Union Carbide in 2001) offered to pay $470 million to clean up the site, but only if it is not subject to the legal liabilities of the disaster (Prasad 2007). Moreover, tens of thousands of survivors are still struggling. Some suffer ailments as diverse as tuberculosis, cancer, breathlessness, dizzy spells, and near-blindness. The survivors—mostly poor working-class people—are still seeking justice because they have been paid only 25,000 rupees ($560) (Reuters 2004).

advertising (Tong 2007). In short, obesity lawsuits might be frivolous in the sense that they have little chance of winning before a judge or jury, but, in the end, they had a major impact nonetheless. Moreover, lawsuits and the threat of lawsuits also prompted response from legislative bodies and regulatory agencies.

Other countries have different standards for frivolous lawsuits and sanctions for those who pursue them. (See Courts in Comparative Perspective: The Republic of India.)

Tort Reform

The rhetoric of the litigation explosion is most visible in campaigns for tort reform. On one side, business groups denounce greedy lawyers who file unwarranted lawsuits that drive up the cost of doing business—to say nothing of driving up the cost of driving (as insurance premiums escalate). Lawyers counter that big businesses are the devious villains, trying to cheat citizens out of their right to sue while allowing businesses to make even greater profits by pocketing promised reductions in the cost of insurance. Lawyer bashing, which has long been a favorite pastime, has now become a national phenomenon (Hensler 1992). Conservative political columnists, for example, regularly headline the ills of "predatory lawyers" (Will 2007) and ask readers to "just say 'no' to the trial lawyers" (Atkins 2007). As a result, trial lawyers are a popular target in elections for local judgeships, votes in state legislatures, statewide referendums, and presidential elections.

The only thing new about these campaigns for tort reform is the amount of money being spent—it has increased greatly in recent years. What have not changed are the basic themes. Periodically, U.S. society experiences what is commonly called a "tort crisis," which, in turn, prompts legislatures to enact "tort reform." The crisis is said to consist of sharp increases in the cost of liability insurance and corresponding decreases in the availability of insurance. The response is based on an assumed relationship between litigation expenses and insurance costs; that is, insurance premiums are too high because courts have forced insurance companies to pay out excessive demands (Eaton and Talarico 1996). Following are examples of this cycle:

- During the 1960s, the tort crisis focused on automobile accidents, and the "reform" consisted of various types of no-fault insurance (Henderson 1977).
- In the 1970s, the perceived tort crisis and subsequent reforms concentrated on medical malpractice (Robinson 1986).
- In the 1980s, the tort crisis centered on the lack of availability of insurance for many types of businesses and governments.
- In the 1990s, the tort crisis had expanded to cut across a broad set of interests (Eaton and Talarico 1996).

- By the 2000s, the tort crisis was often linked to suits involving pharmaceuticals, medical providers like nursing homes, and financial institutions.

A wide variety of proposals march under the general umbrella of tort reform. (See Exhibit 10.1.)

Tort Tales

To the average citizen, the perception of a tort crisis comes from tort tales. Tort tales are moralistic parables that effectively drive home the point that something needs to be done about a legal system that is out of control. One notable example is the case of an administrative law judge in Washington, D.C., who sued his neighborhood dry cleaner for $67 million for a misplaced pair of expensive pants. Although the plaintiff had little chance of winning and no chance of collecting that amount of money, the tale was told and retold. Conservative radio talk show hosts lampooned the case, and conservative interest groups quickly labeled it a frivolous lawsuit. In the end, the plaintiff lost.

The specifics of tort tales like this one change on a regular basis. But reduced to their basics, tort tales exhibit four characteristics. First, tort tales are short, often no more than three to five sentences long. This literary formula makes them easy to remember and, therefore, easy to retell. Second, tort tales emphasize the stupidity of the "victim." Invariably, the person suing did something foolish but won't admit to his or her shortcoming. Third, tort tales emphasize that the defendant is blameless. Typically, an individual (or a business) is doing something very ordinary when he or she is suddenly confronted by a meritless lawsuit. Finally, tort tales center on greed. Stupid "victims" are seeking outlandish monetary damages from ordinary folks like you and me, damages that are far in excess of any realistic injury (adapted from Haltom and McCann 2004).

