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Shot in the Arm for Tort Overhaul

By ADAM LIPTAK

THE politics of overhauling American tort law are anything but straightforward. They involve odd alliances, ideological paradoxes and a great deal of money.

Yet it is all but certain that the Republican Party's election victories will move the call for reform, sought by the business world for years, higher on the legislative agenda.

"It's going to be a hot priority," said Joan Claybrook, the president of Public Citizen, a consumer advocacy group. "It's going to be brutal."

When it's all over, the rules governing tort actions — the civil lawsuits, usually for money, claiming wrongful conduct by defendants, usually companies — may well change drastically.

"Reform" — a capacious and loaded term usually used by defendants — is most likely in the areas of class actions and punitive damages, especially involving asbestos liability and medical malpractice, among other issues. Proponents will no doubt use enormous punitive awards, like the $28 billion awarded last month by a Los Angeles jury to a single plaintiff in a tobacco lawsuit, as a rallying cry. The frivolous suits filed each year also provide ammunition. The American Tort Reform Association's Web site even lists "loony lawsuits," like one saying the haunted house at Universal Studios in Orlando, Fla., is too scary.

Despite the anger those cases incite, even among the general public, earlier Republican Congresses have been cautious in addressing the issue. But George W. Bush, as governor of Texas, pushed through sweeping limits on tort suits. Days after taking office in 1995, he declared a legislative emergency to address the "junk lawsuits that clog our courts." He asked for — and got — limits on punitive damages, curbs on awards in cases with multiple defendants and restrictions on where suits can be filed.

"It was far more successful than anyone thought the Legislature would go for," said Frank B. Cross, a law and business professor at the University of Texas at Austin.

The victory was particular striking given the strength of the opposition. "At least until fairly recently, parts of Texas had a reputation for being very plaintiff-friendly," said Joseph Sanders, a law professor at the University of Houston. "They talked about it the way they now talk about Mississippi."

DEMOCRATS and Republicans have always had competing philosophies about civil justice, said Philip K. Howard, author of "The Death of Common Sense" (Random House, 1995), which argues that society has become too reliant on regulations and lawsuits. He is also the founder of Common Good, an advocacy group that supports broad changes.

Lawsuits, he said, enjoy "a superficial appeal which is consistent with traditional liberal rhetoric, that the little guy has the right to litigate." This litigation culture, Mr. Howard added, is supported by "the private-jet crowd" of trial lawyers, who have generally been big contributors to Democratic politicians.

Yet the legislative discussion is largely based on apocryphal or at least anomalous lawsuits, said Stephen Daniels, a senior research fellow at the American Bar Foundation, which is a nonpartisan research group. "Some of it is philosophical debate, but most of it is the clash of interest groups," he said.

Pushing the issue called tort reform has never been as important to Republicans as opposing it is to Democrats. "It looms so large in Democratic Party power politics," said Walter Olson, a senior fellow at the conservative Manhattan Institute. By contrast, said George L. Priest, a law professor at Yale, "the Republicans are not single-minded."

The Republicans must also try to reconcile support for legislation that would have its greatest impact in the state courts with their traditional philosophical commitment to federalism, which would leave most local matters to the states.

Still, with a president who has made tort reform a signature issue and with the Democrats on the run, "if the Republicans are smart, they can get more

than they have ever gotten," said John Coale, a plaintiffs' lawyer in Washington and a major contributor to Democrats.

Four issues top the legislative agenda.

"Class-action reform is probably the most ripe in terms of the work that's been done," said James M. Wootton, president of the United States Chamber of Commerce's Institute for Legal Reform. A bill called the Class Action Fairness Act of 2001, which was passed by the House in March, would allow defendants to move major interstate class actions filed in state courts to federal courts. That would address the complaint by defendants that a few out-of-the way courts, in places like Madison County, Ill., are too friendly to plaintiffs and thus handle a disproportionate number of class actions.

A bill to address medical malpractice claims was passed by the House in September and will probably resurface. It would shorten the statute of limitations, limit certain kinds of damages, disallow claims where regulators have approved the product in question and give courts the power to review lawyers' contingency fees, which entitle them to a percentage of what plaintiffs win.

Legislation that is likely to be introduced in the next Congress would address the internecine disputes among lawyers who represent plaintiffs who were exposed to asbestos and have actual or potential ailments.

And legislation may also be introduced to cap big punitive awards, which loom large in the public debate on all tort reform issues.

Advocates of tort reform like to justify their agenda by pointing to big punitive awards, meant to punish and deter rather than to compensate. Opponents say those awards are unusual and generally justified, but they are often reversed on appeal.

Last month, the Supreme Court of California, in a 4-to-3 decision, declined to hear a challenge to the largest punitive award ever affirmed in American history in a personal injury case. The decision let stand a $290 million award by a jury in Ceres, Calif., to the family of three people killed in the rollover of a Ford Bronco in 1993.

