

Bush's Agenda on Tort Reform

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Abstract

According to the Bush Administration (www.whitehouse.gov), the U.S. tort system is expensive (the U.S. spends over \$230 billions a year on tort lawsuits), economically distorting (the costs of litigation per person in the U.S. are far higher than in any other major industrialized nation in the world; litigation costs small businesses, on average, about \$150,000 per year) and inefficient (over half of the compensation is eaten up by litigation costs). President Bush supports enactment of medical liability reform, class action liability reform, and asbestos litigation reform to curb the costs of lawsuits in the American legal system.

Summary

- 1. Medical Liability**
- 2. Class Action Lawsuits**
- 3. Asbestos Litigation**

Tort reform is a priority issue in the second term of the Bush Administration, as he remarked at the [2004 Republican National Convention](#) on September 2, 2004. Bush's agenda on tort reform focuses on three major issues:

1. Medical Liability

Medical liability reform has motivated a sharp division between several groups of interest. On one hand, doctors, health care providers and insurance companies support Bush's agenda on tort reform, whereas, on the other hand, victims and trial lawyers are against it.

2. Class Action Lawsuits

The same sharp division can be seen on class action lawsuit reform, where corporations support it and victims, trial lawyers, public interest organizations, and even state and federal judges are against it.

3. Asbestos Litigation

Similarly, asbestos litigation reform is strongly supported by asbestos-related companies and insurance companies, while trial lawyers and victims are the leading opponents.

Bush proposals, as well as its advantages and objections, can only be explained in the context of the current U.S. tort system. Many tort cases are decided by juries which tend to grant larger awards than courts do. Furthermore, punitive damages can be imposed under proper circumstances to punish defendants for wilfully malicious wrongful acts that go beyond mere negligence, thus resulting in even larger awards. Trial lawyers are paid on a contingency fee basis. The judiciary system is decentralized and divided into state and federal courts, which may lead parties to abuse the rules of jurisdiction and forum shopping.

The insurance industry is a powerful agent in the U.S. health care system. Patients can only access health care by buying health insurance (according to the [American Trial Lawyers Association](#), ATLA, 43 million Americans do not have any health insurance); doctors and health care providers buy malpractice insurance to face their eventual liabilities. Therefore, insurers decide whether patients get the tests and treatment they need, how doctors practice medicine, how much doctors are paid for their services, and decide how much doctors pay for medical malpractice insurance.

1. Medical Liability

«There is too many lawsuits around this country that are driving too many good doctors out of practice, that are driving up the cost of medicine. The cost of practicing defensive medicine in order to stay out of the courthouse or to defend -- to provide the defense necessary in case of a frivolous lawsuit is costing you \$28 billion a year at the federal level. And it's a problem. And I look forward to working with Congress to solve this medical liability issue.»
 George W. Bush, Clinton (Michigan), January 7, 2004.

Bush links medical liability reform to the improvement of the quality of health care. To that end, medical malpractice liability reform seeks increasing access to health care while enhancing the quality even further and constraining the rising costs. To achieve these objectives, Bush proposes a cap on judgments, arguing that it will reduce insurance premiums, thereby reducing defensive medicine and, consequently, total U.S. health care costs.

Bush proposal on caps is twofold:

- ✓ Capping non-economic damages at \$250,000, regardless of the number of defendants or the number of separate claims brought for the same injury.
- ✓ Reserving punitive damages for egregious cases where they are justified, and limiting them to reasonable amounts.

Advocates and opponents of caps on judgments argue the following:

- **Effects on health care costs**

- ⇒ According to the [American Medical Association](#) (AMA), medical liability costs have risen an average of 11.9 percent a year since 1975, outpacing increases in overall U.S. tort costs, representing 9.3 percent (AMA, ["Medical Liability Reform - NOW!"](#), December 3, 2004, p. 6).
- ⇒ The Congressional Budget Office (CBO) reports that malpractice costs represent less than 2 percent of overall health care spending (CBO, ["Limiting Tort Liability for Medical Malpractice"](#), January 8, 2004, p. 6). The ATLA relies on this report to break down Bush's arguments (Todd A. SMITH, ["Bush Administration Fakes 'Crisis'. Rather Than Solving The Real Health Care Problems Facing American Families"](#), January 4, 2005).