In *Distorting the Law: Politics, Media, and the Litigation Crisis*, political scientists William Haltom and Michael McCann argue that tort tales distort reality. Indeed, the facts are usually far different from the tale that is being told. Nonetheless, efforts to refute tort tales often prove futile. Legal professionals and social scientists tend to publish their works in scholarly journals. The strong conclusion is that the nation is not facing a litigation explosion and that if there is a tort problem, it is a selective one. One reason that such analysis is drowned out by tort tales is that tort tales are closely connected to the moralistic "culture wars" waged in the United States. In particular, they reinforce popular notions that lawyers are greedy and the legal system has run amok (Haltom and McCann 2004). Perhaps the best-known tort tale involves a spilled cup of coffee at a McDonald's restaurant. (See Case Close-Up: *Liebeck v. McDonald's Corporation* 1995.)

State-Level Tort Reform

Efforts to enact tort reform have had some success. Many of the states that enacted tort reform in the 1980s have recently adopted new rules. According to the American Tort Reform Association (2008), since 1986,

- Forty states have modified the law for joint and several liability.
- Thirty-two states have enacted punitive damage reform.

EXHIBIT 10.1 Types of Tort Reform

Historically, discussions of tort reform focused on specific areas, such as medical malpractice and automobile accidents. Today, the dialogue has expanded to include a wide range of additional topics, including product liability. Here are some of the most commonly mentioned tort reforms.

■ *No-Fault Compensation Plans for Automobile Accidents*

Under no-fault insurance, the policyholder is reimbursed without regard to who supposedly caused the accident. No-fault insurance is designed to provide quicker and more certain compensation, at less cost, because there is no need to ascertain legal responsibility for the accident. What that means, in practice, is that, even if the other driver caused the accident, your insurance company must pay. No state has yet adopted a no-fault plan that totally replaces the tort system. Rather, current plans attempt to prevent automobile accident victims who have suffered less severe injuries from suing under tort. Thus, states prohibit suing unless the injury exceeds a tort threshold.

■ *Abolition or Modification of Joint and Several Liability*

Under joint and several liability, two or more defendants are held liable for a plaintiff's injuries, and each defendant may be held financially responsible for the entire judgment. Thus, in an automobile accident caused primarily by a poverty-stricken driver and only secondarily by a well-insured defendant, the defendant with insurance coverage pays the whole amount, even though he or she was relatively blameless. In recent years, two-thirds of the states have either abolished joint liability for low-fault defendants or limited the damages the less blameworthy defendant must pay.

■ *Caps on Damages*

Caps on damages (often referred to as "caps") place a monetary maximum on the amount the defendant must pay, no matter how severely injured the plaintiff. Legislatures are increasingly imposing caps on jury awards for punitive damages in product liability cases and suits against local and state governments. But most of the attention focuses on medical malpractice, where caps on damages is but one of several changes that have been enacted to reduce medical malpractice costs (Southwick and Young 1990).

■ *Loser Pays*

As discussed in Chapter 5, lawyers are blamed by some for stirring up unnecessary litigation and making a profit by doing so. To discourage such activities, some propose limits on lawyers' fees. One approach would be to modify the contingency fee to include a sliding scale by which the higher the dollar amount, the smaller the percentage lawyers would collect. But another approach—called "loser pays," or, more simply, the English system—requires the loser of the lawsuit to pay the legal fees of the winner (but no more than the losing side paid for its own lawyers). Corporations back loser pays, because they think it will discourage lawsuits like the McDonald's coffee-spill case. Plaintiffs' attorneys scoff, arguing that the legislation is mean spirited because it is designed to protect businesses that manufacture defective products.

