



ISSUE NUMBER 1 ***being challenged in court**

(Referred to the people by the Arkansas General Assembly)

Contingency Fees, Lawsuit Damages and Rules of Court

POPULAR NAME: An Amendment Concerning Civil Lawsuits and the Powers of the General Assembly and Supreme Court to Adopt Court Rules.

BALLOT TITLE: A proposed amendment to the Arkansas Constitution providing that a contingency fee for an attorney in a civil lawsuit shall not exceed thirty-three and one-third percent (33 1/3 %) of the net recovery; defining “contingency fee” as an attorney’s fee that is paid only if the claimant recovers money; providing that the General Assembly may amend the foregoing percentage by a two-thirds (2/3) vote of each house; limiting punitive damages awards for each claimant in lawsuits for personal injury, property damage, or wrongful death to the greater of (i) five hundred thousand dollars (\$500,000), or (ii) three (3) times the amount of compensatory damages awarded; defining “punitive damages” as damages assessed to punish and deter wrongful conduct; providing that the General Assembly may not decrease the foregoing limitations on punitive damages but may increase the limitations by a two-thirds (2/3) vote of each house; providing that the limitations on punitive damages do not apply if the factfinder determines by clear and convincing

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QUICK LOOK: What does your vote mean?

FOR: A FOR vote means you are in favor of changing the Arkansas Constitution regarding all of the components proposed. This includes prohibiting attorneys from charging clients more than 1/3 of the amount of money received in a lawsuit; establishing a maximum dollar amount people can receive in lawsuits for non-economic damages and punitive damages; allowing legislators to change the limits to contingency fees, non-economic and punitive damages at a future date without another vote of the people; giving state legislators the authority to set court rules and practices; and lowering the number of legislators required to approve changes to rules established by the Arkansas Supreme Court.

AGAINST: An AGAINST vote means you are not in favor of changing the Arkansas Constitution regarding one or more of all of the components proposed. This includes prohibiting attorneys from charging clients more than 1/3 of the amount of money received in a lawsuit; establishing a maximum dollar amount people can receive in lawsuits for non-economic damages and punitive damages; allowing legislators to change the limits to contingency fees, non-economic and punitive damages at a future date without another vote of the people; giving state legislators the authority to set court rules and practices; and lowering the number of legislators required to approve changes to rules established by the Arkansas Supreme Court.



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evidence that the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage to the claimant and that such intentional conduct harmed the claimant; limiting awards of non-economic damages in lawsuits for personal injury, property damage, or wrongful death to (i) five hundred

thousand dollars (\$500,000) for each claimant, or (ii) five hundred thousand dollars (\$500,000) for all beneficiaries of an individual deceased person in the aggregate in a lawsuit for wrongful death; defining “non-economic damages” as damages that cannot be measured in money, including pain and suffering, mental and emotional distress, loss of life or companionship, or visible result of injury; providing that the General Assembly may not decrease the foregoing limitations on non-economic damages but may increase the limitations by a two-thirds (2/3) vote of each house; providing that the General Assembly shall adopt a procedure to adjust the dollar limitations on punitive damages and non-economic damages in future years to account for inflation or deflation; providing that the Supreme Court’s power to prescribe rules of pleading, practice, and procedure for courts is subject to the provisions of this amendment; providing that the General Assembly, by a three-fifths vote of each house, may amend or repeal a rule prescribed by the Supreme Court and may adopt other rules of pleading, practice, or procedure on its own initiative; providing that rules of pleading, practice, and procedure in effect on January 1, 2019, shall continue in effect until amended, superseded, or repealed under the provisions of this amendment; providing that a rule of pleading, practice, or procedure enacted by the General Assembly shall supersede a conflicting rule of pleading, practice, or procedure prescribed by the Supreme Court; providing that certain other rules promulgated by the Supreme Court may be annulled or amended by a three-fifths (3/5) vote of each house of the General Assembly instead of a two-thirds (2/3) vote as presently stated in the Arkansas Constitution; and providing that this amendment becomes effective on January 1, 2019.

What is being proposed?

This amendment asks voters to approve changes to four parts of the Arkansas Constitution.

