Tort reform has been gaining momentum in several states, yet faces obstacles and setbacks in other states. Some reforms have included caps on non-economic damages, caps on punitive damages, restrictions on “joint and several” liability cases and decreases in the statute of repose for construction defects. Opponents of tort reform, by contrast, claim that rising insurance premiums can be explained by economic factors, rather than increased tort litigation. On the federal level, widespread tort reform is still sluggish. The trends in tort reform, whether at the state or federal level, will likely have an impact on any product manufacturer facing litigation in the United States.

Background

Amid renewed vigor in the ongoing debate about tort reform and its merits, tort reform advocates scored victories in some states during 2004-2005, but were defeated in others. However, sweeping victory on the federal level for tort reform advocates remains elusive.

Tort reform progress

Some examples of the successes include South Carolina, where Gov. Mark Sanford signed H.B. 3008. The new law requires that plaintiffs sue a corporation in the county where the company had its place of business at the time of the cause of action, thereby limiting the common practice of “forum shopping” by plaintiffs. The law also decreases the state’s statute of repose for construction defects to eight years. In Colorado, Gov. Bill Owens vetoed a bill that would have increased the state’s inflation-adjusted cap on non-economic damages (i.e., pain and suffering) from $366,000 to $440,000. In Missouri, enacted reforms include a cap on punitive damages of $250,000, or three times the net judgment (whichever is greater); a cap on non-economic damages of $350,000; and a restriction on “joint and several” liability cases to those where the defendant is at least 51 percent liable. The new law also contains updated venue rules to eliminate forum shopping.

In other states, the Mississippi Tort Reform Act of 2004 established venue restrictions and imposed caps on non-economic damages in medical malpractice cases ($500,000) and other civil actions ($1,000,000), as well as caps on punitive damages. The law also immunizes “innocent sellers” from products liability lawsuits. In Georgia, joint and several liability has been eliminated, and the state passed a host of reforms in medical malpractice cases. Ohio enacted caps on non-economic and punitive damages, expanded the “government standards” defense and established a 10-year statute of repose for products liability cases.

Tort reform setbacks

Tort reform efforts have stalled elsewhere. In Oregon, voters failed to amend the state’s constitution to restore a cap on non-economic damages that the state’s highest court had previously struck down. Wyoming also rejected a similar cap in a November 2004 voters’ referendum, and the Wisconsin Supreme Court ruled that the state’s 10-year-old cap on non-economic damages was unconstitutional.

The mixed results on the state level seem to have emboldened opponents of tort reform. In May of this year, a study released by the Washington-based Economic Policy Institute (EPI) questioned the very basis for tort reform by criticizing annual reports issued by Tillinghast-Towers Perrin (TTP), a consulting firm whose studies about the economic ill-effects of the current tort system are often cited by tort reform advocates. EPI claims, for example, that tort lawsuits have actually decreased in frequency in recent years, and that rising insurance premiums can be explained by economic factors such as the collapse of the stock market and historically low interest rates, rather than increased tort litigation. EPI also claims that TTP’s price tag on the current tort system is comprised of components that have little to do with the tort system, such as insurance
industry overhead and administrative expenses. For the record, TTP issued a statement defending the data, analysis and methodology used in its studies.

The EPI report will certainly be used by opponents in Congress to stall any semblance of widespread tort reform on the federal level. Although the Bush administration scored a victory earlier this year in passing legislation that effectively relegated major class actions to the federal courts, other significant measures involving asbestos liability and medical malpractice cases were blocked.

**Comment**

Tort reform efforts, whether on the state or federal level, can address the seemingly onerous legal environment that product manufacturers face in the United States today. The tort reform debate will obviously continue, and significant progress in this area, particularly on the federal level, will be slow. We at Wilson Elser understand the importance of this issue for our clients and we will continue to monitor progress in this area for them.