SAFEGUARDING AMERICANS FROM A LEGAL CULTURE OF FEAR: APPROACHES TO LIMITING LAWSUIT ABUSE

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CONTENTS

JUNE 22, 2004

OPENING STATEMENT

WITNESSES

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

SAFEGUARDING AMERICANS FROM A LEGAL CULTURE OF FEAR: APPROACHES TO LIMITING LAWSUIT ABUSE

TUESDAY, JUNE 22, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m., in Room 2141, Rayburn House Office Building, Hon. Lamar S. Smith presiding.

Mr. SMITH. The Committee on the Judiciary will come to order. Chairman Sensenbrenner, unfortunately, cannot be here. He has asked me to take his place. We will proceed with the hearing at hand.

I will recognize myself for an opening statement, then the Ranking Member, Mr. Conyers. And other Members' opening statements, without objection, will be made a part of the record. After the opening statements, we will proceed to hear from our witnesses. I will recognize myself.

Our hearing today examines how we can protect Americans from lawsuit abuse. Frivolous lawsuits harm our economy and threaten to put business owners out of business. This is especially true of small business owners who do not have the money to fund prolonged lawsuits.

The alarming trend of frivolous lawsuits has made a mockery of our legal system. Many of the frivolous suits we will discuss today were brought despite flimsy facts or evidence that show no negligence on the part of the defendant.

Of course, there are many Americans with legitimate legal grievances, from someone horribly disfigured during an operation to a company responsible for contaminating a community's water supply, but these examples are *not* why we are here today.

Americans deserve their day in court. No one who deserves justice should be denied justice.

However, the aggressive nature of some personal injury attorneys and their gaming of the system drives up the cost of doing business and drives down the integrity of the judicial system. The examples are numerous. I will only mention a few.

In my hometown of San Antonio, a man crashed his car into the house of a couple who he had argued with and knocked the house off its foundation. The couple sued the engineer who designed the foundation. Despite the fact that it met the city's legal requirements, a judge awarded the plaintiffs $40,000.

The chief executive officer of San Antonio's Methodist Children's Hospital has seen his medical malpractice premiums increase from less than $20,000 to $85,000 over the last 10 years. He has been sued three times. In one case, his only interaction with the person suing was that he stepped into her child's hospital room and asked how he was doing. Each jury cleared him of any wrongdoing, and the total amount of time all three juries spent deliberating was less than an hour.

A Pennsylvania man sued the Frito-Lay company, claiming that Doritos chips were "inherently dangerous" after one stuck in his throat. Only after 8 years of costly litigation, did the Pennsylvania Supreme Court throw out the case with one justice writing that there is, "a common sense notion that it is necessary to properly chew hard foodstuffs before swallowing."

At a New Jersey Little League game, a player lost sight of a fly ball hit to him because of the sun. He was injured when the ball struck him in the eye. The coach was forced to hire a lawyer after the boy's parents sued, and the coach settled the case for $25,000.

Today, almost any party can bring any suit in practically any jurisdiction for any reason without regard to the facts and without regard to the potentially harmful impact on the defendant. That is because plaintiffs and their attorneys have nothing to lose. This is legalized extortion. It is lawsuit lottery.

Some Americans have filed lawsuits for reasons that can only be described as absurd. They sue a theme park because its haunted houses are too scary. They sue the Weather Channel for an inaccurate forecast, and they sue McDonald's, claiming a hot pickle dropped from a hamburger caused a burn and mental injury.

Our national motto might as well be: "When in doubt, file a lawsuit; it is always someone else's fault."

Defendants, on the other hand, can lose their careers, their business and their reputation. In short, they can lose everything. This is not justice, and there is a remedy.

Last week, I introduced the Lawsuit Abuse Reduction Act, legislation that requires judges to sanction those who file frivolous lawsuits. The act applies sanctions to both plaintiffs and defendants. A plaintiff who files a suit merely to extract a financial settlement can face sanctions, but so can a defendant who files motion after motion for unnecessary documents just to prolong the process.

The bill also reduces "court-friendly" shopping. Plaintiffs can sue only where they live or where injured or where the defendant's principal place of business is located.

One of the many reasons why this legislation is necessary is because of the adverse impact of frivolous lawsuits on every-day Americans.

Today, pastors refuse to counsel parishioners behind closed doors because they fear an accusation of inappropriate behavior.

Doctors forego high-risk procedures such as setting broken bones and delivering babies because of the litigation threat they pose.

Companies place warning labels on their products that should be absolutely unnecessary. A baby stroller label reads, "Remove child before folding." A snow sled label reads, "Beware, sled may develop a high speed under certain snow conditions." A dishwasher label

reads, "Do not allow children to play in the dishwasher." And an iron warns, "Never iron clothes while they are being worn."

