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Tort Trends

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What events in the legal system are likely to influence claiming and losses in the foreseeable future?

- You need to approach this question with a broad "ecological" view of the legal system. Legal doctrine is just part of the picture.
- The last decade has seen substantial changes that should make the tort system more predictable.
- While there is renewed energy on the plaintiffs' side, the balance of forces does not seem likely to change radically in the next few years.

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An Ecological View of the Tort System

- Prevalence & nature of adverse events.
  - Potential willingness to sue
- Mobilization of claims
  - Organization and resources of plaintiffs' bar and its allies
  - Ease of communication with potential claimants
  - Incentives for lawyers, claimants, other gatekeepers
- Characteristics of litigation process
  - Choice of forums
  - Claims management procedures
  - Attitude of judges and juries
  - Structure and quality of juries
  - Practical availability of appeal
- Legal Rules
- Relationship to political system

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The tort system has become substantially more friendly to business over the last 10 years.

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According to U.S. Chamber, big business has become more positive on fairness of state courts.

YEAR	AVERAGE SCORE
2002	52.7
2003	50.7
2004	53.2
2005	52.8
2006	55.3
2007	58.1
2008	59.4
2010	57.9

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These impressions reflect significant real changes.

- It has become much more difficult to mobilize large masses of trivial (and often fraudulent claims).
- Legislation (and sometimes judicial rule-making) has tamed traditional "hell-holes." Places like Texas and Mississippi have become favorable to defendants.
- Trial lawyers have not succeeded in following up their successes in tobacco litigation in the 1990s.
- Mass torts have become more manageable from the business perspective. Judges have become more suspicious of mass torts, and defendants have evolved better strategies.
- Business has become much more savvy politically in influencing judicial selection.
- Conservative ethos of "personal responsibility" resonates with the public more than liberal "corporate accountability" themes.

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The momentum of business-friendly reform has slowed since 2006.

- The major gains in the last decade were made in 2000-2006 period. Republicans were in control in key states; there was a periodic "hard" market in medical malpractice insurance; and tort litigation posed serious threats to business.
- In general, the pace of reform slowed after the 2006 elections, which favored Democrats in the states as well as Washington.
- Tort reform also slowed down because the rate of change earlier in the decade wasn't sustainable.

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For the near future, no breakout seems likely on either side.

- The trial lawyers' agenda continues to be predominately defensive, at least in tort arena.
  - The main exception is in the area of federal preemption, where AAJ hopes to obtain statutory change removing FDA preemption on injuries from medical devices.
- To watch:
  - Trial lawyers are involved in financial services litigation as well as the Toyota recall lawsuits. Successes there could replenish the coffers.
  - Popular mood hostile to business, which could make claims mobilization easier.
  - Increased regulatory activity regarding medical devices and drugs (especially off-label promotion) could generate significant new claims.
  - Internet increases trial lawyer access to accident victims (and vice versa).

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Three Business Success Stories … and One Partial Defeat

Remarkable Successes:

- During the 2000s, asbestos litigation was (more or less) tamed.
- Business defeated trial lawyer efforts to exploit precedent of tobacco litigation.
- Merck strategy led to favorable outcome in Vioxx litigation.

But:

- Strategy to control tort litigation through broad Federal preemption does not appear to have worked.

Success Story I: The (Relative)Taming of Asbestos (and Silica) Claims

Asbestos matters because it is a bellwether for the handling of mass torts generally.

- Asbestos was the pioneer mass tort.
- Almost all of the factors that have led to uncontrolled growth in mass torts appeared first in asbestos claims:
  - Mobilization of claims by unions and "cause" doctors and epidemiologists
  - Demonization of defendants & substantial recoveries for unimpaired
  - Consolidations and other case management techniques designed to force settlements
  - Forum shopping
  - Development of mass settlement techniques (including bankruptcies)

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In the early 2000s, asbestos litigation was completely out of control.

