THE TORT REFORM AGENDA

AFTER THE 2010 MIDTERM ELECTIONS

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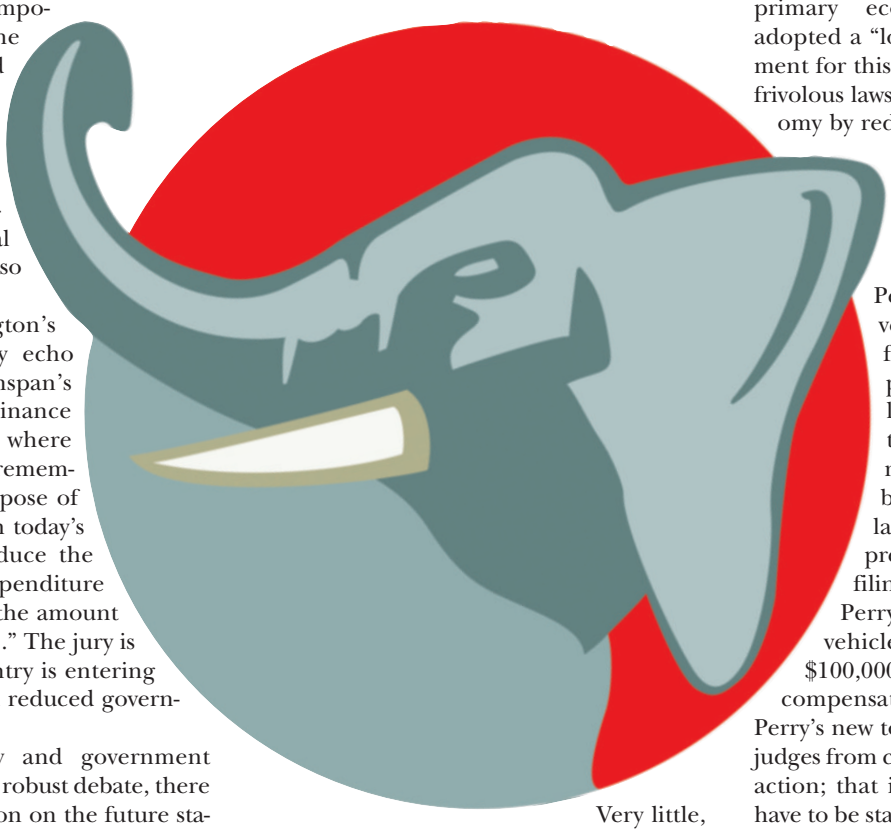
In the November 2010 elections Republicans picked up 16 governorships, gained 680 seats in state legislative elections, and won control of the U.S. House of Representatives with a net pickup of 63 seats. The aftermath of this election so far has resulted in the temporary extension of the Bush-era tax rates and an extension of unemployment benefits. Reduced estate tax rates and provisions permitting the expensing of corporate capital expenditures are also now law.

For now, Washington's new fiscal policy may echo economist Alan Greenspan's 1978 Senate Finance Committee testimony where he remarked, "Let us remember that the basic purpose of any tax cut program in today's environment is to reduce the momentum of expenditure growth by restraining the amount of revenue available… ." The jury is still out on if the country is entering an era of austerity and reduced government.

While tax policy and government growth have generated robust debate, there has been little discussion on the future status of tort reform. This article discusses potential developments in tort reform for 2011 and 2012 and how those changes can be positively utilized.

POTENTIAL STATE TORT REFORM LEGISLATION

Tort reform is likely to center on the state and local levels over the next two years because President Obama and Speaker Boehner are at complete odds on the issue.



Very little, if anything, regarding tort reform will occur at the federal level. However, look for newly elected state Republicans to push the tort reform agenda.

LOSER PAYS ALL BRITISH SCHEME

Republican governors may very well spend some political capital and advocate a British-style "loser pays" rule which would require plaintiffs to pay legal costs should they lose their lawsuit. Most of America's primary economic competitors have adopted a "loser pays" scheme. The argument for this policy is such a system deters frivolous lawsuits and will benefit the economy by reducing legal expenses. A pure "loser pays" law requires the losing party, plaintiff or defendant, to pay for the winner's attorney's fees.

Texas Governor Rick Perry has already proposed a version of the "loser pays" framework. Mr. Perry has proposed a system where the lawyers and law firms would actually pay the winner's attorney's fees. The reasoning behind this idea is to force lawyers to extensively evaluate, pre-suit, whether or not they are filing a frivolous claim. Governor Perry would also create new legal vehicles to handle claims below $100,000 which, in theory, could help compensate victims more quickly. Mr. Perry's new tort reform law would prohibit judges from creating common law causes of action; that is, all causes of action would have to be statutory.[1] It is worth monitoring whether or not your state is considering adoption of a "loser pays" scheme because it could save, or cost, you money in legal expenses.

FEDERAL EXPERT WITNESSES STANDARDS ADOPTED AT THE STATE LEVEL

Republicans are also likely to continue adopting the federal *Daubert* expert witness rules at the state level. *Daubert* refers to the U.S. Supreme Court decision *Daubert v. Merrill Down Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). This decision confers broad authority to a federal court trial judge on deciding whether or not to permit an expert witness to testify before a jury. Via tort reform, many states have already adopted this federal evidentiary law at the state level. Utilizing the *Daubert* scheme can be a powerful tool to save money and efficiently resolve litigation.

