Civil Justice Forum

No. 42 April 2004

CLP
CENTER FOR LEGAL POLICY
AT THE MANHATTAN INSTITUTE

The Seven Myths of Highly Effective Plaintiffs' Lawyers

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"Never stir up litigation. A worse man can scarcely be found than one who does this."[1]

"The era of big government may be over, but the era of regulation through litigation has just begun."[2]

"The asbestos companies are really cash cows that we should care for and cultivate so we can milk them for years as we need to. But I have colleagues who would rather kill them, cut them up, and put them on the grill now."[3]

Frederich Hayek in his opus, *The Constitution of Liberty*, wrote that "[t]here is probably no single factor which has contributed more to the prosperity of the West than the relative certainty of the law…."[4] In the year 2003, American civil justice promises only the certainty of expense and a strange, relative sense of justice.

To understand why, one must look beyond the anecdotal, beyond the multi-million car paint jobs and cups of spilled coffee, to the deeper currents of American culture.

The eternal refrain from the defense bar is that it engages in a difficult contest of reason against emotion, and of logic against impulse. This is doubly true at a time when the lines between entertainment and adjudication, and between reality and make-believe, have all but disappeared. The reason for this is that the law has become our culture's principal drama, much as Westerns and detective shows were in past decades.

Just as the sheriff was always the good guy, so these legal thrillers are invariably told from the side of the plaintiffs' bar. In all of them—*A Civil Action,*[5] *The Rainmaker,*[6] and *The Practice*[7]—the story reaches the denouement when the courageous trial attorney, in the person of John Travolta, young Matt Damon, or fiery Dylan McDermott, hammers the railing and tells the jury that a great wrong has been done.

Somebody has got to pay.

Our culture—saturated in the drama of the law—is in danger of forsaking the rule of law. To understand what is really going on, we need to get behind the sound stage and address seven fictions that some members of the trial bar use to frame their cases and exploit the law. These are *The Seven Myths of Highly Effective Plaintiffs' Lawyers*:

1. Corporations put profits ahead of safety and honesty, and large damage awards are needed to force corporations to act responsibly.
2. The so-called "liability crisis" is an invention of corporations eager to limit their liability for wrongful conduct.
3. Punitive damages are rarely awarded;

those that are awarded are almost always substantially reduced in post-trial proceedings.
4. Class action lawsuits always serve the public good by marrying efficiency with justice.
5. Litigation protects consumers when regulators fail to act.
6. Corporations settle lawsuits to cover up their wrongdoing.
7. Like David-against-Goliath, the trial lawyer is outgunned and outclassed by powerful and resourceful corporations.

MYTH NUMBER ONE—Corporations put profits ahead of safety and honesty, and large damage awards are needed to force corporations to act responsibly.

The law treats corporations as individuals, single entities that serve society as efficient organizers of economic activity. Corporations, like individual executives, can be good actors or bad actors. After Enron and WorldCom, it is obvious that some managers do, in fact, place making profits before dealing honestly with the public. There is a label for such executives: they are criminal suspects. There is a place for them: criminal court.

There is compelling evidence that punitive damage awards have no significant deterrent effect on corporate behavior whatsoever.

Most corporations—like most individuals in business—are not WorldComs or Enrons. They don't need a punitive sword of Damocles to make them do right.

Ralph Nader and his minions serve as a kind of advance shock troop for plaintiffs' lawyers. And they see Corporate America as a monolithic entity: elite, aloof, and arrogant. Most contemporary business people agree that Mr. Nader and his colleagues once served a useful purpose in focusing corporate America—and consumers—to awaken to the needs of safety. After forty years, however, Mr. Nader and his colleagues often sound as if they are living in a sixties time-warp. Mr. Nader still speaks of a "corporate plutocracy" that is "moving on all fronts to advance narrow profit motives at the expense of civic values…."[8] In short, this language of the past has become the language of zealotry and conspiracy theory, language that, if it still lurks anywhere else in our society, lives only in the lesser movies of Oliver Stone.

Punitive Damage Awards Have No Deterrent Effect

The other side of this coin—that corporations routinely harm people for profits—is the belief that only punitive damage awards can set things straight. In fact, there is compelling evidence that punitive damage awards have no significant deterrent effect on corporate behavior whatsoever.

W. Kip Viscusi is a well-respected legal and economics scholar at the Harvard Law School. In 1998, he presented a study at a Georgetown University Law Journal symposium that analyzed the extent to which punitive damages work to deter risky behavior in states that allow punitive damages, as well as in states that do not.[9]

In his study, he reviewed an extremely wide range of risk measures – "toxic chemical accidents, toxic chemical accidents causing injury or death, toxic chemical discharges, surface water discharges, total toxic releases, medical misadventure mortality rates, total accidental mortality rates, and a variety of liability insurance premium measures."[10]

His conclusion: "States with punitive damages exhibit no safer risk performance than states without punitive damages."[11] There were no overall differences with regard to safety and environmental performance, and "there is no deterrence benefit that justifies the chaos and economic disruption inflicted by punitive damages."[12]

Dr. Viscusi noted the "not controversial" argument that when companies weigh the costs of increased safety against the costs of risks, the potential for punitive damages adds to the costs of risks—making safety precautions more attractive.

But, he said, "the linkages in practice may not be so clearly consequential."[13] The reason? Juries award punitive damages in such a capricious manner that there is no linkage between the expected punitive damages and the firm's risk actions. "[W]hen firms look forward, the prospect of punitive damages is so uncertain that there is no deterrent effect."[14]

He also found that there is no need to augment the safety incentives provided by the market, government regulation, and compensatory damages.[15] Penalties that go beyond those needed to create an efficient level of safety will produce redundant levels of safety. These costs, in turn, will lead to higher prices and other adverse economic effects.[16]

In short, his economic models show that punitive damages have many intended and unintended consequences. But there is one thing "punitives" do not do—they do not deter wrongful conduct.

"Hindsight Bias" and the Dock

Why, then, is it so easy for plaintiffs' attorneys to put the modern corporation in the dock? This white paper will later examine ways in which plaintiffs' attorneys have tilted the legal playing field to their advantage. But the first advantage they have is a natural, cognitive inclination all humans share called "hindsight bias." This is the natural human tendency after an accident to see the outcome as predictable—and therefore, easy to affix blame.

This human tendency is naturally seen in the reaction to the fatal accident that destroyed the Space Shuttle Columbia and killed seven astronauts. Afterwards, many news commentators and some experts affixed the blame to a piece of insulation foam that detached during take-off. There are also numerous memos being produced that warned of one danger or another. As of this writing, there is no official conclusion on the likely cause of the accident. But NASA is engaged in a vigorous effort to try to make the public understand that the insulation incident, and the memos, are just part of a complex flow of information that appear significant only in retrospect.[17]

One scholar describes this process in the courtroom:

> . . . to avoid the complicated and often contradictory scientific evidence in a typical personal injury or mass tort lawsuit, jurors will tend to reason back from what actually happened—viewing the evidence retrospectively—in order to determine what the defendant's prospective, pre-outcome conduct should have been . . . When this occurs, jurors can then "match" the evidence to the outcome as they construct a story explaining the plaintiff's injury. Evidence that best "fits" the story will be emphasized and subsequently incorporated into jurors' schema of events.[18]

There is a human tendency to overstate the predictability of past events, confirmed in experiments in which people assign lesser probabilities to adverse events in the future, and higher probabilities to events that have already occurred.

Psychologists have long known about this human tendency to overstate the predictability of past events, confirmed in experiments in which people assign lesser probabilities to adverse events in the future, and higher probabilities to events that have already occurred.

"The bias, in general, makes defendants appear more culpable than they really are," writes Jeffery J. Rachlinski, an associate professor at Cornell Law School:[19]

> The bias can cause judges and juries to find liable even those defendants who attempted to avoid negligence by undertaking all reasonable precautions in foresight. Not only does this seem unjust, but it also might have adverse economic consequences. Any potential defendant who is aware of the implications of the hindsight

> bias might try to avoid liability by taking an excess of precautions . . . Liability judged in hindsight penalizes people who endeavor to comply with what the law requires of them. The law seems to have settled upon a method of determining liability that is neither efficient nor fair.[20]

Rachlinski concludes: "When a court must determine what someone 'knew or should have known,' it is especially likely to fall prey to the hindsight bias."[21]

Particularly in cases involving complicated scientific evidence, fact finders who lack the background to evaluate scientific evidence "often use hindsight as a 'cognitive shortcut.' Junk science can exacerbate this tendency by offering a scientific link between the injury and the product."[22] Some courts follow the *Daubert*[23] standard, in which jurists act as gatekeepers in assessing the reliability and relevance of expert testimony to bar junk science from the courtroom. Despite the U.S. Supreme Court's directive to judges to rely on *Daubert*, however, many judges ignore it.

The quest for perfect safety holds what a company learns about safety against it. If a company improves a product, it is often exposed to the charge that the company should have taken a given safety step earlier.

The Quest for Perfect Safety

A new social factor accounts for the vulnerable position of the modern corporation as a defendant. In the 20th Century, there was a need to hold industry to an accountable standard. In the 21st Century, the Naderite critique only makes sense for those who cling to a belief—not in safety—but in an unattainable ideal, perfect safety.