First, it proposes to add a section regarding contingency fees to Article 7 (Judicial Department). This section would:

- Prohibit attorneys from collecting a contingency fee that is more than 1/3 of the net amount of money a client receives in a civil lawsuit.
- Require the state legislature in 2019 to pass laws implementing the section, which would also include establishing penalties for collecting fees higher than allowed and defining terms such as “net amount of recovery.”

Second, the amendment would make changes to Section 32 (Workmen’s Compensation Laws – Actions for Personal Injuries). This section would:

- Define the terms “non-economic damages” and “punitive damages.”
- Establish a maximum amount of money a person receives as punitive damages in a lawsuit related to injuries resulting in death, or injuries to person or property. The maximum would be the greater of \$500,000 or three times the compensatory damages awarded.
- Establish a \$500,000 maximum limit that an injured person or his/her beneficiaries combined can receive as non-economic damages in a lawsuit related to injuries resulting in death, or injuries to person or property.
- Give legislators the authority to increase maximum amounts for non-economic and punitive damages in the future with a 2/3 vote of each house.
- Require the state legislature in 2019 to pass laws creating a procedure to adjust the punitive and non-economic limits in future years for inflation or deflation.

Third, the proposal would change Section 3 (Rules of Pleading, Practice, and Procedure) of Amendment 80 (Qualifications of Justice and Judges). This section would:

- Allow the state legislature to amend or repeal a rule of pleading, practice, or procedure established by the Supreme Court with a vote of 3/5 of each house.
- Allow the state legislature to create a rule of pleading, practice or procedure with a vote of 3/5 of each house.

Finally, the proposal would change Section 9 (Annulment of Amendment of Rules) of Amendment 80 (Qualifications of Justice and Judges). Specifically, it would:

- Lower the number of votes needed by state legislators from 2/3 to 3/5 to abolish or change rules established by the Supreme Court related to Court of Appeals, Circuit Courts, District Courts and “referees, masters and magistrates.”

How did this issue get on the ballot?

The Arkansas Senate and House of Representatives voted to

place Issue 1 on the 2018 General Election Ballot. The state legislature has the right to include up to three constitutional amendments on the general election ballot. Constitutional amendments require the approval of a majority of voters in a statewide election.

Who were the main sponsors of this amendment?

Sen. Missy Irvin of Mountain View and Rep. Bob Ballinger of Berryville.

How have voters, legislators and the judicial branch addressed contingency fees and injury damages in the past?

Voters approved amending Section 32 of Article 5 of the state constitution in 1938 by a vote of 77,028 (63%) in favor to 45,966 (37%) against. This changed the state workmen's compensation law to give legislators the power to establish the amount of compensation to be paid by employers for death or injuries to employees.

In 2003, a jury awarded a family \$15 million in compensatory damages and \$63 million in punitive damages in a lawsuit against a nursing home over an elderly woman's death. Shortly afterward, state lawmakers passed the Civil Justice Reform Act or Act 649 to change procedures related to civil

The following statements are examples of what supporters and opponents have made public either in media statements, campaign literature, on websites or in interviews with Public Policy Center staff. The University of Arkansas System Division of Agriculture does not endorse or validate these statements.

What do supporters say?

- Issue 1 will protect everyday Arkansans by limiting how much of their settlement can be taken by their lawyers as a contingency fee and provides for fair judgments and the ability to limit frivolous lawsuits that harm small businesses.
- Arkansas is currently targeted by out-of-state attorneys seeking frivolously large rulings against our companies because we have softer tort reform laws than most of our neighboring states.
- Issue 1 will remove one more obstacle and help level the playing field with our neighbors as we work to grow jobs and recruit and retain physicians for our communities throughout Arkansas.
- Issue 1 helps Arkansas recruit doctors to care for loved ones. Arkansas ranks 48th in infant deaths, 44th in maternal deaths and 50th in environment for emergency care; The American College of Emergency Physicians has said to help combat its workforce shortages and improve overall access to emergency care, Arkansas should enact medical liability reforms such as a medical liability cap on non-economic damages.
- This authority is nothing new. Lawmakers have the authority to approve and/or adopt court rules in the federal system court system and in 16 other states.
- It's the legislative branch's job and responsibility to set policy and this restores that power back to the legislative branch of government.

