

## **Politicians Should Be Talking About Insurance Reform, Not Tort Reform**

### **Fourm Column**

Lately, we have seen the greed of the insurance industry producing scandal after scandal. Perhaps now politicians will start talking about "insurance reform" rather than "tort reform," which bolsters insurance companies profits by chipping away at valuable constitutional rights.

Many of our politicians and tort reformers seem to have forgotten the Seventh Amendment. It was the only article of the Bill of Rights ratified unanimously by the states.

It reads, "In suits of common law, where the value and controversy shall exceed \$20, the right to trial by jury shall be preserved, and no fact tried by a jury shall otherwise be reexamined in any court of the United States, than according to the rules of common law."

The insurance industry and its corporate and political friends have attacked the right to jury trial in civil cases by pushing for arbitration clauses, caps on damages and other so-called "tort reform" measures, all designed for their financial benefit.

Two decades ago, I represented the Southern California Physicians Council in a lawsuit against its malpractice insurance carrier for overcharging on premiums. The doctors were hit with a 327 percent increase in their malpractice premiums, and they were livid.

Insurance moguls know that, when policyholders are confronted with outrageous premium increases, they don't blame the insurance companies but instead point the finger at trial lawyers, huge verdicts or frivolous lawsuits. In this case, the doctors were so upset that they lobbied the Legislature to pass a law limiting pain and suffering damages to \$250,000 in medical-malpractice cases.

This so-called tort-reform measure stripped from people who had been injured by medical negligence the ability to recover for their injuries.

This dramatic increase in the doctor's premiums later proved to be totally unfounded. The case was settled with the doctors getting back their money by way of a huge \$50 million rebate on their premiums that was shared by 5,500 doctors. But the law they lobbied for, the cap on damages, remains on the books. This case is a perfect example of how the insurance industry can create an artificial crisis by way of huge premium increases in order to induce cries for tort-reform measures and turn their victims into foot soldiers for tort reform.

Tort reformers and their public-relations mills have coined phrases like "frivolous lawsuits" and "lawsuit abuse" to build support for their tort-reform measures. The public should know that all courts have mechanisms to deal with frivolous lawsuits or lawsuit abuse.

Judges don't need politicians to tell them which lawsuits are frivolous and when the court system is being abused. That has always been the function of the judiciary, and it should stay that way.

The judiciary also determines when damage awards are excessive. Our courts are never reluctant to reduce large awards at every judicial level. This historically has been the function of the judiciary in suits at common law.

When a legislature sets a cap on these damages, it is encroaching on a purely judicial function. Legislatures shouldn't be empowered to set a cap on tort damages any more than they are for other common law suits, like contract damages.

A cornerstone of our democracy is that each branch of government has its distinct constitutional arena, and one should encroach on the others. Yet tort reformers have run to the Legislature to hold certain tort damages excessive by way of statutory caps. When this occurs, it seems to be an unconstitutional violation of the separation of powers. The issue, however, is rarely raised in tort-reform discourse.

If we need caps on anything, it should be on excessive profits of the insurance industry. Insurance has become a necessity of life, much like the public utilities whose profits are regulated to prevent price gouging. If insurance profits were regulated like public utilities, the cost of insurance would be cut in half, and cries for tort reform would disappear.

Someday, the whole tort-reform movement will be exposed as a massive public relations effort to lessen accountability of the insurance industry and other corporations. Given WorldCom, Enron and Global Crossing, not to mention bid-rigging by the insurance industry's largest brokers, we clearly need more accountability, not less.

Free enterprise doesn't mean free to gouge consumers or free to trample on citizens' valuable rights.

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