



Committee for Economic Development

# CED IN BRIEF

A Policy Series From A Business Perspective

## Legal Reform: Common Sense Reforms and Innovative Alternatives

Much debate has arisen in recent years over the state of the legal system in the United States and proposals to drastically alter it. More attention is being directed towards the economic consequences of our litigation-centered legal regime, such as the impact of medical liability on health care costs. The Bush Administration has made legal reform a high priority. This is a worthy and necessary discourse, but the debate unfortunately has deteriorated into partisan quarreling. In this climate, there is little hope for achieving a real resolution that protects individuals and promotes economic activity. The present debate must move towards a bipartisan exploration of sensible reforms and innovative solutions.

The Committee for Economic Development (CED) has examined the economic effects of our legal system and has issued recommendations for reform in the policy statements, *Breaking the Litigation Habit: Economic Incentives for Legal Reform*, and *Who Should Be Liable? A Guide to Policy for Dealing with Risk*. CED finds that the current system is too slow, intrusive, expensive, and complex. While defendants are often paying considerable amounts in damages, victims are not being compensated fairly or quickly for their injuries, with a substantial portion of the money going towards court costs and lawyer's fees. The inefficiency and inequity of the litigation system has broad and serious consequences for the economy. One manifestation of this scenario is illustrated by the current debate over medical liability, with many physicians claiming that their ability to practice medicine is threatened by excessive lawsuits.

The capriciousness of the legal system seriously affects the economy. Consumers pay higher prices for goods and services because of lawsuits against corporations. Innovation and the introduction of new products and services are stymied because of the fear of litigation. The United States is placed at an economic disadvantage compared to other nations that do not rely on litigation nearly as much. For all of this, injured parties, when compensated at all, usually are not compensated fully, and the process can take several years to be resolved.

### Encourage alternatives to litigation

CED has proposed solutions that transform the civil justice system by offering innovative approaches for settling disputes and providing compensation for injured parties in a more efficient and mutually beneficial manner. Litigation would still be an option, but the incentives would make other avenues more attractive. CED believes that alternative dispute resolution (ADR) mechanisms, such as arbitration and mediation, should be more widely used in resolving tort cases. In the same vein, CED also recommends the adoption of Early Offers. Under this approach, parties who believe a claim may be made against them for an adverse event would be encouraged to make an early settlement offer. The potential plaintiff would have the choice of accepting the offer and obtaining fair compensation for economic damages quickly, or pursuing litigation. The incentive for the plaintiff to accept the Early Offer is that they would receive compensation in a timely manner, without undertaking

costly and time-consuming litigation, in which it could take years to receive any settlement and any settlement would be substantially reduced by court costs and attorney's fees.

The legislation implementing Early Offers would establish guidelines for what is a fair offer, such as a formula for compensation that covers all economic damages over time. Incentives could be introduced to encourage potential plaintiffs to accept a fair Early Offer. For example, if a claimant rejects a qualifying Early Offer in order to pursue non-economic damages in court, then the plaintiff would face less favorable rules in the resulting litigation, such as a higher burden of proof and a different standard of liability. Other incentives could be introduced, such as requiring the plaintiff to pay the defendant's court costs if the plaintiff loses in court after rejecting an Early Offer. Reform of lawyer's contingency fees would also promote early settlements. Contingency fees that are not commensurate with the risk and effort undertaken by the attorney can distort the process and significantly reduce the amount of any settlement that actually is received by the injured party.

Encouraging alternatives to litigation also provides broad benefits to society. In the case of medical liability, Early Offers could persuade physicians to quickly admit mistakes. Timely reports of medical errors can improve patient safety and reduce health care costs by allowing health care providers to openly discuss and deal with problems. The dissemination of such information will aid in the implementation of new, improved procedures. The ability to discuss errors will also promote a healthier doctor-patient relationship.

Another benefit of alternatives to litigation is that they may encourage injured parties who otherwise would not seek redress because of the costs and complexity of the litigation process to receive compensation. Some studies suggest that most victims of wrongful conduct do not sue. Early Offers and ADR would also improve the efficiency of the courts in handling cases that require litigation by removing cases from the system and freeing up court resources.

## Reform judicial selection

Any discussion of legal reform must recognize the vital role the legal system performs for our society and economic system. A fair, credible, and efficient legal system is essential to enforce the economic and social policies proscribed by law, to enforce the rules of commerce, adjudicate disputes between parties, and provide remedies for those done wrong by others.

The judiciary is a pillar of our system of governance. Upholding respect for the rule of law is critical to preserving our democratic and free-market institutions. A key element in maintaining the stature of the judiciary is ensuring the independence and impartiality of the courts.

In the policy statement, *Justice for Hire: Improving Judicial Selection*, CED found that the way many states select their judges threatens the objectivity and fairness of the judicial system. Currently 39 states conduct elections to choose or retain at least some of their judges. Judicial elections often compel judges and candidates for the bench to campaign like politicians – soliciting campaign contributions and seeking support from parties that may have business before their court. This arrangement, at the very least, gives the impression that judges are beholden to those that helped elect them. Popularly elected judges may also feel pressure to rule in favor of local parties against non-local parties and to award judgments that keep them in the good graces of the electorate. Research demonstrates that awards in cases against out-of-state corporations are significantly higher in states that elect judges compared to those that appoint them.

Judicial elections have contributed to the partisan warfare over the courts, with political parties and special interest groups actively involved in helping to elect judges that they feel share their views. Judges must be selected based on their legal qualifications and ability to be unbiased arbiters of the law, not on their ability to raise money and attract political support. Any legal reform should also deal with judicial selection to ensure that the most qualified individuals attain the bench, and that the courts are free from political influence.

The Committee for Economic Development (CED) is an independent, non-profit, non-partisan, public policy research organization dedicated to addressing the critical economic and social issues facing society.

Since 1942, CED has played an active and often decisive role in influencing policy on a wide array of domestic and international issues. CED is led by its 200 Trustees – senior corporate executives and university presidents. CED's Trustees are directly involved in the development of all of CED's policy recommendations.

CED's policy statements, as well as a wealth of related materials, can be found on CED's website at <http://www.ced.org>.

CED  
2000 L Street, NW, Suite 700  
Washington, DC 20036  
202-296-5860 (phone)  
202-223-0776 (fax)

March 2005