What do opponents say?

- Issue 1 makes it more difficult for the poor to obtain justice in court.
- Issue 1 shields bad nursing homes, irresponsible trucking companies, corporate polluters, and other big businesses from lawsuits when they kill or injure someone.
- Issue 1's cap on non-economic damages devalues the lives of people who do not earn an income, such as stay-at-home moms, the elderly, children, and the disabled.
- Issue 1 shifts court-rulemaking authority into the legislature and thereby allows special interests and politics to directly interfere with due process, access to justice, and the fair and impartial administration of justice.
- As compared to other states, Issue 1 is an outlier in terms of the breadth of court rulemaking authority given to the legislature. It allows the General Assembly to adopt, on its own initiative, a rule of pleading, practice, or procedure. The U.S. Congress does not initiate its own court rules, and only a handful of states permit legislatures to initiate and adopt court rules that can supersede rules promulgated by the courts.
- The legislative branch has been scandalized recently by corruption, bribes, self-dealing, and collusion with special interest. This amendment will increase the power of insiders who can afford to lobby the legislators because court rulemaking will be moved from the judicial branch and its deliberate non-partisan process to the legislature where special interests wield too much power. It will be much easier for big money to set the rules up against every day citizens.

lawsuits. (Although Act 649 did not apply to the earlier lawsuit, the Arkansas Supreme Court eventually reduced the family's compensatory damages to \$4 million and punitive damages to \$21 million.)

Act 649 placed limits on when punitive damages could be awarded in lawsuits involving injuries or damages, established a \$1 million limit on punitive damage awards, established the locations where a lawsuit could be filed and the burden of proof required in a medical injury lawsuit, among other things. Supporters refer to these types of laws as "tort reform." The word "tort" refers to a wrongful act that causes harm or injury to another person. "Tort reform" refers to changes made in the civil justice system that affect a person or company's financial liability for harm or injury. These laws often involve a limit on how much a wronged individual can collect in a lawsuit.

The \$1 million limit was found unconstitutional in 2011 during a lawsuit involving rice farmers who successfully sued for losses they suffered after unapproved seeds showed up in American rice crops. The Arkansas Supreme Court also overturned other parts of the law over the years, leaving the constitutional amendment process as the only way to enact limits on damage awards.

In 2016, Health Care Access for Arkansans collected signatures from voters to put an amendment on the ballot that sought to limit attorney contingency fees and non-economic damages in medical lawsuits. The proposal was known as Issue 4.

The Arkansas Supreme Court struck Issue 4 from the ballot ahead of Election Day, saying the proposed amendment did not define "non-economic damages" for the voter and therefore the voter did not have enough information to make an informed decision on the measure.

What is Amendment 80 and when was it passed?

Voters approved Amendment 80 to the Arkansas Constitution in 2000 by a vote of 431,137 (57%) in favor to 323,647 (43%) against. This amendment repealed several sections of Article 7 (Judicial Department) of the constitution and revised the court system in a number of ways, including giving the Arkansas Supreme Court the power to establish court practices and procedures.

The following sections describe the proposed changes included in this amendment organized by the parts of the constitution that would be affected.



Section 1: Amend Article 7 of the Constitution, known as the Judicial Department, to create Section 53 - Contingency Fees

What would this section do?

Attorneys would be prohibited from being paid a "contingency fee" that is more than 1/3 of the net amount of money a client receives in a lawsuit. This prohibition would apply to lawsuits that are resolved without going to court, such as a settlement or arbitration, and to cases determined by a judge or jury. State legislators would be able to change the contingency fee limit in the future without voters approving another constitutional amendment. This would require a 2/3 vote of each house, or approval from 23 senators and 67 representatives.

Legislators would be required to enact laws to implement this section beginning with their next session in 2019. This includes establishing penalties for attorneys who do not abide by the 1/3 limit. It also includes defining terms such as "net amount of the recovery," which is not defined in the proposed amendment.

What is a contingency fee?

Attorneys receive payments from clients to cover expenses associated with their case.

A contingency fee is the amount of money an attorney receives for payment only if a lawsuit is won, unlike a fixed fee that a client owes regardless of the case's outcome. According to the American Bar Association, under a contingency fee arrangement, a lawyer agrees to accept a fixed percentage of the final amount paid to a client.

