

18. Tort and Class Action Reform

State legislatures should

- enact punitive damages reforms,
- eliminate joint and several liability,
- require that government pay all legal costs if it loses a civil case, and
- outlaw contingency fees paid by government to private attorneys.

Congress should

- constrain courts' long-arm jurisdiction over out-of-state defendants and
- implement class action reforms.

Four years ago, a Florida jury conjured up punitive damages of \$145 billion for a class of tobacco plaintiffs. Two years later, a California jury recommended a \$28 billion treasure trove for a single claimant. So it goes. Not just tobacco; but guns, asbestos, and a cross section of American industry that has grown into the Mass Tort Monster.

Since 1930 litigation costs have increased four times faster than the overall economy. Federal class actions tripled over the last 10 years. Class actions in state courts ballooned by more than 1,000 percent. The Chamber of Commerce estimates that the annual cost of the tort system translates into \$809 per person—the equivalent of a 5 percent tax on wages. The trial lawyers' share—roughly \$40 billion in 2002—exceeds the annual revenues of Microsoft.

When costs explode, proposals for reform are never far behind. As a result, we've been deluged by congressional schemes to ban lawsuits against gun makers and fast food distributors, cap medical malpractice awards, and otherwise enlist the federal government in the tort reform

battle. But no matter how worthwhile a goal may be, if there is no constitutional authority to pursue it, then the federal government must step aside and leave the matter to the states or to private citizens.

Can Tort Reform and Federalism Coexist?

In its quest for constitutional authority, Congress often cites the Commerce Clause. Consider medical malpractice. No doubt we have a nationwide mess. But not every national problem is a federal problem. More than three dozen states have passed damage caps, and all 50 states are considering various other reforms. Mississippi is a case in point. Because of “jackpot justice,” doctors fled, 71 insurance companies pulled out, and the state lost an \$800 million bid for a Toyota plant. The result: a new law, effective September 2004, that caps pain-and-suffering, medical malpractice, and punitive damages.

That’s an example of tort reform that is compatible with federalism. Nowhere in the Constitution is there a federal power to set rules that control lawsuits by in-state plaintiffs against in-state doctors for in-state malpractice. The substantive rules of tort law are not commerce and they’re not the business of Congress. On those occasions when a state attempts to expand its sovereignty beyond its borders, federal procedural reforms can curb any abuses (see below).

State-Based Tort Reform

With that in mind, here are six remedies that can be implemented by the states without federal involvement. The first three are directed at punitive damage awards; the final three apply to tort reform more broadly.

First, take the dollar decision away from the jury. For example, the jury might be instructed to vote yes or no on an award of punitive damages. Then the amount would be set by a judge in accordance with preset guidelines.

Second, limit punitive damages to cases involving actual malice or intentional wrongdoing or gross negligence. Whatever the heightened standard, the idea is that accidental injuries arising from ordinary, garden-variety negligence are unlikely to require the deterrence for which punitive damages are designed.

Third, states could implement procedural guarantees like those available under criminal law. Punitive awards serve the same purposes as criminal penalties, but defendants are not accorded the protections applicable in a

criminal case. Among those protections is a higher burden of proof than the usual civil standard, which is preponderance of the evidence. Also, no double jeopardy. Current rules allow punitive damage awards for the same conduct in multiple lawsuits. Last, no coerced self-incrimination, which criminal defendants can avoid by pleading the Fifth Amendment. In civil cases, compulsory discovery can be self-incriminating.

Fourth, states ought to dispense with joint and several liability. That's 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. A better rule is to apportion damages in accordance with the defendants' degree of culpability.

Fifth, government should pay attorneys' fees when a governmental unit is the losing party in a civil lawsuit. In the criminal sphere, defendants are already entitled to court-appointed counsel if necessary; they're also protected by the requirement for proof beyond reasonable doubt and by the Fifth and Sixth Amendments to the Constitution. No corresponding safeguards against abusive public-sector litigation exist in civil cases. Limiting the rule to cases involving government plaintiffs preserves access to the courts for less-affluent private plaintiffs seeking remedies for legitimate grievances. And defendants in government suits will be able to resist baseless cases that are brought by the state solely to ratchet up the pressure for a large financial settlement.