This quest for perfect safety is ever-more irrational. This is apparent in food safety, where the Delaney Clause[24] sought to eliminate even a single molecule of an offending chemical in food additives (resulting in a statute said to be "so strict that new, safer, products could not make it through the approval process, so older, more risky, products remained on the market.").[25] You see this in environmental law, where billions of dollars have been wasted in the impossible quest to remove "the last little bit" of a given toxin from the soil.

The quest for perfect safety, in the judicial arena, holds what a company learns about safety against it. If a company improves a product, it is not applauded for acting on the basis of new knowledge. It is often, instead, exposed to the charge that the company should have taken a given safety step earlier. In short, corporate engineers are expected to be technological clairvoyants.

Trade-offs: The Real, Inside Story

In the corporate arena, costs are always believed to trump safety benefits. It is true that corporations feel pressure from customers to keep costs down. Consumers also engage in this kind of cost-benefit analysis: A good example is the trade-off between smaller, generally less-expensive cars versus larger cars. There is a limit, however, to how expensive they can go. (The trade-off between the greater safety of size and weight versus cost and convenience is a matter of common sense to all but those who want to deny these facts in the fuel-economy debates.)

Government also uses this cost-benefit analysis in setting safety standards. Somehow, when industry follows the same approach, it is portrayed as nefarious.

The hard truth is, the really tough safety decisions auto makers have to make are not between cost and safety. The tough decisions often come from weighing the hazards and benefits of a given technology. For example, in the auto industry laminated side window glazing can reduce ejection in certain accidents, but it may also increase head and neck injuries in others. Belt anchorage locations can be moved forward for a better fit on most adults, but they may make securing the attachment of child restraints more difficult. Engineers can boost the power of headlamps,

improving a driver's nighttime seeing distance, but this comes at the cost of increasing glare for oncoming drivers.

Far from being prompted to improve safety by sky-high verdicts, car companies often have to ignore these judgments to protect customers. They have to resist the false implications of a given verdict, and the rhetoric of critics, and stick to the facts.

The story of air bags provides one example of rhetoric overtaking considered safety judgments. As early as the 1960s, engineers in the auto industry warned that children and small adults could be severely injured or killed by air bags. Industry warnings about these dangers were steadily repeated in the 1970s and 1980s. Mr. Nader and his allies in "safety" advocacy groups felt they knew better.

Mr. Nader and his colleague at Public Citizen, Joan Claybrook, a former administrator of the National Highway Traffic Safety Administration ("NHTSA"), at various times claimed air bags were safe for unrestrained children. They promoted them as a replacement for seatbelts, and as late as 1992 Ms. Claybrook and the lobbying group Advocates for Highway and Auto Safety argued against warning labels proposed by manufacturers as "unnecessarily alarming statements." [26] But after air bags were required in automobiles, there were a number of child fatalities in low-speed collisions that normally present little risk of injury.[27] These unfortunate incidents—and federal regulators' rush to develop liberalized air bag rules and other regulatory fixes—indicate that the automobile industry's safety judgments were well-considered and should have prevailed.

It is a myth that punitive damages are necessary to deter corporations from engaging in risky behavior. This myth is undermined by Dr. Viscusi's finding—punitive damages in the United States are applied so capriciously that they are regarded by companies as random visitations of disaster, like tornadoes. Despite this, the human tendency toward hindsight bias and the unattainable ideal of perfect safety are driving a culture of ever-higher punitive damages.

MYTH NUMBER TWO—The so-called "liability crisis" is an invention of corporations eager to limit their liability for wrongful conduct.

The Association of Trial Lawyers of America ("ATLA") is given to making claims (*e.g.*, "tort claims do not clog our courts"[28]) that fly in the face of every civil attorney's experience. In the face of the everyday experience of businesses, legislators, attorneys and jurists, the plaintiffs' bar still claims that there is no legal crisis, and that punitive damages—identified by tort reformers as central to the crisis—are in fact fairly uncommon and relatively low.

The conservative estimate is that the annual direct costs of lawsuits in the United States amount to $233 billion, or more than 2 percent of total U.S. GDP.

Much of their evidence rests on an outdated report from the ATLA-affiliated Roscoe Pound Foundation, in which Dr. Michael Rustad of the Suffolk University Law School collected all reported punitive damage awards in product liability cases from 1965 to 1990.[29] Even Dr. Rustad had to concede, "The number of punitive damage terminations and verdicts can not be known with certainty since neither the Federal Judicial Center [n]or the National Center for State Courts collect that data."[30] The truth is, to know the real extent of punitive damage awards in America, one would need access to thousands of paper files in thousands of county courthouse basements.

Lawsuit Abuse: The National Costs

The most reliable efforts at understanding the national scope of tort law come from an April 2002 report from the President's Council of Economic Advisers[31] and from studies by powerhouse financial services industry consultant Tillinghast-Towers Perrin. The conservative estimate is that the annual direct costs of lawsuits in the United States amount to $233 billion, or more than 2 percent of total U.S. GDP.[32] These groups found:

- The U.S. tort liability system is the most expensive in the world, with more than double the average cost of other industrialized nations that have been studied.[33]
- Tort costs are rising alarmingly. In 1950, tort costs were only 0.6 percent of GDP; in 1970, they were 1.3 percent.[34]
- The current cost amounts to about $809 for every citizen of the United States.[35]

Incredibly, what Americans spend on lawsuits could pay for all the following government programs *combined*: "Education, training, and employment; general science; space and technology; conservation and land management; pollution control and abatement; disaster relief and insurance; community development; Federal law enforcement and administration of justice; and unemployment compensation."[36]

State-level studies show that tort costs are so high—and varied—that they create significant competitive advantages and disadvantages among states.

The cost of lawsuits is far more than the amount of revenue collected from the corporate income tax.[37] It is "far more than enough money to solve Social Security's long-term financing crisis."[38] For an American family of average income, tort costs could pay for more than three months of groceries, six months of utility payments, or eight months of health care costs.

The Competitive Costs to States

State-level studies show that tort costs are so high—and varied—that they create significant competitive advantages and disadvantages among states. A study of state-level data on output and employment among seventeen industries led Thomas Campbell, Congressman and Stanford professor, and his colleagues to come to two major findings.[39] First, states with policies conducive to lawsuits exhibit "lower growth in productivity and employment."[40] Conversely, states with "liability-decreasing reforms exhibit higher productivity growth."[41]

Global insurance heavyweight American International Group, Inc., is seeking to rate state and county governments on the friendliness or hostility of their legal systems toward business.[42] "In our international approach, we've always evaluated each country's legal system and ranked countries by legal risk," explains AIG Chairman and Chief Executive Officer Maurice R. "Hank" Greenberg. "Now we're going to rank U.S. states.

"Why would you want to invest in a state with a hostile legal environment? We want fairness, rather than being the target of frivolous lawsuits. There are states where doctors can't do business anymore, because malpractice lawsuits are out of control."[43]

The Costs to American Consumers

Tort costs not only distort the competitive standing of states—the magnitude of tort costs is so extreme that they are beginning to affect the willingness of exporters to do business in the United States:

- After French kitchen appliance maker Robot-Coupe S.A. was notified that insurance for its U.S. subsidiary was being cancelled, it had to scramble to find a new insurer, which charged 12 times the previous cost.[44]
- Singaporean Sinsin Food Industries, a maker of soy and chili sauces, had to pull back its marketing efforts because "the product liability insurance for North American operations is very costly and complicated—not many insurance companies are willing to take it up."[45]
- One British-based chemical company, ICI, was sued because the Oklahoma City bomber used fertilizer—not necessarily the company's—to make the Oklahoma City bomb in 1995. The lawsuits claimed that ICI was negligent for

not putting an additive into its fertilizer to make it less explosive. This company was also sued in an earlier case for manufacturing anti-theft paint. Bank robbers who were sprayed by the paint sued for pain and suffering, and the case cost the company over $200,000.[46]

- The Austrians have a wonderful cognate—*Nordamerika-Risiko*—that reflects the need for excessively high premiums to cover liability insurance costs in the United States. America is acquiring a reputation as a legal backwater, to be avoided or entered only with the costliest protection.[47]

As the current system charges on like a panicked horse, potential business partners in Europe and Asia are understandably alarmed. Europe has seen major reinsurance companies threatened and companies with asbestos subsidiaries wrecked. If left unchecked, tort costs will ultimately damage the competitive standing of the U.S. economy, much as states with lax systems of civil justice are losing business to states that have passed lawsuit reform.

The scale of abuse in the American system is best seen by comparing the U.S. model for handling asbestos lawsuits to those of other countries. In Great Britain, compensation for asbestos-related illness is paid to those who are seriously sick, rather than to lawyers and co-claimants in class-action lawsuits.[48]

In the United States, we pride ourselves for looking out for "the little guy." But it depends on which "little guy" you happen to be.

