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# Tort Reform School



Openings



Remarks

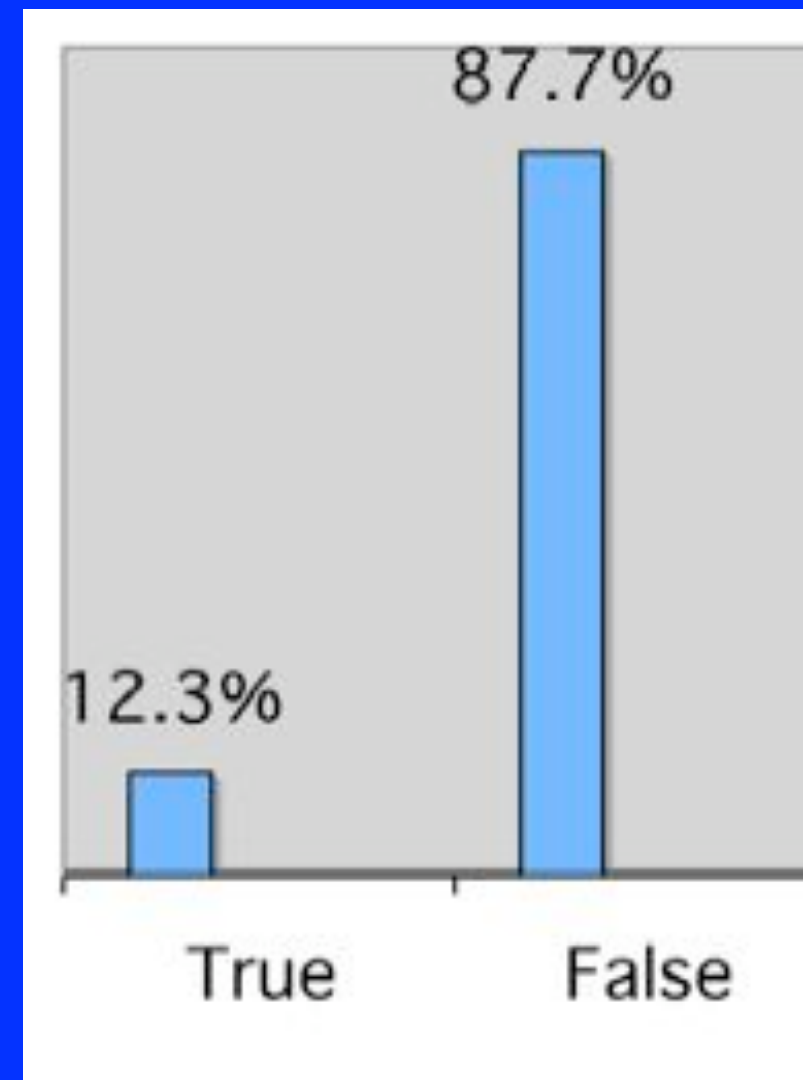
# Survey Monkey Results



1. The Tennessee Civil Justice Act only applies to claims requiring expert testimony, and does not apply to simple negligence claims.

