

Promoting the General Welfare Through Civil Justice Reform

A Memo to President-elect Obama

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Barack Obama believes we need a business and regulatory landscape in which entrepreneurs and small businesses can thrive, start-ups can launch, and all enterprises can compete effectively while investors and consumers are protected against bad actors that cross the line....

—“Barack Obama on Technology and Innovation,” at www.barackobama.com

Increasing medical malpractice insurance rates are making it harder for doctors to practice medicine and raising the costs of health care for everyone.

—“Barack Obama’s Plan for a Healthy America,” at www.barackobama.com

PRESIDENT-ELECT OBAMA, you argued forcefully as a candidate that we need a regulatory and business landscape in which businesses, entrepreneurs, and investors can thrive and consumers are protected. You vowed to take action to make America’s civil justice system work for all Americans.

As you observed when you voted in favor of the Class Action Reform Act, civil justice reform is a bipartisan enterprise that brings together the interests of many disparate constituencies that are affected by the operations of our courts.¹ There is a real risk that special interests will seek to reverse progress made in recent years to achieve their own narrow ends. Your Administration should be vigilant to this threat while also seeking out opportunities to advance the cause of legal reform.

We—and the American people—believe that continuing civil justice reform is essential to America’s long-term prosperity and preserving our freedoms. It is particularly important during an economic downturn when frivolous litigation and attempts to regulate through litigation result in such high costs and liability that our economic recovery is diminished or even reversed. Fully 83 percent of the American people believe that frivolous lawsuits are a problem, and 79 percent agree that any expansion of the opportunity to file such suits by Congress will have a negative effect on the economy.²

The U.S. tort system costs our economy billions of dollars each year: \$246 billion, or \$845 for every person, in 2003 alone.³ U.S. tort costs increased 35.4 percent from 2000 to 2003, and the growth of tort costs has exceeded the growth in GDP by 2 to 3 percentage points over the past 50 years.⁴

As you have noted, in just one important area alone, the huge increase in medical malpractice insurance rates has contributed significantly to the problems in our health care system, making it difficult for doctors to provide care, encouraging the harmful practice of “defensive medicine,” and raising the costs of obtaining quality health care for everyone. Open-ended liability that is not checked by considerations of efficiency and fairness inevitably leads to litigation abuse and these other kinds of unintended consequences.

Protecting consumers and existing businesses and encouraging the creation of new businesses are important to promoting the general welfare and continued growth of the American economy. To achieve that end, you will need to take certain basic steps to reform our civil justice system:

- **Discourage regulation through litigation.** Under our system of government and the constitutional doctrine

1. Barack Obama, “Passage of the Class Action Fairness Act,” speech before the U.S. Senate, February 14, 2005, at http://www.votesmart.org/speech_detail.php?sc_id=145202&keyword=&phrase=&contain.

2. Press release, “Voters’ Resounding Call for ‘Change’ Did Not Include Wanting More Lawsuits,” Institute for Legal Reform, November 5, 2008, at <http://www.instituteforlegalreform.com/media/pressreleases/20081105.cfm>.

3. Towers Perrin, “U.S. Tort Costs: 2004 Update, Trends and Findings on the Cost of the U.S. Tort System” p. 2, at https://www.towersperrin.com/tillinghast/publications/reports/Tort_2004/Tort.pdf.

4. *Ibid.*

of “separation of powers,” how and when commerce is regulated is determined by Congress and state legislatures through the passage of legislation. When courts, through litigation, overreach by legislating from the bench instead of interpreting and applying existing laws as they are written, they erode the democratic principles of our government and usurp the rights of citizens and their elected representatives to determine public policy. It is not the courts that should determine what products and services are available in our economy. The attempt to regulate through litigation can also damage specific industries and retard the growth of the economy. Worst of all, it undermines democratic accountability, weakening the ability of elected officials such as yourself, as well as their appointees, to govern.