Some little guys make out quite well. Most do not. Because one plaintiff can break the bank, and the rest get nothing, all plaintiffs are forced into a real-life version of the movie *Rat Race*.[49] Most poorly treated of all are the deserving plaintiffs in asbestos cases. "Millions of dollars are awarded to perfectly healthy people whose daily lives are unaffected by asbestos exposure," writes former U.S. Attorney General Griffin Bell. "The relatively few sick plaintiffs, in desperate need but with little time, have their payments delayed and reduced due to the volume of cases and recoveries by the nonstick and their lawyers."[50]

Our system lavishly rewards the first plaintiff to reach the courthouse door, and then calls that justice. In the United States, plaintiffs' attorneys run thousands of healthy people through medical mills and then enroll them in asbestos lawsuits—bankrupting companies and taking money from trusts set up to pay genuinely ill people.[51]

As a result, the costs of asbestos litigation for insurers and defendant corporations could reach $200 billion—more than the Northridge, California earthquake, Hurricane Andrew, and September 11th terrorist attacks combined.[52] This figure does not include the costs of job loss and investment losses. As incredible as it may seem at first glance, asbestos litigation is emerging as a prime threat to corporate investment and renewed job creation.

Plaintiffs' attorneys run thousands of healthy people through medical mills and then enroll them in asbestos lawsuits—bankrupting companies and taking money from trusts set up to pay genuinely ill people.

For tens of thousands of loyal employees (soon perhaps hundreds of thousands) who are building savings through ESOPs and 401(k)s, punitive judgments leave them "Enron-ed."[53] From asbestos alone, one could conclude—contrary to ATLA's assertion—that the tort system in America is dysfunctional in the extreme.

The Costs to Medical Patients

Nowhere, however, does lawsuit abuse inflict more harm than in the arena of medicine. According to Jury Verdict Research, Inc., the median jury award increased 43 percent from 1999 to 2000.[54] More than half of all jury awards today top $1 million, and the average jury award has increased to $3.5 million.[55]

Here again, the official findings of the U.S. government are instructive. A study from the De-

partment of Health Human Services reports that the high cost of insurance represents "a threat to health care quality for all Americans."[56] This study finds:

- "Increasingly, Americans are at risk of not being able to find a doctor when they most need one because the doctor has given up practice, limited the practice to patients without health conditions that would increase the litigation risk, or moved to a state with a fairer legal system where insurance can be obtained at a lower price." [57]

The U.S. Department of Health and Human Services reports clear signs that Americans' access to health care is being threatened.

- "This broken system of litigation is also raising the cost of health care that all Americans pay, through out-of-pocket payments, insurance premiums, and federal taxes. Excessive litigation is impeding efforts to improve quality of care. Hospitals, doctors and nurses are reluctant to report problems and participate in joint efforts to improve care because they fear being dragged into lawsuits, even if they did nothing wrong."[58]

Scott Serota, president and CEO of the Blue Cross and Blue Shield Association, observes:

> [M]edical malpractice in the United States is now doing exactly the opposite of what it was originally intended to do. Medical malpractice laws were enacted to protect patients in the event of an egregious error in medical judgment or treatment. But today, our medical tort system is so distorted that it is threatening healthcare affordability (and) access to care—and some would argue it is jeopardizing quality of care.[59]

Among the ominous findings in the HHS Report were clear signs that Americans' access to health care is being threatened:

- "The University of Nevada Medical Center closed its trauma center in Las Vegas for ten days earlier this month. Its surgeons had quit because they could no longer afford malpractice insurance. Their premiums had increased sharply, some from $40,000 to $200,000. The trauma center was able to re-open only because some of the surgeons agreed to become county government employees for a limited time, which capped their liability for non-economic damages if they were sued. This is obviously only a temporary solution. If the Las Vegas trauma center closes again, the most severely injured patients will have to be transported to the next nearest Level 1 trauma center, five hours away."[60]
- "Overall, more than 10 percent of all doctors in Las Vegas are expected to retire, or relocate their practices by this summer. For example, Dr. Cheryl Edwards, 41, closed her decade-old obstetrics and gynecology practice in Las Vegas because her insurance premium jumped from $37,000 to $150,000 a year. She moved her practice to West Los Angeles, leaving 30 pregnant women to find new doctors."[61]
- "Dr. Frank Jordan, a vascular surgeon, in Las Vegas, left practice. 'I did the math. If I were to stay in business for three years, it would cost me $1.2 million for insurance. I obviously cannot afford that. I'd be bankrupt after the first year, and I'd just be working for the insurance company. What's the point?'"[62]
- "A doctor in a small town in North Carolina decided to take early retirement when his premiums skyrocketed from

$7,500 to $37,000 per year. His partner, unable to afford the practice expenses by himself, may now close the practice, and work at a teaching hospital."[63]

- "About 44 doctors at the height of their careers in Delaware County outside of Philadelphia left the state in 2001 or stopped practicing medicine because of high malpractice insurance."[64]
- "At Frankford Hospital's three facilities in Northeast Pennsylvania and Bucks County, all twelve active orthopedic surgeons decided to lay down their scalpels after their malpractice rates nearly doubled to $106,000 each for 2001."[65]
- "Many physicians in Ohio saw their malpractice premiums triple in 2001, and some are leaving their practice as a result. Dr. James Wilkerson, an Akron urologist, decided to retire. Had Dr. Wilkerson continued to practice, he would have spent seven months of his yearly income to cover the $84,000 premium. 'I would have had to go back to working 90 hours a week and I didn't want to do that.'"[66]
- "Ambur Peterson's obstetrician in Cleveland, Mississippi, stopped practicing three weeks before her due date, and she had to drive out of state, over a hundred miles, to Memphis, Tennessee, to get the care she needed."[67]
- In New Jersey, 65 percent of the hospitals report that physicians are leaving because of increased premiums (over 250 percent over the last three years).[68]
- If an obstetrician delivers 100 babies per year (which is roughly the national average) and the malpractice premium is $200,000 annually (as it is in Florida), each mother (or the government or her employer who provides her health insurance) must pay approximately $2,000 merely to pay her share to her obstetrician's liability insurance.[69]

The poorest Americans suffer from this lack of access. The HHS study found that the "proportion of physicians in the country providing any charity care fell from 76 percent to 72 percent between 1997 and 1999 alone, increasing the need for doctors willing to volunteer their services."[70]

The crisis is not only degrading access to care, it is also harming the quality of care. The HHS examined a recent survey of physicians, and found:

- Over 76 percent are concerned that malpractice litigation has hurt their ability to provide quality care to patients . . . 79 percent said that they had ordered more tests than they would, based only on professional judgment of what is medically needed, and 91 percent have noticed other physicians ordering more tests.[71]

Over 76 percent of doctors surveyed are concerned that malpractice litigation has hurt their ability to provide quality care to patients.

- 74 percent have referred patients to specialists more often than they believed was medically necessary.[72]
- 51 percent have recommended invasive procedures such as biopsies to confirm diagnosis more often than they believed was medically necessary;[73]
- 41 percent said that they had prescribed more medications, such as antibiotics, than they would have ordered based only on their professional judgment, and 73 percent have noticed other doctors similarly prescribing excessive medications.[74]
- Doctors are reluctant to collect quality-related information and work together to act on it for fear that it will be used against them or their colleagues in a lawsuit. Perhaps as many as 95 percent of adverse events are believed to go unreported.[75]

One finding in the HHS reports is truly staggering. "If reasonable limits were placed on non-economic damages to reduce defensive medicine, it would reduce the amount of taxpayers' money to the Federal Government by $25.3-$44.3 billion per year. This is a very significant amount. *It would more than fund a prescription drug benefit for Medicare beneficiaries* <u>*and*</u> *help uninsured Americans obtain coverage through a refundable health credit*."[76]

How can lawsuits inflict such high costs on the national medical system? HHS reports that the growth of million-dollar plus awards has increased dramatically in recent years. In 1994-1996, 34 percent of all verdicts that specified damages assessed awards of $1 million or more. This increased by 50 percent in four years; in 1999-2000, 52 percent of all awards were in excess of $1 million.[77] There have been 21 verdicts of $9 million or more in Mississippi since 1995—one of $100 million.[78]

St. Paul Companies, an insurance provider then covering 9 percent of doctors, announced in December 2001 that it would no longer offer coverage to any doctor in the country.

Yet ATLA and the plaintiffs' bar maintain that there is no tort crisis. They would do better to vet their own claims. After all, personal injury lawyers assert that huge numbers of Americans are harmed or killed by doctors every year. If this is so, then the current liability system—despite its gargantuan excesses—does a poor job of protecting patients.