I believe we would be a better and more prosperous America if we discouraged frivolous lawsuits. The Lawsuit Abuse Reduction Act is sensible reform that will help restore confidence in America's justice system.

That concludes my opening remarks, and the gentleman from Michigan, Mr. Conyers, the Ranking Member of the Judiciary Committee, is recognized for his opening statement.

Mr. CONYERS. Thank you, Chairman Smith and Members of the Committee.

This is an important matter that we are dealing with here. We think that there may be some other considerations that might be taken in determining how we deal with frivolous lawsuits and the abuses of lawsuits that are going on. I am going to be asking the witnesses to comment, if they have time, on several considerations. The first is that the number of lawsuits are going down in the United States, in some measure thanks to those who have been working on this matter in the Congress, and I include the Chairman from Texas. The number of lawsuits are going down. They are not staying the same. They are not going up.

The second consideration I would like to find out from our distinguished witnesses is why jury awards, on average, are going down. Jury awards are not staying the same. They are not going up. They are going down. And it seems to me that these concerns could lead us to do something other than come up with measures that may seem logical when you listen to the selected anecdote that we could bring forward.

We have a number of horror stories that are not so happy to report. I have not called the President to task yet today, so I think I will do so now. In Youngstown, Ohio, he talked about health care on May 25. And he was complaining about junk and frivolous malpractice suits which, he said, are discouraging good doctors from practicing medicine. And he introduced a local doctor to his audience at Youngstown State University, an obstetrician, 21 years of practice, who he claimed had been driven out of his practice because of the high costs of malpractice insurance. And the President praised him and thanked him for his compassion.

The only problem was that it turned out that this is the same doctor, wow, he was at dinner when a cesarean delivery occurred that created permanent injury. The baby was born with brain damage. Another patient on which he operated, the incision was closed and a sponge with a cord and a ring was attached to it and left inside. And then on another example, the woman, again, we have a sponge left inside and tremendous problems in that case, too. This was all the same doctor that was praised. And the White House was very sorry that they had raised this example saying that, if they had known these things, they would not have mentioned him as an example of what high insurance rates do to doctors.

So what I am seeking is, other than informed, rational discussion from our expert witnesses here about this subject, it is not a matter of parading nutty label warnings or recounting horrific instances where housewives and infants, who have little economic earning ca-

pacities and, therefore, recoveries are severely limited in serious permanent damages, but that we struggle toward some mid-ground which we understand and deal with as intelligently as we can, a very important and serious medical set of issues that challenge us today.

I thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Conyers.

Our first witness is Philip Howard. Mr. Howard is Chair of Common Good, a bipartisan coalition dedicated to restoring commonsense to American law. Common Good's Advisory Board includes former Senator George McGovern, former Carter Administration Attorney General Griffin Bell and former Clinton Administration Deputy Attorney General Eric Holder. Mr. Howard has advised those of both parties on reform initiatives, including Al Gore's Reinventing Government Program, Georgia Governor Zell Miller, Governor Bill Weld of Massachusetts, and Florida Governors Lawton Chiles and Jeb Bush. He is the author most recently of *The Collapse of the Common Good: How America's Lawsuit Culture Undermines our Freedom.*

Our second witness is Karen Harned. Ms. Harned is the executive director of the National Federation of Independent Business Legal Foundation, a post she has held since 2002. Prior to joining the NFIB, Ms. Harned was an attorney in private practice specializing in food and drug law where she represented several small and large businesses and their representative trade associations before Congress and Federal agencies.

Our third witness is Theodore Eisenberg. Mr. Eisenberg is Henry Allen Mark professor of law at Cornell Law School where he specializes in bankruptcy, civil rights and the death penalty. He currently teaches bankruptcy and debtor/creditor law, constitutional law and Federal income taxation. Following law school, professor Eisenberg clerked for Chief Justice Earl Warren of the U.S. Supreme Court and, after 3 years in private practice, began his teaching career at UCLA.

Our fourth and final witness is Victor Schwartz. For over two decades, Mr. Schwartz has been co-author of the most widely used torts case book in the United States, *Prosser, Wade & Schwartz's Torts*, now in its tenth edition.

As chairman of the Federal Interagency Task Force on Product Liability, he received the Department of Commerce Secretary's award for professional excellence in Government service. Mr. Schwartz has been professor and dean at the University of Cincinnati College of Law. He serves as general counsel to the American Tort Reform Association, and he chairs the American Bar Association's Legislative Subcommittee on the Product Liability Committee. He is also a partner in the Washington office of Shook, Hardy & Bacon.

