpose of the tort reparations system has been to attempt to make whole the victim of negligence or other wrongdoing. While this may not always be possible from a physical standpoint, the concept necessarily incorporates compensation for intangible loss as a fundamental tenet based on the general understanding that serious injury results not only in out-of-pocket loss but in a measure of pain and suffering that is real, despite its intangible character. To cap this component of damages would unjustly discriminate against the relatively small number of accident victims who suffer the most devastating physical and psychological losses. The lower the ceiling, the more drastic the discrimination and injustice.

The awards for non-economic injuries also serve to deter corporate and governmental misconduct and to protect innocent citizens. It makes theoretical and practical sense to assess liability for the full costs of physical and emotional loss, so that careless behavior is sufficiently deterred. To consider only economic loss places at particular risk persons with little or no earnings such as homemakers, children, and retirees.

The practical effect of this proposal would be that the victims and society would subsidize the cost of high-risk activities, thereby leading to inadequate deterrence.

Section 12, 13, 14 would amend Sections 240, 241, and repeal Section 241-a of the Labor Law to eliminate strict liability in "scaffolding" cases.

The Task Force is in opposition to these proposals.

The "scaffolding law" holds owners and contractors liable for injuries to construction workers caused by their failure to provide certain important safety devices, such as sturdy ladders, safety belts, and the like. The Legislature recognized that special risks arise when workers are working at an elevation. The law is designed to place the responsibility for workers' safety against elevation-related risks squarely on the owners and contractors rather than on the workers. This is reasonable since it is the owners and contractors, not the workers, who control the safety conditions at the site.

In recent years the New York courts have imposed several substantial, reasonable limitations on the scope of the "scaffolding law." As noted in the March 10, 1999 *New York Law Journal* article of the Hon. Andrew V. Siracuse, the courts are moving from absolute to relative liability in Labor Law Cases with evermore frequent reference to proximate cause issues and the recalcitrant worker exception. Moreover, courts have emphasized that the application of the law is called for "under very limited circumstance"—that is, only where the worker suffers harm from a risk "related to elevation differentials."

Thus, the scope of the "scaffolding law" is quite limited. Owners and contractors are liable only if they refuse or fail to provide safety equipment that is necessary to protect workers above the ground, and then only if the failure or absence of the safety equipment caused the injury.

Section 15 would amend Section 1411 of the Civil Practice Law and Rules to bar recovery of any damages where the contributory fault of the injured or deceased person is more than 50 percent.

The Task Force is in opposition to this proposal.

A pure system which permits recovery and ascribes liability based on actual percentages of culpability seems most equitable. To place a limit on how negligent a plaintiff can be and still be entitled to recover seems arbitrary, and the Task Force sees no evidence that significant savings would be achieved even if such a provision were enacted. This appears to be an attempt to re-introduce a form of the contributory negligence rule,

which long ago was abandoned by New York-- and the vast majority of jurisdictions in the United States-- because of its unfairness.

Section 16 would amend Section 741 of the Labor Law regarding the "disclosure of employment-related information" by an employer.

The Task Force is in opposition this proposal.

The current law provides adequate protection for employers in the form of a qualified privilege from liability.

The assertion that employers are in an impossible position with respect to employee references is unsupportable. Under New York law, an employer cannot be held liable for giving a reference about an employee unless the employee proves that the employer maliciously libeled the employee. Simply put, if the information is truthful there can be no liability. Even if the information is false, there is no liability unless the employee can prove that the employer was malicious. Presumably, there is no interest in protecting employers who wish to injure their former employees by transmitting knowingly false information.

We recognize that many employers have taken an ultra-conservative posture with respect to responses to inquiries from other entities (generally prospective employers), but the Task Force believes that such reactions reflect a lack of recognition of legal protections already in place for such employers. We hope that better publicity of the current law will give employers greater comfort in providing more complete responses to past-employment inquiries, and reference checks.

Section 17 would exempt from civil liability volunteers performing services for a not-for-profit corporation.

The Task Force is in opposition to this proposal.

This broad proposal would be contrary to sound public policy. The supposed threat of liability faced by volunteers is in fact non-existent. We have seen no evidence that such potential liability has inhibited the public's response to calls for volunteers. In 1997, Congress enacted the Volunteer Protection Act of 1997, which immunizes volunteers for non-profit or governmental entities from liability for ordinary negligence.

The proposal in this legislation represents little more than a scare tactic designed to stir up lawmakers and the public. The proposed "immunity for volunteers" section appears to be included to engender public support for the bill. This proposal does not appear to have been carefully drafted and seems superfluous in light of the federal law already in place. (42 U.S.C. 14501, et seq)

Section 18 would amend Subdivision 3 of section 388 of the Vehicle and Traffic Law to limit liability in relation to motor vehicles leased for a period of twelve months or more.

The Task Force is in opposition to this proposal.

The proposal would shift the burden from those best able to assume responsibility to those least able to assume the expense of injury.

Section 20 would amend the Civil Practice Law and Rules by adding new Section 1411-a to bar actions for injury or damages sustained by a person while intoxicated by alcohol, illegal drugs or while in the commission of a crime.

The Task Force is in opposition to this proposal.

The Association previously established a position which favors a bar on an action to recover for injuries sustained during activity which results in plaintiff's criminal conviction for a felony offense. The Task Force reaffirms that position and, to the extent that this proposal varies from that, would oppose enactment.

Section 21 would add Article 14-B to the Civil Practice Law and Rules in relation to defenses in product liability actions.

The Task Force is in opposition to these proposals.

Barring the use of post-manufacture improvements. The basic argument in support of this proposal appears to focus on the rule of evidence which permits a plaintiff to introduce remedial measures taken by the defendant, after an injury, as proof that the product was defective. The argument is that this rule of evidence deters manufacturers from making repairs or

other innovations, for fear that these measures will be used against them at trial.

Whatever the merits of this deterrence-based argument, subsequent remedial measures are already inadmissible to prove a defect in a product in most product liability claims. The argument has already been accepted and applied in the vast majority of these New York case.

Protecting retailers from liability for products they sell. In the typical case the seller may be named a defendant but it is the manufacturer that assumes the real burden of defense. Sellers, therefore, do not need the protection offered by the instant proposal. The only situation in which seller-immunity would have a practical effect would be where the manufacturer for some reason, such as bankruptcy, could not be a source of recovery. In that situation, the question is, who should assume the risk of loss from a dangerous and defective product—the seller, who has profited from sale of the defective product, or the innocent victim? A law providing that a seller would never be liable is unduly harsh.

Section 22 and 23 would amend the Court of Claims Act to include municipalities, school districts, and special districts within the jurisdiction of the Court of Claims.

The Task Force is in opposition to this proposal.

The Association previously opposed this proposal.

This proposal would eliminate juries in actions against the above-referenced municipalities, on the basis that juries routinely base verdicts on a misplaced desire to compensate an injured individual at the expense of a blameless "deep pocket" defendant. An accusation that strikes at the heart of the civil justice system should presumably be supported by some factual basis. Recent evidence is to the contrary. [2] The "tort reform" movement has already been heard, loud and clear, by its target audience: the jury. Jurors are not biased against "deep pocket" defendants and are not engaged in compensating individuals regardless of fault.

[2] See Capra, n.1 at p. 8.

There is a general sentiment among the members of the Task Force that the collective judgment of six or more jurors is better than relying on the opinion of one individual, even if that individual is a judge.

Sections 24, 25, and 26 would amend the General Municipal Law, the Town Law, and the Village Law, adding provisions which effectively expand the prior written notice provisions regarding alleged liability of certain municipalities.

The Task Force is in opposition to these proposals.

The Task Force believes that if any change should be made, it should be a uniform state-wide notice law, as opposed to the erratic array of provisions that currently exists across the state. Before any change, there needs to be careful consideration as to the extent that such protection would reduce the vigilance of municipalities to identify and correct potential safety hazards.

Section 27 would amend Section 474-a of the Judiciary Law to extend the medical malpractice contingency fee schedule to all actions for personal injury.

The Task Force is in opposition to this proposal.

The American legal system is notable for its dearth of legal aid for lower and middle income citizens, especially for civil cases. Contingent fee arrangements take up the slack. If not for the contingent fee, injured victims of moderate means would not have access to the judicial system or be able to undertake the significant expense of obtaining legal recovery—especially against the most powerful wrongdoers, such as the government, powerful corporations, or wealthy individuals.

The attack on contingent fees is quite ironic, given the general belief by the business community in the virtues of the free market. These free marketeers apparently have no trouble proposing substantial market limitations on the contract between injured victims and their counsel.

The argument that contingent fees encourage frivolous litigation is illogical. In a contingent fee arrangement, a lawyer who takes a case must invest an enormous amount of his or her time and usually advance the costs of the litigation up front, for the potential of a percentage return of

an ultimate recovery. It simply makes no economic sense for a contingent fee lawyer to bring frivolous litigation, because there would be only cost and no benefit. The evidence shows that contingent fee lawyers actually provide an important function in screening out cases of dubious merit.

The contingent fee gives non-affluent tort victims access to the courts to redress their injuries. Contingent fees encourage meritorious litigation that would not otherwise have been brought.

Section 28 would amend Section 9-103 of the General Obligations Law to limit liability for personal injuries sustained at farm/"u-pick" operations.

The Task Force is in opposition to this proposal.

The Task Force does not believe that any entity deriving commercial benefit from a particular activity should be immunized from liability relating to that activity. If no commercial benefit is derived, it might be appropriate to include an activity with the categories set forth in Section 9-103 of the General Obligations Law.

Sections 29 and 30 would limit liability for personal injuries related to "equine activity."

The Task Force is in opposition to this proposal.
(See the explanation set forth above regarding "Section 28.")

Members, Task Force to Consider Tort Reform Proposals

John P. Bracken, Co-Chair
Binghamton

David M. Gouldin, Co-Chair
Islandia

A. Vincent Buzard
Rochester

Lucille A. Fontana
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A. Paul Goldblum
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Robert J. Bohner
Garden City

NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI, § 1

(x) Memo on original bill
() Memo on amended bill

SENATE BILL #: S. 2277

SENATE SPONSOR(S): DALE M. VOLKER

ASSEMBLY SPONSOR(S):

TITLE:

AN ACT to amend the Civil Practice Law and Rules, the Labor Law, the Not-for-Profit Corporation Law, the Court of Claims Act, the General Municipal Law, the Town Law, the Village Law, the Judiciary Law and the General Obligations Law, in relation to enacting the Civil Justice Reform Act.