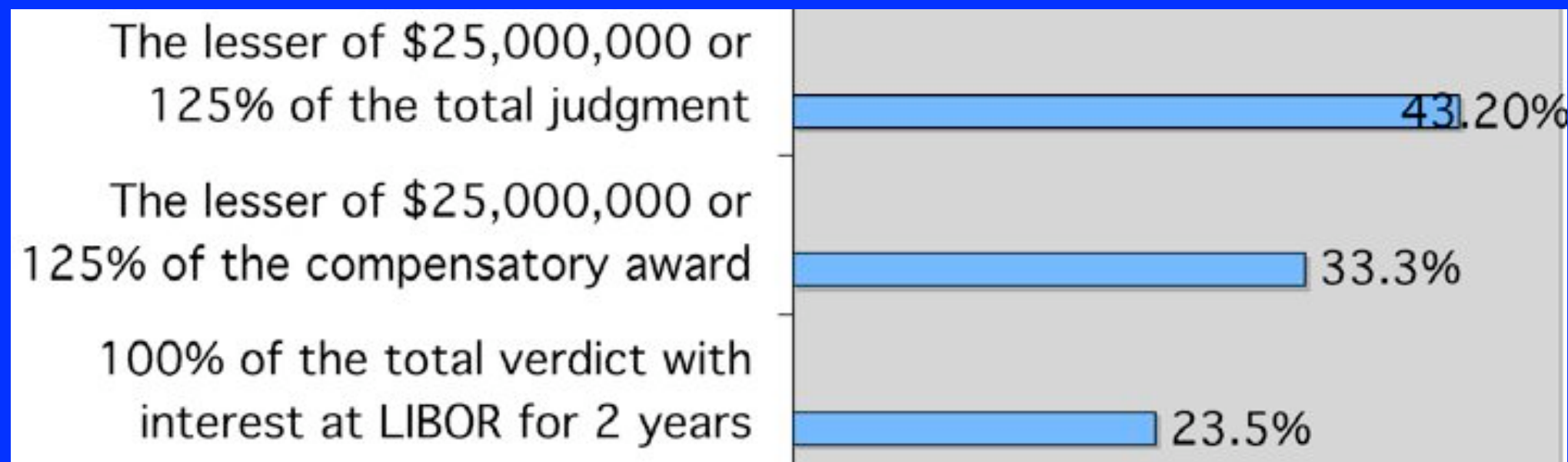
True

False



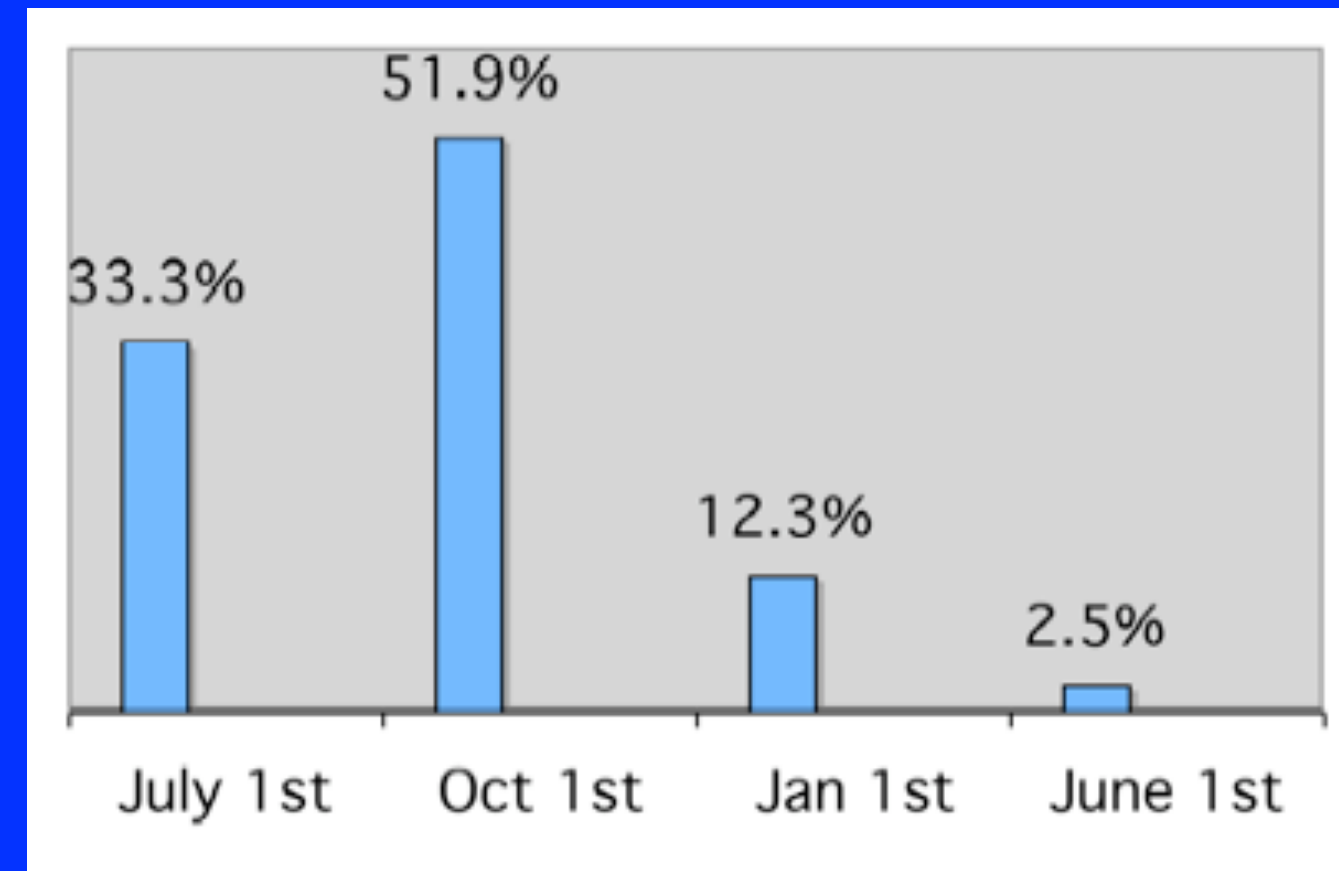
2. The bond to stay execution following an adverse judgment in a civil action changes under the Act. Following the effective date, the bond will be:

