JUDICIAL ACTIVISM IN THE CIVIL JUSTICE SYSTEM: PROBLEMS AND SOLUTIONS

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Any corporate counsel or practitioner who represents defendants in tort cases should take serious note of three legal tactics being promoted by the plaintiffs' bar. Two of these developments - medical monitoring and "Big Government" lawsuits - would subvert 200 years of tort law. The third - judicial nullification of state tort law - threatens attempts by state legislatures to restrain judicial lawmaking and to restore balance and predictability in liability law.

Medical Monitoring

Plaintiffs in medical monitoring cases have no present physical injury. Instead, they seek recovery for the future cost of periodic medical examinations to detect the possible onset of disease.

So far, most courts have rejected medical monitoring claims. They have been unwilling to abandon the 200-year old rule that a plaintiff cannot recover damages without proof that he or she actually suffered a physical injury. This "physical injury rule" has served as the traditional gatekeeper to recovery in tort law.

Most notably, in Metro-North Commuter Railroad Co. v. Buckley, 521 U.S. 424 (1997), the United States Supreme Court rejected a medical monitoring claim brought under the Federal Employers' Liability Act. The plaintiff, a former railroad pipefitter, had been exposed to asbestos in his work, but did not suffer from any asbestos-related disease or injury. The Court warned that recognition of medical monitoring as a "remedy" for injuries that had not occurred and might not occur would produce a flood of claims and delay access to justice for persons already suffering from serious physical injuries.

Other courts, however, have paid little attention to these concerns. For example, in another asbestos case, Bourgeois v. A.P. Green Industries, Inc., 716 So. 2d 355 (La. 1998), the Supreme Court of Louisiana allowed plaintiffs to pursue the creation of a judicially-administered fund to cover the costs of periodic future medical surveillance. Concerned by the court's evisceration of the physical injury rule, the Louisiana legislature promptly passed a statute overturning Bourgeois.

Most recently, in Bower v. Westinghouse Electric Co., 1999 WL 518926 (W. Va. July 19, 1999), the Supreme Court of Appeals of West Virginia adopted what may be the most liberal

medical monitoring cause of action to date. The court held that, to be entitled to medical monitoring, a plaintiff is "not required to prove that a particular disease is certain or even likely to occur as a result of the exposure." The majority opinion came under strong criticism by Justice Maynard, who argued in his dissent that the court lacked the authority to engage in judicial lawmaking.

Decisions like Bower are troubling for a number of reasons. First, the cases brush aside the fundamental (and sensible) "physical injury rule." If a plaintiff no longer has to prove that he or she suffered a physical injury - much less that the defendant caused it - one can just imagine the contingency fee lawyer advertisements that may begin to run. The familiar question, "Have you been hurt?" may soon be replaced by, "Don't wait until you're hurt, call now."

Second, the potential liability is both astronomical and impossible to predict. On a daily basis, almost everyone comes into contact with numerous materials that, arguably, may warrant medical monitoring.

Third, medical monitoring awards are often totally unnecessary. Most workers today already receive access to medical check-ups through a health plan. A tort award would simply provide a windfall recovery.

Fourth, medical monitoring is subject to widespread and serious abuse. When the cost of medical monitoring is awarded in a lump-sum, there is no guarantee that any recovery will actually be spent on medical monitoring. In fact, common sense experience suggests that lump-sum awards are more likely to be spent like lottery winnings - to purchase a new car, a television, or a boat; the jackpot will not be spent on monitoring. This will almost certainly be true in the vast majority of cases where monitoring is already provided by a "collateral source."

Finally, as the United States Supreme Court has said, medical monitoring claims may clog the courts and adversely affect potential plaintiffs who depend on a tort system that can distinguish reliable and serious personal injury claims from unreliable and relatively trivial claims.

Nevertheless, the plaintiffs' bar will push the envelope on medical monitoring, as well as other tort claims that do not involve a present physical injury, such as novel emotional distress or "fear of injury" claims. A primary reason is that the plaintiffs' bar understands that medical monitoring recoveries could be extremely lucrative - particularly in states like West Virginia that have lax class action certification standards. The combination of medical monitoring and unrestrained class action certification is a powerful "double whammy" that could subject businesses to potentially multimillion-dollar liability.

Regulation and Taxation Through Litigation

The second major development in tort law that is cause for serious concern is the attempt by some governmental entities - often working in partnership with private contingency fee lawyers - to seek regulation and taxation through litigation. Big government through big lawsuits.

For more than 200 years, tort law has provided that an injured person's claim is primary; it is equal to or greater than the claim of any party that has suffered only an indirect economic loss.

Automobile accident litigation provides a common example of this settled rule. If you are involved in an automobile accident, the other driver sues you, and you win in court, that driver's insurance company cannot bring a direct legal action against you and win. If you beat that driver in court, you beat his or her insurer too.

