

Judges See Steps Made Toward Standardizing Tort System

NEW YORK 01/15/2004 (BestWire)-Rampant cost inflation in the U.S. tort system has meant chaotic markets for many liability coverages, but signs of progress on both the judicial and legislative fronts are beginning to creep up on the horizon, according to participants in Property-Casualty Industry's Joint Industry Forum.

"When you talk to foreigners about the American tort system, they don't understand class action, don't understand discovery, don't understand how or why we give bonuses for pain and suffering," said Judge Paul V. Niemeyer of the U.S. 4th Circuit Court of Appeals. "I don't want to say we should abolish these things, but we have to recognize that our system is peculiar in many ways, and it requires that we spend a lot of time thinking about how we establish rational standards for concepts that most other legal systems just simply ignore."

But according to Niemeyer, last year's decisions by the U.S. Supreme Court in the *Campbell vs. State Farm Insurance* and *Philip Morris vs. Williams* cases -- in which the court majority found that excessive punitive damages were unconstitutional -- should be considered the first step toward establishing those standards.

"Is it a blunt tool to just say damages should be capped at this amount, or that they should only be three times compensatory damages, or four times?" Niemeyer said. "Yes, it is. It's arbitrary. It's not the ideal. But there may not be better options. Like pornography, I don't know that it's possible to give a definition of excessive damages, but I know them when I see them."

Total costs for the U.S. tort system rose 13.3% to \$233 billion in 2002--a \$27.4 billion increase over 2001--representing the largest dollar increase in U.S. history, according to a study issued last month by Tillinghast-Towers Perrin. The increase translates to an additional \$809 paid by each U.S. citizen--\$87 more than in 2001 and \$797 more than in 1950.

Judge Jess Dickinson--a Republican who won election last year to the Mississippi Supreme Court--said he saw his state's tort system spiraling out of control in recent years, when he was serving as a defense attorney for insurance companies and other large businesses.

"Alabama learned its lesson and they have moved dramatically toward getting some fair and balanced judges sitting at all levels," Dickinson said. "Now, if you go into any Mississippi phone book, you'll find 15 to 20 law firms that used to be in Montgomery or Birmingham."

But according to Dickinson, the election of a greater number of judges with sympathies similar to his own, as well as recent legislative efforts to enact caps on medical liability

and other forms of noneconomic damages, indicates that a corner has been turned in the state's legal environment. "I'd like to think we're on the downhill side of the slope now, and that these efforts will just keep picking up steam as, more and more, the people come to understand what kind of effect this has had on them, how much of a drag on the economy it has been," Dickinson said.

In late 2002, Mississippi's legislature, in a special session at the direction of Gov. Ronnie Musgrove, passed legislation placing a \$500,000 cap on noneconomic damages-- increasing to \$750,000 in 2011 and to \$1 million in 2017. In addition, lawsuits must be filed in the county where the cause of action allegedly occurred and the liability parameters regarding joint-and-several liability were changed so defendants would be liable only for their own percentages of fault as to noneconomic damages (BestWire, Oct. 8, 2002).

Dickinson said these successes should be taken as by insurers as a sign that they can and should be involved in the political process, but cautioned that companies need to be particularly clear about their goals and motivation before doing so.

"You have to be clear that what you want is fairness, and a return of sanity to the process," Dickinson said. "And we know that that is what we all want, but unfortunately, there are many in the public, in the press, who do not, and who can construe a political contribution from an insurer as in some way unfairly influencing the system. That is a very difficult impression to fight, but the option of just ignoring the problem is no longer available."