

Chipping Away at the Tort Reform System

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Guest Column by Jeff Springer

I met with some potential clients last week. At the end of the interview, these very nice people explained that this was the first time they had sought help from a trial lawyer.

"We aren't the kind of people who file lawsuits," they explained. If I earned a nickel every time someone said that to me, I would long since retired.

The fact is, this family is just like every other family I have represented in my 18 years as a trial lawyer. None ever expected to have to hire me. Were they instead able to turn back the hands of time and avoid their tragedies, there is no doubt in my mind they would forego every penny I recovered for them. If the tort system is truly a lottery, from where I sit, the cost of a ticket is far too high.

I'm not sure why there is so much outcry for tort "reform". Perhaps people are still enraged by the McDonald's coffee case. Perhaps it is the lawyer advertising. Perhaps we are so enamored with Enron, Tyco, Firestone, AHP, HealthSouth, and business in general that we are willing to acknowledge their abuses and at the same time immunize them from responsibility for the damage they cause.

Whatever the justifications for "reform", they're not what we're being told. Study after study confirms the absence of objective data to support a need for tort reform. The number of lawsuits is decreasing and the states who have studied it report that, although average jury awards have increased, they have not increased significantly when compared to healthcare costs and inflation. They also found good evidence that the average claims payout has actually decreased. State after state that has studied the issue concludes that there is no "crisis" to reform.

So we must need reform to lower insurance premiums. But there is scant evidence to support that reform will accomplish this, either. A group started by President Ford has now examined 30 years of insurance cycles and it has found that liability insurance rates rise and fall with bond yields, not claims payments. St. Paul fire and Marine Insurance Company, the nation's largest malpractice insurer in the mid-eighties, conducted a study back then concluding that tort reforms "will produce little or no savings to the tort system as it pertains to medical malpractice." If history is any indication, St Paul was right: The states enacting caps in the 1980s and '90s have no lower liability insurance rates than the ones that did not.

If claims were affecting malpractice insurance rates, the doctors who want so desperately to reduce them would do well to clean their own house. Statistics from the National Practitioner Data Bank show that six and a half percent of Texas doctors account for more than half of all claims payments. Many are repeat offenders. Yet in the face of this astounding record, the Texas Board of Medical Examiners has not disciplined a single doctor for a negligent conduct in many years.

Our country's freedoms are based largely upon our ability to speak our minds and have our grievances decided by our peers in a public forum, where they can be publicized and debated. Our differences are resolved by our fellow citizens, not panels of judges, legal experts or political appointees. This system evolved over centuries, borne of the wisdom of some of the best minds our culture has produced. The freedom provided by this system, with all of its

admitted imperfections, is one of the things that make us who we are.

Unfortunately, wisdom has little to do with politics. Politicians began tinkering with the civil justice system in the mid-seventies, tinkered again in the mid-eighties, then enacted sweeping reforms in the mid-nineties, always because insurers sharply increased premiums. Those "reforms" awarded healthcare providers, among others, special treatment: Suits against them must be supported by special expert reports; a unique statute of limitations applies that can expire even before malpractice is discovered; some egregious conduct is sheltered from discovery; recoveries for the most egregious conduct and catastrophic injuries are capped; hospitals enjoy outright immunity when they negligently award credentials to incompetent doctors. Malpractice victims continue to suffer the consequences, but doctors' premiums continued to rise. Nobody benefited but the insurance companies that had more reserves to invest in the bond market.

Now that bond yields are down, insurers have again increased premiums, and politicians stumping reform agendas are again tinkering. But, there is not much left to tinker with. As a practical matter, a bill passed by the Texas House last month would all but immunize health care providers from much of their wrongdoing. If politicians continue to chip away at the remainder of our civil justice system, eventually, it too will collapse. When it does, I only hope that none of these politicians ever needs my help: "we aren't the kind of people who file lawsuits," they will say. If they only know how wrong they were.

JEFF SPRINGER was born in Denton County and has spent his career practicing law here. He earned his law degree at Baylor Law School.