



Surging Tort Costs Could Spark Reform

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The U.S. tort system is posting double-digit increases again this year. Discover the impact on insurance costs and learn how to fight back.

For the second consecutive year the U.S. tort system is posting double-digit cost increases – far outpacing trends of the past decade.

U.S. tort costs ballooned by 13.3 percent in 2002. That comes on the heels of a 14.4 hike last year, according to a new study released by Tillinghast-Towers Perrin. In the study, “U.S. Tort Costs: 2003 Update,” the global management consulting firm reports that costs associated with the U.S. tort system were about \$233 billion in 2002, or more than 2 percent of the gross domestic product.

Legal experts say rising tort costs have a direct impact on insurance costs in the aviation industry and point to tort reform as the route to lasting relief.

“There is absolutely a cause and effect relationship between tort costs and insurance costs,” says David N. Zeehandelaar, partner and chair of insurance practice group at the national law firm Blank Rome LLP. “There is no doubt that the number of lawsuits and the size of the awards are driving up insurance costs, particularly in general aviation. It’s as clear as a bell.”

Taking the Hit

No industry is immune to lawsuits in today’s litigious society, but aviation seems to be one of the world’s biggest targets. Thomas J. Strueber, an aviation defense attorney with the Atlanta law firm Lord, Bissell & Brook LLC, says aviation takes more hits than any other industry outside of medicine.

“Aviation is extremely exposed to litigation because of the high profile nature of the cases and the level of regulation by the Federal Aviation Administration,” Strueber says. “The comprehensive record keeping requirements make it easier for plaintiffs to try to build a case. And since plaintiffs only have to prove that there was something wrong with the plane, whether or not anybody was at fault, you wind up with more people making thinner claims – and winning.”

But how much are they actually winning?

Attorney fees at large firms have jumped from \$500 an hour to as high as an astounding \$30,000 an hour in the

last decade, according to Tillinghast, making millionaires out of some plaintiff’s attorneys virtually over night. Tillinghast concludes that the U.S. tort system is “highly inefficient,” returning less than 50 cents on the dollar to the people it is designed to help and returning only 22 cents to compensate for actual economic loss, down from 25 cents in 1985.

A separate study by the Manhattan Institute, an organization that promotes free-market economics, reports that trial lawyers raked in \$40 billion last year from lawsuits. The study surveyed the lawsuit industry’s size, scope and reach in the U.S. economy, reporting that lawsuits from 1975 through 2001 had cost \$2.8 trillion.

Studying the Studies

The Association of Trial Lawyers of America (ATLA) renounces both studies. ATLA spokesperson Carlton Carl says the studies are misleading. “These studies are bought and paid for by the insurance industry,” he says. “These are very skewed and unreliable presentations that bare no semblance to reality. None of these so-called studies talks about the benefits of the civil justice system.”

Plaintiff attorney James Kreindler, partner with Kreindler & Kreindler LLP in New York City, blames the rising tort costs on the rising costs of defending a case. “The Tillinghast study indicates that a lot of defense lawyers are making a lot of money handling cases before they are resolved,” he says. “The reality is serious good faith early talks can often resolve cases.”

Despite the vehement reaction from the plaintiff’s bar, executives of both the American Tort Reform Association (ATRA) and the U.S. Chamber Institute for Legal Reform, an affiliate of the U.S. Chamber of Commerce, endorse the Tillinghast study as the most reliable data on litigation costs.

Let the Insurers Speak

Looking beyond studies, aviation insurance companies can testify to the fact that litigation is taking a bite out of their coffers and has been a contributing factor to increasing insurance rates over the past few years.

“Currently the insurance market pays \$1.50 in losses for

every dollar it collects in premium,” says Christopher O’Gwen, vice president of United States Aviation Underwriters, Inc. in New York. He says costs rise when losses continue to exceed premiums.

Bill McGloin, president of Phoenix Aviation Managers, Inc., an aviation insurance underwriter in Kennesaw, Ga., points to one of his aviation maintenance clients who did some minor work on an airplane that was subsequently involved in two prop strikes. The plane’s owner chose not to have any work performed on the engine, but when the aircraft crashed his client still fell victim to a lawsuit. “The aircraft engine apparently failed,” says McGloin. “The airplane crashed, somebody was killed, and our client is being sued for millions of dollars. His only fault was being there when the owner had some minor work done. There’s no evidence whatsoever that maintenance shop did anything to cause the crash. But the fact remains that it’s going to cost us, as his insurance company, anywhere from \$25,000 to \$100,000. That’s a common example.”

Other Factors at Play

Over the last 50 years, tort costs in the U.S. have increased more than a hundred-fold. And the connection between litigation and insurance prices is clear. But what other factors are at play? Experts say that at least five additional elements contribute to rising tort costs.

Despite the National Transportation Safety Board reporting fewer accidents in 2002, the financial awards to plaintiffs in general aviation related lawsuits are increasing exponentially. According to internal data from Phoenix Aviation, its average litigation cost for a passenger bodily injury suit was \$8,733 in 1990. That figure jumped to \$41,850 in 1999, a 479 percent increase. Meanwhile, its average cost of a liability claim for a passenger bodily injury in 1990 was \$61,900. That figure skyrocketed to \$217,000 in 1999, a 350 percent increase. Products and Completed Operations liability costs averaged \$96,500 per case in 1990 and leaped to \$244,000 in 1999, a 253 percent increase.

