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Legal Sidebar

Tort and Litigation Reform in the 115th Congress

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Debates over "tort reform"—that is, whether (and to what extent) legislatures should limit lawsuits concerning negligence, personal injury, medical malpractice, products liability, and other similar causes of action—have endured for decades. Many commentators and policymakers have advocated both substantive changes to the tort system (that is, "regulation of the standards of liability" that apply in tort cases "as well as the amount of damages" that a tort plaintiff may recover) and procedural changes (i.e., regulation of where, when, and how a tort lawsuit may proceed). Whereas supporters argue that tort reform is necessary to prevent "questionable lawsuits" that "compromise access to affordable health care, punish consumers by raising the cost of goods and services, chill innovation, and undermine the notion of personal responsibility," opponents argue that measures restricting tort litigation undesirably "chip away at Americans' ability to seek justice." This Sidebar surveys several major tort and litigation reform bills pending in the 115th Congress and discusses some of the legal issues raised by each bill.

Background on Tort Law

Tort law, broadly speaking, aims to "deter people from injuring others and to compensate those who are injured." Tort law encompasses a broad range of subjects, including medical malpractice, personal injury, and products liability law. Although the development and refinement of substantive tort law is generally the province of the states rather than the federal government, Congress nonetheless possesses some power to enact legislation that can directly or indirectly influence tort litigation, especially in the federal courts.

What a plaintiff must prove to prevail in a tort lawsuit varies depending on the context. For instance, to prevail on a medical malpractice claim in most jurisdictions, the plaintiff must prove that the defendant physician "deviated from the standard of care" prevailing "in the medical community," and that the physician's deviation from that standard injured the plaintiff. A plaintiff who alleges that he has been injured by a product manufactured or sold by the defendant, by contrast, must often prove (among other things) that the product was sold in a defective condition that was unreasonably dangerous to the consumer.

In many jurisdictions, plaintiffs are required to introduce expert testimony in order to prove certain elements of their tort claims. As a consequence, tort cases frequently involve "fierce and expensive" battles between competing expert witnesses, as well as battles between the parties over whether the court

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should allow their opponents' experts to testify at all. The *Daubert* standard, which governs the admissibility of expert witness testimony in federal court, generally requires the court to "evaluate: (1) the proffered expert's qualifications; (2) the reliability of the expert's methodology; and (3) the relevance of the expert's testimony" before allowing an expert witness to testify.

A plaintiff who prevails in a tort suit may generally recover "compensatory" damages, which, as the name implies, are intended to compensate the plaintiff for the pecuniary loss he sustained as a result of the defendant's tortious conduct. A successful tort plaintiff may potentially also recover "noneconomic" damages, such as damages for pain and suffering. In limited circumstances, a tort plaintiff may also recover "punitive" damages, which "may be awarded to punish the defendant for his conduct and to deter him and others from committing similar conduct in the future." Tort reform advocates maintain that "the difficulty of predicting whether punitive damages will be awarded by a jury in any particular case, and the marked trend toward astronomically large amounts when they are awarded, have seriously distorted settlement and litigation processes and have led to wildly inconsistent outcomes in similar cases," undermining the deterrent rationale underlying tort law. Supporters of tort reform have likewise criticized noneconomic damages on similar grounds. Other commentators, by contrast, respond that punitive and noneconomic damages are "necessary to provide a needed incentive to litigate" certain socially desirable tort lawsuits.

Tort Reform Legislation Pending in the 115th Congress

The 115th Congress has introduced a variety of bills that could affect tort litigation in the United States. Each of the bills discussed below has passed the House of Representatives and is presently pending in the Senate.

The Protecting Access to Care Act of 2017

The Protecting Access to Care Act of 2017 (H.R. 1215) (PACA), for example, is intended "to improve patient access to health care services and provide improved medical care by reducing the excessive burden the liability system places on the health care delivery system." PACA would, among other things:

- Restrict when a plaintiff may commence certain healthcare-related lawsuits;
- Limit the amount of noneconomic damages (such as damages for pain and suffering) that a plaintiff may recover in a health care lawsuit;
- Prohibit plaintiffs from naming certain health care providers who prescribe or dispense "medical product[s] approved, licensed, or cleared by the Food and Drug Administration" as defendants in product liability lawsuits or class actions involving those products;
- Impose additional limitations on expert testimony regarding certain medical matters beyond those already imposed by the *Daubert* standard described above; and
- Require plaintiffs, as preconditions to filing certain healthcare-related lawsuits, to (1) file "an affidavit of merit signed by a health professional;" and (2) provide health care providers with advance notice of the plaintiff's intent to file the suit.

If enacted, PACA could potentially have wide-ranging effects on tort litigation in the United States. For instance, because many jurisdictions require plaintiffs to introduce expert witness testimony to prove medical malpractice claims, PACA's heightened restrictions on medical expert testimony could make it harder for medical malpractice plaintiffs to prevail in court.

The Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017

Tort reform debates have also frequently focused on the availability of class actions. A class action allows a group of persons affected by a defendant's allegedly unlawful action to challenge that action in a single lawsuit, rather than through numerous, separate suits prosecuted by each individual plaintiff. Class actions empower plaintiffs to hold defendants accountable for unlawful practices that inflict comparatively small injuries to a large number of people. As a consequence, "the class action device has evolved as a central mechanism of enforcement for a broad range of laws, including those governing products liability" and certain other tort claims. However, because a class action allows a plaintiff to aggregate the damages allegedly suffered by numerous individuals, class actions can potentially encourage plaintiffs and their attorneys to file meritless lawsuits in the hopes of securing a lucrative settlement.

The Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017 (H.R. 985) (FICALA) would modify the procedures that govern class action litigation in federal courts, which, according to supporters, would "assure fairer, and more efficient outcomes for claimants and defendants." Among other things, FICALA would (1) supplement the existing requirements that a plaintiff must satisfy in order to pursue a class action seeking monetary relief; and (2) limit and regulate the payment of attorney's fees to plaintiffs' counsel in class action lawsuits.

The Innocent Party Protection Act

Debates over tort reform have also focused on the forums in which plaintiffs may permissibly litigate tort claims. Under certain circumstances, federal courts possess authority to adjudicate state law tort suits between citizens of different states pursuant to a doctrine known as "diversity" jurisdiction. However, with few exceptions, federal courts may not exercise diversity jurisdiction over a lawsuit "if any plaintiff is a citizen of the same State as any defendant." Because plaintiffs have generally perceived state courts as a more hospitable forum for tort suits than federal courts, tort plaintiffs often attempt to prevent federal courts from hearing their claims by naming additional defendants who are "non-diverse"—that is, who are citizens of the same state as the plaintiff—as parties to their suit. In some instances, the plaintiff has no viable cause of action against that non-diverse defendant, yet the plaintiff nevertheless names that defendant as a party to the suit solely in an attempt to prevent a federal court from exercising jurisdiction over the case.

The Innocent Party Protection Act (H.R. 725) (IPPA) aims to make it harder for plaintiffs to defeat diversity jurisdiction by naming non-diverse nominal parties as additional defendants. Under IPPA, if a federal court determines that the plaintiff's claims against a non-diverse defendant are meritless, or that the plaintiff has "no good faith intention to prosecute the action against that defendant," the court would be required to dismiss the non-diverse defendant and exercise jurisdiction over the case. IPPA would likely result in more state law tort suits being adjudicated in federal court.

Author Information

Kevin M. Lewis
Legislative Attorney

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