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“TORT REFORM – NOTWITHSTANDING”

by

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Do non-physician business owners think or care about tort reform? By definition, a tort involves three elements, namely, duty, breach, and damage. The damage or loss must be the proximate result of the breach of an underlying legal duty, giving rise to a viable tort action. Commercial examples may include a retailer’s duty to provide a safe environment for its customers to shop; a landlord’s duty to provide a safe environment for its tenants and their guests; a manufacturer’s duty to produce safe products for consumers; a professional’s duty to provide services consistent with the established standards in their respective profession; etc...

While at risk to potential litigation, many business owners do not perceive the threat as applicable to them, because they have never been sued in the past, feel that they have nothing to lose and/or are otherwise willing to give up the proverbial “keys to the shop” in the event they are proven wrong. Without tort reform, we will all continue paying higher prices for insurance premiums. Think about how much you spend on various insurance coverages, whether it be automobile, bonding, builder’s risk, business interruption, directors and officers, disability, errors and omissions, extended risk, fire/casualty, general/commercial liability, life, products liability, property and casualty, umbrella liability and/or workers compensation. Business owners purchase one or more of these coverages, among other reasons, to protect themselves from the risk of frivolous lawsuits despite the knowledge and confidence that they have undertaken every imaginable precaution in their efforts to provide a safe product, service and/or environment for their patrons. Nonetheless, the risk of a debilitating lawsuit/adverse consequence, the exorbitant defense costs or the overwhelmingly consuming distraction and emotional distress caused by the litigation itself, can destroy an otherwise successful business. If for no other reason, businesses might ultimately enjoy the benefits of reduced insurance premiums likely to result from tort reform.

While I am a clear believer in the right to sue, our judicial system invites abuse.

Until such time as the courts enforce sanctions for baseless suits, impose a “loser pays” consequence, and ensures a true jury of peers, we will never have meaningful Tort Reform.

Rules of procedure provide for sanctions against a lawyer who files a frivolous/baseless suit in the Federal court system under what is known as “Rule 11.” Similar mechanisms exist in the statute books to deter lawyers from filing meritless cases in the State court system, but in practice are rarely enforced. But don’t put all the risk on the lawyers. Under a “loser pays” system, the losing party is responsible for paying the other side’s attorneys’ fees and related costs. Such a mechanism forces self restraint, inhibits frivolous filings from the outset, reduces the number of cases clogging the legal system thereby facilitating swifter resolution of the truly meritorious cases, fosters more realistic, practical and quicker settlements and otherwise shifts the risk to where it properly belongs, namely, on the wrong-doer.

Between the enhanced risks and potentially adverse consequences to Plaintiffs and their lawyers, fewer and fewer cases would ever reach jurors, which in the present system rarely reflect the peer group stature of many defendants in commercial litigation. There are cynics who suggest that the only jurors available to pick from are those too dumb to come up with a plausible excuse to avoid jury duty. In any event, other than a regional geographic match, jurors rarely reflect the peer group of the defendants.

Currently, litigation can take years to work its way through the system and will likely cost each side tens if not hundreds of thousands of dollars. Even the simplest of matters involving claims of \$50,000 or less take six months to be heard by a panel of lawyers sitting as arbitrators within the state compulsory arbitration system. Results at this level are appealable by a disgruntled party, requiring both sides to relitigate their issues before a judge sitting in the Court of Common Pleas.

Notwithstanding these limitations, the judicial system in our country is one of the finest in the world. However, it can still be improved. I, for one, believe that enforcing a combination of Rule 11 sanctions against lawyers, the risk shifting benefit of a loser pays system against the parties, and providing a “Blue Ribbon” jury of true peers capable of understanding, interpreting and deciding critical issues in complex matters would bring an unprecedented level of fairness to all parties involved.

Regardless, meaningful tort reform is a good thing for business.