As President, you should do everything you can to discourage litigation that is outside the proper role of the courts. This includes appointing judges who understand their proper role and base their decisions on the rule of law, not empathy; directing that federal law enforcement agencies act in a modest and deliberative manner and ensuring that they are not used for expansive political purposes or to circumvent congressional lawmaking; and opposing legislation that opens the courthouse doors to claims that make policy rather than resolve specific disputes. These steps will help to ensure that Congress and your Administration, not the courts, are the nation’s primary policymakers.

- **Embrace preemption in areas subject to federal regulation.** When a federal agency’s experts approve a product or device based on its safety and effectiveness pursuant to a federal regulatory program, that determination ought to be the law of the land and not subject to reversal by state courts or regulators seeking to impose their own standards. This doctrine is known as “preemption,” and it has been the subject of criticism by those who disagree with federal regulatory determinations. But if federal regulation is to be effective and businesses in regulated industries are to comply with the law in a cost-effective manner, preemption is often necessary. Congress and many federal agencies have recognized this principle in a

variety of domains, such as product safety, medical devices, and tobacco regulation, and it is a vital bulwark for effective policymaking at the federal level.

Reversing the trend toward preemption in closely regulated industries will increase legal uncertainty, undermine the ability of federal regulators to protect the public, and impose a massive burden on businesses across the economy. To prevent these consequences, you should oppose legislation that would reverse preemption and instruct your appointees that, as a matter of policy, your Administration will not reverse agency positions on preemption and will continue to intervene in legislation where federal regulatory power is inappropriately called into question by state laws. Without these steps, there is the risk that, in more and more domains, federal regulations will come to be mere starting points rather than recognized standards for safety and efficacy determinations, giving state courts and the trial lawyers who sway them the inappropriate power to make national regulation.

- **Encourage arbitration as an alternative to litigation.**

Arbitration serves as a beneficial alternative to litigation because it provides a more expeditious and less expensive resolution of disputes for the country's overburdened civil justice system. Because of its lower costs, it also provides consumers the ability to pursue lower-value claims where they would ordinarily have a difficult time finding legal counsel. As President, you should oppose any efforts to make arbitration clauses unenforceable. Such a public policy would hurt consumers since it would make it more difficult to obtain a lawyer and leave the typical consumer without any remedy but a court remedy, the cost and delays of which could consume the value of any eventual recovery.

As the Supreme Court has recognized, arbitration provides a cheaper, faster, and more effective forum for a variety of disputes, and it provides an overall benefit to our economy in the form of lower prices for goods and services. It would be a major error to invalidate arbitration clauses in employment, consumer, brokerage, and other contracts as has been proposed. Such action

would severely limit the many advantages gained by consumers through a robust arbitration system.

- **Oppose policies that encourage and facilitate lawsuit abuse.** Litigation is rarely the best way to settle conflicts, and when it is necessary, it should serve as a fair and efficient means to adjudicate controversies. Proposals that depart from this norm—that increase the amount of contentious litigation or that drive up the expense and difficulty of litigation—put a damper on entrepreneurship and economic growth and put justice out of reach for many individuals and businesses.

One example is the Sunshine in Litigation Act, which would severely restrict voluntary confidentiality agreements in private litigation. While this would be a boon to trial lawyers conducting “fishing expeditions” and hoping to bring repetitive follow-on lawsuits, it would actually disadvantage plaintiffs with legitimate claims, who would find it more difficult to settle without litigation and risk public disclosure of their personal information. This is the kind of consequence that is often the result of well-meaning but poorly conceived policies that facilitate abusive litigation.

- **Support medical liability reform while respecting the role of the states.** As you have pointed out, high premiums for medical liability insurance in many states “are forcing physicians to give up performing certain high-risk procedures,”⁵ stopping the practice of medicine, or moving their practices entirely. Numerous physicians are also forced to engage in “defensive medicine,” ordering more procedures than are needed to avoid malpractice litigation. Such practices combined with rapidly increasing malpractice insurance premiums have sent health care costs soaring, compromising the quality of and access to medical care for patients.