Predictably, not only are doctors fleeing the system—so are insurers. To cite just one example, St. Paul Companies, covering 9 percent of doctors, announced in December 2001 that it would no longer offer coverage to any doctor in the country.[79]

The plaintiffs' bar has—against all this evidence—gone to great pains to make it appear as if there is no crisis. One 1999 study, titled *Premium Deceit: The Failure of 'Tort Reform' to Cut Insurance Prices,* concluded that "Tort reforms do not produce lower insurance costs or rates."[80]

When the Pennsylvania Medical Society examined this study, it characterized it as a mishmash of "[m]isstatements and omitted concepts"; "[u]nsupported statements and conclusions"; "[i]nappropriate attention to irrelevant background facts"; "[d]istorted methodology that makes it impossible to find any relationship between liability insurance reform and insurance premiums"; "[u]se of a spurious multiplier to hide findings"; "[u]nwarranted conclusions"; and "[i]mproper statistical concepts and conclusions about causality."[81]

Interestingly, the Pennsylvania Medical Society study found the same effect in comparing state medical costs as Dr. Campbell and company found in their survey of 17 industries:

- "States with greater numbers of reforms had substantially lower loss cost increases than states with fewer reforms. Moreover, the relationship appears to be strikingly linear and strong. States that enacted six reforms had an average general liability loss cost increase of 11.5 percent. States without any major liability reforms had an average general liability loss cost increase of 64 percent."[82]
- "States with six major medical professional liability reform saw a 91 percent increase in loss costs between 1985 and 1998. States with only one reform had an increase of 252 percent. The size of this spread is remarkable."[83]

The Cost in Products and Services Withdrawn from the Market

Another measure of the magnitude of the high cost of lawsuit abuse is the number of products and services that have been withdrawn from the U.S. market due to fear of liability, irrationally applied.

Volvo, for example, makes an integrated child booster seat that is not sold in the U.S. because of product liability concerns.[84] Asahi Chemical In-

dustry has decided not to export its tobacco-deodorizing fiber after evaluating damaging lawsuits filed in the U.S. The company was *not* afraid that its product was defective; rather, it was concerned that lung cancer patients who mistakenly concluded that the fiber also eliminated harmful ingredients in tobacco would sue.[85] Similarly, fears of silicone implant lawsuits in America caused Japanese silicone makers to quit production of silicone coating for hypodermic needles, which reduces the pain of an injection. The director of one of these firms stated, "We're sure our product is safe, but we don't want to risk a lawsuit." [86]

Merrell Dow Pharmaceuticals withdrew its anti-nausea morning sickness drug, Bendectin, from the market in 1983. Although the drug had been approved by the U.S. Food and Drug Administration and was widely acclaimed by health care professionals (and not linked by any reputable science to any harm), Merrell Dow's legal defense costs were far in excess of the amount received in annual sales of Bendectin.[87]

Two of the three companies manufacturing the DPT vaccine stopped producing it in 1984 in light of rising product liability costs. The lawsuit-induced shortage was so severe that the Center for Disease Control subsequently asked doctors to stop vaccinating children over age 1 to conserve the limited supply of the vaccine.[88]

A 1988 survey by the Conference Board of more than 2,000 chief executive officers found that 47 percent of manufacturers have withdrawn products because of fear of litigation,[89] and 25 percent have discontinued some product research for that reason. "[P]roduct liability is so extreme and uncertain as to retard innovation," writes Michael Porter, in his definitive study *The Competitive Advantage of Nations*.[90]

The costs are not only economic. They are paid in human health and human lives:

- At least two companies delayed research on an AIDS vaccine, while another company abandoned a promising approach altogether due to liability concerns.[91]
- Monsanto Company abandoned the planned production of a safe, biodegradable, and effective reinforcing phosphate fiber that would have been a substitute for asbestos.[92]
- Union Carbide decided to forego developing a suitcase-sized kidney dialysis unit and offering intravenous equipment.[93]
- Sunstar, a health-spa manufacturer, decided not to market a safety device due to a liability-related increase in its insurance costs. The product would have set off an alarm every time the cover of a spa was opened. Because the product was a safety device, only one insurance company was willing to write a policy.[94]

When two of the three companies manufacturing the DPT vaccine stopped producing it in 1984 in light of rising product liability costs, the lawsuit-induced shortage was so severe that the Center for Disease Control subsequently asked doctors to stop vaccinating children over age 1 to conserve the limited supply of the vaccine.

To sum up, runaway tort costs—costing every American some $809 a year—harm the business climate of states, enforce a kind of "tort protectionism" that isolates parts of the U.S. economy from world trade, reduce access and affordability in health care, and kill goods that promote safety and human health.

The contention that there is no tort crisis in the United States would be, on its face, laughable—if these were laughing matters.

MYTH NUMBER THREE: Punitive damages are rarely awarded; those that are awarded are almost always substantially reduced in post-trial proceedings.

Plaintiffs' attorneys tell us not to believe the headlines; real courthouse practitioners know that punitives are rarely obtained, and often reduced. There is some truth to this, but, even so, it is

grossly misleading. Most cases do not result in punitive damages for the simple reason that most defendants are terrified of going to trial under these rules. So they opt to pay the blackmail.

The DOJ's Bureau of Justice Statistics found that only 2 percent of 762,000 tort, contract, and real property cases handled in state courts of general jurisdiction in the most populous counties did, in fact, go forward to be resolved by juries.[95]

Many cases have always settled. But many are now settled on terms that the plaintiffs demand. The reason has to do with a "shadow of the gallows" effect on the vast majority of cases that settle before going to trial. As Yale Law School Professor George Priest has observed, "the availability of unlimited punitive damages affects 95 percent to 98 percent of cases that settle out of court prior to trial. It is obvious and indisputable that a punitive damage claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process, increasing the likelihood of litigation."[96]

Most cases do not result in punitive damages for the simple reason that most defendants are terrified of going to trial under these rules. So they opt to pay the blackmail.

As the general counsel of one manufacturer of recreational vehicles said, "In states like Mississippi, Alabama and Texas, even if there's a 95 percent chance of prevailing, you're afraid to roll the dice. When one award could be half your company's net worth, those dice can get pretty heavy."[97] Alabama Attorney General Bill Pryor calls these "bet your industry" lawsuits.[98]

That the shadow of the gallows is lengthening is not in dispute. The Institute for Civil Justice of RAND Corporation studied all civil verdicts in Cook County, Illinois, and San Francisco County, California, for the period 1960-1984. In 1960-64, the average punitive damage award in Cook County, in 1984 dollars, was $7,000. In 1980-84, it was $729,000.[99] In 1960-64, the average punitive damage award in San Francisco was $166,000. In 1980-84, it was $381,000.[100] The average amount of Los Angeles County's 149 punitive damage awards in 1980-84 was $1.3 million.[101]

Many of these punitive awards would, as the plaintiffs' attorneys insist, be reduced on appeal. However, each large settlement also inspires other plaintiffs to seek similarly high amounts. In this way, each eye-popping verdict has an unseen but powerful effect on the greater mass of settlements.

The system coerces defendants to settle not only because of the "heavy dice"[102] cited by the recreational vehicles manufacturer, but also coerces by requiring defendants to forgo appeals because they cannot afford to post an appeal bond.

These bonds are a vestigial application of archaic state laws, enacted a time when verdicts were much smaller. "In the new world of billion dollar verdicts," write legal reform analysts Victor E. Schwartz and Leah Lorber, "the bond requirements have brought about a new and unanticipated result: they may deprive a defendant of his or her right to an appeal. The defendant, no matter how large, simply cannot afford to post a bond, so he settles for a lesser amount and gives up his right to an appeal." [103] Or, as one Mississippi lawyer noted, "Any judgment that cannot be appealed because it cannot be bonded is law of the most immediate character."[104]

MYTH NUMBER FOUR: Class action lawsuits always serve the public good by marrying efficiency with justice.

Class actions allow for the convenient and efficient grouping of plaintiffs sharing a common complaint to link up in a single lawsuit. Such suits have deep roots in English common law. When used correctly, class actions allow courts to resolve in one action many smaller, similar claims that might otherwise remain unheard because the cost of any particular suit would exceed the possible benefit to the claimant. Class actions also allow defendants to focus their energies on resolving all claims in one lawsuit, and prevent courts from being flooded with duplicative claims.

But the perverse incentive of contingency fees has warped class action litigation. The character of U.S. class action law underwent a radical transformation in 1966 when jurists revised Rule 23, reversing the "opt in" provision to "opt out."[105] In other words, people could suddenly be dragooned as plaintiffs in a lawsuit unless they affirmatively notified the plaintiffs' attorneys they wanted out. As a result of this one change, countless thousands have been conscripted into class actions, often unknowingly (and sometimes even held in suits against their will). Such a practice prompted class-action impresario Bill Lerach to recently quip, "I have the greatest practice of law in the world . . . I have no clients."[106]

This is, indeed, clientless law. Certainly many of the complaints go by unnoticed by the plaintiffs. Pinellas County, Florida Circuit Judge W. Douglas Baird wrote of one action that it "appears to be the class litigation equivalent of the 'squeegee boys' who used to frequent major urban intersections and who would run up to a stopped car, splash soapy water on its perfectly clean windshield and expect payment for the uninvited service of wiping it off."[107]

Not only do class actions often address specious "injuries," they often cheat the very clients they purport to serve. The exemplar of class-action abuse remains the infamous BancBoston case.[108]

Dexter Kamilewicz, a Maine real estate broker, was one of 715,000 consumers who had the luck (all of it bad) to be represented by Daniel Edelman of Chicago in a class-action lawsuit against BancBoston. Edelman's lawsuit awarded Kamilewicz a $2.19 refund on his account, allegedly to compensate him for the bank having overcharged escrow account customers. "Some customers," reports Scott Walter in *American Enterprise*, "received even less than Kamilewicz; the luckiest one received a whopping $8.76. Kamilewicz didn't even know of his windfall until he asked the bank why it had charged him $91.33 and was told the money was for legal fees!"[109] For this legal service, the plaintiffs' attorneys were awarded more than $8.5 million.[110]

In America today, not only can you be forced to sue against your will, you can be forced to sue yourself.

