

### **33. Tort Reform**

#### ***Congress should***

- cite constitutional authority before federalizing tort actions traditionally reserved to the states,
- respect the laboratory of tort law provided by the 50 states,
- expand the jurisdiction of the federal courts over interstate class actions,
- pass the "Right to Choose Your Lawyer Act" for class actions in federal court, and
- limit the rights of government plaintiffs suing in federal court on behalf of private parties.

A funny thing happened to tort law on the way to the new millennium. For centuries tort liability was a vital and well-functioning component of our common law. Suddenly, for all but plaintiffs' lawyers, tort law is like the Internal Revenue Service: almost no one respects it, and just about everyone believes it should be "fixed." Too often, today's tort law produces huge awards without fault, without causation, even without real damages. Modern tort law discourages personal responsibility, yet the *encouragement* of responsible behavior was historically one of its principal attributes. Because individuals are able to use modern tort law to shift the costs of their behavior to others, we have seen an explosion of litigation, boundless punitive damage awards, and unjustified class actions and government-sponsored litigation. Tort law is being transformed into the crassest kind of public legislation—the transfer to political "losers" of the costs of supporting the lifestyles of political "winners." The result is increased costs of everything for everybody.

In a free society, one person's obligation to another person can arise under contract or tort. A contract is an agreement under which someone willfully exchanges some aspect of liberty for goods or services that are

more highly valued. Tortfeasors, on the other hand, have no intention of incurring obligations. A tort suit occurs when someone claims to have suffered a loss, without his consent, inflicted by another party. Holding a contract debtor liable is philosophically easy: after all, the debtor agreed to be held liable when he made his pledge. But on what grounds can we justify holding tortfeasors to obligations they did not voluntarily accept? Consider two very different answers to that question.

One approach to tort law—generally characterized as “corrective justice”—holds a defendant liable if and only if he wrongfully caused a plaintiff’s injury. The common law of tort typically followed the corrective model. Thus, if a defendant did not behave unreasonably, or if his unreasonable behavior was not the legal cause of the plaintiff’s injuries, the tort suit would be dismissed. Likewise if the plaintiff voluntarily assumed the risk of injury or sought to recover for losses he didn’t actually suffer.

A second approach, all too often advocated in our nation’s law schools, divorces tort law from corrective justice. Rather, tort liability is viewed either as a means of achieving a “fairer” distribution of economic resources—where “fairness” is defined, naturally, by the government—or as a means of punishing politically unpopular defendants. If tort law’s goal is distributive or punitive, rather than corrective, then of course a defendant may be held liable without any wrongfulness, without legal causation, even without damages. Recent tort litigation, at both the state and federal level, has frequently embraced the distributive-punitive model.

That, in a nutshell, is the problem. This chapter examines a few steps that Congress should take to fix tort law. At the outset, however, a threshold test must be passed before the federal government may legitimately intercede. Congress may not act without constitutional authority. Because tort law is traditionally and constitutionally reserved to the states, the federal role in tort reform is indeed limited.

### ***Cite Constitutional Authority before Federalizing Tort Actions Traditionally Reserved to the States***

Most federal tort reform proposals are plainly incompatible with our federal structure and the rule of law. The Constitution does provide that Congress can “regulate Commerce . . . among the several States.” That power was conceived when the states routinely erected protectionist barriers to the free flow of goods and services; it authorizes Congress to remove those barriers. Over the last 65 years, many courts have read the Commerce Clause far more broadly in upholding federal regulation of virtually all

private activity on the grounds that everything, ultimately, affects commerce. In so doing, courts have allowed Congress to turn the commerce power on its head—instead of striking down state barriers to interstate commercial activity, Congress has erected federal barriers and thereby prevented the states from serving as competitive laboratories of law.

Rules of tort liability often do “affect” interstate commerce, but federal intervention is justified only when state tort rules would truly impede the free flow of trade among the states. In 1995, the Supreme Court took a step toward reaffirming that important principle. In *United States v. Lopez*, the Court held that the Gun-Free School Zones Act of 1990, which banned guns within 1,000 feet of a school, exceeded Congress’s authority under the Commerce Clause, in part because Congress made no finding that the possession of firearms near schools involved interstate trade. During its 2000 term, the Court confirmed and extended *Lopez* in *United States v. Morrison*, which held that a federal tort suit for sexual battery under the Violence Against Women Act was unconstitutional, even though Congress had taken care to issue fig-leaf “findings” that sexual assaults in the aggregate “affected” interstate commerce.

Clearly, lip service to the Commerce Clause is no longer sufficient. Before federalizing tort actions traditionally reserved to the states, Congress must show that it has constitutional authority to do so.

### ***Respect the Laboratory of Tort Law Provided by the 50 States***

At the state level, tort law varies from one jurisdiction to another. At its worst, in states like New Jersey, Alabama, and Mississippi, tort law has tended to force corporations to insure careless local residents against injuries that were primarily their own fault. Corporations from near and far are victimized by tort law, and the costs of their victimization are borne by shareholders, workers, and consumers across the country.

