

Lawsuit Abuse

One of the most harmful strains on our economy is the cost to industry and consumers of abusive litigation. Plaintiffs' attorneys and activists try to manipulate the civil justice system for their own ends at the expense of the public. The American tort system costs our economy billions of dollars each year: \$246 billion, or \$845 for every person, in 2003 alone, and those costs are increasing rapidly. The growth of tort costs has exceeded the growth in GDP by 2 to 3 percentage points over the past 50 years.

This is particularly important during an economic downturn when frivolous litigation and attempts to regulate through litigation result in such high costs and liability that our economic recovery is diminished or even reversed.

In just one area alone, the huge increase in medical malpractice insurance rates has contributed significantly to the problems in our health care system, making it difficult for doctors to provide care, encouraging the harmful practice of "defensive medicine," and raising the costs of obtaining quality health care for everyone. Open-ended liability that is not checked by considerations of efficiency and fairness inevitably leads to litigation abuse and other kinds of unintended consequences, including vital drug treatments or other consumer products being withdrawn from the market because of overwhelming liability risks. Our civil justice system can be protected, improved, and made more efficient, while bringing greater fairness and predictability to market participants and citizens generally. This is an issue vital to the economy of the country as well as the health and well-being of Americans.

RECOMMENDATIONS

Federal Policy

1. Support preemption in areas subject to proper federal regulation. When a federal agency's experts approve a product or device based on its safety and effectiveness pursuant to a federal regulatory program, that determination should not be subject to reversal by juries in 50 states or by local regulators seeking to impose their own standards. The Constitution permits the federal government to set federal standards for interstate commerce, and Congress should not be undermining those existing standards as a handout to the trial lawyers.

Notes

2. Oppose federal policies that encourage and facilitate lawsuit abuse. Proposals that increase the amount of contentious litigation or that drive up the expense and difficulty of litigation put a damper on entrepreneurship and economic growth and put justice out of reach for many individuals and businesses.

3. Discourage regulation through litigation. Under our Constitution, how and when commerce is regulated is determined by Congress and state legislatures. Measures that encourage or allow courts to regulate through litigation damage specific industries, retard economic growth, undermine democratic accountability, and hurt consumers.

4. Encourage arbitration as an alternative to litigation when voluntarily agreed to in advance (and not imposed by law).

Arbitration serves as a beneficial alternative to litigation because it provides a more expeditious and less expensive resolution of disputes. It would be a major error for Congress to invalidate arbitration clauses in employment, consumer, brokerage, and other contracts as has been proposed. In contrast, congressional imposition of forced arbitration on parties who do not bargain for it, as proposed in the Employee Free Choice Act (card-check legislation), should be resisted in all but the most exceptional circumstances.

5. Support medical liability reform while respecting the role of the states. Many states have passed legislation that caps noneconomic damages and limits attorney contingency fees, helping to speed settlement of valid claims, providing injured patients with a greater share of recoveries, reducing medical malpractice premiums, and eliminating or reducing shortages of physicians and medical facilities. Congress should not interfere with these important reforms of fundamental state law.

6. Oppose all efforts to eliminate the protections provided against abusive litigation to health and pension plans under the Employee Retirement Income Security Act. ERISA protects the interests of employee benefit plan participants and their beneficiaries by establishing standards of conduct for plan fiduciaries and by providing for appropriate remedies and access to the federal courts while preventing abusive litigation that could significantly raise the costs of such plans.

State Policy

1. Place reasonable limits on punitive damages and specify the standards under which they can be awarded. For example, only reckless or intentional conduct should create liability for punitive damages.

2. Implement medical liability reform by capping noneconomic damages and limiting attorney contingency fees. Limiting attorney contingency fees is justified not only to ensure fairness to prospective plaintiffs but as a matter of fundamental legal ethics.

3. Implement strict jurisdictional and venue requirements for state courts that will prevent venue shopping and other abusive procedural actions by plaintiffs' attorneys. When plaintiffs' attorneys can file lawsuits in jurisdictions where there is no real nexus with the parties, the alleged wrongdoing, or the supposed injuries, there is an incentive to file frivolous and abusive claims.

4. Prohibit state attorneys general from using private law firms to prosecute actions on behalf of states when compensation is based on a contingency fee agreement. State attorneys general have a professional and ethical obligation to enforce the law in a fair and impartial manner that is in the best interests of all of the citizens of their state. Private attorneys, whose compensation is based on a contingency fee, have an inherent conflict of interest and will not necessarily act in the best interests of the state government.

5. Prohibit product liability lawsuits against manufacturers who are in compliance with federal regulatory requirements governing the safety and effectiveness of their products. For example, warnings about the side effects of beneficial drugs that have already been evaluated by the Food and Drug Administration should not be second-guessed by individual juries in the District of Columbia and the 50 states. Otherwise, vital drugs will be withdrawn from the market by manufacturers who will be faced with dozens of different and potentially conflicting rules.

FACTS AND FIGURES

- From 1996 through 2005, more than 135 million civil lawsuits were filed in state courts and payouts for tort losses and insurance premiums for state tort cases increased 60 percent in inflation-adjusted dollars for the same period.
- Fully 83 percent of the American people believe that frivolous lawsuits are a problem, and 79 percent agree that any expansion of the opportunity to file such suits by Congress will have a negative effect on the economy.
- The United States tort system costs our economy billions of dollars each year: \$246 billion, or \$845 for every person, in 2003 alone.
- One study shows that 83 percent of doctors practice defensive medicine by ordering unneeded tests and treatments, costing the American health care system in excess of \$100 billion annually.
- Another study estimates that the impact of the current tort system on medical expenditures is \$124 billion annually, with an additional \$38 billion in reduced access to health care.

ADDITIONAL RESOURCES

Edwin Meese III and Hans A. von Spakovsky, "The Trial Lawyers' Earmark: Using Medicare to Finance the Lifestyles of the Rich and Infamous," Heritage Foundation *Legal Memorandum* No. 47, August 28, 2009, at <http://www.heritage.org/Research/LegalIssues/lm0047.cfm>

Hans A. von Spakovsky, "Killing Americans by Stifling Medical Innovation: The Medical Device 'Safety' Act of 2009," Heritage Foundation *Legal Memorandum* No. 46, August 4, 2009, at <http://www.heritage.org/Research/LegalIssues/lm0046.cfm>

Hans A. von Spakovsky and Brian W. Walsh, "Correcting False Claims about the New False Claims Act Legislation," Heritage Foundation *Legal Memorandum* No. 42, July 2, 2009, at <http://www.heritage.org/Research/LegalIssues/lm0042.cfm>

Hans A. von Spakovsky and Andrew M. Grossman, "Promoting the General Welfare Through Civil Justice Reform," Heritage Foundation *Special Report* No. 38, January 6, 2009, at <http://www.heritage.org/Research/LegalIssues/sr0038.cfm>

Massachusetts Medical Society, "Investigation of Defensive Medicine in Massachusetts," November 2008, at http://www.massmed.org/AM/Template.cfm?Section=Research_Reports_and_Studies2&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=27797

Lawrence J. McQuillan, "U.S. Tort Liability Index: 2008 Report," Pacific Research Institute, at <http://liberty.pacificresearch.org/publications/us-tort-liability-index-2008-report-2>

Lawrence J. McQuillan, "Tort Law Tally," Pacific Research Institute, April 2009, at <http://liberty.pacificresearch.org/publications/tort-law-tally>

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