Many class-actions result in near-worthless coupons that are redeemable only if applied toward a new purchase. In one case involving ITT Financial Corporation, only 2 coupons out of 96,754 were ever redeemed.[111]

Another class action against Carnival Cruise Lines, for the alleged inflation of port charges, awarded former passengers with coupons worth $25 to $55 to be used for a future cruise, or redeemed for cash at 15 to 20 percent of face value. The class action plaintiffs' counsel were set to receive $5 million in attorney fees as part of the settlement.[112]

Not only do class actions often address specious "injuries," they often cheat the very clients they purport to serve.

Another class action settlement arose from allegations that Ralph Lauren inflated the suggested retail price on its Polo line at outlet stores. The take? Plaintiffs' lawyers walked away with $675,000 in fees. Their clients—the actual customers—can apply for 10 percent-off coupons (assuming they still have receipts from purchases made between July 15, 1991, and January 10, 2000).[113]

Many judges are aggressive in their rejection of these suits and their aims. However, because class actions by definition involve a broad group of plaintiffs, often from around the country, they can thrive by clustering in a relatively small number of jurisdictions—many of them small, rural, and remote from the social consequences of bankrupting verdicts.

Termed "judicial hellholes" in a masterful report from the American Tort Reform Association,[114] and "magic jurisdictions" [115] by plaintiff attorney Dickie Scruggs (who is voicing growing skepticism of some recent practices), these venues are critical to the class action process. What are magic jurisdictions? They are venues, Scruggs says, "where the judiciary is elected with verdict

money"[116] and "[t]he trial lawyers have established relationships with the judges."[117] In these courts, "it's almost impossible to get a fair trial if you're a defendant"[118] and [a]ny lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is."[119]

Consider Madison County, Illinois. This rural county is home to Granite City and Alton, both sleepy towns of about 30,000 souls. Yet more class-action lawsuits have been filed per capita in Madison than any other county in the United States.[120]

Because class actions by definition involve a broad group of plaintiffs, often from around the country, they can thrive by clustering in a relatively small number of jurisdictions—many of them small, rural, and remote from the social consequences of bankrupting verdicts.

According to a study by the Center for Legal Policy at the Manhattan Institute, Madison County had 16 class actions in 1999, 39 suits in 2000 and another 39 in the first half of 2001, with a projected 56 cases to be filed by the end of that year. "Clearly, something is drawing plaintiffs' counsel to this court," the report states.[121]

A hint of that "something" might be found in the contributions made to the political campaigns of local judges. The personal injury bar contributes more than 75 percent of the estimated $800,000 given to local judges' political campaigns. According to the Manhattan Institute's Center for Legal Policy, there was a projected 3,650 percent increase in class-action filings in this one Illinois circuit court over a four-year period.[122]

ATRA has identified other problem jurisdictions, including:

- *Los Angeles:* "The Central Civil West Division in particular, which is called 'the Bank' by plaintiffs attorneys (a place where they can always withdraw substantial sums of money), has been the source of number of high jury verdicts . . . In [one] case, a Los Angeles jury awarded $4.9 billion when a Chevy Malibu was rear-ended and burst into flames, severely injuring the occupants of the vehicle. The judge reduced the award to $1.09 billion. The defendants appealed, arguing that the judge erred by refusing to allow GM to enter evidence that the driver, who rear-ended the plaintiffs' car, had been driving at over 70 miles per hour, in excess of the speed limit, and was drunk."[123] The 1979 Chevy Malibu met or exceeded all applicable federal safety standards.[124]
- *Orleans Parish*: "In 1999, a New Orleans jury awarded $3.4 billion in punitive damages for a fire caused by leakage from a train car. No one was killed in the accident; the plaintiffs' claims were for fear, suffering, evacuation, medical expenses and property damage. The case was eventually settled while it was on appeal."[125]
- *Mississippi*: "Although Jefferson County has less than 10,000 residents, more than 21,000 people were plaintiffs in Jefferson County from 1995 to 2000. Hilda Bankston, the former owner of the local pharmacy, has been named as a defendant in so many lawsuits that she has lost count of the number of cases in which she has been sued. . . . In one [Mississippi] case, 398 people who took diet drugs sued 203 physicians and pharmacists in a single lawsuit. Not a single plaintiff, and only one defendant in the case resided in the county in which the case was brought."[126]

The legal concept of *forum non conveniens* allows a court to refuse to hear a case if there is more appropriate forum in which the case could

and should be heard. Somehow, in these "magic jurisdictions," the doctrine rarely seems to apply.

As Elliot M. Kaplan, a Kansas City attorney and observer of the legal system, explains Missouri's *forum non conveniens* practice, "In bigger counties, the location change must be 'for cause,' a concept that is as slippery as an Ozark pig. No judge has ever found cause because of a jurisdiction's proclivity to produce high jury awards. But trial lawyers would not flock to St. Louis and Jackson County without a good reason—jurors there are notoriously pro-plaintiff."[127]

As we will soon see, the doctrine does more than victimize out-of-state defendant corporations. It also distorts the constitutional fabric of American law. As noted by class action specialists John Beisner and Jessica Davidson Miller, "[A] handful of state courts, through their certification and settlement of interstate class action lawsuits, are effectively making law for 49 other states in addition to their own, or applying their own state law to citizens of other states."[128]

MYTH NUMBER FIVE: Litigation protects consumers when regulators fail to act.

In the federal regulatory process, safety policy is developed by a balanced, expert-led investigation of risks. In the tort process, where the stakes are the titanic profits of the blame industry, the investigative process is anything but scientific.

The Case of Cars

Federal auto safety investigators and scientists want to know all the pertinent facts. The legal system deliberately blinds itself to many pertinent facts through arcane and discriminatory rules of evidence. For example, no safety device can be counted on to fully compensate for people who fail to wear seatbelts. Yet in twenty-nine states, juries are allowed to assess damages without being told that an injured plaintiff failed to wear a seatbelt (in other words, failed to obey the law). Incredibly, the fact that the driver at fault was drunk is not admissible in many courts.

Even when scientific research and policy decisions from the regulatory arena are included in a trial, they are often presented in a haphazard and skewed manner. On the basis of courtroom polemics, juries with no expertise are asked to render verdicts that, in effect, set new safety benchmarks.

For example, regulators can determine that a given component is either safe or defective. Twelve juries can find that component to be safe. But if the 13th jury finds it defective, and reinforces that decision with an eye-popping verdict, then they sweep away the methodical deliberations of the other juries and federal regulators alike.

On the basis of courtroom polemics, juries with no expertise are asked to render verdicts that, in effect, set new safety benchmarks.

Regulators, on the other hand, do not dictate design in this way. They seek one result—safety. For example, from 1966, when the National Traffic and Motor Vehicle Safety Act was signed, to 1990, safety improvements have resulted in the saving of 800,000 lives. In 1998, the fatality rate per 100 million vehicle-miles of travel was at a historic low of 1.6.

The auto industry has fostered a 30 percent decline in fatalities over a 10-year period. At least 243,400 of the 800,000 saved human lives can be attributed to federal safety programs. Much of the rest of the credit belongs to public safety campaigns, and to advances made by the auto industry—hundreds of thousands of lives saved as a result of the private sector taking the initiative.

Many safety features and driver assists were required by no regulatory directive. Safety improvements added voluntarily by manufacturers include right-hand outside mirrors; anti-lock brakes; side air bags; built-in child seats; adjustable pedals so small occupants can sit farther back; seat-belt devices to take the slack out of the belt in the case of a severe crash; or load-limiting seatbelts, which stretch when the forces on an

occupant begin to exceed the level where broken ribs can occur. The car companies offered these items because customers appreciate them—and because it was the right thing to do.

While federal regulators look ahead, seeking to save lives, tort law looks back, seeking to use hindsight bias to assign blame for accidents that have already happened. That, of course, is exactly what it was designed to do. The problem arises when plaintiffs' attorneys adopt the guise of regulators and pretend that they are seeking to make products safer. In fact, they often threaten the safety of products, by dictating design changes based on a single accident—while ignoring (as regulators cannot) the whole universe of data. Consider again what happens when regulators can determine that a given seat belt mechanism is safe and effective. When that 13th jury finds it defective, and reinforces that finding with its eye-popping verdict, it washes away all the work of auto engineers, federal regulators, and the United States Congress.

While federal regulators look ahead, seeking to save lives, tort law looks back, seeking to use hindsight bias to assign blame for accidents that have already happened.

The Case of Contraceptives

The last fundamentally new contraceptive was introduced in the United States in the 1960s.[129] Wyeth-Ayerst's Norplant is a new delivery device for an old contraceptive drug.[130] Contraceptive research is stalled. The number of companies conducting contraceptive research has dropped from 13 to 2 due to the threat of litigation.[131]

Writes William Brown in *The Brandeis Law Journal*, "As a society, we cannot afford the pharmaceutical, biotechnology, and medical device companies simply to walk away from this area because it is unprofitable. . . . [C]ontraceptives have wide societal impact."[132]

We cannot afford this outcome, yet we have ensured it for decades.

