

Back to Business: Strengthening South Carolina Businesses to Weather an Uncertain Economy

By Bringing Predictability and Fairness to Its Legal Environment

The South Carolina Civil Justice Coalition urges you to read this communiqué and to pledge your support of its call to action by adding your name and the name of your business to the list of signatories. Please email your approval to: onelawsuitaway@yahoo.com.

Every South Carolina small business is just one lawsuit away from going out of business, especially in today's erratic economic environment. But as a united front, South Carolina's business leaders can call for action- to bring predictability and fairness to the state's litigation environment. Only then will South Carolina be prepared to weather today's uncertain economy and to compete in the expanding, global marketplace.

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Executive Summary

As stated in Thomas Freidman's bestselling book, The World is Flat, the global playing field has become level, and in order for businesses to succeed they must change the way they operate. Site selection now has a global scope, and businesses are looking to set up shop in locations with low costs and positive, overall business climates. Civil justice issues such as low workers' compensation premiums and predictable, fair litigation environments largely factor into creating a positive business climate. And countries/states with unpredictable and unstable civil justice systems are left out of the competition.

South Carolina is such a state, and its current legal climate and workers' compensation system is stifling its economic growth. The U.S. Chamber of Commerce's 2008 assessment of state liability systems ranked South Carolina 43rd among all 50 states in the fairness of its litigation environment. Among the 42 states with fairer litigation climates are many of SC's neighboring states, including North Carolina, Georgia, Virginia, and Tennessee. In 2007, South Carolina received a ranking of 44 in the Small Business Survival Index for workers' compensation costs. On a positive note, South Carolina improved scores in 2008 from other national reports such as Directorship Magazine's State Litigation Guide and the Pacific Research Institute's U.S. Tort Liability Index. These scores are a good indication that efforts to enact civil justice reform have been successful; however, if South Carolina wants to seriously contend for business against foreign countries and even its neighboring, southeastern states, it must enact further, substantive civil justice reform, particularly instituting objective standards for determining workers' compensation awards and enacting comprehensive legal reform.

Over the last few years South Carolina has successfully implemented significant civil justice reform. In 2005, the General Assembly passed legislation addressing tort issues and placing reasonable limits on non-economic damages in medical malpractice cases. Again in 2007, the SC legislature dealt with workers' compensation, phasing out the Second Injury Fund and streamlining the judicial process so workers' compensation appeals move directly to the Court of Appeals.

The two solutions for bringing predictability, stability and fairness to South Carolina's litigation climate are instituting objective standards for determining workers' compensation awards and comprehensive legal reform. Without standard guidelines in place to evaluate physical impairments, workers' compensation awards vary dramatically. In fact, South Carolina workers' compensation commissioners exceed AMA guidelines by an average of 81%. The National Council on Compensation Insurance estimates that by using objective standards, like the AMA guidelines, South Carolina businesses could lower their premiums by 9%. South Carolina ranked in the bottom 10 in the US Chamber's Legal Climate 2008 report in the following areas non-economic damages, punitive damages, class actions, and expert evidence.

South Carolina must bring predictability, stability and fairness back to its civil justice system by implementing objective standards and enacting comprehensive legal reform. Only then will South Carolina position itself as a viable competitor on the expanding, global field.

Globalization Flattens World into Level Playing Field

Thomas Friedman's 2005 New York Times bestselling book, The World is Flat, outlines the changing, global economy of the 21st century. Friedman asserts that there are factors contributing to the flattening of the world, and as they converge, businesses will need to change in order to succeed on the global field. Some of the factors contributing to the flattening effect include the influx of new business competitors from Russia, China and India, who arose on the scene after the fall of the Berlin wall. Another major cause is the expansion of the Internet, which now connects people, services, and money across the globe instantly.

South Carolina has already begun feeling the effects of global competition. Following the national trend, more companies are offshoring and outsourcing to foreign countries because of the lower cost of doing business. The 2008 Carolina Manufacturers' Registry reported that South Carolina has lost 12,781 manufacturing jobs since August 2006. The U.S. Bureau of Labor Statistics also has data showing that the number of manufacturing jobs in the US has fallen below 14 million for the first time since 1950.