- **Effects on insurance premiums**

- ⇒ Insurance and medical lobbies support capping awards on the basis of the experience of the California Medical Injury Compensation Reform Act (MICRA) of 1975, the first legislation to limit non-economic payments to \$250,000, as a way to resolve the malpractice premium crisis. According to the National Association of Insurance Commissioners data, California's medical malpractice premiums have increased 245

percent between 1975 and 2002, while the rest of the nation's medical malpractice premiums have increased 750 percent (AMA, *Idem*, p. 48). According to the CBO, recent studies examining state data from 1993 to 2002 have concluded that capping judgments would reduce premiums by more than one-third (CBO, *Idem*, pp. 5-6).

⇒ Costs of malpractice premiums are only about 1 percent of total U.S. health care costs (ATLA, "[Fact Sheet: Story Behind Rising Health-Care Costs: What the Bush Administration Doesn't Want You to Know about Insurance Companies' Special Treatment](#)") and, contrary to what Bush sustains, premiums would not increase total health care costs, insofar as physicians are unable to pass the cost of premiums onto their patients or their patients' insurers (Richard POSNER, "[Tort Reform](#)", [The Becker-Posner Blog](#), January 16, 2005). Moreover, as Professor POSNER points out in his blog, *«it is simplistic to assume that the total annual malpractice premiums paid is a good index of the net social cost of malpractice liability, or that measures to reduce those premiums by capping malpractice liability would result in a net improvement in welfare»*. Only a portion of the medical malpractice premium represents the real cost of malpractice liability, namely that of lawyers and expert witnesses, while the remaining part represents simply a wealth transfer from physicians to patients. Thus, as Professor POSNER claims in his blog, *«[i]nsofar as malpractice liability merely transfers wealth from physicians to (some) patients, aggregate costs are unaffected»*.

Furthermore, the ATLA reports that premiums averaged across specialties (internal medicine, general surgery and ob/gyn) are 15.3 percent higher in states with caps (ATLA, "[Medical Malpractice Insurance. Do Caps Reduce Malpractice Premiums?](#)", October 2003). Similarly, other studies show that states with caps had sharper increases in median annual premiums than states without caps (Martin D. WEISS *et al.*, "[Medical Malpractice Caps. The Impact of Non-Economic Damage Caps on Physician Premiums, Claim Payout Levels, and Availability of Coverage](#)", June 2, 2003).

Finally, a study by the Foundation for Taxpayer and Consumer Rights (FTCR) points out that regulating rates of insurance companies rather than capping awards is the way of redressing the high premiums problem (FTCR, "[How Insurance Reform Lowered Doctor's Medical Malpractice Rates in California](#)", March 7, 2003). According to the ATLA, California's medical malpractice liability premiums actually increased by 190 percent in the 12 years following enactment of MICRA, and only decreased after California enacted Proposition 103 in 1988, which required State approval for increases in premium rates (ATLA, "[The Ama's 'Crisis' Is Not Real: Limiting Patients' Rights Does Not Improve Care](#)", October 2004; against, see AMA, *Idem*, pp. 47-49). A different approach to reducing malpractice premiums by regulating the insurance market would be that proposed by Professor POSNER, who suggests that the system could be better improved by experience rating --permitting, or even requiring, insurance companies to base malpractice premiums on the experience of the insured physician: *«[t]hat would make malpractice liability a better engine for deterring malpractice -which in turn would reduce malpractice premiums by reducing the amount of malpractice»* (Richard POSNER, *Idem*).

- **Effects on compensation**

- ⇒ Caps for non-economic awards would curb out-of-control jury awards, thus making the medical liability system more fair and predictable. It is a fact that the scale of non-economic damages has increased very quickly in comparison to the rate of increase in other kinds of damages.
- ⇒ Capping non-economic awards limits compensation to people who are severely injured as a result of medical malpractice. In this respect, a recent survey by the RAND Corporation on the effects of caps instituted by MICRA on damage awards in California found that in verdicts involving death cases, victims' jury-awarded compensation was reduced by MICRA 58 percent of the time, with a 49 percent median reduction in total compensation for those cases. The study also found that caps disproportionately affect women, children and the elderly (RAND, "[Capping Non-Economic Awards in Medical Malpractice Trials. California Jury Verdicts Under MICRA](#)", 2004, pp. 47-48).

