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The Downside Of Tort Reform

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In recent years, the country has been rightfully concerned with the emerging "lawsuit crisis," the glut of lawsuits that have overburdened our courts and, more importantly, hurt our businesses. Companies are more cautious due to fear of litigation, and their balance sheets are awash in legal fees, diverting money that would otherwise go to hiring and capital investment.

To combat this problem, many state governments have, over the past decade, begun pushing for tort reform. Tort reform can, in some cases, make a plaintiff's burden in commencing a lawsuit more difficult (by imposing various procedural prerequisites, such as requiring plaintiffs to obtain a certificate of merit from a third-party physician before commencing a medical malpractice lawsuit against their own doctor), and more importantly, it can discourage the filing of suit entirely by placing limits on what is recoverable.

For example, in 2005, Ohio enacted comprehensive tort reform, which, among other things, capped noneconomic damages in non-catastrophic injury cases, R.C. §2315.18, as well as capped punitive damages on most tort claims, O.R.C. § 2315.18.

Many frivolous suits are filed based on the simple calculus that even if the case is weak, it is still worth filing because you never know what might happen; maybe you will get lucky and a "runaway jury" will give you a big verdict. It is this potential for hitting the proverbial jackpot that often leads plaintiffs and their lawyers to file weak or unfounded cases.

By imposing limits on recovery, such as foreclosing punitive damages in certain actions or capping the amount of damages that can be awarded overall, tort reform seeks to remove this incentive and clear the courts of these types of "Hail Mary pass"-style lawsuits. In addition, placing limits on damages provides businesses with more cost certainty, and eliminates the possibility that they could be subject to the kind of excessive verdicts that can wipe out an entire company.

States that pursue a tort reform agenda thus do so to protect the financial health of the businesses within their borders. And for the most part, this plan appears to be successful. But it is not foolproof. Indeed, in some situations, tort reform, rather than discouraging the filing of frivolous lawsuits entirely, only discourages the filing of those frivolous lawsuits in the tort reform state itself. In other words, instead of not filing suit at all, the plaintiff just files that same suit in a state that does not have tort reform. Tort reform, then, rather than discourage suit, can sometimes instead encourage forum shopping.

This issue is relevant in the products liability context, or in any kind of case where the alleged wrongful act may occur in a state separate from where the actual injury occurs. The law of jurisdiction, which guards against forum shopping, is more malleable under those circumstances where the subject matter of the suit touches various states. This results in giving the plaintiff a number of states to choose from when deciding where to file suit, and not surprisingly, plaintiffs may often choose to file suit in those states that do not have tort reform.

But just because a non-tort reform state may have jurisdiction over a matter does not mean that its less favorable substantive law necessarily applies. Indeed, jurisdiction is a separate question from choice of law. While a non-tort reform state may have jurisdiction over a matter, choice of law principles may dictate that the tort reform state's laws govern the legal obligations between the parties.

Due to the potential forum shopping created by tort reform, choice of law therefore becomes even

more crucial in defending cases, as the successful application of the tort reform state's law can substantially limit a defendant's liability. It also adds an additional layer of expense and complexity, however, to defending products liability and other civil cases. A choice of law analysis must be conducted on nearly every issue in the case; one state's law may govern the elements of the cause of action itself, while another state's law may govern the remedies and damages available for any proven claims.

Moreover, even within a certain category, say, damages, one state's law may govern one form of damages, such as punitive damages, while another state's law governs another form of damages, for example, attorneys' fees. These issue-by-issue choice of law questions are often difficult and time-consuming, and there are often no clear answers. This results in the expenditure of considerable time and expense on choice of law matters, and also creates numerous potentially appealable issues.

Tort reform, then, has several unintended consequences. It can lead to forum shopping, i.e., filing suit in a state that does not have tort reform, and it will often result in complex choice of law questions, which can be problematic, time-consuming and costly to address. Although tort reform is a step in the right direction, its lack of uniform application means plaintiffs will take steps to avoid it and file suit elsewhere, and a defense litigator must be prepared to handle the jurisdictional and choice of law issues that follow.

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