Many states have passed legislation that caps non-economic damages and limits attorney contingency fees. Such limits have helped to speed the settlement of valid claims and have provided injured patients with a greater

5. Hillary Rodham Clinton and Barack Obama, “Making Patient Safety the Centerpiece of Medical Liability Reform,” *New England Journal of Medicine*, May 25, 2006, p. 2205.

share of recoveries. They have also reduced medical malpractice premiums and eliminated or reduced the shortage of physicians and medical facilities resulting from skyrocketing medical liability costs.

Though the high costs of malpractice litigation are felt across the nation's health care system, they are the result of individual states' laws and can be addressed most directly at the state level. As part of a broader health care agenda focused on state-level flexibility and innovation, you should encourage states to reform their malpractice systems with both proven strategies, like damage caps, and new proposals, such as legal ethics reform and fee disclosure requirements. You should be wary of federal solutions that block state-level innovation or overrule good state systems.

- **Strengthen the SAFETY Act to make the private sector a stronger partner in homeland security.**

In 2002, Congress passed the SAFETY Act to limit liability for developers and manufacturers of anti-terrorism technologies and provide federal jurisdiction for lawsuits involving the deployment of those technologies. The program was slow to get off the ground, and only in the past two years have larger numbers of businesses begun to apply for SAFETY Act certification and qualification.

The importance of this program is highlighted by the recent attacks in Mumbai, which illustrate the importance of a robust effort to detect, deter, and mitigate terrorism and terrorist organizations. The federal government alone cannot provide for all aspects of homeland defense, but too often the private sector is deterred by the inherent legal risks. The SAFETY Act was a good first step to reduce that risk and thereby encourage more private-sector actors to produce and adopt anti-terrorism and terrorism-response technologies.⁶

But legal risk remains, and implementation has been slower than hoped for. Your Department of Homeland Security should make SAFETY Act implementation a priority and work closely with technology developers

and their potential customers to identify opportunities for improvement, especially regarding the speed of technology review. You should also support sensible statutory reforms to broaden the Act's coverage, clarify its applicability to foreign attacks and insurance requirements, and increase participation.

- **Oppose changes in bankruptcy that undermine credit.** With mortgage defaults at high levels in recent months and bankruptcy filings also growing, there has been some pressure to modify the bankruptcy code to make it more "consumer-friendly," particularly by undoing the reforms of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. This would be a major mistake. That law tightened requirements for consumers seeking discharge of their debts to prevent abuse of the bankruptcy process. The result has been a channeling of more individual filers into Chapter 13 bankruptcy, in which they are required to pay down some of their debts over a period of up to five years—a good compromise between the "fresh start" that discharge provides and the need to avoid abuse and encourage responsible behavior.

A step in the opposite direction, whether by specifically repealing BAPCPA provisions or providing additional barriers to mortgage foreclosure in bankruptcy, would serve the perverse effect of discouraging lending to consumers with checkered credit histories, making it more difficult for them to open businesses, buy homes, and finance important purchases. Reversing course on reform now would be shortsighted and, over the long term, very detrimental to income mobility in America. Your Administration should oppose any such proposals.

Conclusion

Civil justice reform is a key factor in the continued health of our economy and our general welfare. As Justice Souter said recently in an important decision on punitive damages, the United States needs a legal system "whose commonly held notion of law rests on a sense of fairness in dealing with one another."⁷ And in our tort system, we

6. See Paul Taylor, *We're All in This Together: Extending Sovereign Immunity to Encourage Private Parties to Reduce Public Risk*, 75 U. Cin. L. Rev. 1695 (2007).

7. *Exxon Shipping Company v. Baker*, 128 S.Ct. 2605, 2627 (2008).

must “protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary.”⁸

8. *Ibid.*

You have the ability, in coordination with Congress, to achieve the goal of promoting a legal system that is not unnecessarily punitive and is both fair and just to all parties.

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