

**OPEN FORUM**

## Tort 'Reformers' Are at It Again

By Kevin J. Holl

**C**ALIFORNIA VOTERS separated fact from fiction and rejected the so-called tort reform initiatives in March. But, just like Arnold Schwarzenegger's "The Terminator," the "reformers" will be back. The \$21 million battle over litigation reform was only a precursor of things to come.

The special-interest groups that draft initiatives and lobby for litigation reform are relentless. Californians could decide as many as three tort and securities law initiatives in the upcoming November election. The initiatives would address caps on attorneys' fees, expand the scope of shareholder lawsuits and prohibit drunk drivers from recovering certain damages.

Many reformers are hypocritical. While portraying themselves as risk-taking captains of free enterprise, they are encouraging further government intervention into the private sector. A group funded by Silicon Valley entrepreneur, Tom Proulx, authored Proposition 202, the initiative that would have regulated contingency fees. Labeled "pro-consumer" by proponents, the measure was anything but. The initiative sought to restrict fee arrangements only for lawyers hired by "natural persons"—that is, for consumers—but not for business.

Although Proposition 202 was soundly defeated, Proulx's organization sponsored another initiative for the November ballot that would impose contingency-fee caps in all personal injury cases. Proulx recently dropped that initiative only after brokering a deal to address securities litigation reform in the Legislature. His organization, however, may still place the initiative on a future ballot.

The measure would constitute an unprecedented government intrusion into the rights of private citizens to negotiate contracts with their attorneys. Would the backers of these initiatives support similar legislation to regulate salaries for business executives or to set hourly rates for an independent contractor's work? You know the answer.

Reformers assert that their proposals would decrease prices for goods and ser-

vices. History shows that claim to be meritless. The Legislature ratified an agreement in 1975 to cap recoverable damages in medical malpractice lawsuits. Twenty-one years later, health insurance premiums for Californians continue to escalate.

Similarly, consumer prices and taxes have not come down because of 1986 legislation to protect "deep pocket" defendants.

The reform movement in our nation's capital is equally troubling. Congress recently authorized legislation to impose a

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\$250,000 cap on punitive damages in products liability lawsuits to prohibit certain lawsuits and to regulate the recovery of damages. Those voting for the legislation campaigned on the promise to free America from a bureaucratic stranglehold. Fortunately, President Clinton vetoed the bill Thursday. It would have permitted the federal government to nationalize an entire segment of civil law and do what no Congress in our nation's history has ever done—establish a federal products liability law.

Reformers suggest that American businesses are overwhelmed by punitive damage verdicts. However, the Justice Department's analysis of 762,000 civil lawsuits in 1992 from the nation's 75 largest counties shows that punitive damage verdicts occurred in only .038 percent of the cases. A study by Suffolk University Law Professor Michael Rustad recorded only 355 punitive awards nationwide in products liability cases between 1965 and 1990, less than 15 cases per year.

Full disclosure of the facts concerning particular cases such as Stella Liebeck's "hot coffee" case against McDonald's are routinely withheld. Tort reform

advocates do not point out that Liebeck was hospitalized for eight days with third-degree burns on her inner thighs and genitals. Coffee served by McDonald's at a scalding 190 degrees had burned more than 700 customers before Liebeck. McDonald's acknowledged that the coffee was too hot for immediate consumption, but the company would not reduce the temperature. Then, McDonald's refused Liebeck's \$20,000 settlement request. The punitive damages ultimately awarded were based on McDonald's income for two days of coffee sales. The day after the verdict, McDonald's coffee at the location was served at a safer 158 degrees. The trial court reduced the punitive verdict to \$480,000 and Liebeck then accepted an undisclosed settlement sum.

Tort reformers contend that punitive damage claims prevent American businesses from expanding and put Americans at a competitive disadvantage in the global economy. To the contrary, America is the world's largest economy and remains the dominant global exporter.

We live in the world's most competitive economy, according to the U.S. Council on Competitiveness. The stock market continues to reach record highs and mutual funds pooled a record \$2.6 trillion in cash in 1995. The big three American automakers reported net earnings of more than \$12 billion in 1995 with General Motors alone amassing \$6.41 billion in profits.

This is not to suggest that businesses should be sued just because they earn profits, or that they should not defend themselves with the best attorneys possible. The point is merely that many American businesses are thriving in our current civil justice system and they do not require our government to intervene with broadbrush tort reform. This is especially true when the proposed legislative reforms crafted at the behest of highly paid lobbyists work directly against the citizens of our state and country.