The Case of Vaccines

Vaccines are a necessary evil. In deciding to deploy a vaccine, public health officials are forced into an odds-playing game in which the vast majority of those treated will be protected from a disease, while a small number will be apt to develop complications as a result of the vaccine itself.

What the law needed was some way to give compensation to a person injured by a vaccine, without pulling vaccines off the shelf and exposing the public to an epidemic. This is precisely what happened in the 1980s when Victor Schwartz, general counsel for the American Tort Reform Association, worked with Congress to draft a no-fault vaccine injury compensation program.[133] Although Congress clearly intended the program to cover ingredients of vaccines, plaintiffs' attorneys began to isolate out and target vaccine components.[134]

Now, in an age of potential bioterrorism, the question of how to treat vaccines has taken on a new dimension. President Bush and Congress have urged pharmaceutical companies to invest the capital to research and develop new vaccines that can protect the American people from germ warfare. You might think that such an area would be too touchy for even the plaintiffs' lawyers—but you'd be wrong.

Anticipating that plaintiffs' lawyers would see homeland security as a potential juicy source of revenue, Congress last year explicitly included civil liability limitations in the Homeland Security Act of 2002.[135] Among these was a clarification that the vaccine compensation program was intended to cover vaccine ingredients and components. This clarification was removed in early 2003 as part of an omnibus spending bill after the powerful plaintiffs' bar launched a lobbying effort to undo these protections.[136] An additional push is being made to include the clarification language in other legislation. If this effort is not successful, Americans will be less safe and homeland security will be undermined.

Under the current provision, anyone who is not satisfied with the no-fault award from the statu-

torily-created settlement fund still has a right to file a civil lawsuit. As described by *The Washington Times*, "unless a vaccine ingredient works perfectly and without adverse side effects in every person who receives it—an impossible standard to meet"—the manufacturer could "face a multi-million-dollar lawsuit. This will make it far less likely that vaccines, including ones that could protect Americans in the event of deadly attacks using chemical or biological weapons, will ever be produced. Already, the number of foreign and domestic vaccine producers has declined from roughly 24 in 1967 to just four today."[137]

In the FDA, the United States already has the most stringent regulatory regime of protecting the public from prescription drugs (one that is often criticized for being too cautious). In contrast, the plaintiffs' attorney is a perverse regulator.[138]

Government By Judicial Fiat

While a tort system can never be an effective regulator, it is quite effective in taking power away from the proper deliberative, legislative, and regulatory authorities. Alabama Attorney General Bill Pryor has warned that regulation through litigation has the power to "shift the awesome powers of legislative bodies—the powers to control commercial regulation, taxation, and appropriation—to the judicial branch of government."[139]

Attorney General Pryor's remarks are worth quoting here at length:

> Eleven years ago, Justice Antonin Scalia was the lone member of the Supreme Court to vote to declare the independent counsel provisions of the Ethics in Government Act unconstitutional. The beginning of his dissenting opinion, which I think it's fair to say is more popular now than it was in 1988, is worthwhile reading. He wrote:
>
> > "It is the proud boast of our democracy that we have a 'government of laws and not of men.' Many Americans are familiar with that phrase; not many know its deviation. It comes from Part the First, Article XXX of the Massachusetts Constitution of 1780, which reads in full as follows: 'In the Government of this Commonwealth, the Legislative Department shall never exercise the Executive and Judicial powers, or either of them; The Executive shall never exercise the Legislative and Judicial powers, or either of them; The Judicial shall never exercise the Legislative and Executive powers, or either of them . . . to the end that it may be a government of laws and not of men.'"

While a tort system can never be an effective regulator, it is quite effective in taking power away from the proper deliberative, legislative, and regulatory authorities.

> The recent government suits against the tobacco and firearms industries trample upon this central feature of the rule of law. The aim of this litigation is to shift the awesome powers of legislative bodies—powers to control commercial regulation, taxation, and appropriation—to the judicial branch of government. With that shift comes an assault on civil rights, democratic representation, and free enterprise . . .
>
> The [tobacco] settlement creates a complicated regulatory scheme that bans the use of cartoons in tobacco advertising, the sale of clothes with brand name logos, sponsorship of most forms of commercial entertainment, and even some forms of lobbying . . . From a legal standpoint, these restrictions could not have been achieved without violating, for example, the free speech clause of the First Amendment.

Using lawsuits to raise revenue is far easier than raising taxes the old-fashioned way. This method bypasses the need for representatives of the voters to approve the tax. Messy restrictions, such as requiring the revenue measure to originate in the House of Representatives, can also be avoided . . .
For a long time, contingent fee contracts were considered unethical. The justification for these fees was the need for poor persons with valid claims to have access to the legal system. Governments do not have this problem. Governments are wealthy because they have the power to tax and condemn. Governments control access to the legal system. The use of contingent fee contracts allows governments to avoid the appropriation process; it creates the illusion that these lawsuits are being pursued at no cost to the taxpayers. These contracts also create the potential for outrageous windfalls, or even outright corruption, for political supporters of the officials who negotiated the contracts.[140]

The marriage of attorneys general, bound by oath to the Constitution—and personal injury lawyers, bound by practice to the pursuit of profit—is matrimony of the unholiest sort.

With that shift of power, Attorney General Pryor noted, "comes an assault on civil rights, democratic representation, and free enterprise."[141]

The marriage of attorneys general, bound by oath to the Constitution—and personal injury lawyers, bound by practice to the pursuit of profit—is matrimony of the unholiest sort. It threatens to make American law resemble the practices of the ancient Roman court, continuously disordered by the confusion of public and private attorneys, and public and private business.

As in ancient Rome, this confusion also creates a wide open field for a subtle new form of corruption, the trading of ambition for profit, one in which young Caesars (in the form of the attorneys general) are supported by the contributions of friendly plaintiffs' attorneys and the promise of lucrative "rainmaking" partnerships after their public tenure.

Former U.S. Attorney General Dick Thornburgh testified before Congress:

> To add insult to these injuries, plaintiffs' lawyers purport to hold the moral high ground. They act as if they were not mere attorneys, but private-sector attorneys general. A true attorney general, whether he or she is at the state or national level, is accountable to the public through democratic processes. And certainly no true public law enforcement officer would be allowed to personally profit from a prosecution.
>
> Plaintiffs' lawyers, on the other hand, are not bound or constrained in any way by democratic processes. They are free to masquerade their personal agendas in the guise of social policy. That they should want to do so requires no great insight into human nature. That the rules, and the judges who interpret them, should give plaintiffs' attorneys authority to conduct the law in such a rapacious manner is, however, a disturbing development.[142]

This is also the only public process in which billions of dollars in services are contracted with a small number of individuals, without any oversight, standards, or accountability—just the AG's assurance that he has picked the best person. Even then, these sweetheart deals often fall apart, ending in bitter lawsuits in which attorneys fight the states for more settlement money. Such practices should be of greater concern to more than just American business. They should concern every one of us.

In America today, the judiciary is confusing the extent and proper exercise of its power with those of the other two branches. Alabama Supreme Court Justice Harold See, in *Ex parte Jenkins v. M.A.B.*, traces the separation of powers principle

back to Montesquieu.[143] It was this French philosopher who "posited the political maxim that an individual's liberty depends directly upon separation of the legislative, executive, and judicial powers of government."[144]

By usurping the rightful role of the legislative and executive branches, the judiciary is trampling on the fundamental principle of separation of powers. As a result, there is no doubt that our liberty interests are being threatened. All this is happening because we are in danger of having a government not of laws, but of *jurors*.

Closing the Door on Tort Reform

More than ninety times in a decade, state courts have nullified the efforts of state legislators to clean up civil justice. Some judges "have declared these legislative efforts 'unconstitutional' under a variety of malleable provisions in *state* constitutions."[145]

Although this has happened in many states—from Illinois to Alabama—the most breathtaking example in the exercise of naked power took place in Ohio. In 1996, the Supreme Court of Ohio overturned that state's civil justice reform statute, *even though there was not a case or controversy before the court.*[146] Instead, the court saw fit to respond directly to an action filed by the Ohio Association of Trial Lawyers ("OATL") arguing that the law would cut into its members' contingency fees and make it harder for OATL to recruit members![147] The majority's decision to sweep aside the deliberations of the legislature made for poor jurisprudence. In terms of customer relations, it was unexcelled.

Trust Us, We're Lawyers

Derek Bok, former Harvard President and Law School Dean, once observed, "Most plaintiffs do not know whether they have a strong case, and rare is the lawyer who will inform them (and agree to a lower percentage of the take) when they happen to have an extremely high probability of winning. In most instances, therefore, the contingent fee is a standard rate that seldom varies with the size of a likely settlement or the odds of prevailing in court."[148]

Lester Brickman at the Benjamin N. Cardozo School of Law, the nation's leading contingency fee expert, wrote:

> Lawyers have erected toll booths across the courthouse steps, exacting not a fee for passage but a percentage of all business transactions upon traversal. Contingent fee setting today operates in a milieu substantially devoid of fiduciary oversight. Overcharging clients is routine and typically unquestioned, especially when the client is unaware of the degree to which it has occurred. So pervasive are these abuses that one may legitimately describe the current regulatory scheme as "rotten."[149]

By usurping the rightful role of the legislative and executive branches, the judiciary is trampling on the fundamental principle of separation of powers.