PURPOSE:

This comprehensive and omnibus program of proposed legislation is intended to effect an all encompassing yet fair approach of modification throughout the general provisions of law for the purpose of accomplishing seriously necessary and overdue reform in the various areas of tort law. Included herein are reform measures addressing the issues of joint and several liability, ten year statutes of repose, capping of non-economic damage awards, safe workplace, providing that contributory negligence be a bar to recovery in an action where such was found to be over fifty percent of the cause for such injury, employer reference immunity, volunteer immunity, auto leasing vicarious liability, felon-recovery bar in subject actions, product liability reform measures, farm "U-pick" and equine liability.

SUMMARY OF PROVISIONS:

Section 1. Short title.

Section 2. Amends CPLR 3012-a to provide that a complaint in a malpractice or negligence action involving a defined professional must be accompanied by a certificate of merit of an attorney and that at least one such professional has been consulted and provided an affidavit in certain cases, and that the attorney has concluded that there is a reasonable basis for the action. If the attorney is unable to timely procure such a consultation because of the running of the statute of limitations or after three good faith attempts to do so, this must be stated.

Where the attorney intends to rely solely on the doctrine of "res ipsa loquitur," this section is not applicable.

Section 3. Repeals and adds new article 16 to CPLR which abolishes doctrine of joint and several liability; provides for other exceptions as contained in law.

Sections 4, 5 and 6 establish a ten year period of repose with respect to actions against engineers and architects; provides safeguards and statement of non-applicability for certain grace period.

Section 7. Adds section 214-f to CPLR which establishes ten year period of repose with respect to product liability actions, further providing for safeguards, extensions and exceptions as would be equitably proper with ten year maximum period in certain applications.

Section 8. Amends section 3101 CPLR, in regard to certain provisions relating to scope of disclosure in expert matters; removes certain restrictions in existing statute.

Section 9. Amends section 5031 of the CPLR relating to periodic payment of judgment threshold; reduces same from $250,000 to $50,000 in civil actions including malpractices.

Section 10. Amends section 5041 of the CPLR similarly as in bill section 9 above stated, in respect to personal injury, damage and wrongful death actions.

Section 11. Adds article 50-c to the CPLR. Generally caps non-economic damage awards in negligence actions at $250,000.00.

Sections 12, 13 and 14. These sections would clarify the duties and obligations of contractors, owners, and employees regarding protection devices and equipment for construction workers. Subsection (1) of Section 240 of the Labor Law is amended to require certain contractors and owners and their agents (1) to provide construction workers devices and equipment of the type necessary to give reasonable protection to workers employed on the construction site; and (2) when such devices and equipment are provided, to construct, place, and operate such devices and equipment as to provide reasonable protection to those workers. Former subsections 2 and 3 of Section 240 are repealed. Two new provisions are added. As amended, subsection (2) states that if a contractor or owner complies with applicable state and federal health and safety regulations, their compliance shall be PRIMA FACIE proof of compliance with subsection 1. As amended, subsection 3 conforms section 240 with Section 1411 of the Civil Practice Law and Rules. Section 241 is amended to conform with Section 240 as amended. Subsections 1-5 and 7 are effectively repealed. Subsection 6 becomes subsection 1. Subsections 2 and 3, as amended, conform with subsections 2 and 3 of Section 240. Section 241(a) is repealed. Subdivision 8 of

Section 1602 of the CPLR as enacted by chapter 682 of the Laws of 1986 is repealed.

Section 15. Modifies comparative negligence principles to provide that where contributory negligence of plaintiff constitutes more than fifty percent of cause of injury, there shall be a bar to any recovery.

Section 16. Provides that any employer-reference, granted upon request by a prospective employer or a current or former employee, providing information about a current or former employee's job performance or reasons for separation shall be immune from civil liability provided such employer is not acting in bad faith. Its purpose is to exempt from civil liability an employer who provides accurate information about a current or former employee's job performance or reasons for separation.

Section 17. Exempts volunteers performing services for a not-for-profit corporation from civil liability for causes of action arising out of the execution of their office. The bill will amend section 720-a of the Not-for-Profit Corporation Law to extend to many not-for-profit organizations volunteers limited immunity from liability which is now enjoyed only by 501 (c) (3) corporations. The bill defines "volunteer," "not-for-profit corporation" and "damage or injury" and grants limited tort liability. No limitation on liability would be extended to willful, wanton or grossly negligent acts, liability arising out of the use of an automobile, or to liability which would otherwise arise under the dram shop act.

Section 18. Amends the current vicarious liability statute, Section 388 of the Vehicle and Traffic Law, placing responsibility upon the individual lessee.

Section 19. Legislative findings.

Section 20. Bars actions for injury or damages sustained by person while intoxicated by alcohol, illegal drugs or while in the commission of a crime.

Section 21. Adds Article 14-B to CPLR relative to product liability actions.

Sections 22 and 23. Adds provisions to include municipalities, school districts and special districts within the jurisdiction of the Court of Claims.

Sections 24, 25 and 26. Amends the General Municipal Law, the Town Law and the Village Law, generally adding provisions which effectively expand the scope of those items included under the prior written notice provisions in subject instances of alleged liability of certain municipalities.

Section 27. Amends 474-a of the Judiciary Law to adopt medical malpractice contingency fee schedule to all actions for

personal injury and, further, reduces contingency fees in such cases by five percent throughout the schedule.

Section 28. Amends §9-103, General Obligations Law. Limits the liability of farmers at "u-pick" operations or farms from customers' injuries unless the injuries were caused due to a condition which represented an unreasonable risk of harm.

Sections 29 and 30. Adds Art. 18-A §§18-201 - 18-205, General Obligations Law. Provides that an equine activity sponsor, an equine professional, or any other person, which shall include a corporation or partnership, shall not be liable for an injury to or the death of a participant resulting from the inherent risks of equine activities, except under certain circumstances. The bill will address the following: defines not only those risks inherent to the sport for which liability protection will be afforded, but also establishes affirmative acts for which stable owners, activity sponsors, and equine businesses are responsible. Does not limit liability in cases of negligence by the stable owner or activity sponsor. The legislation does not impact upon horse races either positively or negatively. Requires detailed posting and notification of persons engaging in equine activities concerning the inherent risks of the sport, and mandates that participants recognize these risks and accept responsibility for themselves when they choose to participate. Affects only those liabilities incurred after the passage of the act.

Section 31. Severability clause.

Section 32. Effective date.

JUSTIFICATION:

Section 2. Many members of the professions have found themselves to be the targets of frivolous lawsuits. The CPLR 3012-a certificate of merit requirement is presently in effect for medical, dental and podiatric malpractice suits. This legislation seeks to ensure that plaintiff's counsel has consulted with other stated professionals as relevant, to ascertain that a valid cause of action exists. Litigants will not be barred from bringing suit, but absent a favorable opinion from a knowledgeable subject professional as to the merits, it is anticipated that actions may be ended in the early stages, thus saving both parties the expense of litigation, and relieving court congestion. This reform is supported by 82% of New Yorkers, according to a 1997 statewide Zogby poll.

Section 3. Law now generally provides for full joint liability even where one tortfeasor may be proven to be of an extremely limited level of responsibility compared to the other(s). This proposal would limit the amount of damage in comparison to a finding of degree of culpability of each defendant with appropriate exceptions. In order to bring greater

predictability and equity into the insurance market place and to further lessen the impact of "deep pocket" litigation, the modification of joint and several liability should be extended to all losses. This reform is supported by 79% of New Yorkers, according to a 1997 statewide Zogby poll.

Sections 4, 5, 6 and 7. Places a limit of ten years on commencing product liability after product or service enters stream of commerce, i.e., delivered to first consumer. Provides extensions on late discovery, excepts intentional acts and generally protects the consumer while yet providing a more than reasonable limitation for the purpose of protection of manufacturers, selling agents and marketers of general products and services. The Jones Commission recommends that -- lacking federal agreement -- it is in New York State's best interest to enact a package of product liability reforms for application in New York State. The basic reforms in product liability law in this bill are necessary to limit the expanded liability which has been created in Court decisions over the past two decades. This reform is supported by 58% of New Yorkers, according to a 1997 statewide Zogby poll.

Section 8. Prompt disclosure of information on expert witnesses will lead to less surprise and facilitate settlement of claims with merit. Professional malpractice, including medical malpractice would benefit from the same disclosure provisions as other tort claims.

Section 9. Reducing the threshold for periodic payments of judgments will reduce the administrative costs of litigation and allow a more cost efficient method of compensating individuals injured as a result of accidents and other errors in judgment.

Section 10. This section (and Sec.9) is intended to address the ambiguities which led to the decision in SCHULTZ V. HARRISON RADIATOR, 90 N.Y. 2d 311, 660 N.Y.S. 2d 685, holding that plaintiff could present expert evidence on inflation even though trial court was required to add 4% adjustment to structured payment portion of damage award.

Section 11. Non-economic damages are awards for other than payments for medical care, rehabilitative care, lost wages and other actual damages and out of pocket expenses. Non-economic damages are subjective, intangible and unmeasurable, as pain and suffering. Capping these specific awards at $250,000.00 would greatly reduce general liability and malpractice insurance rates while still affording a substantial amount of allowable finding for damages of this nature. This reform is supported by 73% of New Yorkers, according to a 1997 statewide Zogby poll.

Sections 12, 13 and 14. These amendments are necessary as a result of Court of Appeals' decisions misinterpreting the clear legislative intent of Section 240. See ZIMMER V. CHEMUNG COUNTY PERFORMING ARTS, 65 N.Y. 2d 513 (1985); BLAND V. MANOCHERIAN, 66 N.Y. 2d 452 (1985). Indeed, in the ZIMMER decision, Chief Judge

Wachtler, in a dissenting opinion, appealed for legislative reform of Section 240.

These decisions by the Court of Appeals have held that a contractor or owner is liable for virtually any injury suffered by construction workers on a job site, regardless of whether the contractor or owner had done everything they should have done to protect the worker from injury and regardless of whether or not the injury was caused by the worker's own negligence. These decisions have made contractors and owners insurers of workplace safety, and in essence, have made them a second source of workers' compensation for workers who suffer injuries on the job site.