- The number of claims exploded toward the end of the 1990s. By 2002, approximately 100,000 claims were filed in just one year.
- These claims were mostly brought on behalf of people who were not sick. They were filed in a few states – Mississippi, Texas, West Virginia.
- At the same time, there was a rapid increase in the value of claims brought by people who had fatal asbestos cancers. Many of these claims were centered in Madison County, Illinois, a charter member in the "hellhole" club. Jury verdicts exceeding $100 million no longer unheard of.
- As more and more defendants filed for bankruptcy, insurance companies began to fear acceleration of their obligations in asbestos cases, which threatened their ability to finance these losses.

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By 2005, almost all traditional asbestos defendants had filed for bankruptcy protection.

- Wave of bankruptcies began in 2000. By 2005, more than 85 asbestos bankruptcies since inception, with about 2/3 filed since 1/1/2000.
- Almost overnight, the securities markets withdrew financing for companies seen to have an "asbestos problem."
- As each defendant filed for bankruptcy protection, the plaintiffs' trial bar sought to make up the lost settlement contribution by increasing their demands on the remaining defendants – thus pushing still more companies over the cliff.
- At the time, little thought was given to the fact that eventually bankrupt companies would reorganize, and their resources would come back on line. After 2006, however, that is exactly what happened.

Desperation made defendants (and insurers) bold.

- In 2000, an alliance of defendants, insurers and a part of the trial bar agreed on a Federal legislative package which would have deferred the claims of people who could not meet certain medical criteria. The proposal also would have limited consolidated trials and forum shopping.
- Many courts adopted "medical criteria" during the same period, putting unimpaired claimants on so-called deferral dockets.
- Beginning in 2005, states began to enact legislation modeled on (but by that time more stringent than) the 2000 federal bill.
- In 2003, the federal legislative campaign shifted to efforts to establish an administrative compensation program. This fell one vote short in 2006, but it kept attention on asbestos throughout this period and fueled other legislative and judicial proposals.
- Asbestos reform had momentum in courts, state legislatures, and Capitol Hill from 2002 on.

The decisive asbestos victory came … in silica cases.

- In 2002, uncertain of the future of asbestos, plaintiffs' lawyers decided to use the same techniques that had flooded the courts with asbestos claims in a new area, silica.
- The screening companies that generated fraudulent asbestos claims generated phony silica claims as well – often on behalf of the same people.
- This time, however, catastrophe.
  - The lead defendants' law firm, Foreman Perry, represented a large number of silica defendants and was also deeply involved in the Mississippi asbestos litigation. It took a more strategic view than defense firms normally do.
  - Judge Janice Graham Jack managed the cases actively and allowed the defendants to obtain discovery across the group of claims.
  - Result: A judicial opinion rippling "diagnosis for dollars."

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Since 2006, asbestos claims have become manageable again.

- Tort reform in Mississippi and Texas have made those states, if anything, forums for plaintiffs to avoid.
- Changes in judicial management have ended the main abuses in Madison County.
- The screeners who generated great volumes unimpaired claims to be settled en masse have exited the business. Plaintiffs' law firms have either exited or changed their business model to litigation of high value cases.
- Asbestos litigation is largely focused on mesothelioma. As litigation resources have concentrated on mesothelioma claims, values and litigation costs have tended to increase. Some mega-verdicts still occur, including a punitive damages award of over $100 million just last month in L.A.

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The plaintiffs bar and defense bar are wrestling over the future.