Another common example of the traditional rule is found in workplace injury cases. If a worker is injured in the workplace as a result of a defective tool, he or she will receive workers' compensation. The worker also may bring a product liability action against the tool's manufacturer. The employer may put a lien on the employee's recovery to recover economic losses it may have suffered as a result of the employee's injury (e.g., worker compensation paid to the employee, loss of profits while the employee was out of work, or the cost of hiring a replacement worker), but the employer cannot bring an independent action. Furthermore, if the tool manufacturer defeats the injured worker's product liability claim, the employer's indirect claim is cut off.

The reason is that, under the traditional legal principle of subrogation, a party that suffers indirect economic loss must "stand in the shoes" of the person who was directly injured. Similarly, if the government suffers an indirect economic loss on account of harm to a citizen, it should be subject to any defenses that could be raised against the citizen.

Now, governmental entities (often in partnership with private contingency fee lawyers) are working to cast aside the 200-year old subrogation remedy. They are arguing that the governments' claims are "independent" of the claims of individual citizens, therefore, government plaintiffs are not subject to the defenses that could be raised against those individual. The government plaintiffs are seeking to crown themselves "super plaintiffs" with enhanced legal rights that go far beyond the rights of individual citizens with actual physical injuries.

Courts should not discard the 200-year old principle of subrogation and permit independent lawsuits by governments, regardless of the popularity of the defendant. If courts do so, they are engaging in unsound and radical judicial lawmaking.

Former Clinton Administration Labor Secretary Robert Reich candidly admitted this in an editorial he wrote in February 1999 in USA Today. He said that "The era of big government may be over, but the era of regulation through litigation has just begun." He advocated that courts should be the regulators of society, deciding whether certain products or services should be available, how they will be marketed, and at what price.

Mr. Reich's vision of the world violates the bedrock principle of separation of powers. The Constitution provides that the job of courts is to decide cases and controversies - to interpret the law, not make it. When courts "legislate" they upset this structure. Furthermore, courts lack the broad information gathering tools that legislators use in formulating sound public policy.

Big government lawsuits represent another trend that was not mentioned by Mr. Reich - an era of taxation through litigation. The public has said loud and clear that it does not want to pay higher taxes. Legislators on both sides of the aisle know that adverse political consequences can follow in the wake of even the smallest tax hike. Consequently, those who want tax increases to

pay for big government programs are asking courts to become substitute tax collectors.

Taxation through litigation subverts our democracy and constitutional framework. The Founding Fathers made clear their intention that Congress, not the executive or the judiciary - and certainly not a small group of contingency fee trial lawyers - be the branch of government with the power to raise and spend money. They also insisted that any bill introduced to raise revenue must originate among the members of the House of Representatives - the branch of government most accountable to the people.

If governmental lawsuits that overturn established principles of tort law and Democracy are permitted to flourish for the sake of political expediency and political theater, the power of taxation will be removed from Congress and state legislators, and as a result, the control of the people.

Judicial Nullification

The third development - state courts' use of state constitutional provisions to nullify legislative decisionmaking and limit legislative independence in liability law - represents another serious threat to the separation of powers. As a practical matter, it also could stop legislatures from doing anything to curb runaway liability created by medical monitoring or big government lawsuits.

The growing willingness of state courts to substitute their own views of proper tort law for that of state legislators has been facilitated by contingency fee lawyers who try to "game" the legal system by relying solely on obscure state constitutional provisions that have little historical explanation. Indeed, Association of Trial Lawyers of America (ATLA) President Mark Mandell recently bragged that a brief written by ATLA and argued by Harvard Law Professor Laurence Tribe resulted in an Indiana health liability statute being overturned based on an state constitutional provision "that was previously regarded as toothless."

By relying solely on state constitutional provisions, plaintiffs' lawyers know that they can prevent the defendant from appealing a pro-trial lawyer decision to the United States Supreme Court.

Plaintiffs' lawyers also know that the United States Supreme Court, in constitutional challenges under the Fourteenth Amendment, has made clear distinctions between situations in which a legislature violated a person's fundamental rights and situations in which a legislatures has made an economic policy decision. Except in a highly discredited period in the Supreme Court's history known as "the Lochner era," which occurred around the mid-1930s, the Court has shown appropriate deference to legislative policy judgments, even where the Justices might not have personally agreed with the legislature's action.

Most state courts have followed the lead of the United States Supreme Court and have rejected invitations to issue decisions that ignore the legislative role in developing liability law. By almost a two-to-one margin, state supreme courts across the country have sustained rational state legislative efforts to formulate state liability law.

For example, in Pulliam v. Coastal Emergency Services of Richmond, Inc., 509 S.E.2d 307 (Va. 1999), the Virginia Supreme Court upheld a $1 million limit on recoveries in medical malpractice actions. In McDougall v. Schanz, 597 N.W.2d 148 (Mich. 1999), the Michigan Supreme Court upheld a statute establishing standards for the qualification of experts in medical malpractice cases. The court concluded that the legislature had exercised its legitimate lawmaking function.

On the other hand, some courts have embraced the arguments of contingency fee lawyers. For example, in State ex rel. Ohio Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999), the Supreme Court of Ohio narrowly overturned Ohio's 1996 civil justice reform statute, even though there was not a case or controversy before the court. The Ohio Association of Trial Lawyers (OATL) filed an original action directly with the Ohio Supreme Court, arguing that the law would cut into its members' contingency fees and make it harder for OATL to recruit members!