Because abusive state tort rules act much like a tax on productive activity, the more such rules are applied, the more productivity, or wealth, declines. Wealth can decline in many ways. For example, customers will pay more for products if the manufacturers of those products have to pay for injuries caused by negligent consumers. Physicians will avoid practicing in jurisdictions with unreasonable malpractice rules or will charge higher fees to cover their expected and unjustified tort liability. Children and swimmers will enjoy life less if playgrounds cannot be built or diving boards profitably installed at pools. Those costs produce powerful in-state lobbies for tort reform.

Since the so-called torts crisis of the mid-1980s, virtually all 50 states have enacted some form of tort reform. The revisions have varied substantially—from caps on punitive damages to the creation of “statutes of repose” (bars to suits for failures of very old products) to the modification of “joint and several liability” (the “deep-pockets” rule that permits plaintiffs to collect all of a damage award from any one of multiple defendants, even if the paying defendant was responsible for only a small fraction of the harm). Some state reforms have arguably been misguided; other meaningful reforms have been invalidated by state supreme courts under the states’ constitutions. But that is no justification for federal lawmakers to intervene. The federal government must respect the laboratory of tort law provided by the 50 states.

### ***Expand the Jurisdiction of the Federal Courts over Interstate Class Actions***

Until recently, there was little evidence that state tort law intrinsically discriminated against out-of-state firms. Such bias *would* authorize federal remedial action under the Commerce Clause. Recent scholarship suggests, however, that state courts with popularly elected judges are in fact much more likely to rule against out-of-state firms in tort cases.

Moreover, in class action litigation, some state courts have been willing to certify plaintiffs’ classes of unmanageable size, divergent interests, and varying injuries. Trial lawyers have learned which states offer “drive-by” class certification. For example, in Florida’s infamous *Engle* tobacco case, when a jury last July awarded plaintiffs \$145 billion in punitive damages, the class included some smokers with sore throats and others with lung cancer, some who had ceased smoking 20 years ago and others who had just started. At a minimum, a class of plaintiffs must experience similar injuries arising out of a common set of underlying facts.

The Florida tobacco class would never have been certified by a federal court. Yet the verdict in that case, should it be affirmed, will impose costs on out-of-state defendants, and those costs will, in good part, be passed along to out-of-state smokers, presumably for the benefit of other smokers who may well have smoked elsewhere for most of their lives before retiring to Florida. In effect, a state court will have undertaken to establish national tobacco policy—an area that quintessentially comes under Congress’s commerce power.

Congress can protect interstate commerce by expanding the right of out-of-state tort defendants to have class actions heard in federal court.

At present, state claims may not be litigated in federal court if any class member is a citizen of the same state as any defendant. Thus, plaintiffs can prevent “removal” of a case to federal court (that is, they may ensure that the case will be tried by a friendly state court) by including an in-state party as one of the defendants. Once state jurisdiction has been confirmed, the suit against the in-state defendant is typically settled or even dropped, leaving the out-of-state defendant to the tender mercies of the state court.

A better rule, originally proposed by Rep. Henry J. Hyde (R-Ill.), would allow a defendant to transfer a class action to federal court if “any member of a proposed plaintiff class is a citizen of a State different from any defendant.” Congress should enact the Hyde bill, known as the Class Action Jurisdiction Act of 1998 (H.R. 3789, 105th Cong.)—reintroduced, in somewhat modified form, by Rep. Bob Goodlatte (R-Va.) as the Interstate Class Action Jurisdiction Act of 1999 (H.R. 1875, 106th Cong.).

### ***Pass the Right to Choose Your Lawyer Act for Class Actions in Federal Court***

Federal Rule of Civil Procedure 23, which controls class actions in federal courts, was significantly revised in 1966. Before then, to seek money damages in a class action lawsuit, individuals had to indicate affirmatively that they desired to be included in the plaintiff class. The 1966 reforms reversed that procedure: thereafter, individuals who qualified for class membership were presumed to be part of the class unless they expressly opted not to be. Overnight the scope of money damage lawsuits—and the financial exposure of defendant corporations—multiplied many times over. A large number of state courts altered their own class action rules to match the changes in the federal rule.

With the advent of “mass tort” litigation in the 1980s, class actions were further transformed. Many courts now permit class action treatment of mass torts despite exhortations by the 1966 reform panel *not* to use class actions in personal injury suits. Frequently, those lawsuits do not go to trial. Instead, defendants pay what one commentator termed “the 90s form of greenmail”—they settle by offering large sums to class attorneys but virtually nothing to plaintiffs, thus escaping substantial litigation costs. An earlier Florida claim, brought by the same attorneys who brought the *Engle* case, is a particularly egregious example. A national class of 60,000 airline flight attendants sued for damages, claiming they had been harmed by “secondhand smoke.” To avoid litigation, tobacco companies agreed

to disgorge roughly \$349 million, of which \$300 million went for further research, \$3 million for expenses, and the rest lined the pockets of the class's attorneys. Plaintiffs received nothing!