A BLUEPRINT FOR FILING EFFECTIVE *DAUBERT* MOTIONS

If your state has adopted the *Daubert* scheme, or a version of it, then filing a motion under that framework is worth considering. Preparing successful Daubert motions takes considerable time. The case law on this topic can be technical and esoteric. However, the blueprint below provides a specific analytical framework, supported by case law, for generating a *Daubert* attack.

First, note the fundamental analytical requirements set forth in *Daubert v. Merrill Down Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), where the United States Supreme Court held it is the trial judge's responsibility to ensure any scientific testimony or evidence admitted is both (1) relevant and (2) reliable. One constant in cases applying *Daubert* is the theme that the trial court is the gatekeeper of expert testimony.

Second, when filing a *Daubert* motion, keep in mind the non-moving party has the burden of establishing by a preponderance of proof that a proper foundation exists for the admissibility of that party's proffered expert testimony. The role of the Court is to keep unreliable and irrelevant information from the jury. One of the factors the Court must consider in deciding whether or not to admit proposed expert testimony is whether the testimony is "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Daubert*, 509 U.S. at 591.

Third, systematically apply the four *Daubert* factors which must be considered in determining the reliability of expert testimony:

1) whether or not the expert methodology has been tested or is capable of being tested;
2) whether or not the technique has been subject to peer review and publication;
3) the name and potential error rate of the methodology; and
4) whether or not the technique has been generally accepted in the proper scientific community.

509 U.S. at 591-94.

The fourth and final component is to move, if possible, for summary judgment in tandem with filing *Daubert* motions. This provides the proverbial one-two punch that may knock out a case. We recently defended a corporation in a products liability case. Not surprisingly, we filed *Daubert* motions and contemporaneously moved for summary judgment. The trial judge excluded all of the plaintiffs' expert testimony except the proof of inadequate warning for the alleged hazard.

However, when adjudicating summary judgment, the trial judge found there was no evidence of defective design and the alleged dangers/hazards connected to the product were open and obvious. The Court found, as a matter of law, there was no duty to warn of the open and obvious dangers and, even if there had been a duty to warn, the warnings provided by defendant corporation were appropriate. Thus, the only claim plaintiffs had expert testimony on was removed by summary judgment, and plaintiffs' case was terminated.

It is only fair to note the downside to this strategy. If the *Daubert* and summary judgment motions expose gaps in the plaintiff's case, then the plaintiff's attorney may voluntarily dismiss and re-file the action. This may aggravate the client, depending on their goals.

FACTORS TO CONSIDER WHEN FILING *DAUBERT* MOTIONS

First, are there grounds to file a *Daubert* motion? One method for answering this question is taking the expert's deposition. For example, we successfully struck an expert under *Daubert* because the expert assumed a cylinder's center of gravity without knowing volume or weight (The volume of a cylinder = $(\prod)(r^2)(l)$ where r = radius and l = length and $\prod$ = 3.14. Weight = (volume) • (density)). The expert's assumptions were discovered on deposition.

Second, preparing and filing pre-trial *Daubert* motions may save the client money in trial defense costs and, if this is a goal, foster settlement. Successfully excluding an expert could very well gut the opposition's case. Third, filing a *Daubert* motion allows the judge to consider the expert testimony in a cool, collected manner detached from the heat of trial. In our experience, judges are extremely reluctant to strike an expert at trial. Generally judges will only strike an expert at trial if there is overwhelming evidence the expert testimony is defective. Why wait and take the chance the judge will allow a bad expert to testify?

Fourth, many trial lawyers boast they want to shred apart an expert on cross at trial – regardless of whether or not the judge ultimately strikes the testimony for failing to conform to *Daubert*. In theory, this sounds logical. But, what if the jury misses the nuance? What if the testimony is so technical or scientific the jury simply becomes bored and does not listen? Or, what if the injuries are catastrophic, the jury becomes angry, and simply stops focusing on the trial evidence? These are all factors to consider when deciding whether or not to file *Daubert* motions.

We have seen a number of incompetent experts effectively connect with the jury. Sometimes the jury will be drawn to an expert because of demeanor, credentials, or appearance. These experts may have faulty methodologies, conclusions, and inaccurate testimony, but because the jury likes the expert, they are effective and can harm your case. Unfortunately, it is not always the brightest or most logical expert that has the greatest impact on the jury. Therefore, when supported by the record, file the pre-trial *Daubert* motion.

Daubert and its progeny are powerful pre-trial tools that can shape litigation and evidence in favor of your client. Watch to see if your state legislature is debating tort reform. Whether it is *Daubert* evidentiary rules, a "loser pays" framework, or another proposal, these laws will most likely impact your business and legal strategy.

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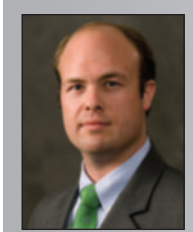

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[1] *Loser Pays, Everyone Wins,* The Wall Street Journal, *December 15, 2010, at A 20.*