If a client wins, the lawyer's fee comes out of the money awarded and paid to the client. If a client loses, the attorney

doesn't receive any payment for his or her legal services, although a client may still be responsible for paying certain costs such as filing fees.

Lawyers and clients use this arrangement most often in cases involving injuries and workers' compensation. A client might agree to a contingency fee because he or she doesn't have enough money to hire a lawyer. The fee typically depends on the complexity of the lawsuit, required resources and how much money the attorney would likely spend while pursuing the lawsuit.

Is there currently a maximum amount that attorneys can charge clients in Arkansas for representing them in a lawsuit?

The amount people pay for legal representation in Arkansas depends on the contract agreed to by the attorney and client. There is no maximum contingency fee established by Arkansas law. However, Arkansas Code § 11-9-715 limits attorney's fees in workers compensation cases to 25 percent.

If approved, this amendment would create in the state constitution a maximum of 33 1/3 percent of the "net amount recovered," a phrase that would be defined in the 2019 legislative session. It also would give legislators the authority to raise or lower the limit in the future without another constitutional amendment.

What happens in other states?

Most courts have professional conduct rules that require a lawyer's fee to be "reasonable." The rule typically provides several factors to consider when determining the reasonableness of a fee, such as the time and labor required, the experience of the lawyer, and the likelihood that the case would prevent the attorney from working on other cases.

Arkansas' court rule on lawyer fees can be read online at <https://courts.arkansas.gov/rules-and-administrative-orders/court-rules/rule-15-fees-0>.

Some states go further and have passed laws that establish a limit on contingency fee rates. Some laws apply only to medical malpractice lawsuits, while others also apply to other types of cases. Tennessee caps attorney contingency fees in medical malpractice cases at 33 1/3 percent. Oklahoma caps contingency fees in lawsuits at 50 percent. There are states with no limits, states with laws that allow caps to be waived under certain circumstances, and states with a sliding scale for fees.

Section 2 – Amend Section 32 of Article 5 of the Constitution, known as the Workmen's Compensation Laws – Actions for Personal Injuries

What would this section do?

This section would establish a maximum dollar amount a person could receive in punitive damages and non-economic damages in a lawsuit against another party for injuries resulting in death, or injuries to person or property, including medical injuries.

State legislators would be able to change the maximum dollar amounts in the future without voters approving another constitutional amendment in two ways:

- Legislators could vote to increase punitive and non-economic damage caps. Increasing the cap would require approval from 2/3 of legislators in each house, or approval from 24 senators and 67 representatives.
- Legislators could adjust punitive and non-economic damage caps due to inflation or deflation. This section requires legislators to pass laws in 2019 to specify the process to adjust for inflation or deflation. The initial legislation would require a simple majority to pass (51 of the 100 members in the House of Representatives and 18 of the 35 members in the Senate). Any changes to that process in future years would require a vote of 2/3 of each house.

What are "non-economic damages"?

The amendment defines non-economic damages as "damages that cannot be measured in money, including pain and suffering, mental and emotional distress, loss of life or companionship, or visible result of injury."

These losses are separate from a person's lost income or medical care expenses, both past and future, that are often referred to as "economic damages." Examples of economic



damages include medical bills, lost pay, cost of repairs, or value of property damaged.

How much money could a person collect in non-economic damages under this proposal?

The answer depends on how many people are suing for non-economic damages. Non-economic damages could not exceed \$500,000 for an individual who is suing for injury. In situations where a person has died as a result of injuries, and the person has multiple relatives or beneficiaries who are seeking compensation for the person's death, the heirs would be limited to receiving a combined \$500,000 in non-economic damages. The heirs would share that amount instead of receiving individual damages.

What are "punitive damages"?

The amendment defines "punitive damages" as "damages to punish and deter wrongful conduct." Generally, this money is awarded to punish the wrongdoer and deter similar behavior in the future.



How much money could a person collect in punitive damages under this proposal?

Punitive damages could not exceed the greater of:

- \$500,000 or
- Three times the amount of money a person receives as compensatory damages. The proposal doesn't define "compensatory damages," but the term typically includes both non-economic and economic damages.