- The lesser of \$25,000,000.00, or 125% of the total judgment
- The lesser of \$25,000,000.00, or 125% of the compensatory award
- 100% of the total verdict, with interest at LIBOR for 2 years



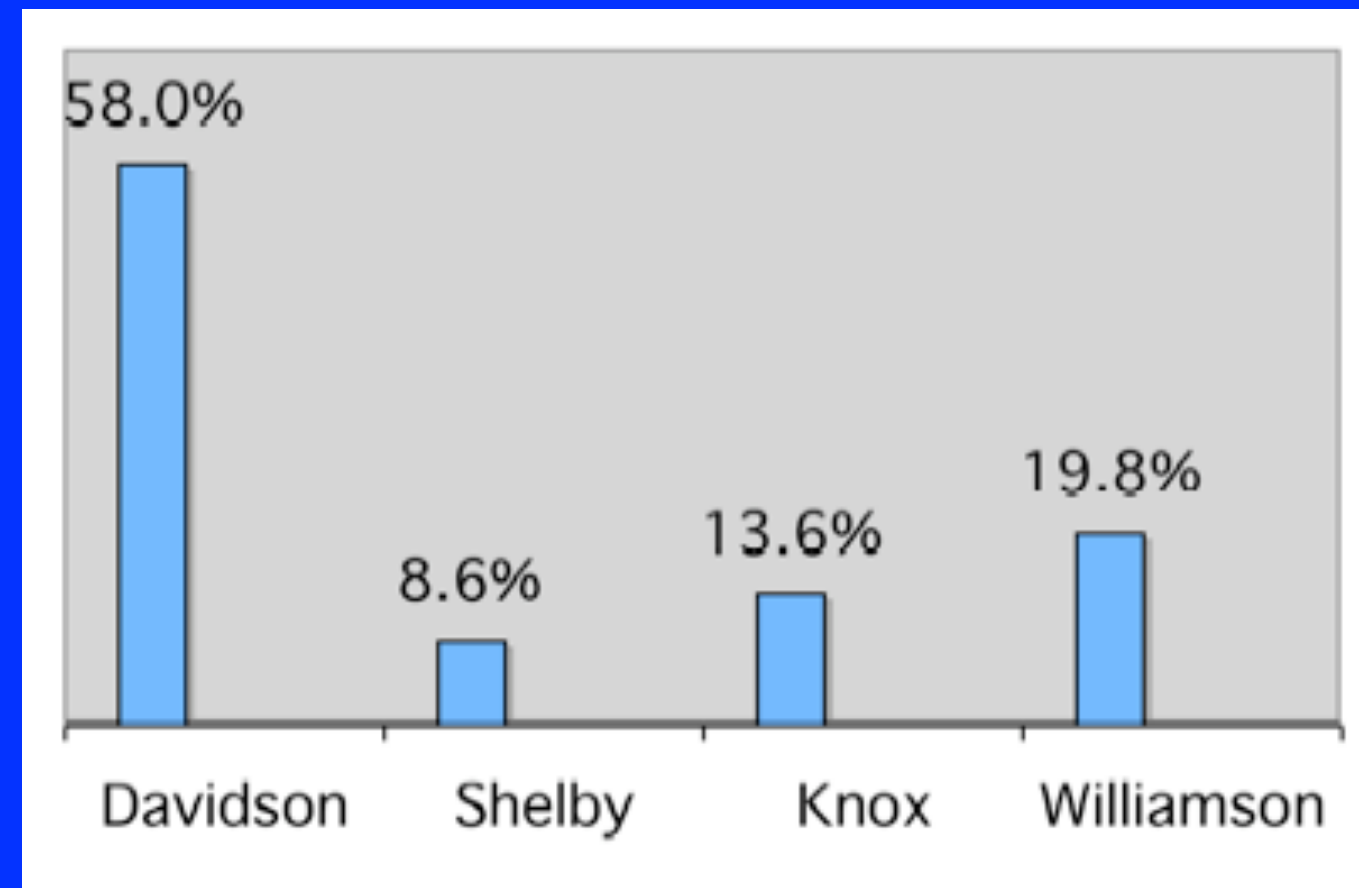
### 3. When does the Tennessee Civil Justice Act go into effect?

- July 1st, 2011
- October 1st, 2011
- January 1st, 2012
- June 1st, 2012



4. The Tennessee Civil Justice Act changes venue for suits against businesses. Which county will probably experience the largest increase in litigation as a result?