We welcome you all.

So let me say, it is the practice of this Committee to swear in witnesses before they testify.

[Witnesses sworn.]

Mr. SMITH. Mr. Howard, we will begin with you.

TESTIMONY OF PHILIP K. HOWARD, CHAIR, COMMON GOOD

Mr. HOWARD. Thank you, Mr. Chairman and Congressman Conyers. Thank you for holding this hearing.

I think it is an important new direction in looking at the effects of law and the importance of law on the lives, the daily lives of Americans. As you suggested, our Board of Common Good is very bipartisan, and our goal is not to achieve any arbitrary limitations on lawsuits but to restore the foundation of reliable law. This debate has tended to focus over the years, as Mr. Conyers suggested, on the extreme cases of one sort or another on both sides. Our focus is not on the cases themselves, because you can find cases on both sides, because we think that the harm is not mainly the crazy verdicts or the amount of litigation; we think the harm here is the fear that has infected American society. It is one of the prime drivers for what most people consider a meltdown of our health system.

Doctors, because they fear and distrust the system of justice, are ordering tens of billions of dollars of unnecessary tests. We conducted a Harris Poll in which four out of five doctors said that they ordered tests that they did not believe were necessary. It has also affected the quality of health care. The leading patient safety advocates in the Country are now working with Common Good because their studies have shown them that the distrust of justice has chilled the professional interaction needed for good health care. Doctors and nurses are not admitting their uncertainties and mistakes to each other, and as a result, stupid mistakes made in prescription doses and other things sometimes lead to tragic results because people are scared that anything they say might be used against them in litigation later.

In schools, teachers find it, particularly in inner city schools, very difficult to maintain order in the classroom. A recent Public Agenda Poll sponsored by Common Good showed that 79 percent of teachers had been threatened with legal claims, not for money damages, just to be dragged into hearings by, "You couldn't have done that, you shouldn't have disciplined me in that way." And the threat of being dragged into a hearing and cross-examined by a lawyer is sufficient to undermine the authority of teachers.

And going a little further, today in America, a teacher will not put an arm around a crying child because who will defend you if someone says it was an unwanted touching?

It has affected the workplace in many ways. Most businesses, including my own law firm, don't give out personal references anymore. It has affected ordinary incidences of life-like playgrounds. There is no athletic equipment left in the playground, no jungle gyms, even seesaws have disappeared, leading or contributing to the crisis of childhood obesity.

This is not about lawsuits. We are talking about people's daily lives here. What's happened is that Americans no longer trust the system of justice, and the reason is because there is a kind of open-season philosophy which is that people believe correctly that, if someone is angry enough, they can haul you into court. They may not win, but they can nonetheless haul you into court, and the threat of that is so horrible to people that it's literally undermined their freedom, particularly of those who deal with the public, like ministers and teachers and doctors and the like.

So the most important reform—well, first, I think it is very important to have sanctions for frivolous lawsuits. If you do not sanction the conduct, people, some people at least, will continue to do it. So I applaud the draft legislation.

But the most important reform is to restore the responsibility of judges to act as the gatekeepers. Today, judges don't have that idea. In order to sanction for frivolous conduct, a judge first has to decide that the case is frivolous. And judges today don't believe they have that authority.

So I applaud what the Committee is doing. I applaud this legislation and this debate. I think it is an important first step, and I think, in looking at the legislation, the goal here is to restore—is not to get rid of lawsuits but to restore the confidence of Americans in the legal system because, today, it is as if we've built a monument to the unknown plaintiff who looms high above the Country casting a dark shadow across everyone's daily choices. And it's very important to restore trust in our great legal system. Thank you.

[The prepared statement of Mr. Howard follows:]

PREPARED STATEMENT OF PHILIP K. HOWARD

Thank you for the opportunity to speak with you today on the issue of "Safeguarding Americans from a Legal Culture of Fear." I believe these hearings will play a significant role in raising public awareness of this issue, and the need for a basic shift in approach to restore predictability to our legal system.

While I'm a lawyer in private practice, I appear here as pro bono Chair of Common Good, a bipartisan legal reform coalition dedicated to restoring the foundation of reliable law. Common Good's advisory board includes former Attorneys General Griffin Bell and Dick Thornburgh, former Deputy Attorney General Eric Holder, and former political leaders such as Newt Gingrich, George McGovern, Alan Simpson, and Tom Kean. I've written a fair amount on the subject, including two books, *The Death of Common Sense and The Collapse of the Common Good,* and an essay on recent legal history in the new *Oxford Companion to American Law.*

In the past two years, Common Good has hosted five forums jointly with the American Enterprise Institute and Brookings Institution and sponsored a number of polls. What we have found is that, in dealings throughout society, Americans no longer feel free to act on their reasonable judgment. The reason is that they no longer trust our system of justice.