Generally, others, like Prof. Anthony SEBOK, have argued that capping non-economic damages would just result in uncompensated and unaddressed victims. «*So the argument against pain and suffering awards isn't they are being lowered to represent actual pain and suffering. It is simply that society can't afford to fully compensate victims of medical malpractice*» (Anthony SEBOK, "[Should Doctors Vote Against John Edwards? The Reasons Why Critiques of His Medical Malpractice Litigation Record Are Wrong](#)", July 26, 2004).

- **Effects on defensive medicine**

- ⇒ Limiting malpractice liability would reduce the practice of defensive medicine, resulting in savings in health care costs.
- ⇒ It is controversial whether capping malpractice awards would reduce defensive medicine, because at least some so-called defensive medicine may be motivated less by liability concerns than by the income it generates for physicians or by the positive benefits to patients. Even assuming that caps would reduce defensive medicine, savings would be very small (CBO, *Idem*, p. 6).

The remaining actions on medical liability reform proposed by Bush are the following:

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| <ul style="list-style-type: none"> ✓ Securing the ability of injured patients to get quick unlimited compensation for their economic losses. ✓ Shortening the statute of limitations to ensure that old cases cannot be brought to court years after an event. |
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- ✓ Abolishing joint and several liability to ensure that defendants pay judgments in proportion to their fault.
- ✓ Providing for payments of judgments over time rather than in a single lump sum, to ensure that appropriate payments are made when patients need them.

2. Class Action Lawsuits

«We need to reform the class-action lawsuit problem. We've got -- these lawsuits are being filed; they have an impact on our economy. They -- many times, the lawyers get the money and the people don't. They are -- these suits that have got interstate claimants really ought to be in the federal court. The system right now allows people to shop for a court of law that is convenient to their case, or place where they can find a sympathetic jury.» [George W. Bush, Clinton \(Michigan\), January 7, 2004.](#)

Bush proposals aim at stopping abuses of the class action device that harm class members as well as defendants, adversely affect interstate commerce and, in the end, undermine public respect for the judicial system. An explosion of interstate class actions being filed in state courts has occurred in the past few years, some of which are called "judicial hellholes" or "magnet courts" for routinely favouring plaintiffs and approving settlements in which the lawyers receive large fee awards and the class members receive virtually nothing. It is not controversial that a class action reform to stop abuses is needed.

Bush proposals have resulted in the Class Action Fairness Act of 2005 bill, introduced in the Senate by Charles E. GRASSLEY (R-IO) on January 25, 2005. The following are Bush proposals and a summary of the provisions in the bill:

- ✓ Curbing forum shopping by granting Federal Courts jurisdiction of large interstate class action lawsuits, as they typically affect more citizens, involve more money, and implicate more interstate commerce issues than any other types of lawsuits.

The Class Action Fairness Act of 2005 would create federal jurisdiction over large multi-state class actions, that is, those class actions where the amount in controversy exceeds \$5 million, there are at least 100 class members, and any member of the class is a citizen of a different state from any defendant.

- ✓ Preventing victims from receiving awards of little or no value while class action lawyers receive large fees.

The Class Action Fairness Act of 2005 would require that judges carefully review all coupon settlements and limit attorneys' fees paid in such settlements to the value to class members of the coupons that are redeemed; carefully scrutinize net loss settlements in which the class members end up losing money; and ban settlements that provide greater sums to some class members solely because they are closer geographically to the court.

- ⇒ Advocates of the reform claim that state courts may be more inclined to favour state plaintiffs, whereas federal courts would be fairer. State courts decide the claims of other states' citizens under their own law, thus imposing its policy preferences. Furthermore, according to a recent study by Eric HELLAND and Alexander TABARROK (Eric HELLAND and Alexander TABARROK, *"The Effect of Electoral Institutions on Tort Awards"*, 2002), judicial bias against out-of-state defendants is particularly common where state judges are elected, as they have strong incentives to redistribute wealth from those out-of-state defendants (nonvoters) to in-state plaintiffs (voters). Finally, moving cases to federal courts would ensure that state law be applied impartially and balancing competing interests of the various states represented by class members.
- ⇒ According to the ATLA, rare state court abuses have been appropriately handled by state supreme courts and state legislatures (ATLA, ["Don't Let Class Action 'Reform' Deny Justice to Consumers"](#), January 2005). Moreover, federalizing class actions would exponentially delay the judicial process for injured consumers and other class actions plaintiffs because federal courts do not have the resources to handle complex issues of state law. Finally, federal courts are generally less willing to entertain complex civil litigation than state courts, thus very rarely certifying classes in complicated cases.

