Torts pit lawmakers vs. courts

The battle over limiting court judgments continues in state capitols and state court rooms.

Fearful that big bucks lawsuits are driving away businesses, state lawmakers are again introducing tort reform bills into this year’s legislative sessions as they have in the past. However, a concurrent trend of state courts overturning reform legislation seems likely to continue.

A struggle for power between the branches of government is under way — and no winner is yet apparent. The question, sure to remain prominent for the foreseeable future, is: Who should set tort law, legislatures or state courts?

In 1999 sessions, states including Alabama, Texas and North Dakota instituted reforms to tort law. And over last summer, state high courts in Indiana, Oregon and Ohio overturned such laws. As more challenges work their way through the court system, the lifespan of reform legislation may be limited.

“The state courts are invalidating huge parts of the tort reform legislation to the consternation of supporters of tort reform,” New York University law professor Mark Geistfeld said. “There is much more judicial hostility to this kind of legislation than anyone was expecting.”

Since 1985, at least 87 decisions by...
Proponents say reforms are needed in the face of continuing high jury awards: In 1998, the top 10 verdicts awarded in the United States amounted to $2.8 billion, according to Lawyers Weekly USA. This represents an increase of 375 percent over the top 10 in 1997.

In the eyes of many, a 1999 case in which an Alabama family was awarded $581 million after being overcharged $1,200 for two satellite television dishes is a “poster child” for reform. But Geistfeld cautioned that such reports do not show the actual amount the judge decides to award and that one cannot draw conclusions from these figures. He points to studies that show juries are more sympathetic to defendants than plaintiffs.

Business killers?

“Tort reform” encompasses a wide range of legislative actions, including limits on product liability, caps on different kinds of damages, prohibition or limits on joint liability, timelimits on filing certain kinds of lawsuits and various types of immunity. In the past year, state legislatures have also taken up Y2K liability, in bills that extend immunity to public entities and employees or limit liability and economic damages for private groups. Thirteen states passed some type of Y2K liability bill in 1999.

The Texas Legislature passed several reform measures in 1999, including Y2K liability, a bill providing immunity to medical providers who volunteer for charitable organizations and a measure limiting contingency fees for private lawyers used in state litigation actions (SB 598, SB 215, SB 113). Gov. George W. Bush has made such reform a priority. In his 1995 State of the State address he said, “The most important thing you and I can do to improve our economy and create jobs in Texas is to reform our civil justice system.” The 1999 reforms built on a package of 1995 reforms that included venue restrictions, caps on punitive damages and penalties for frivolous lawsuits.

Like Bush, Alabama Gov. Don Siegelman sees tort reform as an important measure to attract business to his state. For years avoided by business due to a reputation for high jury awards and the nickname “tort hell,” Alabama enacted significant tort reforms in 1999. The measures include limits on punitive damages and joint liability, procedures to certify class actions and rules on venue (SB 137, SB 72, SB 305). Larry LeClair, director of Legislative Affairs for the American Tort Reform Association, foresees more reform in the 2000 session. The reforms have been led in part by Attorney General Bill Pryor.

A comprehensive reform package from the 1999 Florida legislative session includes caps on punitive damages, limits on joint and several liability, measures limiting product liability, immunity for employers giving information on job performance of former employees and limits on the liability of car owners or lessors for injury or damages (HB 775, SB 80).

Courts weigh in

Challenges to legislatures’ ability to set tort law mainly have been based on separation of powers and state courts often have ruled that state constitu-
tions do not allow legislatures to make tort law. Challenges also have been founded in the citizenry’s right to fair access to the courts and the right to a jury trial. The state courts become the final authority when they base their opinion on state constitutions because such rulings cannot be appealed to the U.S. Supreme Court. Court action on tort laws in 1999 included:

- In January, in a rare victory for legislators, the Virginia Supreme Court upheld a law limiting medical malpractice damages. The ruling said, “If it is permissible for a Legislature to enact a statute of limitations completely barring recovery in a particular cause of action without impinging upon the right to trial by jury, it should be permissible for the Legislature to impose a limitation upon the amount of recovery as well.”

- In July, the Oregon Supreme Court overturned legislation limiting damages for pain and suffering, saying the state constitution “prohibits the Legislature from interfering with the full effect of a jury’s assessment.”

- In July, the Indiana Supreme Court ruled that a statute of limitations for medical malpractice was unconstitutional.

- In August, Ohio’s Supreme Court overturned that state’s 1996 civil justice reform law, which had been one of the nation’s most comprehensive. The overhaul included limits on punitive and non-economic damages as well as time limits on suit filing.

The court ruled that the law violated the separation of powers and the single-subject bill rule. “The General Assembly may not enter upon the judicial business of setting the constitutionality of its own laws… or in any other exercise direct control, or encroach upon the judicial power.”

State legislators are dismayed by this trend of courts reversing their work. Many argue that legislatures are allowed to influence the judicial system in other ways, such as in setting criminal penalties. John Greene, in 1997 then-president of the Arizona Senate, wrote, “What some state courts appear to have done is not to render true ‘constitutional’ decisions, but substitute their own judgment for that of the legislature. This is simply wrong as a matter of public policy. We need a balance of power among the three branches of government at the state level.”

Legal experts on both sides of the issue point to outside influences. Some contend that the judicial reversals are simply restoring the rights of consumers after business interests used campaign contributions and lobbying to encourage legislators to pass pro-business tort reform laws. On the other side, some point to the efforts of trial lawyers to protect their livelihood. Geistfeld sees it differently, however. “Courts are looking at what the laws are doing. (In cases in which they overturn laws) they are not persuaded that these legislative reforms are helping consumers.”

When states sue

While challenges to tort reform work their way through the court system, and legislators propose new bills, other state leaders will work for new reforms. LeClair expects Alabama, California, Minnesota and New York, among others, to feature tort reform in their 2000 sessions. With legislative changes over the past two years, Cali-
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States that enacted tort reform legislation in 1999:

- Alabama
- Alaska*
- Arizona*
- Colorado*
- Florida*
- Louisiana
- Minnesota*
- Nebraska*
- North Carolina*
- North Dakota*
- Oklahoma*
- South Carolina*
- South Dakota*
- Texas*
- Utah
- Virginia*

*Reforms included (or were limited to) Y2K liability legislation

Source: American Tort Reform Association

What next?

What will stop the cycle of enactment and overrule? Some have suggested that legislators will target supreme court justices up for election. More conservative judges are likely to allow reform laws to stand. Geistfeld believes there are parallels to the U.S. Supreme Court during the Lochner era, when many of the New Deal reforms were overturned. Either courts will “correct” their actions, or the rulings will continue and the legislatures must decide whether to try to amend state constitutions to allow the laws.

For now, while state lawmakers continue to work for reforms, and verdicts reach higher and higher levels, state supreme courts are likely to retain the final say on tort reform law.

Resources

“Ohio top court rejects civil-justice reform” by Laura A. Tomaka, Stateline Midwest, October 1999. Available through the STARS database at www.csg.org

American Legislative Exchange Council Web site: Search under Civil Litigation and Tort Reform, www.alec.org


In late January, a state legislative outlook for tort reform was scheduled to be available from the American Tort Reform Association, (202) 682-1163, www.atra.org.