According to a Harris Poll, five out of six doctors do not trust the system of justice. As a result, doctors are ordering billions of dollars worth of unnecessary tests and procedures—not to address the health of their patients but to protect themselves from potential lawsuits. The nation's leading patient safety advocates, such as Dr. Troy Brennan at Harvard, are working with our coalition because their studies show that legal fear has chilled the professional interaction needed for quality care.

In schools, teachers are unable to maintain discipline in their classrooms, fearful that they may be sued by students or parents. A recent Public Agenda poll, sponsored by Common Good, found that 78% of teachers have been threatened with legal proceedings by their students. In America today, teachers are told not to put a comforting arm around a crying child.

No part of society is immune. Playgrounds have been stripped of anything athletic. Even seesaws are disappearing because town councils can't afford to be sued if someone breaks an ankle.

Greenwich, Connecticut, is considering outlawing winter sports on public property after one resident broke his leg sledding. In that case—a good example of what's wrong with American justice—a father took one last run with his young son down a popular sledding hill and was tossed off his plastic dish when he hit a shallow drainage ditch at the end of the run. Falling in an awkward way, the father badly broke his leg. He sued the town, claiming that it should have taken better care of the hill. The judge gave the issue to the jury to decide, and it rendered a verdict of $6.3 million, including $1.5 million for pain and suffering.

The harm to society in this case is not mainly the monetary verdict, which, I suspect, will be reduced in the end by the judge. The harm is the resulting legal fear, undermining everyone's freedom to enjoy winter activities. Greenwich is now consid-

ering banning not only sledding but all winter sports on town property. Awareness of possible sledding claims has undoubtedly spread to other towns, and indeed to any private property owner who allows sledding. Why take the legal risk?

There is a missing link in American justice—rulings on who can sue for what. Any legal system requires deliberate choices, binding on behalf of society, of what is reasonable behavior and what is not. That's what the law is supposed to provide. Justice Oliver Wendell Holmes, Jr. famously defined law as "the prophesies of what courts will do." Today, no one has any idea what a court will do—that's why Americans are fearful.

Current legal orthodoxy is that in civil cases, as in criminal cases, juries should make the ultimate decision. But juries can't set precedent; every jury is different, and their decisions are often inconsistent. One jury may make a huge award in a particular case, and another, in a similar case, may make no award at all.

Perhaps it is useful to remember that, in a criminal case, the jury is our protection against abusive prosecution using state power. A civil case, by contrast, is a use of the state's coercive powers by a private citizen against another private citizen. A lawsuit is just like indicting someone, except that the penalty is money. The mere possibility of a lawsuit changes people's behavior.

That's why judges must continually act as gatekeepers, interpreting the principles of common law to draw the boundaries of reasonable claims. Justice Benjamin Cardozo wrote that this kind of "judicial legislation" was essential to the functioning of the common law. Holmes put it this way: "Negligence is a standard we hold people bound to know beforehand, not a matter dependent on the whim of the particular jury . . ."

The flaw in the sledding case is not that this particular jury went off the tracks, but that the jury was given the case at all. The threshold legal question in any accident case is whether we as a society tolerate certain risks—including sledding on a hill with its predictable imperfections of nature and of landscapes. That decision must be made by someone with authority to make it stick. Judges and legislatures have that authority. Juries do not.

The role of juries in civil cases is to decide disputed facts, such as whether someone is lying, not standards of conduct. Whether a seesaw is a reasonable risk should be decided on behalf of society as a whole, in a written ruling. The Seventh Amendment of the Constitution protects the right to a jury trial but only in "suits at common law." A judge must first decide what is a valid claim under the common law.

Trial lawyers like the unpredictability of juries, because it gives them a lever for settlement, and argue that juries are "democracy in action." But that's exactly what's wrong with the current legal system. Justice is supposed to be rendered by the rule of law, with consistent rulings and predictable outcomes, not rendered in mini-elections, jury by jury, tolerating wildly inconsistent results for the same conduct. To quote former Yale Law Professor Eugene Rostow, the "basic moral principle, acknowledged by every legal system we know anything about . . . is that similar cases should be decided alike."

The point of reform is not to put arbitrary barriers on lawsuits. Lawsuits are a vital component of the rule of law. By making people potentially liable when they are negligent, law provides incentives for reasonable conduct. But the converse is also true. Allow lawsuits against reasonable behavior, and pretty soon people no longer feel free to act reasonably. And that's what's happening in America today.