- Davidson
- Shelby
- Knox
- Williamson



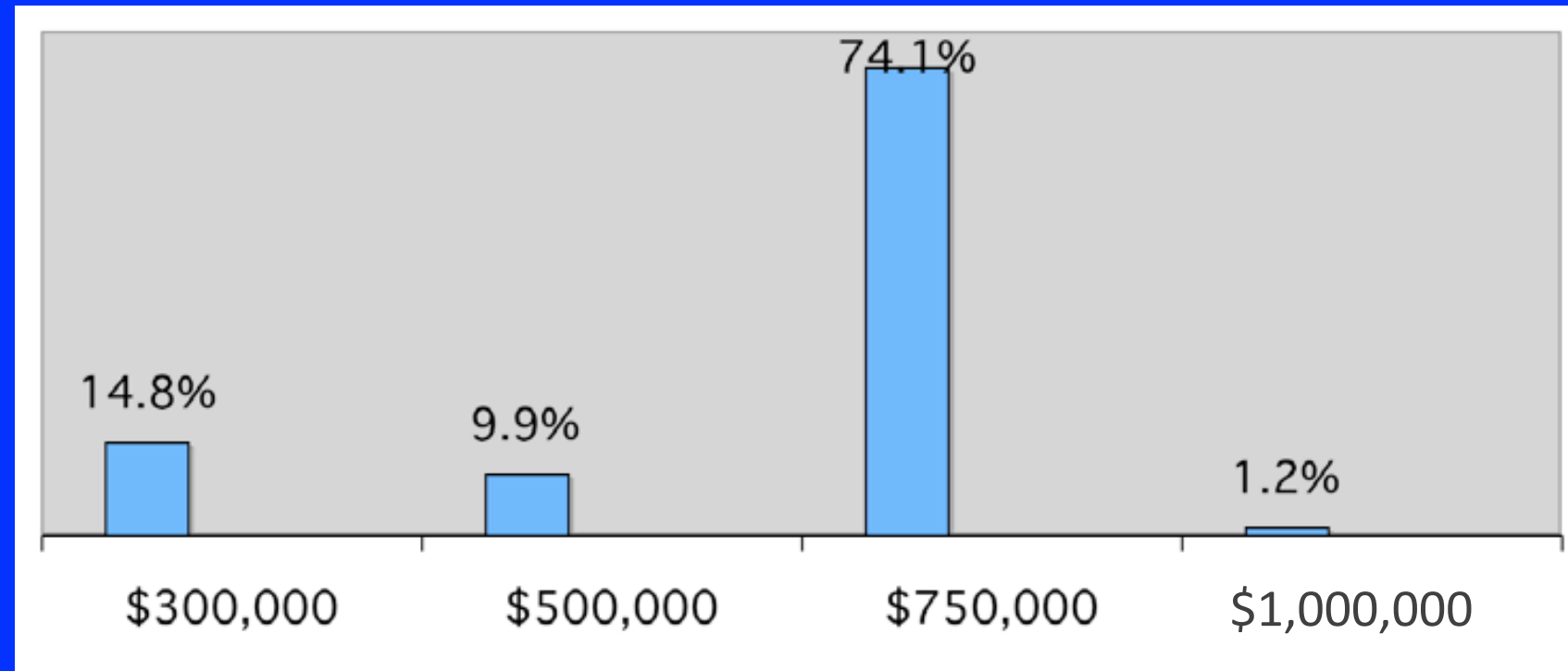
5. What is the default cap for non-economic damages under the Tennessee Civil Justice Act, absent special circumstances?

\$300,000

\$500,000

\$750,000

\$1,000,000



# Capsule Summary of “Tort Reform” Provisions Since 2010 Election



# Modification of Summary Judgment Standards

Tenn. Code Ann. § 20-16-101

In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:

- (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or
- (2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.

# Tennessee Patient Safety and Quality Improvement Act

Tenn. Code Ann. § 68-11-272



## Tennessee Civil Justice Act, HB 2008, amending the following:

Tenn. Code Ann. § 20-4-104 (venue)

Tenn. Code Ann. § 27-1-124 (bond for stay)

Tenn. Code Ann. § 29-26-101 adding § 29-39-101, *et seq.* (caps)

Tenn. Code Ann. § 29-39-104 (punitive damages, spoliation)

Tenn. Code Ann. § 29-28-101, *et seq.* (products liability claims)

