

The Heritage Foundation **Background**er

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THE LIABILITY INSURANCE CRISIS

(Updating Backgrounder No. 498, "The Liability Insurance Crisis: What Washington Can Do To Help," March 27, 1986.)

The Reagan Administration has sent Congress a legislative package to alleviate the nation's insurance liability crisis, which has developed after years of skyrocketing tort liability awards. The measures are being sponsored by Senators Robert Kasten (R-WI), Mitch McConnell (R-KY), and Strom Thurmond (R-SC) and Representatives Hamilton Fish (R-NJ) and Thomas Kindness (R-OH).

Since liability laws are mainly a matter of state, not federal, law, Congress and the Administration can do only so much. By using the bully pulpit of the presidency, Ronald Reagan has focused the debate on the central issue, the need for a thorough overhaul of the tort system. But there are problems with the proposed legislation. First, many of the substantive proposals contradict basic conservative principles while failing to advance the goal of a fairer, fault-based justice system. Second, in some cases, the proposals call for a wider federal preemption of state law than is warranted.

The package proposed by the Administration contains three bills. Two are concerned with lawsuits against the federal government and federal contractors, the third with product liability suits against manufacturers. The key elements in all three include:

- o Elimination of "joint and several" liability as to defendants not acting in concert, so that a defendant's share of damages will not exceed his share of fault for an injury.

- o Limitation of noneconomic damages to \$100,000.

- o Periodic, rather than lump-sum, payment of damages for future injury exceeding \$100,000.

- o Reduction of court awards by the amount that the plaintiff has already received from worker's compensation, employer-paid insurance plans, or government sources.

o Limitation of attorney contingency fees according to a set "sliding-scale."

o A national policy to encourage alternative dispute resolutions.

The legislation also provides that manufacturers not be held liable for injuries caused by defective products in cases where an adequate warning has been given, when the defect is apparent to a reasonable person or is a matter of common knowledge, or when the product was used or altered by the user in an unforeseeable way.

Many of these reforms would improve the tort system. Several, however, are unwise. In particular, the \$100,000 limit on noneconomic damages seems unrealistically low, while the offset for other forms of compensation introduces an irrelevant factor into the tort system. Most important, the limit on attorney fees would establish price controls in the legal industry, clearly a violation of Ronald Reagan's free market principles.

This federal legislative package does not intend a wholesale preemption of state tort law. The first two bills, involving claims against the government and its contractors, seem appropriate areas for federal standards, given the direct federal interest. Some federal preemption of state product liability law is also warranted to ensure uniform standards for manufacturers. Currently, a national manufacturer must design and produce its products to conform with the products laws of each of the 50 states. Thus, the state with the most stringent law can often dictate standards for all the rest.

Some of the Administration's product liability reforms, such as capping noneconomic damages and limiting joint and several liability, do not involve the standard of liability for manufacturers. Such measures would limit the amount of liability, but would not address the standards for product design or manufacture. There being no apparent need for national uniformity, the rationale for federal preemption of state law is much more tenuous.

Where federal preemption is not warranted, the Administration should encourage reform by developing a model code for consideration by the states. By pursuing this option, the Administration could make a contribution without interfering unduly with matters of state law.

The Administration's efforts have added significantly to the debate on tort reform, and they have focused attention on the need for change. But federal legislation can help tort law reform only where it has a proper role. The most important federal job is to provide resources, information, and focus for the debate emerging in the states--where comprehensive reform must be made.

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