Federal and state disclosure laws benefit consumers with Truth in Lending laws,[150] Truth in Leasing laws,[151] and Truth in Funeral Home Direction.[152] Funeral home directors are subject to a long array of regulations in the selling of caskets, flowers and services on the theory that most buyers of their services are distressed.[153] But we have no effective disclosure laws when it comes to lawyer retention and fees.

It is time to ask, is the so-called little guy well served where plaintiffs' attorneys fail to apply the same standards of disclosure to their own businesses that they routinely demand from all others?

- A Tennessee attorney was found to have violated ethical norms when he charged his client a $108,000 contingency fee for helping the client recover one-third of the proceeds from the estate of the client's wife; the court said the lawyer should not have demanded payment of a risk premium, because there was

never any risk that the husband would receive anything less than one-third of the estate.[154]

- In Georgia, a 1996 medical malpractice case yielded $2.4 million for the two plaintiff attorneys, and left their comatose client's estate without enough money to pay for her funeral. A probate judge ordered the fee returned to the client's estate, and the attorneys were investigated for violating eight bar standards including charging a "clearly excessive fee," which amounted to 72 percent of the cash portion of the settlement.[155]

Funeral home directors are subject to a long array of regulations in the selling of caskets, flowers and services on the theory that most buyers of their services are distressed. But we have no effective disclosure laws when it comes to lawyer retention and fees.

- In Texas, two attorneys recovered $6 million in a divorce action – the equivalent of a fee of $42,379 per hour for one of the attorneys and $8,079 per hour for the other.[156]
- Attorney fees of $250 to $350 million were awarded in one asbestos case, resulting in effective hourly fees averaging $2,500 to $5,000 and provoking a federal judge to label these fees as "grossly excessive."[157]
- In one airline accident case in which there was no issue of liability, a one-third contingency fee yielded an attorney $383,244 for only 25 to 35 hours of work, a rate of $10,000 to $15,000 an hour.[158]

Many potential plaintiffs are stunned and grieving. They clearly need the same protections as customers of funeral homes.

- When nine-year-old Ren Glass was in intensive care recovering from being hit by an automobile, a man posing as a hospital chaplain came into his hospital room and asked Ren's mother, Molly Glass, if he could pray with her. Molly Glass later learned that the "chaplain" was "hustling business" for an attorney, and received $200 for each client he recruited.[159]
- In 1993, after a passenger train derailment killed forty-seven people north of Mobile, Alabama, a Louisiana attorney reportedly signed up a Mexican train passenger, who spoke no English, at his hospital bedside.[160]

Among the most common abuses are "policy limit cases," slam-dunks in which insurance companies pay the limit on clear liability cases. Judyth Pendell, a legal reform scholar, writes that "the time and work required is quite modest" in these cases, "yet the lawyer takes a third of the settlement. This can result in an effective hourly rate rising up into the thousands or even tens of thousands of dollars."[161]

The Manhattan Institute surveyed urban bar associations across the country, services that receive a total of 400,000 calls a year. None provides written information about fees. Some will provide a basic explanation about how a contingency fee works; others will not answer any questions.[162] Imagine what the trial lawyers would do to companies that did business that way!

Consumers need the same protections from lawyers that they receive from salesman from funeral homes, nursing homes and financial services. Consumers deserve:

- A three-business-day 'cooling off' period to reconsider and rescind any contingency-fee and retainer agreement;
- To be informed that the size of the contingency fee is always subject to negotiation and that there is no such thing as a "standard" rate that all attorneys are entitled to charge;
- To be informed that there are possible

> adverse effects of litigation, including possible counterclaims, award of opposing attorney fees, and other sanctions.[163]

.

Such measures are necessary because we cannot count on state agencies to enforce basic ethical standards. In 1997, more than 84,000 formal complaints were issued against attorneys. How many faced disciplinary action? Agencies imposed sanctions on fewer than 0.3 percent of lawyers.[164] In fact, in the past half-century, there have been only three instances in which an attorney was professionally disciplined for charging the "standard" contingency fee in a tort case.[165]

Legal reformers are coalescing around two proposed solutions. One of them is the Legal Consumer's Bill of Rights, model legislation proposed by the American Legislative Exchange Council that would shield consumers from high-pressure tactics from lawyers and their agents.[166] This legislation would require attorneys to keep accurate time records and to provide clients with detailed accounts of time spent on the case and charged expenses. Above all, ALEC's legislation would require lawyers to inform their clients of their right to request an objective review of the reasonableness of a contingency fee.[167]

Legal reformers also are considering adopting the New American Rule, which University of Illinois Professor of Law Richard Painter explains as granting clients the right to choose, at the conclusion of litigation, to pay the contingent percentage-of-net-recovery fee, or the maximum hourly fee (whichever is lower).[168]

Similar reforms need to be brought to be bear in the case of class-action lawsuits. One plaintiff in class-action discussions with Coca-Cola overheard his lawyers gloating over their take of an anticipated $250 million settlement, while the actual clients would get very little. When the plaintiff tried to offer a new lawyer to protect clients' interests, he was dropped as a named plaintiff and told to find new representation.[169]

Class-action rules are even worse for the consumer. "[W]hile individual plaintiffs in suits are ill-equipped to bargain over lawyer fees, *class action members have no opportunity at all to bargain*," the Washington Legal Foundation noted in a brief to the Federal Trade Commission.[170]

Hope for pro-consumer change rests not only in a Legal Consumer's Bill of Rights and the New American Rule, but also with the Federal Trade Commission, which has the power to outlaw trade practices harmful to consumers. On at least three occasions, the FTC has challenged attorney fees in three proposed class action settlements. It has also urged the Judicial Conference, which oversees the federal court system, to amend class action rules to limit attorney fees. The agency has published a consumer guide, "Need A Lawyer? Judge for Yourself?"[171]

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Timothy J. Muris, FTC Chairman, told *The Washington Post* that the agency will be vigilant in scrutinizing coupon settlements and other arrangements that leave lawyers with millions and consumers with near-worthless gimmicks. "I'm sure the lawyers are going to be unhappy on occasion," Muris said. "We think that if it's a choice between money going to the consumers or to the plaintiffs' lawyers, we'll take the consumers every time."[172]

MYTH NUMBER SIX: Corporations settle lawsuits to cover up their wrongdoing.

Despite the lax standards that govern the plaintiffs' bar, it is the corporate defendant who must labor under the perception of guilt. This is especially true when defendants are forced to settle rather than face a ruinous class-action judgment.

Few people, other than lawyers, know that virtually every certified class action ends in settlement. Why does this happen? The reason, as Alabama Attorney General Pryor noted, is simple: to face a class action is to risk the corporate death penalty.

Kip Viscusi has been able to identify 53 punitive damage awards of $100 million or greater over the last seventeen years. Awards in the billions no longer generate much astonishment. "The world of blockbuster awards," Dr. Viscusi writes, "is almost exclusively the province of juries, which account for 98 percent of these awards."

That is why corporations tend to settle class actions before they get to juries. To go to jury trial can make a game of Russian roulette seem like a reasonable gamble.

What is the True Corporate Character?

Are corporations the heartless monsters Ralph Nader and his trial lawyer colleagues make them out to be? Consider General Electric, which under Jack Welch's leadership boosted its profits by 650 percent.[173] This is an appropriate example, because in an era of crackdown on executive excess, Mr. Welch was caught in the crosshairs of adverse publicity and forced to give back some of the retirement perks bestowed upon him by a grateful board. Intelligent people can dispute whether or not a retired chief executive officer deserves access to a penthouse or a jet. But can any intelligent person debate the immense social benefits created by GE during the Welch years?

Corporations tend to settle class actions before they get to juries. To go to jury trial can make a game of Russian roulette seem like a reasonable gamble.

Most Americans see GE in the light of the cameraman in a Chicago television studio in which Mr. Welch was giving an interview. When Mr. Welch was done, the cameraman ran forward to shake his hand, saying, "Jack, you made me a millionaire. I love you man." The reason was because of the cameraman's investment in GE stock. At each of his book signings, people thanked Jack Welch for helping them send their kids through college, or for helping them buy a house. GE's prosperity also allows its employees to give more to their communities. To name just one example, GE engineers volunteer to raise the standards of a Cincinnati school, a school that once sent 5 percent of its students to college and now sends 60 percent on to higher education. Fifty-five thousand GE people all over the world volunteer their time.[174]

Mr. Welch puts it like this: "A corporation's role in society, first and foremost, is to win, to be successful, to be profitable, to grow. Because when you do that, you pay taxes. You have people who are not scared, hanging on. They give back to their community."[175]

He then goes on to say, "the whole thing is that if people are frightened of their own security, they're not going to give back to the community . . . So a healthy company doesn't cut corners, doesn't cut corners on the environment, gives back to its people. And all this nonsense about a corporation's role in society, it's to win. It's to have resources and happy, excited workers that can give back. A broke company—take a dot.com now. Go ask him for something."[176]

All social wealth originates from a single source—profits. Yet in today's environment, good corporations are slammed for succeeding—as if all success were like that of Enron or WorldCom.