Sixth, contingency fee contracts between private lawyers and government entities should be prohibited. When a private lawyer subcontracts his services to the government, he bears the same responsibility as a government lawyer. He's a public servant beholden to all citizens, including the defendant, and his overriding objective is to seek justice. Imagine a state attorney paid a contingency fee for each indictment, or state troopers paid a bonus for each speeding ticket. The potential for corruption is enormous.

Federal Procedural Tort Reform

Aside from state-imposed reforms, there are at least three areas where the federal government can intervene without offending long-established state prerogatives. The guiding principle is that federal legislatures and courts are authorized to act when there is a high risk that states will appropriate wealth from the citizens of other states. One federal reform

consistent with that principle is to amend the rules that control state exercise of so-called long-arm jurisdiction over out-of-state businesses.

Congress could, for example, preclude a local court from hearing a case unless the defendant engages directly in business activities within the state. A company's mere awareness that the stream of commerce could sweep its product into a particular state should not be sufficient to confer jurisdiction. Instead, jurisdiction should be triggered only if the company purposely directs its product to the state—i.e., the company itself exerts control over the decision to sell in the state. A sensible rule like that would give firms an exit option—they could withdraw from a state and thereby avoid the risk of a runaway jury, even if a product somehow ends up in-state. Today, federal limits on long-arm statutes remain lax or ambiguous. For that reason, oppressive state tort laws remain a threat to out-of-state defendants.

There's a second federal reform that's compatible with federalist principles—a federal choice-of-law rule for product liability cases. Here's how that might work:

Basically, choice of law is the doctrine that determines which state's laws control the litigation. Generally, plaintiffs can and will select the most favorable forum state, in part, on the basis of its tort laws. But suppose a federal choice-of-law rule were enacted for cases in which the plaintiff and defendant are from different states. Suppose further that the applicable law were based on the state where the manufacturer was located. A manufacturer could decide where to locate, and its decision would dictate the applicable legal rules. Consumers, in turn, would evaluate those rules when deciding whether to buy a particular manufacturer's product. If a manufacturer were located in a state that didn't provide adequate legal remedies for defective products, consumers would buy from rival companies.

Would there be a race to the bottom by manufacturers searching for the most defendant-friendly tort law? Maybe. But more likely, states would balance their interest in attracting manufacturers against the interest of in-state consumers, who want tougher product liability laws. In effect, healthy competition among the states would enlist federalism as part of the solution rather than raise federalism as an excuse for failing to arrive at a solution.

Class Action Reform

The third procedural reform that Congress can and should enact is aimed at class actions. In the past 20 years, class actions have morphed

from a rarely used procedural device, designed to litigate a large number of unusually similar claims, into a commonly used device for coercing a settlement from companies that haven't done anything wrong.

The 108th Congress attempted to address that problem in the Class Action Fairness Act—by giving defendants and class members the power to pull some class suits into federal courts. But the root problem is not with courts that administer class actions. It's with the class device itself. Congress can, and should, do more to directly address key problems associated with modern class actions at the state and federal levels. Here are four suggestions:

First, put the burden on trial lawyers to convince persons to join their class actions. Currently, the modern class action rule creates a presumption that persons out of court, who have no connection to the class proceeding, favor being “represented” by a trial lawyer who files a class action on their putative behalf. That presumption is based on nothing more than the trial lawyer's say-so. Considering that modern class action lawyers often claim to “represent” the interests of thousands—or even millions—of persons, the presumption is a legal fiction. Many litigants have no idea that their interests are being represented in court, and so serve as mute pawns of plaintiffs' lawyers seeking to coerce settlements and line their pockets. The rule should be changed by putting the burden on trial lawyers to convince people to affirmatively “opt in” to a class action (for example, by mailing a consent form to the court) before they can be counted as part of the “class.”

Second, prohibit class actions that deprive defendants of their due process right to fairly litigate individualized defenses. Currently, vague rules dictate what kind of claims get certified. For example, classes are certified even when a governing statute or common law rule requires that key elements of proof—such as reliance, causation, or damages—be proved on an individual basis. That means trial lawyers can use the class device to combine tens of thousands of factually dissimilar claims into one proceeding, making it impossible for defendants to adequately smoke out and identify weak or meritless individual claims. In a series of cases, the U.S. Courts of Appeals for the Fourth, Fifth, and Seventh Circuits have rejected that use of the class device. So should Congress—by enacting a rule stating that, in the absence of a clear legislative statement to the contrary, class actions cannot be used to litigate legal claims when the governing law requires case-by-case proof of each plaintiff's claim.