The theory of strict liability advanced by the Court of Appeals' decisions has resulted in a substantial increase in the number of civil suits filed against contractors and owners. These lawsuits can only exacerbate the liability insurance crisis faced by construction industry employers. Without legislative relief, construction firms, employing thousands of workers, will be unable to find affordable insurance and will be forced to shut their doors. As Chief Judge Wachtler observed in ZIMMER, the ultimate victims of the current statute may be the workers it was designed to protect: "Because I read the statutory policy underlying Labor Law Section 240 as encouraging owners and contractors to provide safety devices where possible, and not to provide insurance coverage to their employees (who are already covered by workers' compensation), I respectfully dissent, AND URGE THE LEGISLATURE TO AMEND THE STATUTE AND MAKE THIS INTENT MORE CLEAR (emphasis added). The imposition of insurers liability on owners and contractors will not further the goal of protecting workers because the absent devices cannot protect them. It will, however, hurt the building industry and perhaps cost those already adequately protected workers their jobs." This bill is designed to remedy the obvious problems with the Court of Appeals interpretation of Section 240 noted by Chief Judge Wachtler. It would impose a negligence liability standard on contractors and owners, rather than the insurers' liability imposed by the Court of Appeals. It would also provide guidance to contractors and owners who must comply with a confusing array of federal, state and local building codes and regulations by making compliance with the Federal OSHA regulations PRIMA FACIE evidence of compliance with Section 240. It would also promote workplace safety by making workers responsible for their own culpable acts. Finally, it would be a significant step towards alleviating the serious liability insurance problems confronting both the construction industry and, ultimately, all those whose livelihood depends on a vigorous construction industry. This reform is supported by 82% of New Yorkers, according to a 1997 statewide Zogby poll.

Section 15. Common sense dictates that if a plaintiff is found to be more than fifty percent responsible for the damages or injuries he or she shall have sustained, there should be no recovery from any defendant for the remaining fault. This reform

is supported by 81% of New Yorkers, according to a 1997 statewide Zogby poll.

Section 16. Under current law, employers face the untenable situation where they can be sued both for sharing information about a current or previous employee, or for refusing to share such information. Employers should be free to share pertinent information requested, in good faith, concerning an employee without fear of liability. This legislation would provide limited liability to employers who provide accurate information about an employee's job performance. The legislation would preclude employer's from civil liability provided that the information provided is accurate and the employer is not acting in bad faith. An employer is considered acting in bad faith if it can be shown by a preponderance of the evidence that the information disclosed was knowingly false and deliberately misleading. An employer's evaluation shall be based on attendance, attitude, awards, demotions, duties, effort, evaluations, knowledge, skills, promotions and disciplinary actions. This reform is supported by 72% of New Yorkers, according to a 1997 statewide Zogby poll.

Section 17. Exempts volunteers performing services for a not-for-profit corporation from civil liability when acting in good faith, and within the scope of their designated responsibilities. Present law provides a limitation of liability for directors, officers or trustees of 501(c)(3) corporations in recognition of the need to encourage people to serve on the boards of such charitable organizations. The New York limitation is less expansive than similar liability limits already in effect in other states. The need to expand the limitation has been recognized at the federal level through the introduction of legislation in both houses of Congress which would require states to limit liability of volunteers of not-for-profit entities or face reduction of social services block grants. The bill recognizes the need to encourage people to serve as volunteers for not-for-profit entities. At the same time, this legislation seeks to strike a balance by not granting a limitation of liability for certain activities. This reform is supported by 81% of New Yorkers, according to a 1997 statewide Zogby poll.

Section 18. Under §388 of the New York Vehicle and Traffic Law, all vehicle owners in the state can be held vicariously liable for the negligence of others in the use or operation of the vehicles they own. Section 388 is intended to create incentives for vehicle owners properly to maintain, and to police the use of, their vehicles. In the abstract, New York's vicarious liability statute makes public policy sense. An individual vehicle owner should take care to ensure that his or her car or truck is kept in good working order and that only responsible persons are allowed to drive it. There is much to commend a system that encourages such behavior.

This analysis breaks down, however, in the case of a vehicle leasing company whose ownership of the vehicles it leases is, for these purposes, largely a matter of legal form. The

long-term corporate lessor generally does not maintain its vehicles and has no effective means to regulate their use. Under the typical consumer lease, the lessor transfers possession and control of the vehicle to a lessee for an extended period, with no real means for the lessor to oversee the situation during that time. Thus, this lessor is in no meaningful way an "owner" within the contemplation of the New York vicarious liability statute; rather, it is effectively in the same position as a lien-holding bank in traditional financed sales who has no vicarious liability exposure.

There is simply is no practical reason why a vehicle lessor should be responsible for the negligence of its lessee or others solely because it owns the vehicle.[1] Indeed, this allocation of liability turns the public policy objective of the rule on its head. Not only does the New York statute impose liability on a party who has little if any control of the situation, the law fails to impose liability on the one actor who can and should modify its behavior in response -- the lessee. As between the lessee and the lessor, the lessee is the person who can attend to the maintenance of the vehicle and restrict access to the driver's seat. But the New York law does not impose liability on lessees for failing to perform these gatekeeping functions. As a consequence, the risks to which the balance of the motoring public is exposed are not reduced.

Sections 19 and 20. There have been cases of convicted felons successfully suing a municipality for damages and injuries sustained while in the commission of a crime. This proposal fairly bars any individual from recovery in such cases and, further, in cases where the subject was proven to be intoxicated by alcohol or illegal drugs. Such awards defy common sense, encourage a cynical attitude toward justice and promote a free booting mentality among criminals who, if they cannot generate substantial revenue from their crimes, then get a second bite of the apple by suing the municipality when they are apprehended. By creating an absolute bar to recovery, this bill would save municipalities and private individuals substantial attorney's fees and the often frustrating involvement in litigation. Immediately upon conviction of the claimant/plaintiff, the conviction could be used as conclusive proof on a motion for summary judgement dismissing the complaint. This reform is supported by 86% of New Yorkers, according to a 1997 statewide Zogby poll.

Section 21. While it is preferable that the tort law establishing the liability of product manufacturers and sellers be national in scope, it is becoming increasingly apparent that Congress is unable to resolve this plaguing problem. The Jones Commission recommends that -- lacking Federal agreement -- it is

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[1] Of course, if the lessor is itself negligent, it should be (and generally is) held responsible for resulting damages.

in New York State's best interest to enact a package of product liability reforms for application in New York State. The basic reforms in product liability law in this section are necessary to limit the expanded liability which has been created in court decisions over the past three decades.

Sections 22 and 23. Court of Claims actions do not involve juries which often tend to view municipalities as a deep pocket defendant. Includes school districts and special districts with municipalities as within the jurisdiction of the State Court of Claims. This provision would move substantially toward fair verdicts against such defendants and necessarily reduce insurance premiums and, ultimately, taxes imposed for such expenses.

Sections 24, 25 and 26. The basic theory of prior written notice provisions is to insure reasonable notice is given of a dangerous or defective condition, affording a municipality a fair opportunity to correct the same. Vandalism or natural forces could cause change from one day to the next. Recently, the Court of Appeals has held to a very strict interpretation of the prior written notice provisions (Walker v Town of Hempstead, 618 N.Y.S. 2nd 758, 1994) specifically holding that only those items particularly enumerated by section 50-e could be covered in the prior written notice categories. Legislation, therefore, becomes essential to clarify the subject law and afford reasonable protection to municipalities and their taxpayers.

Section 27. Extensive studies have indicated that plaintiffs receive only 40% of the total damage award with the remaining going to expert witnesses, lawyers and court costs. Unlimited contingent fees promote unscrupulous solicitation and prosecution of cases and encourage litigiousness causing unnecessary judicial congestion. This reform is supported by 90% of New Yorkers, according to a 1997 statewide Zogby poll.

Section 28. Limits the liability of farmers at "u-pick" operations or farms from customers' injuries in cases absent gross negligence or disregard for safety. Those entering such areas are generally aware of the inherent dangers, i.e., ruts in the dirt, mud by the crops, etc. and are basically assuming the risk of normal presence and movement in such farm locales. At the present time, the General Obligations Law, 9-103, has no liability limits at farms where the customers pick the crop. With the rising costs of liability insurance, the "u-pick" farm operations have had to incur these increases in premiums. This bill would assist in eliminating unfounded suits against growers and thus reducing some outrageous insurance costs to these farmers. However, in no way would it remove the liability of an owner, tenant or lessee for injuries caused by a condition which involved an unreasonable risk of harm. By limiting the liability of farm owners, it would provide an equitable and fair balance of responsibility between the farmers and customers who choose to pick their own fruits and vegetables. This reform is supported by 70% of New Yorkers, according to a 1997 statewide Zogby poll.

Sections 29 and 30. Persons electing to ride horses for pleasure, competition or other personal reasons should obviously be aware of the inherent risk involved in such activity. Absent gross negligence on the part of the vendor, no liability for injury or damage while engaged in such activity should ensue. This proposal provides that an equine activity sponsor, an equine professional, or any other person, which shall include a corporation or partnership, shall not be liable for an injury to or the death of a participant resulting from the inherent risks of equine activities with appropriate exceptions. Over the course of many years the issue of liability has become more and more critical to the equine industry, not only in New York, but nationally. Large claims paid by insurers to persons injured in accidents involving horses has driven the cost of liability insurance for stable owners and sponsors of recreational horse activities to intolerable levels. In many cases, horse farmers are risking the loss of their farms simply because they cannot afford the premium or cannot obtain coverage at all. At least 30 other states have passed, or are considering legislation nearly identical to this proposal. The passage of this bill will take NYS one step closer to its goal of preservation of farmland and open space by allowing horse farms to exist and operate, while at the same time protecting the rights of persons injured due to the negligence of another.

LEGISLATIVE HISTORY:

1998 first introduced as S.6661 in its omnibus format combining the proposals of past intended legislation with new and additional issues.

FISCAL IMPLICATIONS:

According to the Public Policy Institute, in 1996 New York State's "Tort Tax" amounted to $14.3 billion or a tax on every New York State citizen of $787 per person. This tort tax is equivalent to 2.35% of our state's estimated gross state product. This tort tax is approximately 28% above the national average. This bill, to the extent it brings New York tort law more in line with the national average, would cut this tax by roughly $800 million a year.

EFFECTIVE DATE:

This act shall take effect immediately, with additional provisions where appropriate.

STATE OF NEW YORK

2277

1999-2000 Regular Sessions

IN SENATE

February 5, 1999

Introduced by Sens. VOLKER, HOLLAND, JOHNSON, LARKIN, LIBOUS, MARCELLINO, PADAVAN, SALAND, SEWARD -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the civil practice law and rules, the vehicle and traffic law, the labor law, the not-for-profit corporation law, the court of claims act, the general municipal law, the town law, the village law, the judiciary law and the general obligations law, in relation to enacting the civil justice reform act relating to civil liability and to repeal article 16, section 214-d, subdivision (h) of rule 3211 and subdivision (i) of rule 3212 of the civil practice law and rules and section 241-a of the labor law relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. This act shall be entitled and may be referred to as the "civil justice reform act".