■ *Reform of Punitive Damages*

Compensatory damages are damages directly related to the legal injury suffered by the plaintiff; they are typically based on medical expenses and lost wages but may also include monetary damages for intangibles such as pain and suffering and loss of consortium. **Punitive damages,** on the other hand, are awarded if the defendant was grossly negligent or intentionally committed the tort. Thus, punitive damages are above and beyond compensatory damages and are designed not only to punish the defendant for wrongdoing but also to deter others from doing the same in future cases. Proposed reforms include the elimination of punitive damages or the limitation of punitive damage awards to $250,000 or three times the compensatory damages, whichever is greater. (See Debating Law, Courts, and Politics: Should Limits Be Placed on Punitive Damages?)

■ *Reform of Product Liability Laws*

Product liability law refers to the legal responsibility of manufacturers and producers for damages or injuries caused by the use of a defective product. Proposed reforms include introducing a statute of limitations on product liability suits and establishing a defense for manufacturers who did not know of the product defect. Although product liability cases are somewhat infrequent, they are nonetheless at center stage in the debate over civil justice reform (Eisenberg and Henderson 1990, 1992; Koenig and Rustad 1993).

CASE CLOSE-UP

■ Liebeck v. McDonald's Corporation *(1995)*

A Dangerously Hot Cup of Coffee

"When Stella Liebeck fumbled her coffee cup . . . she might as well have bought a winning lottery ticket. . . . That absurd judgment is a stunning illustration of what is wrong with America's civil justice system," opined the *San Diego Tribune*. First on radio talk shows and later in the print media, this tale of the dangerously hot cup of coffee became the best-known tort tale. Just examine the elements. First, the tale is short (and gets shorter the more it is retold). Second, it emphasizes the stupidity of the plaintiff—after all, she fumbled the cup of coffee. Third, it stresses the innocence of the defendant—buying coffee is an everyday occurrence and everyone should know that coffee is hot. Above all, this tort tale emphasizes greed—the jury awarded her $2.9 million dollars in damages.

Stella Liebeck became the poster lady for action in the bitter battle over "tort reform." In the following years, numerous state legislatures passed tort reform, partially energized by this tort tale. But does the tale distort reality? Reporters from the *Wall Street Journal* (a pro-business publication that typically supports tort reform) discovered a very different reality to this tort tale.

Stella Liebeck was a most unlikely plaintiff, a spry eighty-one-year-old former department store clerk who had never filed suit before. In fact, she said she would never have filed this one if McDonald's hadn't refused her request for $800 in medical bills and a small amount for pain and suffering.

She bought a forty-nine-cent cup of coffee at the drive-through window of an Albuquerque McDonald's. Having difficulty removing the top so she could add cream and sugar to her coffee, Liebeck put the cup between her knees. While she tried to dislodge the cap, scalding coffee gushed into her lap, causing second- and third-degree burns to the groin and inner thighs. Her lawsuit claimed the coffee was "defective" because it was so hot (more than 180 degrees Fahrenheit) that it was undrinkable. In previous hot-coffee lawsuits, lawyers for McDonald's had settled out of court, but this time they decided to litigate, probably hoping to put an end to further lawsuits.

Jurors initially scoffed at the idea of a lawsuit over a spilled cup of coffee, but they began to change their minds when lawyers presented gruesome photographs of the burns and proved that Mrs. Liebeck had spent seven days in the hospital undergoing painful skin grafts. Thus, the most interesting feature of the case is the transformation of jurors' attitudes from an initial assessment that this was a frivolous lawsuit to a later judgment that it was a serious matter. The longer the case proceeded, the more the jurors saw McDonald's as callous and indifferent to the plight of an injured person. Witnesses for McDonald's testified that the giant fast-food corporation makes a considerable profit from selling one billion cups of coffee a year. Their officials seemed more interested in defending why their coffee is so hot (fully twenty degrees hotter than anyone else's) than apologizing to Stella Liebeck for the severe burns she suffered. In the end, jurors were struck by the fact that no one at McDonald's seemed to have the common courtesy, let alone the common sense, to say they were sorry. Thus, during trial, the case was transformed from a frivolous lawsuit to a case of the little guy fighting a giant corporation. Afterward, jurors pointed to the callous indifference of McDonald's as the key to their decision (Gerlin 1994).

