

RA&MCO QUARTERLY

The Design and Construction Newsletter

A publication of RA&MCO Insurance Services

Summer Quarter 2003

Volume 21, Issue 3

Tort Reform - Panacea or Illusion?

In its simplest terms, "Tort" is a legal concept involving a breach of a non-contractual duty that gives rise to a legal cause of action. It is a private or civil wrong or injury as opposed to a crime, which is a violation of penal law, an offense against the state (or United States). For a plaintiff to recover for such a wrong or injury, it must demonstrate that it was owed a duty, that the duty was breached, and that there were resulting damages caused by the breach of duty, occurring either negligently or unintentionally.

In the famous case of *Ashby v. White*, Chief Justice Holt declared that for every interference with a recognized legal right the law will provide a remedy. The eloquent Professor William Prosser further observed that "new and nameless Torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before."

Recently a study sponsored by the U.S. Chamber of Commerce and conducted by Harris Interactive, Inc., polled senior corporate attorneys at public corporations. A majority of those surveyed (57%) gave the liability systems as practiced in their state an overall ranking of "fair" or "poor" and then ranked the 50 states accordingly. Equally compelling is a recent study by Tillinghast - Towers Perrin that showed that the overall cost of the U.S. Tort System was \$205 billion in 2001, or \$721 per U.S. citizen, equivalent to a 5% tax on wages. In the past 50 years tort costs have increased more than 100-fold, whereas U.S. economic growth has increased by a factor of 34 and the population has only doubled. Moreover, the tort system was found to be inefficient, retaining less than 50 cents on the dollar to those it seeks to serve and only returning about 22 cents to compensate for actual economic loss or damage. If these trends continue, tort costs could approach \$1,000 per U.S. citizen by 2005 - costs that ultimately are passed on to these same citizens in the costs of goods and services.

This system clearly increases the cost of doing business in the U.S., further aggravating its ability to compete in world markets. No other country has anywhere near the litigious nature of the U.S. nor its costs. Offsetting these costs concerns is the recognized social policy benefit of ready access to the civil justice system by members of the public, expedited by a contingency fee system by attorneys that represent them. The "consumer" attorneys are a powerful political force with both major political parties and have a highly effective and well funded lobbying presence at both the state and national level in order to protect these rights.

Do these traits indicate that the U.S. Civil Justice system has achieved an imbalance between the rights of those seeking redress for their losses and injuries and those from whom they should reasonably expect to recover for such? Some recent events have brought this question into sharper focus, such as a perceived crisis for many physicians being unable to obtain malpractice insurance at reasonable cost and availability because of their being drawn into expensive litigation by patients. Contractors/builders are similarly affected because of construction defect claims and design professionals admitting this climate stifles their pursuit of innovative design for the benefit of their clients or the public in their services. It is the current situation of the physicians, however, that is in the public eye because of the actual and threatened reasoned withholding of medical services.

Typical initiatives to seek a better balance between the overall goal of civil justice reform that retains individuals' rights but discourages "jackpot justice" involve legislation at both the national and state level. Features proposed may include caps on non-economic and punitive damages, limiting joint and several liability, requiring an affidavit of merit in malpractice actions, venue reform (reducing "shopping"), mediation early in the legal process, "right to cure" laws, limitations on attorney contingency fees, changes in statutes of limitations and repose and giving judges greater power to reduce unjustified jury awards.

At last count, 17 States have such legislation pending, while a number of others have passed one form or another. There are considerable doubts that any meaningful reform legislation will be passed at the federal level for numerous reasons. Additionally, any legislation that has been passed is subject to careful judicial scrutiny and challenges. Probably of equal importance is the need for commercial and professional organizations to educate the public that "there is no free lunch", and while some juries may be encouraged to have a "lottery winning" state of mind in determining liability and awarding damages, ultimately they are paying for it, so reasonableness should prevail in their deliberations.

In light of the above, it may be unlikely that Design and Construction Professionals will be able to reply upon any meaningful tort reform legislation or judicial authority to alleviate their own professional liability exposures anytime soon. Rather, their best means of protection is by means of "reform" of expectations by their clients to keep controversies out of court in the first place or to limit triable issues of fault. This is accomplished by utilizing all reasonable loss prevention means, including client selection, careful documentation of project events, fair contracts for services and constant, effective communications to all project stake holders. Litigation is best avoided than dealt with once it is underway. Whatever the legal climate, one should bear in mind the old Spanish aphorism: "litigation is a tree that grows in a lawyer's garden."

Coming Next Quarter: Frivolous Litigation

If you would like more information about this or future publications please contact (800) 684-7475, or you can reach us by mail at:

RA&MCO Insurance Services
2300 Clayton Rd, Suite 1100
Concord, CA 94520-2157
www.ramco-ins.com
Info@ramco-ins.com

RA&MCO is one of the nation's leading underwriters of professional liability insurance for design professionals. It is accessed through over 1,600 brokers across the country. This newsletter is dedicated to its readers as an educational and informational resource and the views and opinions expressed herein are not to be construed as legal advice from the author(s), RA&MCO Insurance Services or any insurer. Readers should seek specific legal advice from competent legal counsel on any issue or topic herein before taking any action. References and citations are omitted for the sake of brevity.

RA&MCO

INSURANCE SERVICES

Professionals insuring Professionals

© RA&MCO Insurance Services, 2003