§ 2. Section 3012-a of the civil practice law and rules, as amended by chapter 507 of the laws of 1987, is amended to read as follows:

§ 3012-a. Certificate of merit in medical, dental and podiatric malpractice actions and actions against all other professionals. (a) In any action for medical, dental or podiatric malpractice, or in any action for damages, contribution or indemnity arising out of alleged negligence of a professional subject to the provisions of title VIII of the education law, the complaint shall be accompanied by a certificate, executed by the attorney for the plaintiff, or other party asserting the cause of action, declaring that:

(1) the attorney has reviewed the facts of the case and has consulted with at least one physician in medical malpractice actions, at least one dentist in dental malpractice actions [~~or~~], at least one podiatrist in podiatric malpractice actions, or at least one professional in the same profession as the person or persons defendant in the subject suit in other professional malpractice or negligence actions and who is licensed to practice in this state or any other state and who the attorney

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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reasonably believes is knowledgeable in the relevant issues involved in the particular action, and who has signed an affidavit concluding that there is a reasonable basis for the commencement of an action, such affidavit shall accompany the certificate required by this section, and that the attorney has concluded on the basis of such review [~~and~~], consultation and affidavit that there is a reasonable basis for the commencement of such action; or

(2) the attorney was unable to obtain the consultation and affidavit required by paragraph one of this subdivision because a limitation of time, established by article two of this chapter, would bar the action and that the certificate required by paragraph one of this subdivision could not reasonably be obtained before such time expired. If a certificate is executed pursuant to this subdivision, the certificate required by this section shall be filed within ninety days after service of the complaint; or

(3) the attorney was unable to obtain the consultation and affidavit required by paragraph one of this subdivision because the attorney had made three separate good faith attempts with three separate physicians, dentists [~~or~~], podiatrists or subject professionals, in accordance with the provisions of paragraph one of this subdivision to obtain such consultation and affidavit and none of those contacted would agree to such a consultation and affidavit.

(b) Where a certificate is required pursuant to this section, a single certificate shall be filed for each action, even if more than one defendant has been named in the complaint or is subsequently named.

(c) Where the attorney intends to rely solely on the doctrine of "res ipsa loquitur", this section shall be inapplicable. In such cases, the complaint shall be accompanied by a certificate, executed by the attorney, declaring that the attorney is solely relying on such doctrine and, for that reason, is not filing a certificate required by this section.

(d) If a request by the plaintiff for the records of the plaintiff's medical or dental treatment by the defendants has been made and such records have not been produced, the plaintiff shall not be required to serve the certificate required by this section until ninety days after such records have been produced.

(e) For purposes of this section, and subject to the provisions of section thirty-one hundred one of this chapter, an attorney who submits a certificate as required by paragraph one or two of subdivision (a) of this section and the physician, dentist [~~or~~], podiatrist or subject professionals with whom the attorney consulted shall not be required to disclose the identity of the physician, dentist [~~or~~], podiatrist or subject professionals consulted and the contents of such consultation and affidavit; provided, however, that when the attorney makes a claim under paragraph three of subdivision (a) of this section that he was unable to obtain the required consultation and affidavit with the physician, dentist [~~or~~], podiatrist or subject professionals, the court may, upon the request of a defendant made prior to compliance by the plaintiff with the provisions of section thirty-one hundred one of this chapter, require the attorney to divulge to the court the names of physicians, dentists [~~or~~], podiatrists or subject professionals refusing such consultation and affidavit.

(f) The provisions of this section shall not be applicable to a plaintiff who is not represented by an attorney.

(g) The plaintiff may, in lieu of serving the certificate required by this section, provide the defendant or defendants with the information required by paragraph one of subdivision (d) of section thirty-one

hundred one of this chapter within the period of time prescribed by this section.

(h) The subject professional or professionals consulted may not be a party to the litigation.

(i) For purposes of this section, a complaint shall include a complaint, third party complaint, an answer containing a counterclaim or a cross claim.

§ 3. Article 16 of the civil practice law and rules is REPEALED and a new article 16 is added to read as follows:

ARTICLE 16

LIMITED LIABILITY OF PERSONS JOINTLY LIABLE

1600. Definitions.
1601. Limited liability of persons jointly liable.
1602. Application.
1603. Burden of proof.

§ 1600. Definitions. As used in this article, the term "damages" shall include, but in no manner be limited to, all economic and non-economic loss awarded in an action as pecuniary compensation or satisfaction for an injury caused or loss sustained as a result of a breach of a contractual obligation, a tortuous act of commission or omission or any other such incident.

§ 1601. Limited liability of persons jointly liable. 1. Notwithstanding any other provision of law, when a verdict or decision in an action or claim for economic or non-economic damages is determined in favor of a claimant in an action involving two or more wrongdoers jointly liable or in a claim against the state, the liability of each such wrongdoer to the claimant for loss shall not exceed the wrongdoer's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability, whether or not such person was or could have been a party to the action.

2. Nothing herein shall be construed to affect or impair any right of a wrongdoer pursuant to the provisions of section 15-108 of the general obligations law.

§ 1602. Application. The limitations set forth in this article shall:

1. Apply to any claim for contribution or indemnification but shall not include: (a) a claim for indemnification if, prior to the accident or occurrence on which the claim is based, the claimant and the wrongdoer had entered into a written contract in which the wrongdoer had expressly agreed to indemnify the claimant for the type of loss suffered; or

(b) a claim for indemnification by a public employee, including indemnification pursuant to section fifty-k of the general municipal law or section seventeen or eighteen of the public officers law.

2. Not be construed to impair, alter, limit, modify, enlarge, abrogate or restrict (i) the limitations set forth in section twenty-a of the court of claims act; (ii) any immunity or right of indemnification available to or conferred upon any defendant for any negligent or wrongful act or omission; (iii) any right on the part of any defendant to plead and prove an affirmative defense as to culpable conduct attributable to a claimant or decedent which is claimed by such defendant in diminution of damages in any action; and (iv) any liability arising by reason of a non-delegable duty or by reason of the doctrine of respondent superior.

3. Not be applied to claims under the workers' compensation law or to a claim against a defendant where the claimant has sustained a "grave

injury" as defined in section eleven of the workers' compensation law to the extent of the equitable share of any person against whom the claimant is barred from asserting a cause of action because of the applicability of the workers' compensation law; provided, however, that nothing in this section shall be construed to create, impair, alter, limit, modify, enlarge, abrogate or restrict any theory of liability upon which any person may be held liable.

4. In conjunction with the other provisions of this article not be construed to create or enlarge actions for contributions or indemnity barred because of the application of the workers' compensation law of this state, any other state or the federal government, or section 18-201 of the general obligations law.

§ 1603. Burden of proof. In any action or claim for damages, a party asserting that the limitations of liability set forth in this article do not apply shall allege, and must prove by a preponderance of the evidence, that one or more of the exemptions set forth in either subdivision one of section sixteen hundred one, or section sixteen hundred two of this article, shall apply.

§ 4. Section 214-d of the civil practice law and rules is REPEALED and a new section 214-d is added to read as follows:

§ 214-d. Limitations on certain actions against professional engineers, architects, landscape architects, land surveyors or construction contractors. 1. Except as otherwise provided in subdivision two of this section, no action to recover damages for injury to the person or for wrongful death or for damage to property nor any action for contribution or indemnity for damages sustained on account of such injury or wrongful death or damage to property arising from any defect in the structure or improvement resulting from the design, planning, or supervision of construction of an improvement to real property shall be brought against a professional engineer, architect, landscape architect, land surveyor or construction contractor more than ten years after the completion of such improvement.

2. If, by reason of such defect, an injury to the person or an injury causing wrongful death or an injury to property occurs during the tenth year after completion, an action to recover damages for such injury or wrongful death or damage to property may be brought within one year after the date on which such injury occurred, but in no event may such action be brought more than eleven years after the completion of the improvement.

3. Except as provided in subdivision two of this section, in the event the provisions of subdivision one of this section shall have reduced the period during which an action against a professional engineer, architect, landscape architect, land surveyor or construction contractor could have otherwise been brought pursuant to any other provision of law, rule or regulation, the claimant shall, in that event, be entitled to institute any such action for a period of one year after the effective date of this section.

4. The limitations prescribed by this section shall not apply to actions brought by one in contractual or professional privity with the engineer, architect, landscape architect, land surveyor or construction contractor and shall not be asserted by way of defense by any person in actual possession or control as owner, tenant, or otherwise, of such an improvement at the time any defect in such improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

5. For purposes of this section an improvement shall be deemed to be "completed" (a) when, after the improvement has been started, a permanent certificate of occupancy is issued by the municipality in which the improvement is situated, if such is required or is actually issued pursuant to law or regulation; or (b) if a public improvement, upon the acceptance of the improvement by the owner, if a certificate of occupancy is not required and has not been issued; or (c) on the earlier of the following dates, if the provisions of paragraphs (a) and (b) of this subdivision do not apply (i) four months prior to the last day on which mechanic's lien, resulting from work performed or materials furnished with respect to such improvement, can be filed; or (ii) upon the owner's final payment for services rendered or materials supplied with respect to such improvement.

6. An architect, engineer, landscape architect, or land surveyor shall mean a person licensed or registered as an architect, engineer, landscape architect, land surveyor or construction contractor, pursuant to the provisions of the education law or any partnership, corporation or any other entity lawfully performing architectural, engineering, landscape architectural or surveying services.

§ 5. Subdivisions 4 and 5 of section 214 of the civil practice law and rules, as separately amended by chapters 485 and 682 of the laws of 1986, are amended to read as follows:

4. an action to recover damages for an injury to property except as provided in [~~section~~] sections 214-c, 214-d and 214-f;

5. an action to recover damages for a personal injury except as provided in sections 214-b, 214-c, 214-d, 214-f and 215;

§ 6. Subdivision (h) of rule 3211 and subdivision (i) of rule 3212 of the civil practice law and rules are REPEALED.

§ 7. The civil practice law and rules is amended by adding a new section 214-f to read as follows:

§ 214-f. Actions alleging injury from a product; repose. (a) Notwithstanding any law, rule or regulation to the contrary, and subject to the provisions of subdivisions (b), (c) and (d) of this section, no cause of action arising out of the manufacture, sale or marketing of a product may be commenced more than ten years after any such product is delivered to the first purchaser or lessee.