One useful step toward restoring control of plaintiff classes to the members of each class rather than trial lawyers would be to enact legislation patterned on the Right to Choose Your Lawyer Act, offered by Rep. Christopher Cox (R-Calif.). In some respects, the Cox proposal would return us to the pre-greenmail days of 1966: First, the class attorney has to provide each potential client with a good-faith estimate of the likely amount of legal fees, how they are to be calculated, and the relative recovery by the client. Second, the attorney must furnish the court with a written statement that the client wishes to join the class. Third, the attorney may not personally solicit individual class members. Fourth, no settlement or judgment shall bind people who are not members of the class.

Congress should pass the Right to Choose Your Lawyer Act, or its equivalent, and apply its provisions to all class actions in federal court.

### ***Limit the Rights of Government Plaintiffs Suing in Federal Court on Behalf of Private Parties***

After repeatedly denying that the federal government had a legitimate cause of action against cigarette makers to recover health care expenditures for smoking-related diseases, Attorney General Janet Reno has launched a multi-billion-dollar lawsuit against the major tobacco companies. The suit is a travesty, and Congress should deny funding for any further litigation. (See Chapter 21 of this *Handbook*.) But, in the longer term, the appropriate remedy is to limit the rights of government plaintiffs suing in federal court on behalf of private parties.

Until very recently, juries in tobacco cases seem to have understood that consumers of a legal product, if they are informed about the risks associated with the product, are responsible for any harm that ensues. Under that "assumption of risk" rule, the federal government could still sue tobacco companies for Medicare and other health care outlays, but the industry would not be liable if it could show that the smoker was aware of the risk and nonetheless elected to smoke.

Taking a page from the states' Medicaid recoupment suits, the Justice Department has asked the court to eliminate assumption of risk as a defense in the government's claim against the tobacco industry. For good measure, the department wants the new rule to apply retroactively. Still worse, to head off any remaining possibility of an adverse jury verdict, the govern-

ment insists that it need not prove individual causation. Instead of demonstrating that a particular Medicare recipient's illness was caused by smoking, the Justice Department would have to show only that certain injuries were more prevalent among smokers than nonsmokers.

If a smoker can show that he was defrauded, unaware of the risks, addicted by the industry's deception, and injured as a result of smoking, then he may be able to prevail in court. But the rules must be objective and evenhanded—the same rules that apply to an individual plaintiff must apply to all plaintiffs. Government health care systems can sue for smoking-related expenditures just as an insurance company can, but they must step into the shoes of the smoker, prove case-by-case causation and damages, and convince a jury that the smoker did not assume the risk.

More generally, when the federal government sues to recoup costs it has allegedly paid on behalf of a private party, it must have no greater right to recover than would that person if he were to sue directly. That rule is the essence of a bill introduced by Sen. Mitch McConnell (R-Ky.), the Litigation Fairness Act of 1999, (S. 1269, 106th Cong.). McConnell's proposal should be enacted, but its applicability should be limited to federal causes of action. Unless a rule of tort law can somehow be justified as necessary and proper to the performance of an enumerated federal power, Congress may not impose such a rule on state courts.

## **Conclusion**

Modern tort theories would see every "victim" compensated by corporate America; those theories have penetrated deeply into the psyches of many judges and jurors. As a result, the cost of insurance and of goods and services now includes a "tort premium" that far exceeds the cost of corporate misbehavior. And the producers of the goods and services that make the American economy strong have come to believe that no matter what they do, no matter how responsibly they behave, they are going to be held liable for the negligence of others.

Those problems are indeed real. But no matter how real the problem, if there is no constitutional authority, Congress may not intercede. By respecting state jurisdiction over most tort actions, Congress would cease doing harm. And by expanding the jurisdiction of the federal courts over interstate class actions, passing the Right to Choose Your Lawyer Act for class actions in federal court, and limiting the rights of government plaintiffs suing in federal court on behalf of private parties, Congress can make

an important contribution to solving the torts problem and reestablishing corrective justice as the basis of tort law.

***Suggested Readings***

Helland, Eric, and Alex Tabarrok. “Exporting Tort Awards.” *Regulation* 23, no. 2 (2000).

Krauss, Michael I. “NAFTA Meets the American Torts Process: O’Keefe v. Loewen.” *George Mason Law Review* 8, no. 1 (2000).

\_\_\_\_\_. “Restoring the Boundary: Tort Law and the Right to Contract.” Cato Institute Policy Analysis no. 347, June 3, 1999.

Niskanen, William A. “Do Not Federalize Tort Law: A Friendly Response to Senator Abraham.” *Regulation* 18, no. 4 (1995).

Priest, George. “The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law.” *Journal of Legal Studies* 14 (1985).

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