There's a lot of discussion about the need to deter frivolous lawsuits and excessive claims. Fulfilling that task, however, requires judges to make decisions of what's frivolous. Anytime there's an accident, it couldn't be easier to come up with a theory of what someone might have done—there could have been a warning, or more supervision, or a stronger lock on the door. Judges mustn't be so reticent to use their common sense. It would probably help if legislatures would make clear that this is their job, for example, with legislation to the effect that, "It is the responsibility of judges to draw the boundaries of reasonable dispute, under the precepts of common law."

Judges also must not hesitate to impose penalties when the case is frivolous. A recent case over a car accident in Indiana involved a claim that Cingular should be liable because it was foreseeable that the customer might use the phone in the car. After the case was properly dismissed, the plaintiff appealed. While the phone company won the case, the court refused to award attorney's fees on the basis that the claim was "not frivolous." That's not, I submit, how we are going to restore respect for our legal system.

All life's activities involve risk, and therefore the inevitability of accident and disagreement. The role of law is not to provide a consolation forum for those who have felt the misfortune of risk; it is to support the freedom of all citizens to make reasonable choices, including taking reasonable risks. Setting limits on lawsuits is not

an infringement of freedom but a critical tool of freedom. Otherwise one angry person, by legal threat, can bully everyone else.

The main loser in the current situation is the American people. It is their healthcare that is increasingly unaffordable, their schools that are disrupted by disorder, their sympathy that is chilled by fears that someone may misinterpret a kind word, or an arm around the shoulder of a crying child . . . and their fun that is lost when the snow blankets a nearby hill.

Thank you for the opportunity to appear before you.

Mr. SMITH. Thank you.

Ms. Harned.

TESTIMONY OF KAREN R. HARNED, EXECUTIVE DIRECTOR, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION

Ms. HARNED. Thank you, Mr. Chairman and distinguished Committee Members.

My name is Karen Harned, and I serve as executive director of the National Federation of Independent Business Legal Foundation, the legal arm of NFIB. NFIB represents 600,000 small businesses with about five employees. NFIB's average member nets $40,000 to $60,000 annually. We applaud the Committee for holding this hearing on the ever-growing problem of lawsuit abuse.

Small business ranks the cost and availability of liability insurance as the second most important problem facing them. The only problem ranked higher is the rising cost of health care. Many small businesses fear getting sued even if a suit is not filed. For the small business with five employees or less, the problem is the $5,000 and $10,000 settlements, not the million dollar verdicts. When you consider that many small businesses only net $40,000 to $60,000 a year, $5,000 paid to settle a case immediately eliminates about 10 percent of its annual profit.

In my experience, the greatest abuses occur in lower-dollar suits which often target small businesses. In many instances, a plaintiff's attorney will just take a client at his word, performing little, if any, research regarding the validity of the plaintiff's claim. As a result, a small-business owner must take time and resources out of their business to do the plaintiff's attorney's homework. They must prove their innocence in cases where a few hours of research at most would lead the attorney to conclude that the lawsuit is unjustified.

Small business is the target of frivolous suits because trial lawyers understand that they are more likely than a large corporation to settle a case rather than to litigate. Small businesses do not have in-house counsels to inform them of their rights, write letters responding to allegations made against them or provide legal advice. They do not have the resources needed to hire an attorney nor the time to spend away from their business fighting many of these small claim lawsuits. Often, they do not have the power to decide whether or not to settle a case. The insurer makes that decision.

I place frivolous lawsuits into four categories: Pay me now, or I'll see you in court; somebody has to pay, and it might as well be you; let's not let the facts get in our way; and Yellow Page lawsuits.

Pay me now or I'll see you in court: An increasingly popular tool is the demand letter. Demand letters are particularly attractive when the plaintiff can sue a small business for violating a State

or Federal statute. They allege the small business violated a particular statute and are replete with cites to statutes and case law. At some point, the letter says that the small business has an opportunity to make the whole case go away by paying a settlement fee upfront and provides time frames for paying the fee. If these demands are not met, the letter threatens a lawsuit.

Somebody has to pay, and it might as well be you: This is where the plaintiff may have been harmed but is suing the wrong person. For example, Bob Carnathan, an NFIB member, owns Smith Staple and Supply Company, a small nail and staple fastening business in Harrisburg, Pennsylvania. Mr. Carnathan's business leases space in a strip small. After a snow storm, one of the tenants slipped and fell in the parking lot on the icy pavement. The medical bills from his injury totalled a little over $3,000. The man sued every tenant in the complex as well as the landlord and the developer for $1.75 million. Mr. Carnathan was sued, though he was not at fault, because his rent included maintenance on the facilities and grounds. After 2 years of endless meetings and conference calls, Mr. Carnathan's business was released from the lawsuit. He says that there is no compensation for the time he was forced to spend away from his business to fight this unfair lawsuit. He firmly believes that "the smaller your business, the more you're impacted when a frivolous lawsuit lands on your doorstep."