(b) The provisions of subdivision (a) of this section shall not bar a product liability action against a subject defendant who shall have made an express warranty, in writing, as to the safety or life expectancy of the specific product involved, which period of warranty is longer than ten years, except that such subdivision shall apply at the expiration of that warranty.

(c) If a product liability cause of action accrues during the ten year period described in subdivision (a) of this section but at a time less than two years prior to the expiration of such period, such action may be brought within two years after accrual thereof; provided, however, that in no event may such action be brought more than twelve years after the product was delivered to the first purchaser or lessee.

(d) Except as provided in subdivisions (b) and (c) of this section, in the event the provisions of subdivision (a) of this section shall have reduced the period during which a product liability action could have otherwise been brought pursuant to any other provision of law, rule or regulation, the claimant shall, in that event, be entitled to institute any such action for a period of one year after the effective date of this section.

(e) For purposes of this section, "cause of action arising out of the manufacture, sale or marketing of a product" means any action, including but not limited to a contribution, indemnity or restitution action, brought for or on account of personal injury, wrongful death, injury to property or expenditure of funds that is alleged to have resulted from the manufacture, sale, use, construction, design, formulation, development of standards, preparation, processing, assembly, rebuilding, testing, listing, certifying, marketing, advertising, packaging or labeling of any product, or any warning or instruction or lack of warning or instruction associated with that product, regardless of the theory of liability employed.

(f) Notwithstanding the foregoing or any other provision of law, rule or regulation, no claim may be brought against a defendant in any civil action if either (i) with respect to all civil actions, including actions subject herein, the claim is based in whole or in part on any act or omission of the defendant which occurred more than twenty-five years before the claim was brought; or (ii) with respect to any such actions subject herein, the claim is brought more than twenty-five years after the date of delivery of the product to the first purchaser or lessee, which product is alleged to have caused the plaintiff's injury or damage.

§ 8. Paragraph 1 of subdivision (d) of section 3101 of the civil practice law and rules, as amended by chapter 184 of the laws of 1988, subparagraph (ii) as amended by chapter 165 of the laws of 1991, is amended to read as follows:

1. Experts. (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. [~~In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.~~]

(ii) In an action for medical, dental or podiatric malpractice, any party may, by written offer made to and served upon all other parties and filed with the court, [~~offer to disclose the name of, and to~~] make available for examination upon oral deposition, any person the party making the offer expects to call as an expert witness at trial. Within twenty days of service of the offer, a party shall accept or reject the offer by serving a written reply upon all parties and filing a copy thereof with the court. Failure to serve a reply within twenty days of service of the offer shall be deemed a rejection of the offer. If all parties accept the offer, each party shall be required to produce his or her expert witness for examination upon oral deposition upon receipt of a notice to take oral deposition in accordance with rule thirty-one hundred seven of this [~~chapter~~] article. If any party, having made or accepted the offer, fails to make that party's expert available for oral

deposition, that party shall be precluded from offering expert testimony at the trial of the action.

(iii) Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. However, a party, without court order, may take the testimony of a person authorized to practice medicine, dentistry or podiatry who is the party's treating or retained expert, as described in paragraph three of subdivision (a) of this section, in which event any other party shall be entitled to the full disclosure authorized by this article with respect to that expert without court order.

§ 9. Subdivisions (b) and (e) of section 5031 of the civil practice law and rules, as amended by chapter 485 of the laws of 1986, are amended to read as follows:

(b) The court shall enter judgment in lump sum for past damages, for future damages not in excess of [~~two hundred~~] fifty thousand dollars, and for any damages, fees or costs payable in lump sum or otherwise under subdivisions (c) and (d) of this section. For the purposes of this section, any lump sum payment of a portion of future damages shall be deemed to include the elements of future damages in the same proportion as such elements comprise of the total award for future damages as determined by the trier of fact.

(e) With respect to awards of future damages in excess of [~~two hundred~~] fifty thousand dollars in an action to recover damages for dental, medical or podiatric malpractice, the court shall enter judgment as follows:

After making any adjustments prescribed by subdivisions (b), (c) and (d) of this section, the court shall enter a judgment for the amount of the present value of an annuity contract that will provide for the payment of the remaining amounts of future damages in periodic installments. The present value of such contract shall be determined in accordance with generally accepted actuarial practices by applying the discount rate in effect at the time of the award to the full amount of the remaining future damages, as calculated pursuant to this subdivision. The period of time over which such periodic payments shall be made and the period of time used to calculate the present value of the annuity contract shall be the period of years determined by the trier of fact in arriving at the itemized verdict; provided, however, that the period of time over which such periodic payments shall be made and the period of time used to calculate the present value for damages attributable to pain and suffering shall be ten years or the period of time determined by the trier of fact, whichever is less. The court, as part of its judgment, shall direct that the defendants and their insurance carriers shall be required to offer and to guarantee the purchase and payment of such an annuity contract. Such annuity contract shall provide for the payment of the annual payments of such remaining future damages over the period of time determined pursuant to this subdivision. The annual payment for the first year shall be calculated by dividing the remaining amount of future damages by the number of years over which such payments shall be made and the payment due in each succeeding year shall be computed by adding four percent to the previous year's payment. <u>The addition of four percent to each of the previous year's payment shall be the exclusive measure of interest, inflation, foregone investment opportunity and any other measure of damage.</u> Where payment of a portion of the future damages terminates in accordance with the provisions of this

article, the four percent added payment shall be based only upon that portion of the damages that remains subject to continued payment. Unless otherwise agreed, the annual sum so arrived at shall be paid in equal monthly installments and in advance.

§ 10. Subdivisions (b) and (e) of section 5041 of the civil practice law and rules, as added by chapter 682 of the laws of 1986, are amended to read as follows:

(b) The court shall enter judgment in lump sum for past damages, for future damages not in excess of [~~two hundred~~] fifty thousand dollars, and for any damages, fees or costs payable in lump sum or otherwise under subdivisions (c) and (d) of this section. For the purposes of this section, any lump sum payment of a portion of future damages shall be deemed to include the elements of future damages in the same proportion as such elements comprise of the total award for future damages as determined by the trier of fact.

(e) With respect to awards of future damages in excess of [~~two hundred~~] fifty thousand dollars in an action to recover damages for personal injury, injury to property or wrongful death, the court shall enter judgment as follows:

After making any adjustment prescribed by subdivisions (b), (c) and (d) of this section, the court shall enter a judgment for the amount of the present value of an annuity contract that will provide for the payment of the remaining amounts of future damages in periodic installments. The present value of such contract shall be determined in accordance with generally accepted actuarial practices by applying the discount rate in effect at the time of the award to the full amount of the remaining future damages, as calculated pursuant to this subdivision. The period of time over which such periodic payments shall be made and the period of time used to calculate the present value of the annuity contract shall be the period of years determined by the trier of fact in arriving at the itemized verdict; provided, however, that the period of time over which such periodic payments shall be made and the period of time used to calculate the present value for damages attributable to pain and suffering shall be ten years or the period of time determined by the trier of fact, whichever is less. The court, as part of its judgment, shall direct that the defendants and their insurance carriers shall be required to offer and to guarantee the purchase and payment of such an annuity contract. Such annuity contract shall provide for the payment of the annual payments of such remaining future damages over the period of time determined pursuant to this subdivision. The annual payment for the first year shall be calculated by dividing the remaining amount of future damages by the number of years over which such payments shall be made and the payment due in each succeeding year shall be computed by adding four percent to the previous year's payment. <u>The addition of four percent to each of the previous year's payment shall be the exclusive measure of interest, inflation, foregone investment opportunity and any other measure of damage.</u> Where payment of a portion of the future damages terminates in accordance with the provisions of this article, the four percent added payment shall be based only upon that portion of the damages that remains subject to continued payment. Unless otherwise agreed, the annual sum so arrived at shall be paid in equal monthly installments and in advance.

§ 11. The civil practice law and rules is amended by adding a new article 50-C to read as follows:

<u>ARTICLE 50-C</u>

<u>LIMITATION ON NONECONOMIC DAMAGES</u>

5051. Definitions.
5052. Damage awards.

§ 5051. Definitions. As used in this article:

1. "Noneconomic damages" means subjective, nonpecuniary damages arising from pain, suffering, inconvenience, physical impairment or disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation and other nonpecuniary damages.

2. "Actual economic damages" means objectively verifiable pecuniary damages arising from medical expenses and medical care, loss of earnings and earning capacity, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, loss of business or employment opportunities, rehabilitation services, custodial care and other pecuniary damages.

3. "Personal injury action" means any action, including but in no manner limited to medical, dental and podiatric malpractice actions, whether in tort, contract, or otherwise, in which the plaintiff seeks damages for injury to the person or wrongful death.

4. "Compensation" means monetary awards.

§ 5052. Damage awards. In any personal injury action, the prevailing plaintiff may be awarded:

1. Compensation for actual economic damages suffered by the injured plaintiff; and

2. Compensation for noneconomic damages suffered by the injured plaintiff, not to exceed two hundred fifty thousand dollars.

§ 12. Section 240 of the labor law, the section heading and subdivision 2 as amended by chapter 683 of the laws of 1947 and subdivision 1 as amended by chapter 241 of the laws of 1981, is amended to read as follows:

§ 240. Scaffolding and other devices for use of employees. 1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected devices or equipment for the performance of such labor, such as scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, and ropes, [~~and other devices which~~] where such devices or equipment are necessary to give reasonable and adequate protection and safety to a person so employed. Where such devices or equipment are furnished or erected, the devices or equipment shall be so constructed, placed and operated as to [~~give proper~~] provide reasonable and adequate protection and safety to a person so employed.

No liability pursuant to this subdivision for the failure to provide protection to a person so employed shall be imposed on professional engineers as provided for in article one hundred forty-five of the education law, architects as provided for in article one hundred forty-seven of such law or landscape architects as provided for in article one hundred forty-eight of such law who do not direct or control the work for activities other than planning and design. This exception shall not diminish or extinguish any liability of professional engineers or architects or landscape architects arising under the common law or any other provision of law.