Third, ensure that only class actions that have some merit get certified. Under current law, class certification decisions are made very early—

before a judge has even considered the merits of the claims and before plaintiffs have demonstrated that they have some evidence to back up their allegations. That allows trial lawyers to game the system by including large numbers of meritless claims in one lawsuit in the hopes that corporate defendants will settle before the suit goes to trial. That's not a bad strategy, given the stakes involved: Even when companies are faced with clearly weak claims, the enormity of large classes—which can encompass millions of individual suits—means that few corporations want to bet the company that a jury will get the case right. Congress should nip meritless class actions in the bud by providing that classes may be certified only after the class “representative”—the main plaintiff—is able to make a preliminary factual showing that he has a reasonable likelihood of success on the merits.

Finally, Congress must address state class actions—which are often just as troublesome as the federal kind. The 108th Congress proposed to tackle the problem by expanding federal diversity jurisdiction over “interstate” class claims. That's not enough: For one, it does nothing to curb rich trial lawyers from bankrolling a number of duplicative intrastate class actions in state court, in order to “put the squeeze” on a beleaguered company involved in simultaneous proceedings in federal court. That's a major abuse of our federal system—one that is a hallmark of the most troublesome multidistrict class actions, like the recent “managed care litigation” against health maintenance organizations. Expanding diversity jurisdiction over “interstate” state class actions does nothing to solve that problem.

Moreover, a key component of the plan to expand diversity jurisdiction could be struck down by federal courts. A provision of the Class Action Fairness Act treats hypothetical members of a proposed class as “parties” for purposes of establishing federal jurisdiction, even though a class hasn't been certified and class members therefore aren't yet an official part of the judicial proceedings. That goes against the grain of Chief Justice John Marshall's ruling 180 years ago, in *Osborn v. Bank of the United States*, that a federal court cannot look to the citizenship of unnamed persons who are not in court when assessing whether the court has diversity jurisdiction. In the 2002 case of *Devlin v. Scardelletti*, the modern Court similarly cast doubt on the proposition that “nonnamed class members” are parties for purposes of establishing diversity.

We propose a different solution—one that will not be struck down by courts, will address the worst components of state class actions, and will give states an incentive to take control of local court procedure. It’s a two-step reform. First, Congress has the power to expand federal question jurisdiction over class claims that raise defenses under federal law—including claims that a proposed class action is so large and unwieldy that it might violate due process. Federal courts have broad power over such lawsuits—even if the due process problems haven’t yet materialized. Nonetheless, under current law, many such claims can’t be litigated in federal court. That should be changed by giving federal courts power to assert jurisdiction over class actions—intrastate and interstate—that might raise defenses under federal law, including due process and other constitutional provisions, and by empowering state court defendants to remove such actions to federal court.

But expanding federal question jurisdiction, and federal removal jurisdiction, is not enough: To combat intrastate class actions effectively, states must take responsibility for class action reform. Congress can give them an incentive to do so by creating a “safe harbor”—one that provides that states can keep control over large class actions filed in state court, even those class actions that raise federal defenses, if they adopt federal class action reforms, including “opt in,” a ban on the use of the class device to deny defendants the power to litigate individualized defenses, and a rule that classes will be certified only when the main plaintiff has a reasonable likelihood of success on the merits. That provides an incentive for states to enact far-reaching reforms at the state level, and so harnesses a key component of federalism—competition between state and federal judicial systems—to cure what ails the modern class action regime.

Conclusion

When a state exercises jurisdiction beyond its borders or discriminates against out-of-state businesses, federal intervention may occasionally be appropriate. For the most part, however, the states have reformed and are continuing to reform their civil justice systems. Under those circumstances, time-honored principles of federalism dictate that each state exercise dominion over its substantive tort law. Congress can then focus on procedural matters. In that regard, we suggest three reforms: First, tighten long-arm jurisdiction over out-of-state defendants. Second, implement a federal choice-of-law regime. Third, restructure the rules for class actions.

Suggested Readings

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