



## Enact Tort Reform to Eliminate Frivolous Lawsuits, Limit Punitive Damages, and Cap Attorney Fees

### Issue Background:

Lawsuit abuse has become too common in American society partly because the lawyers who bring these cases have everything to gain and nothing to lose. Plaintiffs' lawyers can file frivolous suits, no matter how absurd the claims, without any penalty. Meanwhile defendants are faced with the choice of years of litigation, high court costs and attorneys' fees or a settlement. Many of these cases have cost innocent people and business owners their reputations and hundreds of thousands of dollars.

### Key Points:

- *Eliminate Frivolous Lawsuits That Plague Our Legal System And Restore Sanctions Against Attorneys Who File Meritless Suits In Federal Court.* Federal rules mandating sanctions for frivolous suits were watered down in 1993, resulting in the current crisis of widespread lawsuit abuse. Congress should enact legislation that restores accountability for attorneys by reinstating monetary sanctions against lawyers who file frivolous suits.
- *Enact Punitive Damages Reform.* While punitive damages awards are infrequent, their frequency and size have grown greatly in recent years. More importantly, they are routinely asked for today in civil lawsuits. The difficulty of predicting whether punitive damages will be awarded by a jury in any particular case, and the marked trend toward astronomically large amounts when they are awarded, have seriously distorted settlement and litigation processes and have led to wildly inconsistent outcomes in similar cases. Punitive damages are awarded not to compensate a plaintiff, but to punish a defendant for intentional or malicious misconduct and to deter similar future misconduct.
- *Establish Caps on Attorney Fees.* A contingent fee is an attorney's fee that is based upon a percentage of the money awarded to the client. Contingent fees allow plaintiffs with little money to seek redress in the courts because the attorney bears the financial risk of bringing a lawsuit in exchange for a percentage of the recovery, if any. In recent years, the current system has benefited lawyers at the expense of their clients. The contingent fee system invites abuse because it encourages lawyers with a financial interest in the outcome of a case to try meritless claims or ask for unreasonably high awards. Contingent fees are generally one-third of a total award, even when, as is often the case, attorneys bear no risk in taking a case. Attorneys today seek out cases that can be settled easily, with little work, or can be decided under no-fault laws. The one-third contingent fee pay-off for seeking such cases is disproportionate and discourages lawyers from taking more difficult, work-intensive, cases.

### NECA Position:

NECA urges Congress to consider the following recommendations to pass comprehensive tort reform:

- **Frivolous Lawsuits:**
  - Reinstating the requirement that if there is a violation of Rule 11, there are sanctions (Rule 11 of the Federal Rules of Civil Procedure was originally intended to deter frivolous lawsuits by sanctioning the offending party).
  - Require that judges impose monetary sanctions against lawyers who file frivolous lawsuits. Those monetary sanctions will include the attorney's fees and costs incurred by the victim of the frivolous lawsuit.

- Reverse the 1993 amendments to Rule 11 that allow parties and their attorneys to avoid sanctions for making frivolous claims by withdrawing them within 21 days after a motion for sanctions has been served.
- Punitive Damages:
  - Establish a liability “trigger” that reflects the intentional tort origins and quasi criminal nature of punitive damages awards. The legal term describing “actual malice” should require “clear and convincing evidence” to establish punitive damages liability, and should require proportionality in punitive damages so that the punishment fits the offense.
  - Enact legislation that addresses the problem of multiple punitive damages awards to protect against unfair overkill, guard against possible due process violations, and help preserve the ability of future claimants to recover basic out of pocket expenses and damages for their pain and suffering.
- Contingent Fees:
  - Limit the use of contingent fees in cases where a legitimate risk of non-recovery exists, and requires an hourly fee in cases where no legitimate risk of non-recovery exists, such as cases involving accidents and other incidents where the parties are likely to settle, and cases where strict liability is imposed, such that no liability question exists to be resolved at trial.
  - Establish a sliding scale for the award of contingent fees. A sliding scale removes some of the incentive for lawyers to seek excessive jury awards, while preserving for plaintiffs the access to the civil justice system that the contingent fee system provides.
  - Support legislation requiring an attorney to provide clients up front with an estimate of what the hourly rate for a case would be versus the applicable contingent fee charge. The client would be free to choose the payment method under which they would like to proceed. After disposal of a case, an attorney would disclose the number of hours actually spent resolving the case and the amount of the hourly fee or the contingent fees due. Fully informed clients would be able to compare attorneys' fees and go in to fee arrangements with realistic expectations.