2. [~~Scaffolding or staging more than twenty feet from the ground or floor, swung or suspended from an overhead support or erected with stationary supports, except scaffolding wholly within the interior of a~~

~~building and covering the entire floor space of any room therein, shall have a safety rail of suitable material properly attached, bolted, braced or otherwise secured, rising at least thirty four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the outside and the ends thereof, with only such openings as may be necessary for the delivery of materials. Such scaffolding or staging shall be so fastened as to prevent it from swaying from the building or structure.~~

~~3. All scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use~~] Compliance with applicable provisions of the federal Occupational Safety and Health Act and Part 23 of the New York Codes, Rules and Regulations, as amended, shall be prima facie proof of compliance with subdivision one of this section.

3. Nothing in this section shall be deemed to relieve a person injured in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure from the consequences of his culpable conduct in accordance with section fourteen hundred eleven of the civil practice law and rules.

§ 13. Section 241 of the labor law, as added by chapter 1108 of the laws of 1969, the opening paragraph as amended by chapter 670 of the laws of 1980, subdivisions 6, 7 and 8 as amended and subdivision 10 as added by chapter 520 of the laws of 1989, and subdivision 9 as added by chapter 241 of the laws of 1981, is amended to read as follows:

§ 241. Construction, excavation and demolition work. 1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall [~~comply with the following requirements:~~

~~1. If the floors are to be arched between the beams thereof, or if the floors or filling in between the floors are of fireproof material, the flooring or filling in shall be completed as the building progresses.~~

~~2. If the floors are not to be filled in between the beams with brick or other fireproof material, the underflooring shall be laid on each story as the building progresses.~~

~~3. If double floors are not to be used, the floor two stories immediately below the story where the work is being performed shall be kept planked over.~~

~~4. If the floor beams are of iron or steel, the entire tier of iron or steel beams on which the structural iron or steel work is being erected shall be thoroughly planked over, except spaces reasonably required for proper construction of the iron or steel work, for raising or lowering of materials or for stairways and elevator shafts designated by the plans and specifications.~~

~~5. If elevators, elevating machines or hod hoisting apparatus are used in the course of construction, for the purpose of lifting materials, the shafts or openings in each floor and at each landing level shall be inclosed or fenced in on all sides by a barrier of suitable height, except on two sides which may be used for taking off and putting on materials, and those sides shall be guarded by an adjustable barrier not less than three nor more than four feet from the floor and not less than two feet from the edges of such shafts or openings.~~

~~6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted~~] construct, shore, equip, guard, arrange, operate and conduct such work so as to provide reasonable and

adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

[~~7. The commissioner may make rules to provide for the protection of workers in connection with the excavation work for the construction of buildings, the work of constructing or demolishing buildings and structures, and the guarding of dangerous machinery used in connection therewith, and the owners and contractors and their agents for such work, except owners of one and two family dwellings who contract for but do not direct or control the work, shall comply therewith.~~

~~8.~~] 2. Compliance with applicable provisions of the federal Occupational Safety and Health Act and Part 23 of the New York Codes, Rules and Regulations, as amended, shall be prima facie proof of compliance with subdivision one of this section.

3. Nothing in this section shall be deemed to relieve a person injured in the construction, demolition or excavation of a building or structure from the consequences of his culpable conduct in accordance with section fourteen hundred eleven of the civil practice law and rules.

4. The commissioner, as deemed necessary, shall promulgate rules designed for the purpose of providing for the reasonable and adequate protection and safety of persons passing by all areas, buildings or structures in which construction, excavation or demolition work is being performed, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith. The provisions of this subdivision shall not apply to cities having a population of one million or more.

[~~9.~~] 5. No liability for the non-compliance with any of the provisions of this section shall be imposed on professional engineers as provided for in article one hundred forty-five of the education law, architects as provided for in article one hundred forty-seven of such law or landscape architects as provided for in article one hundred forty-eight of such law who do not direct or control the work for activities other than planning and design. This exception shall not diminish or extinguish any liability of professional engineers, architects or landscape architects arising under the common law or any other provision of law.

[~~10.~~] 6. Prior to advertising for bids or contracting for or commencing work on any demolition work on buildings covered under this section except agricultural buildings as defined in regulations promulgated by the commissioner and except buildings the construction of which was begun on or after January first, nineteen hundred seventy-four, all owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall conduct or cause to be conducted a survey to determine whether or not the building to be demolished contains asbestos or asbestos material as defined in section nine hundred one of this chapter. Such surveys shall be conducted in conformance with rules and regulations promulgated by the commissioner. Information derived from such survey shall be immediately transmitted to the commissioner and to the local governmental entity charged with issuing a permit for such demolition under applicable state or local laws or, if no such permit is required, to the town or city clerk. If such survey finds that a building to be demolished contains asbestos or asbestos material as defined by section nine hundred one of

~~[the]~~ this chapter, no bids shall be advertised nor contracts awarded nor demolition work commenced by any owner or agent prior to completion of an asbestos remediation contract performed by a licensed asbestos contractor as defined by section nine hundred one of this chapter.

§ 14. Section 241-a of the labor law is REPEALED.

§ 15. Section 1411 of the civil practice law and rules, as added by chapter 69 of the laws of 1975, is amended to read as follows:

§ 1411. Damages recoverable when contributory negligence or assumption of risk is established. In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages; provided, however, that the claimant or the decedent's representative shall be absolutely barred from the recovery of any damages where the trier of fact finds that the contributory fault on the part of said claimant or decedent constitutes more than fifty percent of the proximate cause of the harm for which recovery is sought.

§ 16. The labor law is amended by adding a new section 741 to read as follows:

§ 741. Disclosure of employment related information; presumptions; causes of action; definitions. 1. Any employer who, upon request by a prospective employer or a current or former employee, provides accurate information about a current or former employee's job performance or reasons for separation shall be immune from civil liability and other consequences of such disclosure provided such employer is not acting in bad faith. An employer shall be considered to be acting in bad faith only if it can be shown by a preponderance of the evidence that the information disclosed was knowingly false and deliberately misleading.

2. Any prospective employer who reasonably relies on information pertaining to an employee's job performance or reasons for separation, disclosed by a former employer, shall be immune from civil liability including liability for negligent hiring, negligent retention, and other causes of action related to the hiring of such employee, based upon such reasonable reliance, unless further investigation, including but not limited to a criminal background check, is required by law.

3. As used in this section, the following words and phrases shall have the following meanings unless the context clearly requires otherwise:

(a) "Employer" means any person, firm, or corporation, including the state and its political subdivisions, and any agent thereof with one or more employees, or individuals performing services under any contract of hire or service, expressed or implied, oral or written.

(b) "Employee" means any person, paid or unpaid, in the service of an employer.

(c) "Prospective employer" means any "employer", as defined in paragraph (a) of this subdivision, to which a prospective employee has made application, either oral or written, or forwarded a resume or other correspondence expressing an interest in employment.

(d) "Prospective employee" means any person who has made an application, either oral or written, or has sent a resume or other correspondence indicating an interest in employment.

(e) "Job performance" includes, but is not limited to, attendance, attitude, awards, demotions, duties, effort, evaluations, knowledge, skills, promotions, and disciplinary actions.

§ 17. Section 720-a of the not-for-profit corporation law, as added by chapter 220 of the laws of 1986, is amended to read as follows:

§ 720-a. Liability of [~~directors, officers and trustees~~] volunteers. (a) Definitions. For purposes of this section the terms: (1) "volunteer" means an individual performing services for a not-for-profit corporation or a governmental entity who does not receive compensation, or any other thing of value in lieu of compensation, for such services (other than reimbursement for expenses actually incurred or honoraria not to exceed three hundred dollars per year for government service), and such term includes a volunteer serving as a director, officer, trustee or direct service volunteer;

(2) "not-for-profit corporation" means any organization exempt from taxation under section 501(c) of the Internal Revenue Code; and

(3) "damage or injury" includes physical, nonphysical, economic and noneconomic damage.

(b) Immunity from liability. Except as provided in sections seven hundred nineteen and seven hundred twenty of this chapter, and except any action or proceeding brought by the attorney general or, in the case of a charitable trust, an action or proceeding against a trustee brought by a beneficiary of such trust, no [~~person~~] volunteer serving [~~without compensation as a director, officer or trustee of~~] a not-for-profit corporation[~~, association, organization or trust described in section 501 (c) (3) of the United States internal revenue code~~] shall be liable to any person other than such corporation, association, organization or trust based solely on his or her conduct in the execution of such office unless the conduct of such [~~director, officer or trustee~~] volunteer with respect to the person asserting liability constituted gross negligence or was intended to cause the resulting harm to the person asserting such liability. [~~For purposes of this section, such a director, officer or trustee shall not be considered compensated solely by reason of payment of his or her actual expenses incurred in attending meetings or otherwise in the execution of such office.~~]

(c) Exceptions. Nothing in this section shall be deemed to grant immunity to any person causing damage by his willful, wanton or grossly negligent act of commission or omission; or as the result of his negligent operation of a motor vehicle; or for liability which would otherwise arise under section 11-101 of the general obligations law.

§ 18. Subdivision 3 of section 388 of the vehicle and traffic law, as amended by chapter 552 of the laws of 1962, is amended to read as follows:

3. As used in this section, "owner" shall be as defined in section one hundred twenty-eight of this chapter [~~and their~~] except in the case of a leased vehicle as defined below, in which case "owner" shall be as defined below. Owner's liability under this section shall be joint and several. If a vehicle be sold under a contract of sale which reserves a security interest in the vehicle in favor of the vendor, such vendor or his assignee shall not, after delivery of such vehicle, be deemed an owner within the provisions of this section, but the vendee, or his assignee, receiving possession thereof, shall be deemed such owner notwithstanding the terms of such contract, until the vendor or his assignee shall retake possession of such vehicle. A secured party in whose favor there is a security interest in any vehicle out of his possession, shall not be deemed an owner within the provisions of this section. If the vehicle is a leased vehicle, the term "owner" shall mean the person to whom the vehicle has been leased, not the person to whom the certificate of title for the vehicle has been issued or

assigned or to whom the manufacturer's or importer's certificate of origin for the vehicle has been delivered or assigned. For purposes of this section, "leased" means the transfer of the possession or the right to possession of a vehicle to a lessee for a valuable consideration for a continuous period of twelve months or more, pursuant to one or more written agreements.

§ 19. Legislative findings. The legislature hereby finds and declares that allowing convicted felons or persons acting under the influence of alcohol or illegal drugs, in certain cases, to recover civil damages for injuries suffered during the commission of their crimes is an outrage to the people of the state of New York. It is in the public policy to bar convicted felons from recovering for damages against private citizens and against the government when they, by their criminal behavior, have set in motion a chain of circumstances resulting in their own injury. Accordingly, a felony conviction or proof of certain intoxication shall hereafter bar persons from recovery for injuries suffered during the commission of a crime or while under the influence of alcohol or illegal drugs.