Let's not let the facts get in the way: Plaintiffs and even attorneys sometimes stage injuries for prospective lawsuits. In these suits, if the business does not catch the plaintiff in a lie early in the process, the small business owner must suffer the cost of litigation or settle a fabricated claim.

Yellow Page lawsuits: In these cases, hundreds of defendants are named in a lawsuit, and it is their responsibility to prove that they are not culpable. Plaintiffs name defendants by using vendor lists or even lists from the Yellow Pages from businesses operating in a particular jurisdiction.

Legislation is sorely needed to reform our Nation's civil justice system. H.R. 4571, recently introduced by Representative Lamar Smith, would be particularly helpful in curbing if not stopping many of the types of lawsuits I have described.

Thank you for asking us to testify today.

[The prepared statement of Ms. Harned follows:]

PREPARED STATEMENT OF KAREN R. HARNED, ESQ.

Thank you, Mr. Chairman and distinguished Committee members for inviting me to provide testimony regarding the tremendous negative effects lawsuits, and particularly the fear of lawsuits, are having on the millions of small-business owners in America today. My name is Karen Harned and I serve as Executive Director of the National Federation of Independent Business (NFIB) Legal Foundation, the legal arm of NFIB. The NFIB Legal Foundation is charged with providing a voice in the courts for small-business owners across the nation.

NFIB has 600,000 members, and is represented in each of the fifty states. NFIB represents small employers who typically have about five employees and report gross sales of $300,000–$500,000 per year. NFIB's average member nets $40,000–$60,000 annually. NFIB members represent an important segment of the business community—a segment with challenges and opportunities that distinguish them from publicly traded corporations.

Although federal policy makers often view the business community as a monolithic enterprise, it is not. NFIB members, and hundreds of thousands of small businesses across the country, do not have human resource specialists, compliance offi-

cers, or attorneys on staff. These businesses cannot pass on to consumers the costs from taxes, regulations, and liability insurance without suffering losses.

Being a small-business owner means, more times than not, you are responsible for everything—taking out the garbage, ordering inventory, hiring employees, dealing with the mandates imposed upon your business by the federal, state and local governments, and responding to threatened or actual lawsuits. For small-business owners, even the threat of a lawsuit can mean significant time away from their business. Time that could be better spent growing their enterprise and employing more people.

The NFIB Legal Foundation applauds the Committee for holding this hearing in order to focus on the ever-growing problem of frivolous lawsuits.

FRIVOLOUS LAWSUITS CREATE A CLIMATE OF FEAR FOR AMERICA'S SMALL BUSINESSES

Small-business owners rank the "Cost and Availability of Liability Insurance" as the second most important problem facing small-business owners today, according to a survey just released by the NFIB Research Foundation.[1] The only problem ranked higher is rising health-care costs.

This number two ranking represents a significant increase from the thirteenth position it held in the 2000 "Small Business Problems and Priorities" survey.[2] More than 30% of businesses today regard the "Cost and Availability of Liability Insurance" as a critical issue, compared to 11% in 2000—a threefold increase.[3] With a dramatic rise in the cost of lawsuits,[4] it is not surprising that many small-business owners 'fear' getting sued, even if a suit is not filed."[5] That possibility—the fear of lawsuits—is supported by a recent NFIB Research Foundation National Small Business Poll, which found that about half of small-business owners surveyed either were "very concerned" or "somewhat concerned" about the possibility of being sued.[6] The primary reasons small-business owners fear lawsuits are: (1) their industry is vulnerable to suits; (2) they are often dragged into suits in which they have little or no responsibility; and (3) suits occur frequently.[7]

The bottom line is that the escalating numbers of lawsuits (threatened or filed) are having a negative impact on small-business owners. For two years, as Executive Director of NFIB's Legal Foundation, I have heard story after story of small-business owners spending countless hours and sometimes significant sums of money to settle, defend, or work to prevent a lawsuit.

For the small-business owner with five employees or less, the problem is the $5,000 and $10,000 *settlements*, not the million dollar verdicts. When you consider that many of these small businesses only net $40,000–$60,000 a year, $5,000 paid to settle a case immediately eliminates about 10% of a business' annual profit. Small-business owners also are troubled by the fact that they often are forced to settle a case at the urging of their insurer. In most cases, if there is any dispute of fact, the insurer will perform a cost-benefit analysis. If the case can be settled for $5,000 the insurer is likely to agree to the settlement because generally it is less expensive than litigating, even if the small-business owner would ultimately prevail in the suit.