In November 2007, Jim Micali, Chairman and President of Michelin North America in Greenville, SC, became chairman of the South Carolina Chamber of Commerce. During his address at the Chamber's 28th Annual Summit, Micali spoke about the impact of global competition on SC's economy. Micali said that as the dollar continues growing weaker, the cost of importing materials and products increases. Thus, it is necessary for businesses to be as productive and efficient as possible.

"SC businesses are being challenged by global competition that is sometimes fair and sometimes unfair...Let me give you an example of that. In the tire industry, the average Chinese tire employee salary, wages, benefits is about \$3,000 a year. The average SC employee for Michelin or for some of our BMWs is going to be anywhere between \$70,000 and \$80,000. So you have 25 times disadvantage, which means that while you expect that your technology, your brand, your image, your reputation are going to be able to carry the day, the margin for error is much reduced. You can take any SC businesses we know, they've got the exact same issues".

Where to Set up Shop?

Now that the global playing field is level, business leaders have the option of global site selection. Although site selection criteria differ from industry to industry, all are looking for locations with low costs and a positive overall business climate. Civil justice issues such as rapidly escalating workers' compensation costs and the lack of predictability created by a system that allows for limitless awards factor into both business costs and climate. In a 2007 speech, Thomas J. Donohue, President and CEO of the U.S. Chamber of Commerce, said that there is "an elephant in the room, which is massive and unique to America, and which overshadows any discussion of our global competitiveness and that is our highly litigious legal environment." Donohue then points out that the nation's judicial system, which was once a world model is now a "serious drag on America's competitiveness."

The site selection process is also changing. Over the last five years, virtual tools, including email, Internet searching and software programs have replaced phone calls and face to face visits as the most widely used methods of site selection. Many of the site selection software programs pull statistical data

from online sources and rankings. Thus, it is very important for these sources to categorize South Carolina as a pro-business state. For example, if a company is looking at South Carolina as a prospective business site, it will want to gauge its liability climate. The U.S. Chamber of Commerce's Web site is a premier source for national business rankings. The Chamber's 2008 assessment of state liability systems ranks South Carolina 43rd among all 50 states in the fairness of its litigation environment. There are 42 states with fairer litigation climates than South Carolina, so the company might select one of those states instead.

Some of these 42 states are located in the Southeast. For example, Virginia, Georgia, North Carolina, and Tennessee are all ranked higher than South Carolina for fairness of their litigation environments. The Southeast is a popular region for new business. L. Clinton Hoch, managing director of location services for DCG Cropland Consulting says, "Among our latest 25 major projects for clients in the financial sector, all but four have landed in the Southeast or Southwest." South Carolina is competing for these new projects against its surrounding, southern states that have more attractive business climates.

In June 2008, *Directorship Magazine* ranked every state based on its liability climate using data from the U.S. Tort Liability Index, Harris Poll and Hantler Weighted Variable Index. With the rating of one being the best, South Carolina ranked 21, and it received a color coding of yellow, indicating that the state's liability climate is neutral to growth and job creation. South Carolina's surrounding states of Virginia, North Carolina, and Tennessee, all received much lower composite rankings.

Not only do these surrounding states have fairer litigation environments than South Carolina, but they also have cheaper workers' compensation costs. In 2007, the Small Business and Entrepreneurship Council conducted a study ranking the workers' compensation costs for small businesses in all 50 states. With a rating of one being the best, all of the surrounding states had higher ratings than South Carolina's rating of 44. South Carolina had the highest ranking in the Southeast.

Businesses assessing which Southeastern state to locate in will take each state's workers' compensation costs and litigation climates into account. South Carolina's surrounding states all have lower workers' compensation premium rates and better litigation climates than South Carolina. Thus, those states are more attractive to businesses than South Carolina.