Jurors in other cases experience similar transformations. Interviews with jurors in Delaware indicated they were initially skeptical of plaintiffs' tort claims against businesses. Contrary to media and popular perceptions that jurors are generous to plaintiffs, those jurors viewed plaintiffs as money-hungry, expressed concern over the litigation crisis, and also thought it was important to limit tort awards because businesses passed on the costs to their customers. Thus, during trial the absence of testimony by business executives worked to the advantage of businesses. But those favorable attitudes changed once executives testified. Jurors then focused on specific individuals rather than on corporate entities (Hans and Lofquist 1992).

The Albuquerque jury awarded Stella Liebeck a total of $2.9 million, of which $2.7 million was for punitive damages. The trial judge later reduced the jury award to $640,000; in the end, McDonald's settled the case out of court during the appeal for considerably less than the jury verdict. But this coffee-spill saga was literally heard in legislative chambers across the nation.

Tort reform at the state level reflects a political tug of war between two well-entrenched and well-funded interest groups—trial lawyers and insurance companies. Depending on how the issues are framed, consumer groups may also become involved. The 1988 California initiative on insurance reform illustrates the interplay between these powerful political interest groups.

Drivers in the most populous U.S. state pay the third-highest auto insurance rates in the nation. The insurance industry blamed those high rates on skyrocketing legal costs and supported regulatory reform that assigned most of the costs to trial lawyers. The California Trial Lawyers Association, on the other hand, ascribed the high cost of auto insurance to the oligopolist structure of the insurance industry and supported legal changes that assigned most of the costs to insurance companies. (Needless to say, each side accused the other of being greedy.) Both groups are among the most influential and best-financed lobbies in California; the battle of these titans in the legislature ended with the defeat of all attempts at so-called reform. The legislative stalemate led to a ballot initiative, where the debate expanded to include consumer groups who wanted lower insurance rates largely by removing the antitrust exemption of the insurance industry. The end result was that California voters were presented with five different insurance reforms on the November ballot. The only proposition to pass on Election Day was sponsored by the consumer activist group Voter Revolt (whose primary spokesperson was Ralph Nader). It called for removal of the insurance industry's antitrust exemption, for public hearings before rate increases, and for the setting of auto insurance premiums primarily by driving record rather than by the location of one's residence (Lupia 1994). In subsequent years, California voters were again called upon to decide similar issues (Price 1996).

In states like Illinois, Indiana, Ohio, and Oregon, legislatively passed tort reform has been struck down by state supreme courts (Marek 2007). As a result, business interests are now spending unprecedented amounts of money in efforts to elect pro–tort reform judges (Chapter 6). Whether adoption of tort reform will, in the end, reduce the high costs of automobile insurance or medical malpractice insurance remains an open question.

National Tort Reform

Tort reform has historically been a state-level issue, because tort law is almost exclusively state law. In the 1990s, however, tort reform emerged as a potent national issue with clear partisan dividing lines.

During the 1992 presidential campaign, the George H. W. Bush administration condemned lawsuit abuse (Neubauer and Meinhold 1994). At the heart of the nationalization of the debate was the assertion that litigation costs constitute a much larger percentage of the U.S. gross national product than do litigation costs in other industrialized countries. For those reasons, U.S. businesses were said to be at a disadvantage in world markets (Goerdt 1993).