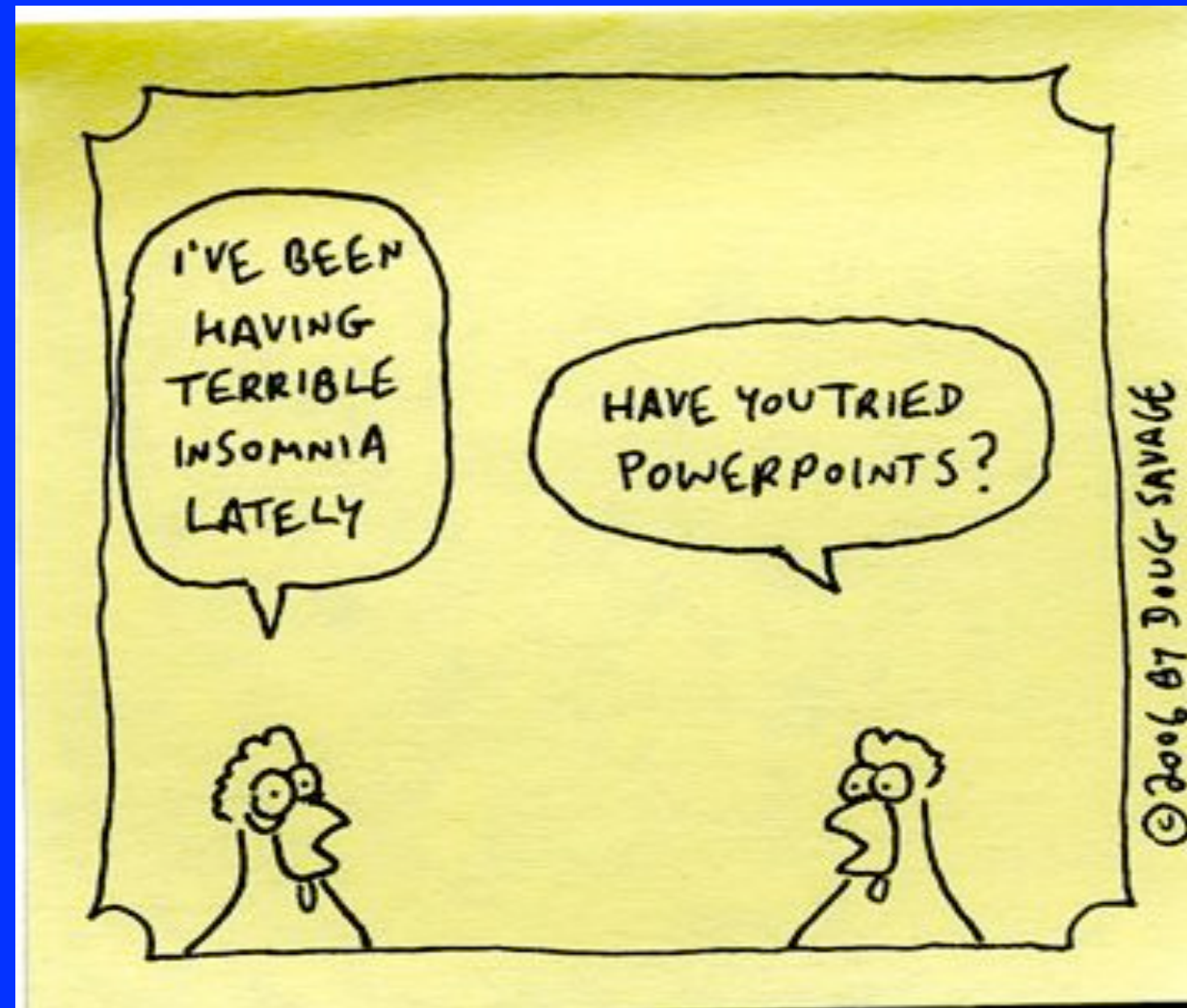
Tenn. Code Ann. § 27-1-125 (immediate appeal of class certification)

Tenn. Code Ann. § 47-18-109 (no right of action for marketing or sale of a security)

Tenn. Code Ann. § 47-18-109 (no class action claim for TCPA)

Tenn. Code Ann. § 47-18-104(b)(27) (TCPA, no private right of action for deceptive conduct)

# Substantive Presentations



# Data on Jury Verdicts 2007-2010



## Damage Awards 2007-2008

462 Med Mal cases disposed of

- 20 went to trial
- \$6,033,570 in total monetary awards statewide

11,725 Damage/Tort cases disposed of

- 506 went to trial
- 237 were awarded damages
- \$58,029,913 in total monetary awards statewide

## Damage Awards 2007-2008 Continued

- Average award \$242,803
- 3 cases between \$500K - \$1 million
- 13 cases over \$1 million
- 16 cases accounted for 81.6% of all awards
- Largest award \$17,529,109 (Putnam County)
- Personal injuries of two plaintiffs/car wreck