In order for South Carolina to better compete against surrounding states as well as with foreign countries, it must improve its overall business climate. South Carolina cannot afford to lose businesses and jobs on the rapidly expanding global field because of an unstable and unpredictable liability environment.

Recent Civil Justice Reform Gains Recognition for South Carolina

Over the last few years South Carolina has successfully implemented significant civil justice reform, but is it enough? South Carolina is now gaining recognition from national business organizations and magazines for its efforts toward becoming a more pro-business state. Although these are great steps forward, further reform, particularly instituting objective standards for determining workers' compensation awards and comprehensive legal reform are still needed to ensure that South Carolina has a fair and predictable legal climate.

The General Assembly focused on tort reform in 2005 and passed H.3008 in 2005, which addressed issues such as a joint and several liability threshold of 50%; venue reform; reduction of the statute of repose from 13 to 8 years; frivolous lawsuit sanctions; changing of the post judgment interest rate from 12% to prime plus 4%; and a ban on certain types of lawyer advertisements. Also in 2005, the General Assembly enacted laws placing reasonable limits on non-economic damages at \$350,000 in medical malpractice cases.

In 2007, the General Assembly dealt with workers' compensation, passing legislation that phased out the Second Injury Fund and streamlined the judicial process so workers' compensation appeals bypass trial courts and move directly to the Court of Appeals. Six anti-business, workers' compensation court decisions were also addressed.

South Carolina has been noticed for its civil justice reform efforts and has received higher rankings for being a pro-business state. For example in 2007, South Carolina was ranked second among Pollina's Corporate Top 10 Pro-Business States. The Pollina ranking is based on 28 criteria, including: taxes, right-to-work legislation, work force, energy costs, workers' compensation legislation, and jobs lost or gained. In the study, Dr. Pollina says, "From A to Z, South Carolina understands economic development and is clearly making the effort to continue its attractiveness to business. When it comes to economic development, it's a state that other states should emulate."

Southern Business & Development Magazine listed South Carolina in its annual Top Ten list edition for 2007. Being in the top ten is a great achievement for South Carolina, but it is important to note that neighboring southern states are also on the list and ranked lower than South Carolina. Although improving, South Carolina is still racing to catch up with its competitors.

Continued Challenges to Business Growth and How to Overcome

Although some advancement has been made with workers' compensation and tort reform in South Carolina, the state can better position itself as a business competitor by implementing further civil justice reform. In his article, "Risky Business," Steven Hantler explains that many companies are learning that liability reform has a strong bottom-line impact. For example in Michigan, liability filings declined by 67% after liability reforms were enacted.

Without standard guidelines in place to evaluate physical impairments in South Carolina, workers' compensation awards vary dramatically. For instance, national disability ratings exceed AMA guidelines by 14 percent. South Carolina workers' compensation commissioners; however, exceed AMA guidelines by an average of 81 percent. In a recent Op-ed in the Greenville News, Ben Haskew, President and CEO of the Greenville Chamber of Commerce, cited this fact and others such as how South Carolina was ranked as the 44th worst state in terms of workers' compensation, according to the 2007 Small Business Survival Index published by the Small Business & Entrepreneurship Council in Washington. This ranking has drastically increased over the past four years. In 2004, South Carolina ranked 10 on the same index and then jumped to 38 in 2006.

In a 2006 article from *USA Today*, Robin S. Conrad, Senior Vice President of the National Chamber Litigation Center of the US Chamber of Commerce said that failure to "enforce existing standards and limits..." results "...too often in arbitrary and grossly excessive awards."