The truth is that most corporations care about their reputations for honest dealing, just as they care about the safety of their customers. They do so because it is the only way to do business in the modern world.

Consider the auto industry. The plaintiffs' lawyers often claim that auto companies knowingly place defective products into the marketplace. Yet Ford executives drive Fords, General Motors executives drive GM cars, and Daimler-Chrysler executives drive their company's cars. The very same cars that auto executives make are the same cars they drive to work, and in which their spouses and children ride in every day. Moreover, in the very competitive global environment in which automakers live, consumers can demand safety—and get it. Safety sells.

The plaintiffs' lawyers and their propagandists have convinced much of the national jury pool that corporations are not a collection of hard-working people with kids to put through college, but

monolithic entities to be feared. The irony here is that it is the legal system itself that can be a heartless, monolithic monster.

MYTH NUMBER SEVEN: Like David-against-Goliath, the trial lawyer is outgunned and outclassed by powerful and resourceful corporations.

This is the most cherished trial lawyer myth, perpetuated in countless movies, that they are so many Robin Hoods struggling against the armed might of the powerful Sheriff. It deserves to be said that Robin Hood didn't fly around Sherwood Forest in a customized jet, or own mansions or private golf courses.

Robin Hood, after all, gave to the poor. The six trial lawyers who took more than $5 billion for their firms from state tobacco litigation are claiming large portions of the settlements that many believe rightly belong in state budgets for health care and education.[177] Indeed, some of these erstwhile Robin Hoods are, like Peter Angelos (who is suing the State of Maryland for 25 percent of the state's $4.4 billion share of the tobacco settlement) seeking to take even more.[178]

Examined closely, the trial bar looks less like a tender shepherd boy with a slingshot and more like a band of Goliaths. Joe Jamail of Texas has a Fortune 500-sized net worth of $1.2 billion. Another trial lawyer, Frederick Furth of San Francisco, owns his own 1,200-acree vineyard in Sonoma County. Another, Wayne Reaud of Beaumont, owns his own newspaper. And, of course, Peter Angelos owns the Baltimore Orioles.[179]

The point here is not that these are very rich men. It is that their law firms are even richer—with the depth and agility to field an array of well-paid experts, legal strategists, private detectives, jury consultants, and top public relations people. Against such outfits, even the largest corporations can be left feeling intimidated.

Former U.S. Attorney General Thornburgh explains: "The plaintiffs' lawyers . . . had turned America's tort system into a business. The formula was easy: Publicly threaten a lawsuit to put downward pressure on a company's stock price, then use the legal system to coerce the beleaguered corporation into a large settlement. The pattern brought a windfall, and unburdened by lengthy court battles, the plaintiffs' attorneys could execute a quick turnaround . . . . The game became so established that the Association of Trial Lawyers of America now offers courses in how to sue particular companies."[180]

In exposing these myths, it is not the author's intention to suggest that there is no need for a strong tort system. The author does mean to suggest that our system is wildly out of balance. It is out of balance because the outcomes lawyers used to joke about are becoming reality.

The truth is that most corporations care about their reputations for honest dealing, just as they care about the safety of their customers. They do so because it is the only way to do business in the modern world.

Consider that no less a scholar than Harvard's Larry Tribe is presaging a movement to grant full legal rights to dogs, cats, pigs, mice, and chimpanzees, complete with 13th Amendment protections. After all, Tribe says, nowhere in the Constitution does it state that only humans are protected from slavery. Why not research animals?[181]

Lawyers used to joke that some day people would sue fast-food restaurants. Now lawsuits are proliferating against fast-food chains for making people obese. One plaintiff says, "[t]here was no fast food I didn't eat, and I ate it more often than not because I was single, it was quick and I'm not a very good cook."[182] So he is suing.

This is a ridiculous, imbalanced system, but it is no joke. It is giving birth to a new plutocracy, one emerging before our eyes. This plutocracy of 60,000 plaintiffs' attorneys is so powerful it can overwhelm the broader interests of industry, workers, municipalities, schools, charities, and individual citizens.

The plaintiffs' bar, flush with tobacco-settlement money, is a power lobby like none other. Over the last decade, the legal profession has led

all other groups in campaign contributions—giving a total of $357 million to federal candidates—with 70 percent of its cash going to Democrats. The 56,000-member Association of Trial Lawyers of America was the top PAC contributor to Democratic federal candidates in the last election cycle; the organization spent $2.6 million, 86 percent of which went to one party.[183]

Just as it took an era of trust-busting to bring the corporate plutocrats to heel—just as it is taking some swift justice today to bring crooked managers and accountants to task—so too do we need seven reform measures to reign in the powerful plutocrats of the trial bar.

The plaintiffs' bar, flush with tobacco-settlement money, is a power lobby like none other. Over the last decade, the legal profession has led all other groups in campaign contributions.

First, we need to eliminate the doctrine of joint-and-several liability, at least for non-economic damages.

Second, we need Congress and the courts to impose and follow rational guidelines for punitive damage awards, so the greater interests of workers and shareholders can be taken into account. The United States Supreme Court, in a series of recent decisions, has strengthened and clarified constitutional guidelines on the award of punitive damages.[184] Lower courts should heed those rulings.

Third, Congress or the courts should reverse the "opt-out" provision, so that people must affirmatively choose to join a class-action lawsuit.

Fourth, we should return to the original understanding of the rule of law spelled out by Justice Scalia in his opinions. Congress or the courts should rely on the implied powers of the Interstate Commerce Clause to roll back the ability of a single jury to tax and regulate the entire United States.

Fifth, Congress needs to act on asbestos law reform. Former U.S. Attorney General Bell reviewed our current asbestos system and commented, "The founding fathers of our legal system would shake their heads in disbelief if they could witness the mess we have made of their wisdom and vision."[185] Our courts are clogged with lawsuits filed by people who, while they may have been exposed to asbestos, have absolutely no illnesses. These claims prevent those with real illnesses from having their day in court.

Sixth, we need to adopt Attorney General Pryor's recommendations to restrict government lawsuits, so that regulation through litigation becomes a thing of the past.

Seventh, we need a Legal Consumer's Bill of Rights that would give clients the vital element of any functional marketplace—disclosure and honest information.

These seven measures would go a long way toward reforming the stranglehold the plaintiffs' bar has on our society. But one more area still needs to be addressed: our culture.

By financing Hollywood movies, by feeding a steady supply of outrage to television journalists and the plethora of "reality-based" shows, plaintiffs' attorneys have achieved a degree of power unknown even to the tycoons of the big trust era.

After all, the Goulds and the Rockefellers had reason to fear the Ida Tarbells and *McClure's* magazines of their day. But today, many of the Ida Tarbells of the 21st Century are living in Hollywood, hoping to write the screenplay of the latest legal thriller. Before we can free our political system from the grip of a special interest, we must free our culture from the distorted myths told by the plaintiffs' bar.

There is reason here for hope, signs that the culture is beginning to change. After all, John Grisham, a former trial lawyer who has used his gifts as a writer of fiction to glorify the trade, has come to see that the most compelling drama and colorful villains are to be found these days in the abusive practices of the plaintiffs' bar. His new novel, *The King of Torts*,[186] tells the story of a plaintiffs' lawyer persuaded "to sell [his] soul" for $15 million. One corrupt lawyer advises a protégé, "The money takes the sting out of the negative image."[187]

In his tale, an honest old lawyer tells off a corrupt class-action attorney, "Class actions are a fraud, at least the way you and your pals handle them. Mass torts are a scam, a consumer rip-off, a lottery driven by greed that will one day harm all of us."[188] When was the last time you came across that kind of language in a work of fiction (at least, language that didn't apply to a corporation)?

The King of Torts is a start, but we will need many more acts of truth-telling before this country can turn the corner. The time has come for those who are able to work toward the betterment of our legal system to understand that this is not just a struggle over a few arcane rules. This is a struggle for the hearts and minds of the American people. This is a struggle to tell our story. This is a struggle to make it clear what real justice looks like and to provide Americans with a civil justice system worthy of our heritage.

About the Author

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Since joining Chrysler in 1981, he has brought leadership and innovation to a succession of management roles resulting in reduced costs and better legal outcomes for the Company. During his career, he has served as Assistant General Counsel of Litigation Strategy and Communications, Assistant General Counsel of General and Consumer Litigation, Chrysler's Manufacturing Group Counsel, and Associate General Counsel of Gulfstream Aerospace Corporation. Mr. Hantler also served as Senior Trial Attorney for several years. Prior to joining Chrysler, he was engaged in the private practice of law.

Mr. Hantler is one of the nation's leading experts on legal reform and has contributed to legal reform initiatives in many states and at the federal level. He serves on the boards of directors of the Michigan Chamber of Commerce, the New York University Law School Center for Labor and Employment, the American Tort Reform Association and is legal reform advisor to the Council of State Chambers. He also chairs the board of directors of the State Government Leadership Foundation, which is dedicated to educating state leaders on timely public policy issues. He previously served as Steering Committee Chair of the U.S. Chamber Legal Reform Institute and as the Chair of the Advisory Board of the National Judicial College.

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