3. Asbestos Litigation

«We got a problem. The Supreme Court recognized [asbestos litigation] as a problem. They said it is a huge mass of -- huge mass of asbestos cases defies customary judicial administration and calls for national legislation. That's a better -- it's better that they define it than me. After all, these are all lawyers and judges; I'm not. But when they say -- the Supreme Court says we have a national problem, I think Congress needs to listen.» [George W. Bush, Clinton \(Michigan\), January 7, 2004.](#)

Bush claims that at least 74 companies have been forced into bankruptcy because of asbestos-related litigation that has cost more than \$70 billion; the volume of asbestos lawsuits is beyond the capacity of U.S. courts to handle; and more than 100,000 new asbestos claims were filed in 2004. The crisis originated by asbestos litigation is so serious that most senators believe that at least some reform should be enacted.

Bush proposals on asbestos litigation will result in The Fairness in Asbestos Injury Resolution Act of 2005 bill, which will most likely be introduced in the Senate by Arlen SPECTER (R-PA), the new chairman of the Senate Judiciary Committee, this week (The Economist, ["Asbestos in America. A Bid to Bypass the Lawyers"](#), January 27, 2005). The following are Bush proposals and a summary of the provisions in the bill:

- ✓ Creating a national industry-financed trust Fund, governed by no-fault principles, to compensate asbestos victims.

The Fairness in Asbestos Injury Resolution Act of 2005 would create a national industry-financed \$140 billion trust fund to compensate asbestos victims, providing \$40 billion of front-end funding for the first five years. Companies would pay \$90 billion and insurers would pay \$46 billion. The last \$4 billion would come from trust funds set up by firms already bankrupted by asbestos claims.

The Fairness in Asbestos Injury Resolution Act of 2005 would create a formula under which companies with big past liabilities would contribute more. Larger companies would also pay more than smaller ones with similar liabilities.

- ✓ Compensating only genuinely sick asbestos victims by applying appropriate medical standards to determine legitimate victims.
- ✓ Banning asbestos lawsuits.

According to the Fairness in Asbestos Injury Resolution Act of 2005, victims would give up their right to sue for damages. However, the Act would allow victims to return to the courts if the fund goes bankrupt.

- ⇒ The National Association of Manufacturers (NAM) and the National Association of Mutual Insurance Companies (NAMIC) have assumed Bush's arguments. The latest has also argued that to date, the number of asbestos liability claims filed in the U.S. numbers more than 700,000, 600,000 of which are largely baseless claims brought by people who are not ill (The Economist, *Idem*). With tens of thousands of new claims filed each year, legal experts expect that the total number of lawsuits could eventually exceed 2.5 million. Additionally, some experts predict that asbestos liability could ultimately cost the U.S. economy more than \$200 billion (NAMIC, "[NAMIC Advocates Asbestos Reform](#)", April 23, 2004). According to the National Association of Manufacturers, removing claims from the tort system is the only way to ensure that victims receive fair and prompt compensation, stop the bankruptcies and eliminate the fraud and uncertainty for both victims and defendant companies, as well as the enormous transaction costs (John M. ENGLER, "[Engler Testimony on Draft Asbestos Legislation](#)", January 11, 2005).
- ⇒ According to the NAM, the size of the fund should approach \$200 billion (www.atla.org). Generally, critics of the asbestos reform point out that banning asbestos lawsuits is against the victims' constitutional right to a jury trial. Similar reasoning would lead to oppose scheduling awards.

Asbestos victims have proposed different alternatives to the implementation of a fund, since they consider that it will not be able to provide the needed protection. The [Committee to Protect Mesothelioma Victims](#) calls for a medical criteria/registry approach, requiring those seeking to sue for asbestos injury to first be screened under medical criteria determined by a third party. Experts have estimated that this approach

can reduce asbestos court cases by 90 percent (PRNewswire, “[Victims Group Backs Alternative Approach to Asbestos Reform](#)”, FindLaw, January 11, 2005).