For example, if a person's compensatory damages were \$25,000, the most they could receive is \$500,000 in punitive damages. Whereas if a person received \$300,000 in compensatory damages, they could receive up to \$900,000 in punitive damages.

The proposed limits on punitive damages would not apply in situations where the defendant intentionally caused the injury or damage.

What does the Constitution say now?

Section 32 of Article 5 of the Arkansas Constitution currently says:

The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees, and to whom said payment shall be made. It shall have power to provide the means, methods, and forum for adjudicating claims arising under said laws, and for securing payments of the same. Provided, that otherwise, no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property; and in case of death from such injuries the right of action shall survive, and the General Assembly shall prescribe for whose benefit such action shall be prosecuted.

The proposed change would create an exception, allowing limits to be set on the amount of money people could receive in punitive and non-economic damages for injuries resulting in death or for injuries to people or property.

What happens in other states?

Laws regarding punitive and non-economic damages vary from state to state. Some states, like Arkansas, have no limits. Other states may have a limit on one type of award but not on another. The amounts also vary from state to state, with some having a sliding scale of what can be awarded and others having a limit on the overall amount a person can receive in an injury lawsuit. Some states have limits only in lawsuits involving injuries suffered in a medical setting while others cover non-medical situations.

Missouri, for example, has a \$400,000 limit on non-economic damages in medical malpractice lawsuits and a \$700,000 limit for catastrophic injury or death. But its cap on punitive damages was found unconstitutional by the state court. In Tennessee, punitive damages are limited to \$500,000 and non-economic damages range from \$750,000 to \$1 million.

Louisiana doesn't allow punitive damages except in cases involving drunk driving, sexual abuse of a child or domestic violence. The state limits economic and non-economic damages in medical malpractice cases to a combined total of \$500,000. Other states, like Arkansas, Arizona and Kentucky, have state constitutions that prohibit such limits.

Section 3: Amend Section 3 of Amendment 80, known as the Rules of Pleading, Practice, and Procedure

What would this section do?

This section would give the General Assembly authority to create court rules and to change or eliminate court rules established by the Arkansas Supreme Court.

State senators and representatives would have the power to pass laws amending or repealing a rule of pleading, practice, or procedure established by the Arkansas Supreme Court with a vote of 3/5 of each house (or approval from 21 senators and 60 representatives).

The amendment also would give legislators the authority to pass laws creating a rule of pleading, practice or procedure with approval of 3/5 of each house.

Rules passed by the state legislature would take precedence over those established by the Arkansas Supreme Court when there is a conflict between the two sets of rules.

Any rules set by the Supreme Court and already in effect as of Jan. 1, 2019 would remain in effect until changed by legislators.

What does “rule of pleading, practice, or procedure” mean?

The proposed amendment does not define this phrase but generally it refers to the rules and operating procedures that judges and attorneys follow in court. These rules touch on all aspects of law, from criminal to civil to family courts.

Some examples of what these rules govern include what types of evidence can be presented, who can testify as an expert, whether a losing party must pay the winner’s attorney’s fees, whether lawsuits must be filed where the plaintiff lives or where the defendant lives, what juries must consider, and whether a lawsuit is worthy to proceed.

What does the constitution say now?

Section 3 of Amendment 80 to the Arkansas Constitution currently says:

The Supreme Court shall prescribe the rules of pleading, practice and procedure for all courts; provided these rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as declared in this Constitution.

The proposed change would create an exception in the amendment and give legislators the authority to pass laws establishing, changing and eliminating court rules.

How are rules of pleading, practice and procedure currently made in Arkansas?

The Arkansas Supreme Court has the constitutional authority to create the rules of pleading, practice and procedure. Historically, the Supreme Court has used a committee process to review proposed rule changes.

Committees tend to consist of attorneys, judges and others interested in the subject matter. A committee may be asked by the court or by the public to review a proposed rule or change, followed by a discussion and public comment



period. The Supreme Court would then decide whether to enact a rule.

What happens in other states?

Authority over court rules has varied throughout the history of the United States. When some states were created, early leaders gave rulemaking authority to courts. In other states, such as Arkansas, legislatures initially had greater control over procedural rules and a shift to the courts took place over time.

