

The New Tort Reform: Should Asset Protection Be Illegal?



By Robert J. Mintz, JD

It appears that advocates of tort reform seeking to limit lawsuits and cap negligence awards have lost the battle in Congress, with no sign of substantive change on the political horizon. Trial lawyers are breathing easier in this more favorable political climate and are making inroads in their efforts to reshape the tort system and make lawsuit filing and judgment collection easier and more efficient. Too many lawsuits are discouraged, trial lawyers argue, because legal asset protection measures make collecting awards difficult or impossible. The solution they propose is to restrict or eliminate asset protection strategies. Let's consider why trial lawyers want to get rid of asset protection and what will happen if they are successful.

Not Enough Lawsuits

A leading scholar in the field recently claimed that the tort system is indeed broken and proposed specific remedies (www.law.bepress.com/expresso/eps/772). The goals of deterring and punishing wrongdoers (both intentional and negligent) and providing compensation for injured victims are not being met under our current laws. The reason, he argues, is that too many potential defendants are effectively “judgment-proof” because their assets are legally shielded and therefore unreachable from a successful claim. As a result, the deterrent impact of tort law is nullified, there is no compensation for the “victim,” and lawyers are discouraged from taking these cases.

According to Gilles, although most individuals have sufficient assets or income to pay some claims, they are effectively insulated by available asset protection strategies and exemption laws, including state homestead laws that protect a portion or even all of the equity in a defendant's home, the complete protection afforded most retirement plans, social security payments, and the exclusion of 75% of wages from garnishment.

Creating More Deep Pockets

The proposed remedy for this perceived injustice is simply to remove all barriers to judgment collection. Under this plan, no meaningful assets could be protected from a judgment. Exemptions would be reduced or eliminated, and asset protection strategies would be illegal or restricted to non-tort judgments. For example, Gilles proposes that “federal law could forbid Americans to enter into OAPTs (Offshore Asset Protection Trusts) unless the trust provides that tort claimants shall have effective remedies against the trust proceeds, and unless the foreign jurisdiction actually enforces those provisions.”

Do Lawsuits Deter Negligence?

The argument that asset-protected or judgment-proof individuals are more likely to commit wrongful acts is a theory that well serves Gilles' purpose but lacks evidence and opposes common sense. Automobile accidents account for the vast majority of all tort claims. Would an increased threat of losing assets make drivers more careful? If rational self-interest in avoiding death or serious injury doesn't make a driver cautious, the threat of a lawsuit isn't likely to have much additional impact.

Getting sued for malpractice has more to do with bad luck, circumstances, and deep-pocket economics than it does with any wrongful behavior. The threat of losing a malpractice lawsuit doesn't make doctors deliver better patient care. It drives up expenses, inhibits needed treatment, and reduces available care for those in the most “risky” categories.



Who Wants More Lawsuits?

If the tort system has little practical role in deterrence, it is not apparent what social good would be achieved by eliminating asset protection for individuals. Most of the benefits of this plan would accrue to the trial lawyers, who know that people with unprotected assets are easy potential targets. The mere threat of a lawsuit, no matter how baseless, can force a potential defendant to settle simply to avoid steep defense costs and the uncertainty of a trial's outcome. There are plenty of “deep-pocket” defendants who possess property and assets above the exemption amounts and who lack additional asset protection.

Closing Arguments

It's difficult to predict whether the movement to expand the “litigation explosion” to create an even larger pool of potential defendants and make all assets reachable will be successful. Trial lawyers are a powerful political force, but popular opinion these days clearly favors relief from lawsuits and *greater* protection from business risks and frivolous claims. Will money and political influence overcome significant popular opposition? We're likely to see this conflict played out in Congress over the coming years and we all have a significant stake in the outcome. **mdng**

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