Once the suit is settled, the small-business owner must pay with higher business insurance premiums. Typically, it is the fact that the small-business owner settled a case, for any amount, which drives insurance rates up; it does not matter if the business owner was ultimately held liable after a trial. Not surprisingly, a recent NFIB Research Foundation National Small Business Poll shows that 64% of small employers believe that the biggest problem with business insurance today is cost.[8] Many small-business owners understand this dynamic, and as a result, will settle claims without notifying their insurance carriers.

In addition to the financial costs of settling a case are the psychological costs. Small-business owners threatened with lawsuits often would prefer to fight in order

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[1] "Small Business Problems and Priorities," Bruce D. Phillips, NFIB Research Foundation. (June 2004).

[2] "Small Business Problems and Priorities," William J. Dennis, Jr., NFIB Education Foundation (May 2000).

[3] "Small Business Problems and Priorities," (June 2004), at 7.

[4] "U.S. Tort Costs: 2003 Update, Trends and Findings on the Costs of the U.S. Tort System," Tillinghast-Towers Perrin, 2003.

[5] *Id.* at 7–8.

[6] NFIB National Small Business Poll, "Liability," William J. Dennis, Jr., NFIB Research Foundation Series Editor, Vol. 2, Issue 2 (2002).

[7] *Id.* at 1.

[8] NFIB National Small Business Poll, "Business Insurance," William J. Dennis, Jr., NFIB Research Foundation Series Editor, Vol. 2, Issue 7 (2002).

to prove their innocence. They do not appreciate the negative image that a settlement bestows on them or on their business.

THE IMPACT OF FRIVOLOUS LAWSUITS ON SMALL BUSINESS

We would all like to think that attorneys comply with the highest ethical standards; unfortunately, that is not always the case. In my experience, this seems particularly true of plaintiffs' attorneys who bring lower-dollar suits—the type of suits of which small businesses are generally the target. In many instances, a plaintiff's attorney will just take a client at his word, performing little, if any, research regarding the validity of the plaintiff's claim. As a result, small-business owners must take time and resources out of their business to prove they are not liable for whatever "wrong" was theoretically committed. As one small-business owner remarked to me last year, "What happened to the idea that in this country you are innocent until proven guilty?"

Although that mantra refers to a defendant's rights in our criminal justice system, problems with our civil justice system can no longer be ignored. It is incumbent upon the attorney representing a plaintiff to get the facts straight *before* sending a threatening letter or filing a lawsuit, not after the letter is sent or the lawsuit is filed. Sadly, due in large part to the ineffectiveness of Rule 11 in its current form, we have a legal system in which many plaintiffs' attorneys waste resources and place a significant drain on the economy by making the small-business owner do the plaintiff's attorney's homework. It often is up to the small-business owner to prove no culpability in cases where a few hours of research, at most, would lead the attorney for the plaintiff to conclude that the lawsuit is unjustified.

Small business is the target of so many of these frivolous suits because trial lawyers understand that a small-business owner is more likely than a large corporation to settle a case rather than litigate. Small-business owners do not have in-house counsels to inform them of their rights, write letters responding to allegations made against them, or provide legal advice. They do not have the resources needed to hire an attorney nor the time to spend away from their business fighting many of these small claim lawsuits. And often they do not have the power to decide whether or not to settle a case—the insurer makes that decision.

FRIVOLOUS LAWSUITS COME IN MANY SHAPES AND SIZES

Frivolous lawsuits take different forms, and I will highlight those types of suits that have been brought to my attention. I place these suits into four categories—"Pay me now, or I'll see you in court;" "Somebody has to pay, and it might as well be you;" "Let's not let the facts get in our way," and "Yellow Page lawsuits."

"Pay me now, or I'll see you in court."

An increasingly popular tool, which can be quite effective against the small-business owner, is the "demand" letter. In my experience, plaintiffs and their attorneys find "demand" letters particularly attractive when they can file a claim against a small-business owner for violating a state or federal statute. Generally, on behalf of a plaintiff, an attorney will send a one and a half to two-page letter alleging the small business violated a particular statute. The letter is replete with cites to statutes and case law. At some point, the attorney's letter states that the business owner has an "opportunity" to make the whole case go away by paying a settlement fee up front. Timeframes for paying the settlement fee are typically given. In some cases, there may even be an "escalation" clause, which raises the price the business must pay to settle the claim as time passes. So, a business might be able to settle for a mere $2,500 within 15 days, but if it waits 30 days, the settlement price "escalates" to $5,000. At some point, however, a suit is threatened. Legal action is deemed imminent.