§ 20. The civil practice law and rules is amended by adding a new section 1411-a to read as follows:

§ 1411-a. Damages recoverable; criminal conduct or intoxication with alcohol or illegal drugs as a bar to recovery in certain cases. (a) Notwithstanding any other provision of law, rule or regulation, in any action to recover damages for personal injury, injury to property, or wrongful death, culpable criminal conduct or intoxication with alcohol or illegal drugs on the part of a claimant, as provided in subdivision (b) of this section, shall absolutely bar recovery.

(b) In any action to recover damages as itemized in subdivision (a) of this section, the showing by a preponderance of the evidence that intoxication with alcohol or illegal drugs on the part of the claimant was a proximate cause for the specific damages sustained, or culpable criminal conduct attributable to the claimant or to the decedent, arising from the same transaction for which damages are sought and so established by a criminal conviction, shall constitute an absolute bar to recovery.

§ 21. The civil practice law and rules is amended by adding a new article 14-B to read as follows:

ARTICLE 14-B

PRODUCT LIABILITY ACTIONS; SPECIFIC DEFENSES

1420. Postmanufacture changes.

1421. Sealed containers.

1422. State of the art design.

§ 1420. Postmanufacture changes. In a product liability action, evidence of measures taken by the manufacturer or seller after an event, which if taken previously would have made the event less likely to occur, is not admissible to prove negligence or culpable conduct or to prove a defect in the product. Evidence of subsequent measures may, however, be admissible when offered to impeach or as proof of ownership, control, or feasibility of precautionary measures, if such issues are controverted.

§ 1421. Sealed containers. In any product liability action a party may assert as a defense in such action that he is not the manufacturer of the product in question and that such product was acquired and sold by him in a sealed container or that the product was acquired and sold by him under circumstances in which he was afforded no reasonable opportunity to inspect the product in such a manner which would have or should

have, in the exercise of reasonable care, revealed the existence of the defective condition; provided, however, that the defense set forth herein will not be available if (a) the manufacturer is not subject to service of process under the laws of the state in which the plaintiff brings the action, or (b) the manufacturer has been judicially declared insolvent and is unable to pay its debts as they become due in the ordinary course of business, or (c) the court determines that the plaintiff would be unable to enforce a judgment against the manufacturer. The provisions of this section shall not apply to actions based upon breach of express warranty, negligence or fraudulent misrepresentation of the seller.

§ 1422. State of the art design. (a) In any product liability action based upon defective design, a party shall not be liable unless the plaintiff proves by a preponderance of the evidence that, at the time the product left the control of the party, there existed a feasible alternative design that would have prevented the harm without substantially impairing the usefulness or desirability of the product to users.

(b) In any product liability action based upon defective design, a party shall not be liable unless the plaintiff proves by a preponderance of the evidence that the product design was the immediate, physical and producing cause of the injury or damage of which the plaintiff complains, and that, if a feasible alternative design as provided in subdivision (a) of this section was marketed by the defendant, the user of the product would have responded by altering his conduct and thereby would have avoided or reduced the injury or damage of which the plaintiff complains.

(c) In any product liability action based upon defective design, a party shall not be liable unless the plaintiff proves by a preponderance of the evidence that, at the time the product left the control of the party, such party knew or, in light of then existing scientific and technological knowledge, reasonably should have known of the danger that caused the plaintiff's harm.

(d) In any product liability action based on defective design, a product shall not be found to contain a defect or be unreasonably dangerous for its intended use if the personal injury, property damage, or death for which recovery of damages is sought was caused by an inherent aspect of the product about which adequate specifications, instructions, or warnings are provided or which would be recognized as capable of causing harm by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended.

(e) In any product liability action based on defective design, a product shall not be found to contain a defect or be unreasonably dangerous for its intended use if the personal injury, property damage, or death for which recovery of damages is sought was caused by an unavoidably unsafe product, as defined in comment K to Section 402A of the Restatement (2d) of Torts, and specifications, warnings or instructions are provided to the extent required by this article.

§ 22. Subdivisions 2, 3 and 4 of section 9 of the court of claims act, subdivision 2 as amended by chapter 40 of the laws of 1977, are amended to read as follows:

2. To hear and determine a claim of any person, corporation or municipality against the state, a county, city, town, village, school district, or a special district as such term is defined in section one hundred two of the real property tax law for the appropriation of any real or personal property or any interest therein, for the breach of

contract, express or implied, or for the torts of its officers or employees while acting as such officers or employees, providing the claimant complies with the limitations of this article. For the purposes of this act only, a real property tax lien shall be deemed to be an interest in real property.

3. To hear and determine any claim in favor of the state, a county, city, town, village, school district, or a special district as such term is defined in section one hundred two of the real property tax law against the claimant, or against his assignor at the time of the assignment.

4. To render judgment in favor of the claimant or the state, a county, city, town, village, school district, or a special district as such term is defined in section one hundred two of the real property tax law for such sum as should be paid by or to the state, a county, city, town, village, school district, or a special district as such term is defined in section one hundred two of the real property tax law.

§ 23. The court of claims act is amended by adding a new section 9-a to read as follows:

§ 9-a. Construction of "state". For purposes of this act, the term "state" shall be deemed to include the state, a county, city, town, village, school district, or a special district as such term is defined in section one hundred two of the real property tax law whenever such a construction is necessary to effectuate the provisions of this act with respect to the jurisdiction conferred by section nine of this article pertaining to such entities; provided, however, that such construction shall not be given when it would conflict with the provisions of the general municipal law.

§ 24. Subdivision 4 of section 50-e of the general municipal law, as amended by chapter 745 of the laws of 1976, is amended to read as follows:

4. Requirements of section exclusive except as to conditions precedent to liability for certain defects or snow or ice. No other or further notice, no other or further service, filing or delivery of the notice of claim, and no notice of intention to commence an action or special proceeding, shall be required as a condition to the commencement of an action or special proceeding for the enforcement of the claim; provided, however, that nothing herein contained shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, public place, land or building, grading, opening, drain, sewer, park or playground or equipment located therein or any parking field, skating rink or park property, or of the existence of snow or ice thereon, where such notice now is, or hereafter may be, required by law, as a condition precedent to liability for damages or injuries to person or property alleged to have been caused by such condition, and the failure or negligence to repair or remove the same after the receipt of such notice.

§ 25. Subdivision 1 of section 65-a of the town law, as amended by chapter 771 of the laws of 1963, is amended to read as follows:

1. No civil action shall be maintained against any town or town superintendent of highways for damages or injuries to person or property sustained by reason of any highway, bridge [~~or~~], culvert, public place, land or building, grading, opening, drain, sewer, park or playground or equipment located therein or any parking field, skating rink or park property, being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, dangerous or

obstructed condition of such highway, bridge [~~or~~], culvert, public place, land or building, grading, opening, drain, sewer, park or playground or equipment located therein or any parking field, skating rink or park property, was actually given to the town clerk or town superintendent of highways, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of, or, in the absence of such notice, unless such defective, unsafe, dangerous or obstructed condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence; but no such action shall be maintained for damages or injuries to person or property sustained solely in consequence of the existence of snow or ice upon any highway, bridge [~~or~~], culvert, public place, land or building, grading, opening, drain, sewer, park or playground or equipment located therein or any parking field, skating rink or park property unless written notice thereof, specifying the particular place, was actually given to the town clerk or town superintendent of highways and there was a failure or neglect to cause such snow or ice to be removed, or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice.

§ 26. Section 6-628 of the village law is amended to read as follows:

§ 6-628 Liability of village in certain actions. No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk [~~or~~], crosswalk, public place, land or building, grading, opening, drain, sewer, park or playground or equipment located therein or any parking field, skating rink or park property, being defective, out of repair, unsafe, dangerous or obstructed or for damages injuries to person or property sustained solely in consequence of the existence of snow or ice upon any sidewalk, crosswalk, street, highway, bridge [~~or~~], culvert, public place, land or building, grading, opening, drain, sewer, park or playground or equipment located therein or any parking field, skating rink or park property unless written notice of the defective, unsafe, dangerous or obstructed condition or of the existence of the snow or ice, relating to the particular place, was actually given to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or to cause the snow or ice to be removed, or the place otherwise made reasonably safe.

§ 27. Section 474-a of the judiciary law, as amended by chapter 485 of the laws of 1986, is amended to read as follows:

§ 474-a. Contingent fees for attorneys in claims or actions for medical, dental or podiatric malpractice, or in any claim or action for property damage or personal injury, including death. 1. For the purpose of this section, the term "contingent fee" shall mean any attorney's fee in any claim or action for medical, dental or podiatric malpractice, or in any claim or action for property damage or personal injury, including death, whether determined by judgment or settlement, which is dependent in whole or in part upon the success of the prosecution by the attorney of such claim or action, or which is to consist of a percentage of any recovery, or a sum equal to a percentage of any recovery, in such claim or action.

2. Notwithstanding any inconsistent judicial rule, a contingent fee in a medical, dental or podiatric malpractice action, or in any claim or action for property damage or personal injury, including death, shall

not exceed the amount of compensation provided for in the following schedule:

[~~30~~] 25 percent of the first $250,000 of the sum recovered;

[~~25~~] 20 percent of the next $250,000 of the sum recovered;

[~~20~~] 15 percent of the next $500,000 of the sum recovered;

[~~15~~] 10 percent of the next $250,000 of the sum recovered;

[~~10~~] 5 percent of any amount over $1,250,000 of the sum recovered.

3. Such percentages shall be computed on the net sum recovered after deducting from the amount recovered expenses and disbursements for expert testimony and investigative or other services properly chargeable to the enforcement of the claim or prosecution of the action. In computing the fee, the costs as taxed, including interest upon a judgment, shall be deemed part of the amount recovered. For the following or similar items there shall be no deduction in computing such percentages: liens, assignments or claims in favor of hospitals, for medical care, dental care, podiatric care and treatment by doctors and nurses, or of self-insurers or insurance carriers.