In a salute to contingency fee lawyer politics, the majority opinion, written by Justice Alice Robie Resnick and joined by Justices Andrew Douglas, Francis Sweeney, and Paul Pfeifer, invented a new judicial doctrine to get around the established common law principle of standing. Now, in Ohio, any public interest group can file a direct action with the Ohio Supreme Court to challenge the constitutionality of virtually any legislation that may affect its members. This aspect of the majority's opinion was heavily criticized by the dissenting members of the court, Chief Justice Thomas Moyer and Justices Deborah Cook and Evelyn Lundberg Stratton.

The majority's holding with respect to the substance of the legislation was equally shocking. The court totally up-ended the doctrine of separation of powers and the notion of mutual respect between the legislature and the courts. Without so much as a passing reference to the need to preserve legislative independence in creating liability law, the court broadly declared tort law to be within the exclusive domain of the judiciary.

The majority also held that statute violated the "one-subject rule" of the Ohio Constitution, which prohibits totally unrelated subjects from being bundled in a single statute. Even though the statute was plainly focused on just tort actions, that was not enough for the members of the court who were bent on overturning the law. They held that the legislation focused on more than one subject, because they do not like civil justice reform.

By relying solely on the Ohio Constitution, the Ohio Supreme Court was able to preclude any appeal to the United States Supreme Court. Unfortunately, the Ohio Supreme Court was not the first state court to embrace the arguments of contingency-fee trial lawyers.

For example, in December of 1997, the Illinois Supreme Court overturned a comprehensive Illinois tort reform statute in its entirety, holding that it violated the Illinois Constitution. The court's overreaching opinion in Best v. Taylor Machine Works, 689 N.E.2d 1057 (Ill. 1997) (opinion by Justice Mary Ann McMorrow), ignored the fundamental separation of powers principle. As Illinois Supreme Court Justice Benjamin Miller wrote in his dissent: "Today's decision represents a substantial departure from our precedent on the respective roles of the legislative and judicial branches in shaping the law of this state. Stripped to its essence, the

majority's mode of analysis simply constitutes an attempt to overrule, by judicial fiat, the considered judgment of the legislature."

What Can Be Done?

1. *Amicus* Support Critical

When contingency fee lawyers urge courts to adopt medical monitoring, ask courts to engage in regulation and taxation through litigation, or challenge the constitutionality of state tort reform, solid amicus briefs are needed in response. These briefs can signal to the court the importance of a particular case and draw the court's attention to broad public policy issues that may not be covered by the attorneys representing the private parties in the case.

The very best amicus brief will not "save the day," however, if judges are unwilling to listen. This is one reason why multiple paths need to be pursued.

2. Election of Judges

For years, contingency fee lawyers have understood that judicial selection is an important factor in the overall legal reform debate. They heavily support judicial elections. Businesses should do the same. They should identify and support qualified candidates for the state judiciary.

While no one should ever expect a particular outcome from a court, the public has a right to expect a balanced judiciary that is appropriately deferential to the perspectives of other elected leaders, including state legislators and governors. This is true with respect to both tort reform and other key areas of public policy.

3. Publicity: Let the Public Know What is Going On

The late United States Senator Everett Dirksen once said, "When they feel the heat, they will see the light." Another eminent seer observed that "the Supreme Court follows the election returns." Both aphorisms have an applicability here.

It is difficult to get the public's attention focused on topics as complex as medical monitoring, big government litigation, or the constitutionality of legal reform, but if messages are framed in a fair, balanced, and thoughtful way, the public, and the judges themselves, will appreciate that government functions best when there is cooperation among the co-equal branches of government.

4. Federal Legislation

Lastly, although most tort reform successes have occurred at the state level, the need for federal legislation to complement state tort reform efforts is worth mentioning, because it represents one more way of addressing the problem of judicial activism in liability law. In particular, federal legislation may be the most direct way of responding on a national level to the problem of judicial nullification of state tort law.

The Supremacy Clause in the United States Constitution assures that federal liability reform

legislation cannot be attacked under state constitutions. If constitutional attacks are to be launched against federal reform laws, they must be grounded in the United States Constitution. For almost a century, the United States Supreme Court has repeatedly upheld federal legislation altering state tort law.

While Congress is not likely to "federalize" the entire civil justice system, federal legislation may provide some hope for states that would not otherwise have any means of addressing the problem of unfair tort liability.

Conclusion

The start of the new Millenium may bring about the most radical changes in tort law since the late 1960's and 1970's. Medical monitoring and other novel emotional distress claims that do not involve present physical injuries, as well as big government lawsuits, seek to overturn well-founded 200-year old tort law rules. Judicial nullification of state tort law could cripple efforts to do anything about it.

Serious education efforts are needed. If courts and the public understand the full policy implications of the contingency fee lawyers' "wish list," wiser courts will not go down that path - and the public will not support those courts that do.

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