## Damage Awards 2007-2008 Continued

- Largest award \$17,529,109 (Putnam County)
- Personal injuries of two plaintiffs/car wreck



## Damage Awards 2008-2009

479 Med Mal cases disposed of

- 26 went to trial
- \$16,419,443 in total monetary awards statewide

11,247 Damage/Tort cases disposed of

- 608 went to trial
- 281 were awarded damages
- \$83,618,431 in total monetary awards statewide

## Damage Awards 2008-2009 Continued

- Average award \$296,519
- 6 cases between \$500K - \$1 million
- 15 cases over \$1 million
- 21 cases accounted for 87.5% of all awards

## Damage Awards 2008-2009 Continued

- Largest award \$19,009,222 (Putnam County)
- Personal injury/motorcycle wreck
- Actual money collected \$101,000



## Damage Awards 2009 - 2010

429 Med Mal cases disposed of

- 30 went to trial
- \$7,128,800 in total monetary awards statewide

10,872 Damage/Tort cases disposed of

- 588 went to trial
- 229 were awarded damages
- \$91,682,216 in total monetary awards statewide

## Damage Awards 2009-2010 Continued

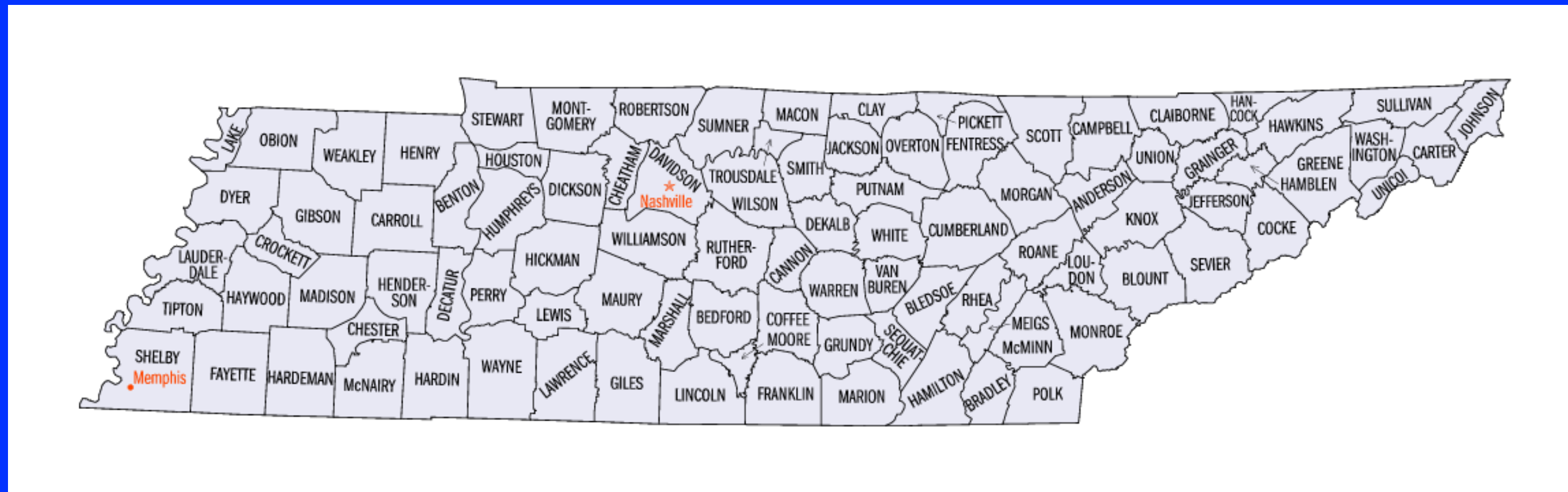
- Average award \$400,359
- 3 cases between \$500K - \$1 million
- 14 cases over \$1 million
- 17 cases accounted for 88.4% of all awards

## Damage Awards 2009-2010 Continued

- Largest award \$43,800,000 (Shelby County)
- Wrongful death of husband/parent and catastrophic personal injuries to minor child
- Products claim against Ford Motor Company



# Venue



# Spoliation: Before & After TCJA



# What is Spoliation?

- “Rule 37 sanctions may be imposed upon a party or an agent of a party who discards, destroys, mutilates, alters, or conceals evidence.” - Tenn. R. Civ. P. 34A.02
- Discretion to dismiss action or proceeding, enter a default judgment, or impose less severe sanctions
- “Spoliation inference” or “adverse presumption” jury instruction
- Evidence tampering is not uncommon