4. In the event that claimant's or plaintiff's attorney believes in good faith that the fee schedule set forth in subdivision two of this section, because of extraordinary circumstances, will not give him adequate compensation, application for greater compensation may be made upon affidavit with written notice and an opportunity to be heard to the claimant or plaintiff and other persons holding liens or assignments on the recovery. Such application shall be made to the justice of the trial part to which the action had been sent for trial; or, if it had not been sent to a part for trial, then to the justice presiding at the trial term calendar part of the court in which the action had been instituted; or, if no action had been instituted, then to the justice presiding at the trial term calendar part of the Supreme Court for the county in the judicial department in which the attorney has an office. Upon such application, the justice, in his discretion, if extraordinary circumstances are found to be present, and without regard to the claimant's or plaintiff's consent, may fix as reasonable compensation for legal services rendered an amount greater than that specified in the schedule set forth in subdivision two of this section, provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the claimant or plaintiff and the attorney. If the application is granted, the justice shall make a written order accordingly, briefly stating the reasons for granting the greater compensation; and a copy of such order shall be served on all persons entitled to receive notice of the application.

5. Any contingent fee in a claim or action for medical, dental or podiatric malpractice, or in any claim or action for property damage or personal injury, including death, brought on behalf of an infant shall continue to be subject to the provisions of section four hundred seventy-four of this [~~chapter~~] article.

§ 28. Section 9-103 of the general obligations law is amended by adding a new subdivision 1-a to read as follows:

1-a. No cause of action shall arise against the owner, tenant or lessee of land or premises for injuries to any person, other than an employee or contractor of the owner, tenant or lessee, who is on the land or premises for the purpose of picking and purchasing agricultural or farm products at a farm or "u-pick" operation, unless the person's injuries were caused by a condition which involved an unreasonable risk of harm and all of the following apply:

a. The owner, tenant or lessee knew, had reason to know of, or reasonably should have known of the condition or risk.

b. The owner, tenant or lessee failed to exercise reasonable care to make the condition safe, or to warn the person of the condition or risk.

§ 29. Legislative intent. The legislature hereby finds that horseback riding is both a major recreational sport and a major industry within the state of New York. The legislature further finds: (1) that horseback riding, like many other sports, contains inherent risks including, but not limited to, the risks of personal injury or death or property damage, which may be caused by the propensity of equines to behave in ways not always controllable by the participant; the unpredictability of an equine's reaction to such things as sounds, sudden movements, and unfamiliar objects, persons, or other animals; surface or subsurface conditions; collisions with other equines or objects; and the potential of a participant to act in a negligent manner; (2) that it is appropriate, as well as in the public interest, to establish certain duties and obligations of equine sponsors and equine professionals relative to the safety of the horseback riding public; and (3) that it is also necessary and appropriate that the public become apprised of, and understand, the risks inherent in the sport of horseback riding so that they may make an informed decision of whether or not to participate in horseback riding notwithstanding the risks. Therefore, the purpose and intent of this article is to establish guidelines for the conduct of the participants, sponsors and professionals involved in the sport of horseback riding; to educate the public as to the inherent risks in the sport of horseback riding so as to minimize the risk of injury to persons engaged in the sport of horseback riding; to promote safety in the horseback riding industry, and to preserve the financial sustainability of the equine sponsors and equine professionals engaged in the horseback riding industry.

§ 30. The general obligations law is amended by adding a new article 18-B to read as follows:

ARTICLE 18-B

EQUINE ACTIVITY SAFETY CODE

Section 18-301. Short title.

18-302. Definitions.

18-303. Liability of persons involved in equine activities.

18-304. Limitation of liability.

18-305. Posting and notification.

§ 18-301. Short title. This article may be cited and shall be known as the "equine activity safety code act".

§ 18-302. Definitions. For the purposes of this article, the following words or phrases shall be defined as follows:

1. "Engages in an equine activity" means riding, training, assisting in veterinary treatment of, driving, or being a passenger upon an equine, whether mounted or unmounted, visiting or touring or utilizing an equine facility as part of an organized event or activity, or any person assisting a participant or show management. The term "engages in an equine activity" does not include being a spectator at an equine activity, except in cases where the spectator places himself in an unauthorized area or in immediate proximity to the equine activity.

2. "Equine" means a horse, pony, mule or donkey.

3. "Equine activity" means:

(a) Equine shows, fairs, competitions, performances, or parades that involve any or all breeds of equines and any of the equine disciplines, including, but not limited to dressage, hunter and jumper horse shows,

grand prix jumping, three-day events, combined training, rodeos, riding, driving, pulling, cutting, polo, steeplechasing, English and western performance riding, endurance trail riding, gymkhana games, and hunting.

(b) Equine training or teaching activities or both.

(c) The boarding of equines; including normal daily care thereof.

(d) Riding, inspecting, or evaluating by a purchaser or an agent an equine belonging to another, whether or not the owner has received some monetary consideration or other thing of value for the use of the equine or is permitting a prospective purchaser of the equine to ride, inspect, or evaluate the equine.

(e) Rides, trips, hunts or other equine activities of any type however informal or impromptu that are sponsored by an equine activity sponsor.

(f) Placing or replacing horseshoes or hoof trimming on an equine.

(g) Providing or assisting in veterinary treatment of an equine.

4. "Equine activity sponsor" means an individual, group, club, partnership, or corporation, whether or not the sponsor is operating for profit or nonprofit, which sponsors, organizes, or provides the facilities for, an equine activity, including but not limited to: pony clubs, 4-H clubs, hunt clubs, riding clubs, school and college-sponsored classes, programs and activities, therapeutic riding programs, stable and farm owners and operators, instructors, and promoters of equine facilities, including but not limited to farms, stables, clubhouses, pony ride strings, fairs, and arenas at which the activity is held.

5. "Equine professional" means a person engaged for compensation:

(a) In instructing a participant or renting to a participant an equine for the purpose of riding, driving or being a passenger upon the equine;

(b) In renting equipment or tack to a participant;

(c) To provide daily care of horses boarded at an equine facility; or

(d) To train an equine.

6. "Inherent risks of equine activities" means those dangers or conditions which are an integral part of equine activities, including but not limited to:

(a) The propensity of equines to behave in ways that may result in injury, harm, or death to persons on or around them;

(b) The unpredictability of an equine's reaction to such things as sounds, sudden movement, and unfamiliar objects, persons, or other animals;

(c) Certain hazards such as surface and subsurface conditions including, but not limited to, rocks, forest growth, debris, branches, trees, roots, stumps, or other natural objects;

(d) Collisions with other equines or objects; and

(e) The potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the animal or not acting within his or her ability.

7. "Participant" means any person, whether amateur or professional, who engages in an equine activity, whether or not a fee is paid to participate in the equine activity.

§ 18-303. Liability of persons involved in equine activities. 1. Nothing in section 18-304 of this article shall prevent or limit the liability of an equine activity sponsor or an equine professional, if the equine activity sponsor or equine professional:

(a) (1) Provided the equipment or tack, and knew or should have known that the equipment or tack was faulty, and such equipment or tack was faulty to the extent that it did cause the injury; or

(2) Provided the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity, and determine the ability of the participant to safely manage the particular equine based on the participant's representations of his ability;

(b) Owns, leases, rents, has authorized use of, or is otherwise in lawful possession and control of the land, or facilities upon which the participant sustained injuries because of a dangerous latent condition which was known or should have been known to the equine activity sponsor or equine professional and for which warning signs, pursuant to subdivision four of section 18-302 of this article have not been conspicuously posted;

(c) Commits an act of omission that constitutes willful or wanton disregard for the safety of the participant, and that act of omission caused the injury;

(d) Intentionally injures the participant.

2. This section shall not apply to the horse racing activity authorized pursuant to article two, three or four of the racing, pari-mutuel wagering and breeding law.

§ 18-304. Limitation of liability. 1. Except as provided in subdivision two of section 18-303 of this article, an equine activity sponsor, an equine professional, or any other person, which shall include corporation or partnership, shall not be liable for an injury to or the death of a participant resulting from the inherent risks of equine activities and, except as provided in subdivision two of section 18-303 of this article, no participant nor participant's representative shall make any claim against, maintain an action against, or recover from an equine activity sponsor, an equine professional, or any other person for injury, loss, damage, or death of the participant resulting from any of the inherent risks of equine activities.

2. Nothing in this article shall limit the application of the provisions of section 9-103 of this chapter.

§ 18-305. Posting and notification. 1. Every equine professional shall post and maintain signs which contain the warning notice specified in subdivision two of this section. Such signs shall be placed in a clearly visible location in the proximity of the equine activity. The warning notice specified in subdivision two of this section shall appear on the sign in black letters, with each letter to be a minimum of one inch in height. Every written contract entered into by an equine professional for the providing of professional services, instruction, or the rental of equipment or tack or an equine to a participant, whether or not the contract involves equine activities on or off the location or site of the equine professional's business, shall contain in clearly readable print the warning notice specified in subdivision two of this section.

2. The signs and contracts described in subdivision one of this section shall contain the following warning notice:

WARNING

Under New York Law, an equine professional or equine activity sponsor is not liable for an injury to, or the death of, a participant in equine activities resulting from the inherent risks of equine activities, pursuant to section 18-304 of the General Obligations Law.

§ 31. Severability. If any section, part or provision of this act shall be declared unconstitutional, invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in any such controversy in

which such declaration was made and shall not affect any other section, part or provision thereof.

§ 32. This act shall take effect immediately, provided, however, that:

(a) The amendments effected by the provisions of sections two, three, eleven, fifteen, sixteen, seventeen, eighteen, nineteen, twenty and twenty-one of this act shall apply to subject actions commenced on and after such date;

(b) The amendments effected by the provisions of sections four, five and six of this act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to action commencing on and after such date;

(c) The amendments effected by the provisions of section twenty-seven of this act shall apply to retainer agreements executed on and after such date; and

(d) The amendments effected by the provisions of section thirty of this act shall take effect on the ninetieth day after it shall have become a law.

REPEAL NOTE.-- Article 16 of the civil practice law and rules, proposed to be repealed by section three of this act, relates to the limited liability of persons jointly liable in legal actions and is replaced by a new article 16 added by section two of this act;

--Section 214-d of the civil practice law and rules, proposed to be repealed by section four of this act, relates to the limitations on certain actions against licensed engineers and architects and is replaced by a new section 214-d as added by section four of this act;

--Section 241-a of the labor law, proposed to be repealed by section fourteen of this act, relates to the protection of workers in elevator shafts;

--Subdivision (h) of Rule 3211 of the civil practice law and rules proposed to be repealed by section six of this act relates to standards for motions to dismiss certain cases involving licensed architects, engineers or landscape architects;

--Subdivision (i) of Rule 3212 of the civil practice law and rules proposed to be repealed by section six of this act relates to standards for summary judgment in certain cases involving licensed architects, engineers or landscape architects.