Newspapers are headlining major jury awards against general aviation companies. A lawsuit against Ohio-based Parker Hannifin, a company that makes airplane parts, was recently decided. The jury found that the company was legally negligent before the plane crash that killed Missouri Gov. Mel Carnahan, his son and an aide on Oct. 16, 2000. The Carnahan family will get \$4 million if the jury’s award is upheld. The family has already settled lawsuits against several other defendants, including Cessna Aircraft, for a combined total of about \$2 million. Cessna admitted no liability. This is just one of many high-dollar aviation lawsuits in recent years.

Another disturbing factor is what ATRA general counsel Victor Schwartz calls “judicial hellholes.” Judicial hellholes are cities, counties or judicial districts that attract lawsuits from around the nation or the region because they are perceived as very plaintiff-friendly jurisdictions. “Some of the crazy verdicts that may be rendered against companies in the aviation industry come out of about 13 areas of the United States where the judges just run ramshot over defense counsel and don’t let them try their cases properly,” Schwartz argues. “To the extent that the hellholes are corrected, it’s more likely that the verdicts will be fair.”

An ATRA study cites 13 such judicial hellholes, including Madison County, Illinois; Jefferson County (Beaumont), Texas; Mississippi’s 22nd Judicial Circuit (Copiah, Claiborne and Jefferson Counties); Hidalgo County, Texas; Orleans Parish, Louisiana; Kanawha County, West Virginia; Nueces County, Texas; Los Angeles County, California; Philadelphia Court of Common Pleas, Pennsylvania; Miami-Dade County, Florida; the City of St. Louis, Missouri, and Holmes and Hinds Counties, Mississippi.

Strueber points to rising re-insurance prices as a culprit. He says the loss history has made an obvious impact, but the availability and cost of re-insurance is also affecting prices that primary insurance companies have to charge clients. “Going back to 9-11, the immediate after affect of that tragedy was that re-insurance became very hard to find and was very expensive when you found it. So that drove up the costs of insurance policies that people in the industry could buy,” Strueber says. “There’s a constant ebb and flow in the availability and cost of re-insurance.”

The contingency fee system and a U.S. system that does not award legal fees to the prevailing party are also to blame, according to Zeehandelaar. “The contingency fee system may indeed help those who are economically challenged, but it also creates an incentive for people to try anything because there is no downside,” he says. “In addition, because we don’t award attorneys fees to the prevailing party, a defendant could win a case but spend \$1 million defending it. So what kind of win is that? In the British system there is a hammer – the prevailing party can seek attorneys fees. That makes the risk more equal on each side.”

No End in Sight

High tort cost growth experienced in 2001 and 2002 suggests another period of high tort costs growth in the U.S. akin to what was last experienced in the 1970s and 1980s, according to Tillinghast. Study authors cannot accurately predict future increases in tort costs, but report that without sweeping structural changes to the

U.S. tort system, annual increases could be in the 6 percent to 11 percent range for the next several years.

“The spike in tort cost growth during the past two years is like nothing we’ve seen in the last 15 years,” says Tillinghast spokesperson Jeanne Hollister. “In the past, the government and industry responded with tort reform measures, public opinion campaigns against excessive jury awards, a greater focus on safety and risk management, and changes in insurance company claim practices. The current surge in tort costs may lead to similar reactions in the near future.”

It is noteworthy that, in the five-year period following the lawsuit crisis of the 1970s, tort cost inflation moderated significantly.

Touting Tort Reform

There have also been significant tort reform victories in recent years. In fact, ATRA reports 2003 was the most successful year ever for state tort reform with 28 states enacting laws. Some states, like New Jersey and California, curtailed contingencies. Other states, like Texas and Florida, are looking at capping non-economic damages for pain and suffering. Still other states are beginning to allow awards of outside expenses beyond attorney fees.

“The structural change that’s required is a fee shifting change,” says Zeehandelaar. “You have to do something to reduce the lack of risk for a plaintiff bringing a lawsuit. With contingent fees, plaintiffs don’t have to pay their lawyer or the defense lawyer anything if they lose. We need to either change the contingent fee or change the fee shifting system to force the losing side to pay the winning side. Those two structural changes could have an affect.”

Perhaps the most significant boon for defendants is *State Farm v. Campbell*. The U.S. Supreme Court struck down a \$145 million punitive damage award in the case as excessive and said it violated the Due Process Clause of the 14th Amendment of the Constitution where compensatory damages were only \$1 million dollars. So the U.S. Supreme Court has now given blueprints to a formula that can be applied to punitive damage awards to determine whether due process was satisfied.

Experts say it will take a push by the broader society to bring tort reform to the aviation industry. That may not be too difficult to drum up. A recent ATRA poll found that by a two-to-one margin, Americans believe that lawsuits are hurting the economy and discouraging the creation of jobs. Moreover, at current levels U.S. tort costs are equivalent to a 5 percent tax on wages. This translated to \$809 per person in 2002. At the current rate of increase, tort costs could approach \$1,003 per U.S. citizen by 2005 – representing a new quadruple-digit benchmark.

“The aviation industry should work with ATRA and others to seek some reasonable limit on damages,” says Schwartz. “There should be some line of demarcation. Having cases heard in legitimate courts, not judicial hellholes, is the best thing for the industry and the *State Farm* cases needs to be utilized in the court room and not forgotten.”