# Elements of Spoliation Claim

1. existence of a potential civil action
2. a legal or contractual duty to preserve evidence which is relevant to the action
3. destruction of that evidence
4. significant prejudice to ability to prove the lawsuit
5. causal relationship between evidence destruction and inability to prove suit
6. damages

## Spoliation Claims Prior to the TCJA

- No ruling on recognition of independent spoliation tort
- Possible to establish negligent spoliation if evidence of prejudice to non-spoliating party's case
- Negligence still not enough to raise “spoliation inference” jury instruction, only intentional spoliation

## The Importance of Spoliation After the TCJA

“The limitation on the amount of punitive damages imposed by subdivision (a)(5) shall not apply to actions brought for damages or an injury: . . . “(B) If the defendant intentionally falsified, destroyed or concealed records containing material evidence with the purpose of wrongfully evading liability in the case at issue; provided, however, that this subsection (a) does not apply to the good faith withholding of records pursuant to privileges and other laws applicable to discovery, nor does it apply to the management of records in the normal course of business or in compliance with the defendant’s document retention policy or state or federal regulations.”

- § 29-39-104 (a)(7)

- Plaintiff can avoid limitations on punitive damages by proving intentional spoliation
- Negligence-based spoliation claims NOT recognized
- Still does not create an independent tort

# Punitive Damages

Tenn. Code Ann. § 29-39-104



# Requirements

- Defendant must have acted maliciously, intentionally, fraudulently or recklessly
- Conduct must be proven by clear and convincing evidence

## Limitations on Damages

- Punitive damages shall not exceed either two times the total amount of compensatory damages awarded OR five hundred thousand dollars – whichever is higher
- But the jury doesn't get to know these limitations; rather they shall be imposed by the Court to the jury's verdict

## Limitations on Damages Continued

- There are several exceptions to these limitations, such as a specific intent by the defendant to inflict serious physical injury and that intentional conduct injured the plaintiff; falsifying, destroying, or concealing records (with some exceptions); or the influence of alcohol, drugs, or other intoxicants or stimulants (again, with some exceptions)

# In Practice

You will have a bifurcated trial:

- In the first proceeding, the trier of fact will determine:
  1. whether and to what extent compensatory damages will be awarded
  2. whether defendant's conduct was malicious, intentional, fraudulent or reckless – must be determined by special verdict
  3. whether any exceptions to limiting punitive damages apply. If so, the punitive damages will not not limited to two times the total amount of compensatory damages awarded OR five hundred thousand dollars. Must be determined by special verdict

## In Practice Continued

If compensatory damages are awarded and the defendant acted maliciously, intentionally, fraudulently or recklessly, then:

- the Court will “promptly” conduct an evidentiary hearing in which the jury will determine whether and to what extent punitive damages will be awarded
- the statute lists a number of factors for the jury to consider, such as the defendant's financial condition and net worth; the nature and reprehensibility of the defendant's wrongdoing; and the impact of the defendant's conduct on the plaintiff
- “The trier of fact shall be instructed that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole”

## In Practice Continued

- The culpability of a defendant for punitive damages whose liability is alleged to be vicarious shall be determined separately from that of any alleged agent, employee or representative.
- This statute specifically states that it shall not be construed to limit a court's authority to enter judgment as a matter of law prior to or during a trial on a claim for punitive damages.

## Additional Limitations on Punitive Damages

- Sellers of products (other than manufacturer) shall not be liable for punitive damages except for under specific circumstances, such as when a seller alters a product and that alteration is a substantial factor in causing the plaintiff's harm
- There are specific situations detailed in the statute under which punitive damages shall not be awarded in civil actions involving a drug or device, such as if the drug or device is manufactured and labeled in accordance with the Federal Food, Drug, and Cosmetic Act or the Public Health Service Act

## Additional Limitations on Punitive Damages Continued

- Punitive damages shall not be awarded in any civil action when a defendant demonstrates by a preponderance of the evidence that it was in substantial compliance with applicable federal and state regulations setting forth specific standards applicable to the activity in question and intended to protect a class of persons or entities that includes the plaintiff, if those regulations were in effect at the time the activity occurred.

# Class Action Claims



## Activities Covered

- Previously TCA § 47-18-104 had a list of 33 activities defined as “unfair or deceptive acts or practices affecting the conduct of any trade or commerce”
- (b)(27) was a “catch all” stating “Engaging in any other act or practice which is deceptive to the consumer or to any other person”

## Activities Covered

- (b)(27) has been amended to limit its application such that enforcement “is vested exclusively in the office of the Attorney General and Report and the director of the division [of consumer affairs in the department of commerce and insurance].”