- Most asbestos plaintiffs can obtain substantial compensation from bankruptcy trusts that have come on line in the last 5 years. In effect, there is an administrative claims regime for asbestos victims.
- The objective of the plaintiffs' bar is to collect from the trusts while also maximizing tort system compensation.
- The defense strategy seems largely aimed at making compensation from the trusts the main resource for asbestos plaintiffs. Thus:
  - The defendants want to increase transparency regarding trust distributions to minimize double-dipping.
  - **The defendants also want to forestall expansion of the pool of defendants (and if possible diminish it).**

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Two important battlegrounds

- Second-hand exposure
  - A significant number of mesothelioma cases are found in wives and children of asbestos workers, who were exposed to asbestos on the worker's clothing.
  - Trial lawyers want to be able to hold premises owners liable for these cases. (Because the injured person isn't an employee, workers' compensation doesn't apply).
  - Cases are mixed, but defendants ahead on points.
- Responsibility for asbestos sold by others
  - Major new area in late 2000s: naval personnel exposed to asbestos in valve packings and gaskets on warships.
  - The issue is whether the manufacturer of the valves is responsible for warning ship personnel, when it did not actually supply the asbestos.
  - Key case now being briefed in Calif. Supreme Court: O'Neil v. Crane Co.

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Success Story II: Guns, Lead, and Big Macs

- Ten years ago, the plaintiffs' bar, its tobacco winnings in the bank, was on the lookout for a new way to use the model that had just worked so well.
- The vehicle of choice was public nuisance actions, which needed to be brought in conjunction with public officials. The issues: gun injuries, clean up of lead paint, obesity.
- These new initiatives have been unsuccessful thus far, because of legislation, judicial decisions, or both.
- The business side has been working hard to undermine the often cozy relationships between contingency fee lawyers and state attorneys' general. A number of states have adopted transparency provisions and other measures designed to prevent attorneys general from circumventing the roles of state legislatures.
- The current attention on pay-to-play scandals in other areas may increase pressure to enact transparency measures here too.

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Elite plaintiffs' lawyers may find new opportunities in financial and consumer litigation.

- The elite plaintiffs' bar has does not currently have rich new opportunities in the personal injury area. Public nuisance cases have been disappointing . Outside a routine flow of pharmaceutical cases, there doesn't seem to be any really promising mass tort opportunities.
- The litigation around Toyota accelerators may open the way to high-value litigation by aggregation. Rather than bring cases on behalf of the people who are injured by defects in Toyota cars, trial lawyers are bringing cases for the loss of market value caused by the revelation that Toyota's were not as safe as we all thought. *Some of the lawyers jockeying for leadership positions on the plaintiff side are also experienced at mass personal injury litigation.*
- Large-scale tort litigation needs to be funded, and to the degree that tort lawyers can reap the fruits of the financial meltdown, corporate missteps, and other disasters, funds may be reinvested in other torts.

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Success Story III: Vioxx Hardball

- In 2004, Merck & Co. withdrew the pain-killer Vioxx from the market because studies showed that it was associated with an elevated risk of heart attacks.
- The Vioxx case had the potential to be a major mass tort debacle. Merck had been criticized in medical journals for publishing misleading reports supporting the drug's safety. There was evidence that the risks of heart attack should have been discovered much earlier.
- Predictably, the withdrawal of Vioxx from the market led to the filing of thousands of claims.

Merck developed a hard-ball strategy toward defending the Vioxx claims.

- Pharmaceutical companies had in the past sought quick global settlements in drug cases. But experience had shown that a "soft" settlement posture often led to very expensive resolutions and simply encouraged a new flood of claims.
- While Merck had some important litigation vulnerabilities, so did the claimants. The key difficulty on the claimant side was proving that Vioxx caused the claimant's heart attack.
- Merck refused to settle and insisted on trying cases full out, over and over.
- While there were some claimant wins, for the most part Merck was successful in challenging causation.

The inevitable global settlement was favorable to Merck.

- By 2007, when the judges handling the Vioxx cases pressed hard for settlements of the mass of cases, Merck was in the driver's seat.
- The eventual settlement resolved the Vioxx cases on a global basis on terms favorable to Merck.
- Lawyers representing claimants promised not only to recommend the settlement to them, but to withdraw (subject to ethical obligations) if the claimant held out.
- Vioxx did not put an end to pharmaceutical litigation, of course. It did suggest that an aggressive strategy early on, designed to demonstrate the strength of the defendant's case, could pay dividends when the time came to resolve the mass of claims.

