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Commentary

The Real Victims of Tort Reform

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Now that the Republicans have won more seats in Congress, and President Bush has won re-election, the move toward “tort reform” will be gathering more momentum.

The problem is that the perception of the need for tort reform is outweighing the facts. If consumer advocacy groups do not put an end to these misconceptions, the tort system as we know it will be a relic.

Evidence of this gathering momentum can be seen in the recent election:

- Sixty-four percent of Florida voters approved a referendum to limit attorneys’ fees in medical malpractice cases to 30 percent of the first \$250,000 and 10 percent of any amount thereafter.

- An Illinois Supreme Court candidate who ran on a tort reform platform was elected, funded largely by insurance companies and doctors.

- California voters passed a proposition limiting who can sue under the state’s unfair business competition law.

- Nevada voters approved a tort reform measure, known as “Keep Our Doctors in Nevada,” which would remove two exceptions from cap limitations and limit attorneys’ fees based on the size of the settlement.

The facts do not justify these extreme measures. In November, the

president of the largest medical malpractice carrier in Texas stated that caps on damages there will do nothing to reduce malpractice premiums since malpractice awards are only a small percentage of the overall underwriting equation.

And the Institute of Medicine of the National Academies published a study in 1999 stating that 44,000 to 98,000 patients die each year in the hospital as a result of physician error. Yet, for some reason, the facts get overshadowed by hype and innuendo.

Why is this? Is it because trial lawyers are easy targets? Is it because doctors and insurance groups have bigger lobbying and advertising budgets? It is difficult to say. When you ask doctors privately whether they feel legitimate malpractice suits are the cause of the increase in their premiums, most will say no. If you ask judges how many frivolous suits are tried before them, the answer will be few, if any.

While talk of tort reform measures is essentially limited to medical negligence at this juncture, this is only a beginning. When the insurance industry and anticonsumer groups obtain the necessary reforms in the medical field, they will turn to products liability cases, consumer fraud cases and other causes of action. None of this is justified.

While there is no question that

our livelihood as attorneys is at stake, it is the general public who will suffer the most. The tort system as we know it has provided access to the court system for individuals who would never have been able to do so were it not for the contingency fee system. As a result, cases that have improved the safety of vehicles, machines, power saws and lawnmowers could never have been brought were it not for attorneys who work for the middle class without guaranteed fees.

Other suits have resulted in removing dangerous drugs from the marketplace, making sure insurers pay claims they are legally obligated to pay and protecting workers from being discriminated against or wrongfully discharged due to age, race or gender.

These “tort reformers” never stress the good that attorneys have done (let’s not forget the 1,100 attorneys who worked for free for Sept. 11 victims and their families), or that without us, millions of Americans would have been denied access to the courts.

The real problem is not that attorneys will no longer be able to make a living. We will find other avenues to pursue. The real victims are the working and middle classes. Their only voice against big business, insurers, the medical profession and the tobacco industry has been attorneys willing to take on their cases with no guarantee of success. When the public reads stories of tort reform, there is never mention of the cases attorneys lose, in which they receive nothing.

The problem is not one of facts, but perception. If we as attorneys do not act

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now, and do not help get the message
out, the practice as we know it will be a

thing of the past. The unfortunate aspect
of all this is that it is not the attorneys

who will suffer the most, it is the mid-
dle class. We cannot let that happen. ■