## Activities Covered

- § 47-18-109 was amended specifically to *exclude* claims related to the marketing or sale of securities
- Consumers still have the protection in the Tennessee Securities Act, TCA §48-2-101, et seq., of a private right of action, but it does not include the recovery of treble or punitive damages.

## Activities Covered

- § 47-18-109 was amended to bar class action lawsuits under the TCPA

## Activities Covered

- § 47-18-109(a)(3) was amended to provide/clarify that punitive damages are not available in addition to the treble damages and attorney's fees already provided

# Interactive Audience Testing



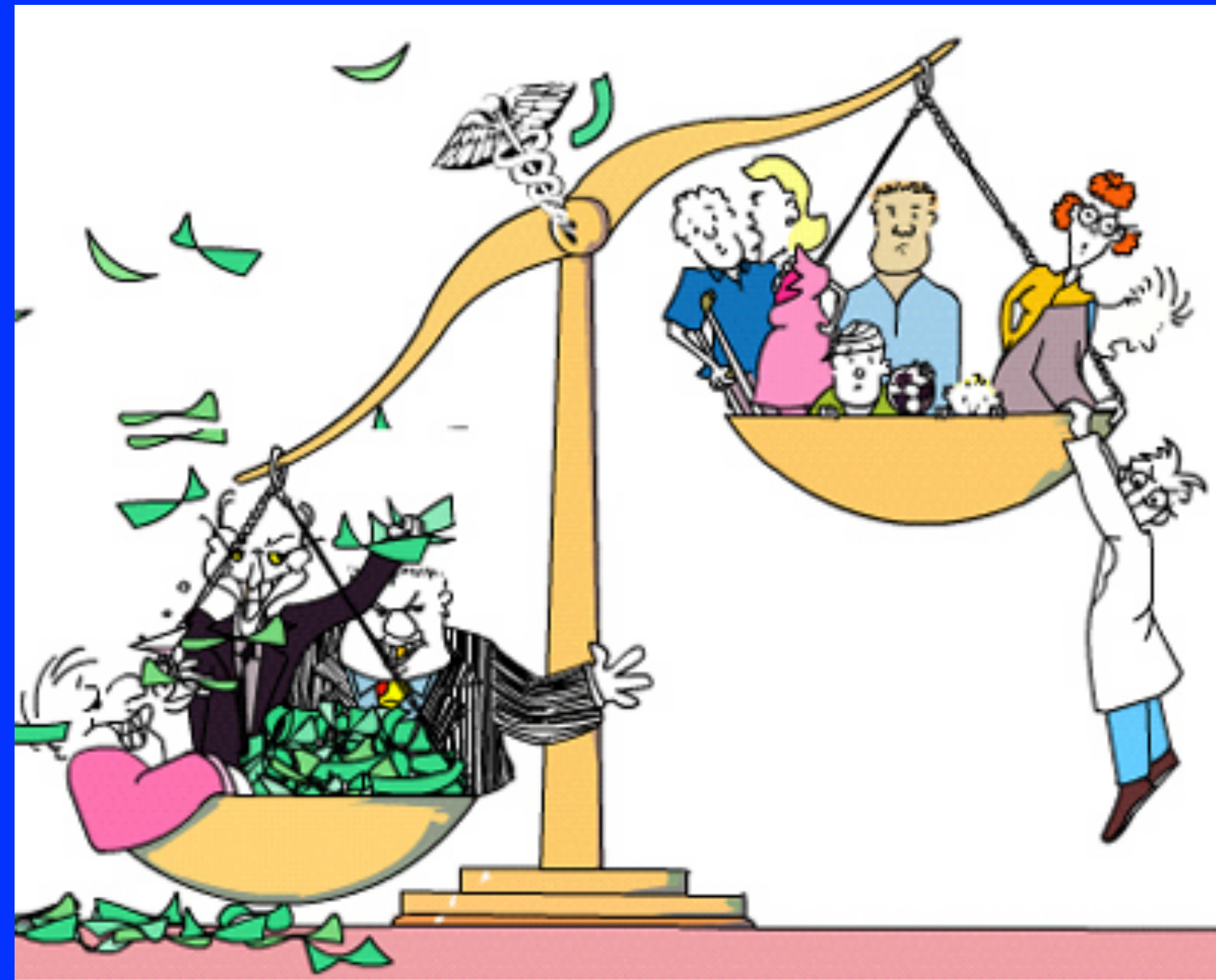
Special Guest

Herb Slattery

*Legal Counsel to Governor Bill Haslam*



# What is in this for plaintiffs?



# Concluding Remarks