The National Center for Policy Analysis issued a report in September 2006 suggesting that one prescription for flawed workers' compensation systems was to, "Use AMA Guidelines to rate impairment...Adhering to the AMA Guides for the final rating of permanent disability would cap the size of the anticipated award, and therefore lower the frequency of claim." By adopting AMA guidelines for determining workers' compensation awards, South Carolina could bring certainty and equality to the state's legal environment. According to Former Michigan Governor and President of the National Association of Manufacturers, John Engler, 32 states have already adopted objective standards such as AMA guidelines to determine compensation awards. And Engler says, **"The National Council on Compensation Insurance estimates using objective standards, like the AMA guidelines, should save South Carolina businesses \$72 million--money that could go to expansion, payroll, and benefits."**

Over the past few decades punitive damages have gotten increasingly out of control in the US. According to the US Department of Justice, between 1996 and 2001, the number of known punitive damages verdicts of \$100 million or more doubled. Without a federal constitutional limit on punitive damages in place, damages are arbitrary, and there is no predictability for corporate defendants. **The US Chamber of Commerce's Harris Poll and the HWV Index found that placing reasonable limits on punitive damages was the single most important legislative issue in improving a state's legal climate.** Currently in South Carolina, there are not any limits on punitive damages, and multiple plaintiffs can punish a company many times for one decision. As of 2001, 15 states had placed limits on punitive damages, including Georgia, North Carolina, and Virginia, states that directly compete with South Carolina for business. Because the issue is so important to business leaders, South Carolina needs to follow the lead of its surrounding states and enact reasonable limits on punitive damages.

Excess punitive damages have been shown to stifle innovation and expansion. They also equate with jobs lost, including benefits and other costs. South Carolina cannot afford to lose more jobs. In November 2007, the South Carolina Employment Security Commission reported that the state's jobless rate rose to 5.8% in October 2007 as 2,100 South Carolinians became unemployed. The national unemployment rate remained stable during this time period at 4.7%.

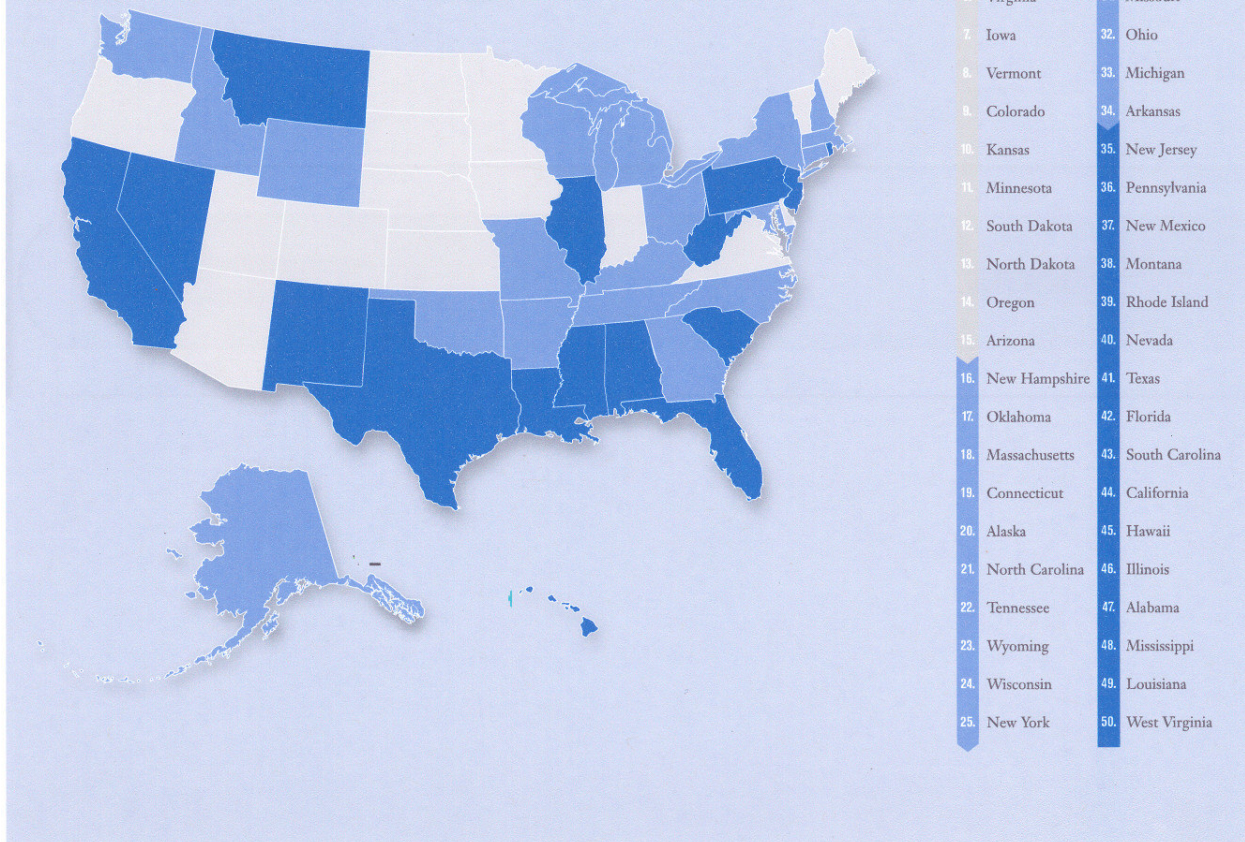
Further Reform Will Make South Carolina a Global Competitor

