CIVIL JUSTICE
RESOURCE GROUP

Why the Tort System is Important

The tort system gives average people a way to influence powerful businesses and institutions and change their dangerous practices and policies.

- For years, people reported instances of clergy abuse to church officials. However, it was not until lawsuits were filed that church hierarchies began to institute procedures to punish offenders and protect parishioners.[i]
- As a result of lawsuits brought by patients' families, nursing home policies and procedures have been changed to better protect elderly patients.[ii]
- After individuals successfully sued companies, many re-designed their products, improved warnings, and in some cases, withdrew dangerous products from the marketplace.[iii]

The tort system deters companies from putting profits ahead of safety.

- The prospect of paying damages provides the financial incentive for companies to ensure safety and refrain from harmful conduct, thereby preventing injuries in the first place.
- Corporate Risk Managers have reported that the threat of tort liability helps them motivate companies to improve product safety.[iv]
- Liability concerns have helped spur the manufacture of safer consumer products, such as flame retardant pajamas and cars with rear-seat shoulder belts and improved fuel tank design.[v]

The tort system helps limit the government's role.

- Without the tort system to police and deter business misconduct, government probably would have to assume a greater role in protecting the public from negligent and unscrupulous business conduct.
- Government agencies already cannot or do not fully enforce regulations designed to protect the public. For example, OSHA rarely seeks charges for workplace deaths based on willful violations of workplace safety rules.[vi] The Consumer Product Safety Commission "often withholds for months or even years information about suspected unsafe products…. It has never publicized the safety violations related to more than 11,000 'corrective actions' from 1990-2004, sometimes allowing violators to sell out substandard merchandise to unsuspecting American consumers."[vii] The FDA's failure to address concerns about Vioxx is just the latest example of an agency allowing dangerous products to enter and remain in the marketplace.[viii] In other cases, administrative agencies failed to discover that manufacturers had concealed critical information about the potential harm caused by asbestos, PCBs, the Dalkon Shield IUD, the anti-cholesterol drug MER/29, or heart catheters.[ix]
- A move from the tort system to reliance on government agencies to protect consumers and deter corporate misconduct would likely require: more bureaucracy to enforce the regulations, higher taxes or a shift of money from other sources to pay for increased governmental enforcement, more paperwork from businesses, and greater governmental interference in business practices. Even these changes would not guarantee a more effective regulatory system or equal or better protections for consumers than those that exist under of the tort system.

P.O. Box 3326 • Church Street Station • New York, NY 10008-3326 •
geoff@cjrg.com • www.law.suffolk.edu/cjrg • (CJRG is a project of the Center for Justice & Democracy)

Endnotes

[i] *See, e.g.,* Michael Rezendes, *Abuse Allegations Known, Files Show,* BOSTON GLOBE, June 5, 2002, at A1 (discussing church's knowledge and cover-up of sexual abuse allegations); Michael Paulson, *U.S. Bishops OK Revised Policy on Sexual Abuse*, BOSTON GLOBE, Nov. 14, 2002, at A1 (discussing Catholic Church's newly formulated policy regarding sexual abuse allegations).

[ii] Lawsuits and settlements have resulted in changes in patient monitoring and care procedures and operational reforms. *See Olson v. Chisolm Trail Living & Rehabilitation Center*, No. 98-0363 (Caldwell County Ct., Tex. Aug. 26, 1999*), Trew v. Smith & Davis Mfg. Co.* , No. SF 95-354 (Santa Fe County Jud. Dist. Ct. N.M., July 19, 1996); *see also Widman v. Paoli Memorial Hospital*, No. 85-1034 (E.D. Pa., Dec. 9, 1988) (one of many suits that have led health care facilities around the country to be more attentive to infection control).

[iii] Professor Michael Rustad conducted an empirical study which found that, due to tort verdicts, the following products were taken off the market: aminophylline suppositories (caused serious brain damage due to interaction with other drugs), Copper Seven IUD (caused pelvic infections), Dalkon Shield (caused serious injuries). He also found that numerous products were re-designed or retrofitted to improve safety, such as: step ladders (re-designed with improved braces); farm augers (re-designed by adding a shield), lathes (retro-fitted with guards); revolvers (re-designed to reduce risk of accidental discharge). Michael Rustad, *In Defense of Punitive Damages In Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 80 (1992).

[iv] Gary Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 415-16 (1994) (reporting that Risk Managers found that the threat of liability helped them convince companies to make important safety changes). Professor Schwartz also noted that even the business-oriented Conference Board reported "significant safety improvements on account of products liability" and that "the negative effects of products liability were not substantial." *Id.* at 409

[v] John D. Graham, *Product Liability and Motor Vehicle Safety*, in Peter W. Huber & Robert E. Litan, eds, THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION, 119, 181 (Brookings Inst. 1991) (discussing how liability considerations have led to numerous automobile safety features).

[vi] David Barstow, *U.S. Rarely Seeks Charges for Deaths in Workplace,* NEW YORK TIMES, Dec. 22, 2003 at A1.

[vii] *Hazard in Aisle 5*, CONSUMER REPORTS, Nov. 2004.

[viii] As early as 2000, the FDA had evidence that the arthritis drug Vioxx could lead to an increased risk of heart attacks. In 2001, the FDA sent a warning letter to Merck, Vioxx's manufacturer, chastising it for misrepresenting the risk in promotional ads and to physicians. Nonetheless, the FDA allowed the product to remain on the market, even after an October 2003 Merck-funded study which indicated patients taking Vioxx were at a 39% increased risk of heart attack within the first 90 days compared to Celebrex. In fact, despite mounting evidence of the dangers associated with Vioxx, in September, 2004, the FDA approved Vioxx to treat juvenile rheumatoid arthritis. On Sept. 30, 2004, based upon its own study's overwhelming evidence of the drug's danger, and with numerous Vioxx-related lawsuits already pending, Merck voluntarily removed Vioxx from the marketplace. See Barbara Martinez et al*., Expiration Date: Merck Pulls Vioxx From Market After Link to Heart Problems*, WALL ST. J. , Oct. 1, 2004, at A1; *see also* Barbara Martinez*, Vioxx Lawsuits May Focus on FDA Warning in 2001*, WALL ST. J., Oct. 5, 2004. At the time of Vioxx' s recall, Merck already was faced with numerous Vioxx-related lawsuits. Given the FDA's inaction, without the threat of civil liability resulting from continuing to market a known dangerous product, would Merck have withdrawn Vioxx from the marketplace?

[ix] Carl T. Bogus, *War on the Common Law, The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1, 73 (1995).