Theodore J. Boutrous Jr., a lawyer for Ford, said his client would ask the United States Supreme Court to hear the case. He added that the outsized award, sustained at all three levels of the state court system, demonstrated why federal legislative action was needed.

LAWYERS for Juan Romo, one of the surviving family members, said the award was justified by Ford's conduct in making what the family called "the weakest roof in Ford's history." Made of fiberglass, the roof was sold by Ford as "tough" and "rugged"; the roof's design included a hollow hump that suggested the presence of a rollover bar even though it did not have one.

Other big punitive awards imposed recently in a variety of cases have also made headlines. The biggest is that $28 billion in punitive damages given by a California jury last month, an award in a suit brought by a smoker with lung cancer who accused the Philip Morris Companies of luring her into a lifelong tobacco habit with fraudulent advertising and marketing.

The United States Supreme Court is considering whether State Farm Insurance must pay a policyholder $145 million in punitive damages, in addition to $2.6 million in compensatory damages, in a car-accident insurance dispute. The Alabama Supreme Court is reviewing a $3.4 billion punitive award, on top of a $90 million compensatory award, in a case about the interpretation of an offshore gas lease.

Plaintiffs' lawyers say punitive awards are quite unusual.

"Seeing a check in the mail from a punitive award is very, very rare," Mr. Coale said.

To address the issue of excessive awards, Mr. Boutrous contended, Congress should consider limiting each state's court system to imposing damages based on a defendant's conduct only in that state.

Another approach was suggested by Lori S. Nugent, a Chicago lawyer who represents corporate defendants. "One of the most effective reforms would be to mandate trials in three phases," she said. Under that system, a jury would first decide whether and how much the defendant must pay in compensation, then whether punitive damages were warranted. Only after that would the jury set the amount of any damages.

Such micromanagement of state judicial systems is not universally endorsed, even by people who generally favor changes in this area.

"A federal legislature would be loath to impose a procedural limit on state proceedings," Mr. Boutrous said, "and I am not even sure that they could."

Ms. Nugent argued, though, that the federal government could and should act. "It's a wish-list item," she said. "But when you see the kind of drain that punitive damages is placing on the economy, it joins the ranks of reality."

Regardless of whether the issue of punitive damage awards is addressed, the asbestos crisis may well move toward a resolution. "The Supreme Court seems to have given Congress a strong hint that it needs to do something about the asbestos crisis," said Catherine M. Sharkey, a fellow at Columbia Law School.

In 1999, in the process of setting aside a $1.5 billion class-action settlement in an asbestos case, the Supreme Court referred to what it called "the elephantine mass of asbestos cases" that "defies customary judicial administration and calls for national legislation."

"Asbestos will be on the agenda in the next Congress," Mr. Howard said, "and that bill will be supported by plaintiffs' lawyers who represent people who are actually sick."

Mr. Howard was referring to internecine disputes between lawyers who represent people who have actually developed cancer and other symptoms of asbestos exposure and those who are suing on behalf of people who fear getting sick in years to come. The finite sums of money available are likely to mean that not everyone can be compensated.

Michael E. Baroody, executive vice president of the National Association of Manufacturers, said legislation to address this issue was likely.

"The courts are not distinguishing between people who are sick now, and genuinely so, and people who have been exposed," Mr. Baroody said. He said he expected that legislation to establish medical criteria, at the least, would be introduced in the next Congress.

In addition, he said, Congress could suspend statutes of limitations to ensure that those who did not sue immediately would lose no rights.

There is proposed legislation on broader medical issues, too, much of it driven by what doctors call an insurance crisis. Even Mississippi, widely regarded as one of the forums most receptive to plaintiffs' suits, recently enacted legislation curbing medical malpractice suits.

It apparently had to — the market had intervened.

"When there is no doctor around, you really notice," Professor Priest said. "You notice it less if there are fewer products to buy."

Mr. Coale said caps would be unwise and unwarranted. "I have had clients with catastrophic medical injuries, and they really need this money," he said.

By most accounts, however, the Republican majority in the new Congress is facing treacherous political terrain on the tort reform issue.

"It's very scary for those of us concerned about protecting the jury system," said Joanne Doroshow, the executive director of the Center for Justice and Democracy, a consumer group that focuses on the civil courts, "but it's hardly a done deal that Congress will start passing huge amounts of tort reform."

Mr. Nugent, a defense lawyer, said action like that was likely.

"We are now in a political environment where reform has a real shot," he said, "and that will save jobs and help the economy."

Ralph Nader, the former presidential candidate, said he agreed that legislation was likely. But he thinks it will backfire. "The Republicans will attack the civil justice system," he said. "That will sharpen and focus the issues, and it will boomerang against them."