The relationship between the legislature and the court system varies from state to state. In some states, the legislature can change court rules. Some can veto court rules. Some can create rules as long as they don’t conflict with state law. In others, the court has the final say.

Section 4 – Amend Section 9 of Amendment 80, known as the Annulment or Amendment of Rules

What would this section do?

This section would lower the number of state legislators required to abolish or amend rules established by the Supreme Court related to the Court of Appeals, Circuit Courts, District Courts and “referees, masters and magistrates.”

The amendment would lower the number required to approve legislation from 2/3 of each house (24 senators, 67 representatives) to 3/5 of each house (21 senators, 60 representatives).

What does the constitution say now?

Section 9 of Amendment 80 to the Arkansas Constitution currently says:

Any rules promulgated by the Supreme Court pursuant to Sections 5, 6(B), 7(B), 7(D), or 8 of this Amendment may be annulled or amended, in whole or in part, by a two-thirds (2/3) vote of the membership of each house of the General Assembly.

If passed, when would the changes in Issue 1 take effect?

All parts of the amendment would go into effect Jan. 1, 2019. The amendment would apply to lawsuits filed starting Jan. 1, 2019 and to contracts signed with attorneys for contingency fees on and after Jan. 1, 2019.

Where can I find more information?

The complete wording of this amendment can be found at www.uaex.edu/issue1

The following is the proposed constitutional amendment name and title as they will appear on the state's November General Election ballot.

Issue No. 1

(Popular Name)

An Amendment Concerning Civil Lawsuits and the Powers of the General Assembly and Supreme Court to Adopt Court Rules

(Ballot Title)

A proposed amendment to the Arkansas Constitution providing that a contingency fee for an attorney in a civil lawsuit shall not exceed thirty-three and one-third percent (33 1/3 %) of the net recovery; defining "contingency fee" as an attorney's fee that is paid only if the claimant recovers money; providing that the General Assembly may amend the foregoing percentage by a two-thirds (2/3) vote of each house; limiting punitive damages awards for each claimant in lawsuits for personal injury, property damage, or wrongful death to the greater of (i) five hundred thousand dollars (\$500,000), or (ii) three (3) times the amount of compensatory damages awarded; defining "punitive damages" as damages assessed to punish and deter wrongful conduct; providing that the General Assembly may not decrease the foregoing limitations on punitive damages but may increase the limitations by a two-thirds (2/3) vote of each house; providing that the limitations on punitive damages do not apply if the factfinder determines by clear and convincing evidence that the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage to the claimant and that such intentional conduct harmed the claimant; limiting awards of non-economic damages in lawsuits for personal injury, property damage, or wrongful death to (i) five hundred thousand dollars (\$500,000) for each claimant, or (ii) five hundred thousand dollars (\$500,000) for all beneficiaries of an individual deceased person in the aggregate in a lawsuit for wrongful death; defining "non-economic damages" as damages that cannot be measured in money, including pain and suffering, mental and emotional distress, loss of life or companionship, or visible result of injury; providing that the General Assembly may not decrease the foregoing limitations on non-economic damages but may increase the limitations by a two-thirds (2/3) vote of each house; providing that the General Assembly shall adopt a procedure to adjust the dollar limitations on punitive damages and non-economic damages in future years to account for inflation or deflation; providing that the Supreme Court's power to prescribe rules of pleading, practice, and procedure for courts is subject to the provisions of this amendment; providing that the General Assembly, by a three-fifths vote of each house, may amend or repeal a rule prescribed by the Supreme Court and may adopt other rules of pleading, practice, or procedure on its own initiative; providing that rules of pleading, practice, and procedure in effect on January 1, 2019, shall continue in effect until amended, superseded, or repealed under the provisions of this amendment; providing that a rule of pleading, practice, or procedure enacted by the General Assembly shall supersede a conflicting rule of pleading, practice, or procedure prescribed by the Supreme Court; providing that certain other rules promulgated by the Supreme Court may be annulled or amended by a three-fifths (3/5) vote of each house of the General Assembly instead of a two-thirds (2/3) vote as presently stated in the Arkansas Constitution; and providing that this amendment becomes effective on January 1, 2019.

FOR

AGAINST