Partial Failure: Tort Reform by Preemption

Preemption provides a way for tort defendants to avoid having their conduct evaluated by juries.

- The "Supremacy Clause" of the Constitution makes Federal law the Supreme Law of the land. When it conflicts with state law, Federal law prevails or "preempts" state law.
- The Supreme Court has consistently held that state tort rules are the sort of "requirements" to which the preemption doctrine applies.
- Preemption is attractive to businesses for two reasons:
  - Most importantly, it establishes a regulatory compliance defense. Traditionally, compliance with regulations is regarded as evidence of due care, but isn't conclusive. The court always can consider whether more should have been done. Preemption gives the defendant a safe harbor.
  - Federal regulation is generally sympathetic to business concerns … at least compared to juries evaluating corporate conduct with the benefit of hindsight. Even strict Federal regulation, however, may be preferable to 50 differing state rules.

The Bush (43)Administration pushed to expand the scope of federal preemption.

- The FDA led the way with preamble language that asserted that its rules on drug warnings were both a "floor" and a "ceiling" and thus preempted state tort law. This was a reversal for the agency, which had previously thought of FDA-required warnings as just a "floor" and had welcomed tort litigation as an adjunct to federal regulation.
- While the FDA was in front on this issue, many agencies followed a similar policy of including preemptive preambles to regulations. These included the NHTSA, the FRA, and the CPSC.

The expansion of preemption was checked by the Supreme Court's decision in Wyeth v. Levine (2008).

- Preemption cases all involve questions of statutory interpretation.
- A federal statute can "occupy the field" ousting any state attempt to regulate in the preempted area. An example is nuclear power.
- A federal statute may also expressly preclude the operation of state law.
- If there is no express preemption, preemption may be implied:
  - if it is impossible to comply with both the federal rule and the state rule or
  - if operation of state law would be an obstacle to the achievement of the purposes of the federal law.
- In "obstacle" cases, it was an open question whether an administrative agency's view of whether state law was a hindrance should be given the broad deference that agency interpretations of statutes normally enjoy.
- *Wyeth* established restrictive principles on these issues.

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Wyeth suggests that preemption is the exception, in the absence of a clear statement by Congress.

- *Wyeth* started "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."
- "Impossibility pre-emption is a demanding defense." The defendant must show actually conflicting obligations.
- *Wyeth* refused to give weight to the FDA's preamble asserting that FDA labeling was both a floor and a ceiling (and so preempted state law): "The weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness." FDA's inconsistency robed its current view of persuasive force. But even without inconsistency, the Court was willing to give the agency's view only "some weight" – not the broad deference.

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Lower court cases since *Wyeth* have followed the Supreme Court's skeptical approach to preemption.

- *Wyeth* itself dealt with a new drug. The lower federal courts almost immediately had to address whether the court's conclusion on preemption would apply to generic drugs, which operated under a somewhat different FDA regulatory scheme. The emerging consensus is that it does.
- *Wyeth* has also been applied outside the FDA context. For example, in *Cook v. Ford Motor Co.*, an Indiana appellate court relied heavily on *Wyeth* in holding that an NHTSA standard on warnings of the danger air bags can pose to children did not preempt state law claims that the manufacturer's warnings were inadequate.

Meanwhile, back in Washington…

- *Wyeth* took the wind out of the sails of the Bush 43 Administration's effort to use executive interpretations of the effect of state law to effect broad tort reform. But *Wyeth* was not the last word.
- On May 20, 2009, President Obama issued a memorandum suggesting that agencies had previously taken positions regarding the preemptive effect of federal regulations and directing the agencies to review those findings. The memorandum also put an end to the agency practice of including preemptive language only in the preamble: if an agency thought its regulation would have preemptive effect, that conclusion had to be included in the regulations themselves.
- Meanwhile, trial lawyers, flushed with victory, have pressed hard for Congress to amend the FDCA to eliminate express preemption for medical devices. Given the current balance in Congress, it is unlikely they will succeed.