As South Carolina prepares for its economic future and works to gain a competitive advantage in the expanding, international market, action must be taken on the two solutions for bringing predictability, stability, and fairness to its legal climate -- instituting objective standards for determining workers' compensation awards and enacting comprehensive legal reform to create a predictable and stable litigation climate. With a fair and consistent legal environment in place South Carolina will gain ground on the global field.

Small Business Survival Index 2007
Appendix L: State Rankings of Workers' Compensation Benefits Per \$100 of Covered Wages

| Rank | State | Work Comp | Rank | State | Work Comp |
|------|-------------------|-----------|------|----------------|-----------|
| 1 | Dist. of Columbia | 0.31 | 26 | Iowa | 1.01 |
| 2 | Texas | 0.55 | 26 | New Mexico | 1.01 |
| 3 | Arizona | 0.58 | 28 | Alabama | 1.02 |
| 3 | Massachusetts | 0.58 | 29 | Colorado | 1.03 |
| 5 | Indiana | 0.61 | 30 | Mississippi | 1.04 |
| 6 | Arkansas | 0.62 | 31 | Nebraska | 1.06 |
| 6 | Virginia | 0.62 | 31 | North Carolina | 1.06 |
| 8 | New York | 0.68 | 33 | Florida | 1.09 |
| 8 | Utah | 0.68 | 34 | Louisiana | 1.11 |
| 10 | Maryland | 0.76 | 35 | Missouri | 1.18 |
| 11 | Rhode Island | 0.80 | 36 | Kentucky | 1.22 |
| 12 | Connecticut | 0.83 | 37 | Vermont | 1.23 |
| 12 | Georgia | 0.83 | 38 | Hawaii | 1.24 |
| 12 | South Dakota | 0.83 | 39 | Pennsylvania | 1.25 |
| 15 | New Jersey | 0.85 | 40 | Ohio | 1.26 |
| 16 | Nevada | 0.86 | 41 | Wisconsin | 1.27 |
| 17 | Michigan | 0.87 | 42 | Idaho | 1.33 |
| 18 | New Hampshire | 0.88 | 43 | Oklahoma | 1.34 |
| 18 | North Dakota | 0.88 | 44 | South Carolina | 1.37 |
| 20 | Minnesota | 0.89 | 45 | Maine | 1.44 |
| 21 | Kansas | 0.90 | 45 | Wyoming | 1.44 |
| 22 | Delaware | 0.92 | 47 | California | 1.59 |
| 23 | Oregon | 0.94 | 48 | Alaska | 1.70 |
| 24 | Illinois | 0.98 | 49 | Washington | 1.72 |
| 24 | Tennessee | 0.98 | 50 | Montana | 2.11 |
| | | | 51 | West Virginia | 3.39 |

Legal Climate Overall Rankings by State



US Chamber's Legal Climate 2008 report