During the 1994 elections, Republican candidates for the U.S. House of Representatives drafted a ten-point plan titled the "Contract with America." Among other things, it promised legal changes, including the Common Sense Legal Reform Act, which would make the losers pay for lawsuits, place limits on punitive damages, and reform product liability laws. In 1995, the House passed three tort reform bills, but moderate

DEBATING LAW, COURTS, AND POLITICS

Should Limits Be Placed on Punitive Damages?

Ira Gore, an Alabama physician and no relation to the more famous Al Gore, thought that for $40,000 he was buying a flawless luxury car. But months later, he discovered that his "new" BMW had been repainted, apparently because of damage from acid rain suffered before shipping. Gore sued, and the jury agreed that BMW was guilty of fraud for failing to disclose the new paint job. As compensation, the jury awarded $4,000 in actual damages but also added on a staggering $4 million in punitive damages (a sum later reduced by the Alabama Supreme Court to $2 million).

Punitive damages lie at the very heart of the tort reform controversy. The debate is fueled by the occasional large damage awards in cases such as those involving the flawed BMW and the burns Stella Liebeck suffered at a McDonald's restaurant. Proposed reforms include eliminating punitive damages or limiting punitive damage awards to $250,000 or three times the compensatory damages, whichever is greater.

The business community has tried for years to have limits placed on punitive damages. They argue that jurors are unduly sympathetic to plaintiffs (who, after all, are from the same area) and are all too likely to define justice as awarding huge amounts of money in damages that will be paid by out-of-town "deep-pocket" defendants. Not only may the punitive damages be way out of proportion to the actual damages suffered, but also the dollar amounts may be grossly excessive. As a result, jury verdicts in punitive damage cases serve no useful purpose—misconduct is not deterred, nor is safety enhanced. In the end, the only ones who benefit are plaintiff lawyers, who are allowed under the contingency fee system to reap fees far in excess of any reasonable effort or skill.

Defenders counter that punitive damages should remain unchanged because they are serving their intended purpose of making companies pay for flawed business practices. In the BMW case, for example, executives testified that repainting cars (but not telling prospective buyers) was standard operating procedure. Gore's lawyers argued that this was a decades-long fleecing of consumers on a large scale. Indeed, BMW changed its policy on notifying buyers just five days after the jury verdict. Business interests claim that the consumer will benefit because companies will pass the savings on to consumers, but defenders of the status quo argue that this is at best naive (Stewart 1994).

Shifting from the law on the books to law as discretion indicates that the big-award cases trumpeted by both sides are rare indeed. In a study of the nation's seventy-five largest counties, about 6 percent of tort cases in state courts resulted in any award of punitive damages. The median amount of punitive damages was $50,000. Of further interest is the fact that judges sitting alone awarded punitive damages 11 percent of the time; juries, only 5 percent of the time (Cohen and Smith 2004). These figures seem to belie the stereotype that juries are pushovers for plaintiffs.

In *BMW v. Gore* (1996), the Supreme Court overturned the jury award of $4 million in punitive damages as "grossly excessive" because it exceeded the constitutional limit under the due process clause of the Fourteenth Amendment. The Court set out three guideposts for appellate courts to use in assessing the appropriateness of punitive damages:

1. BMW's conduct was not particularly reprehensible.
2. The punitive damage award was 500 times the amount of the compensatory damages.
3. The award was substantially greater than statutory fines for such conduct.

Interestingly, several of the conservative justices dissented, citing states' rights. But even though the Court has imposed these broad limits, they fall far short of what conservative business interests demand. Moreover, despite the high profile of the case, early assessments indicate that it failed to alter jury patterns of awarding punitive damages (Szali 1998). As for Dr. Ira Gore, the Alabama courts eventually reduced his punitive damage award to $50,000.

In a later case, the Court held that a punitive damage award of $145 million (compared with compensatory damages of $1 million) is excessive and violates the due process clause of the Fourteenth Amendment (*State Farm v. Campbell* 2003). The Court reinforced this trend in setting aside $79.5 million dollars in punitive damages against tobacco giant Philip Morris, concluding that jurors

(continued)