An example of such a case was a suit threatened against Custom Tool & Gage, Inc. owned by Carl T. Benda and located in Cleveland, Ohio. The plaintiff in the case ultimately withdrew his complaint one week after threatening legal action against Custom Tool & Gage, Inc. The company's attorney sent a response letter and noted that the plaintiff in the case, James Brown, was neither the owner nor the buying agent for Miller Bearing Company Inc., the business that received the fax. Miller Bearing Company is a regular customer of Custom Tool & Gage, Inc. and had placed five orders with Custom Tool and Gage, Inc. in 2004 alone. James Brown was a truck driver for Miller Bearing Company, and not authorized to file such a lawsuit on behalf of the company. That fact would have taken little time for Mr. Brown's attorney, Joseph Compoli, Jr., to uncover.

Below are excerpts of the "demand" letter sent to Custom Tool & Gage. The letter was accompanied by a signed complaint, which was ready to be filed in the Court

of Common Pleas for Portage County, Ohio. I request that a copy of the letter, the complaint, the subsequent correspondence leading to the withdrawal of the suit, and a March 3, 2004 newspaper article discussing the tactics employed by Mr. Joseph Compoli, Jr. in similar "do not fax" suits be admitted into the record.

> This office represents the above referenced client. We have been retained to bring a lawsuit against Custom Tool & Gage, Inc., in connection with your transmitting of one unsolicited facsimile ("fax") advertisement to our client. . . .
>
> Kindly be advised that it is a violation of the Telephone Consumer Protection Act (TCPA), Title 47, United States Code, Section 227, to transmit fax advertisements without first obtaining the 'prior express invitation or permission' of the recipient. *See,* 47 U.S.C. 227(a)(4) and 227(b)(1)(C). In addition, Ohio courts have declared that a violation of the TCPA is a[n] [sic] 'unfair or deceptive' act or practice under the Ohio Consumer Sales Practices Act (CSPA), Section 1345.02(A) of the Ohio Revised Code.
>
> We are sending you this letter for the purpose of offering you an opportunity to resolve this matter without the expense of court litigation and attorneys['] [sic] fees. We are authorized to amicably settle this claim for the amount of **$1,700**. This amount represents the sum of $1,500 under the TCPA and $200 under the CSPA for each unsolicited fax advertisement[,] [sic] which was received by our client.
>
> ---
>
> We believe that our proposed settlement is very fair and reasonable under the circumstances. We will leave this offer open for fifteen (15) days from the date of this letter.
>
> Recently, in the case of *Nicholson* v. *Hooters of Augusta*, a court in Georgia awarded over $11.8 million in a class action lawsuit under the TCPA. Also, more recently, in the case of *Gold Seal Termite & Pest Control* v. *Prime TV LLC*, a court in Indiana has certified a **nationwide class action** against Prime TV for sending unsolicited fax advertisements.
>
> If it becomes necessary for our office to file a lawsuit, we will pursue all legal remedies, including seeking certification of the case as a Class Action under the TCPA. This could result in a court order for you to pay *$1,500* to each and every person to whom you have sent unsolicited fax advertisements.
>
> If you have an insurance agent or company, please forward this letter to your agent or insurance company. If not, please contact our office directly.[9]

Even though this case was completely baseless, Mr. Benda still was required to spend $882.60 (over half the amount of the settlement costs) to his attorney to draft the letter and avoid payment of the settlement.

"Somebody has to pay, and it might as well be you."

These frivolous suits are the type in which the plaintiff may have been harmed, but is suing the wrong person.

For example, Bob Carnathan, an NFIB member, owns Smith Staple and Supply Co., a small nail and staple fastening business located in Harrisburg, Pennsylvania. Mr. Carnathan's business leases space in a strip mall. After a snowstorm, one of the tenants in the complex was walking across the parking lot when he slipped and fell on the icy pavement injuring his back and head. The medical bills from his injury totaled a little over $3,000. The man sued every tenant in the complex, as well as the landlord and the developer, for $1.75 million. Mr. Carnathan was sued even though he was not at fault because his rent included maintenance on the facilities and grounds.

After two years of endless meetings and conference calls, Mr. Carnathan learned that his business was released from the lawsuit. He says that there is no compensation for the time that he was forced to spend away from his business to fight this unfair lawsuit. Mr. Carnathan firmly believes that "the smaller your business, the more you are impacted when a frivolous lawsuit lands on your doorstep."[10]

Another NFIB member is in the midst of litigation and likely will be dropped from the lawsuit shortly. This member asked that the business' story remain anonymous, so as not to jeopardize dismissal of the lawsuit. The NFIB member, an optometrist, referred a patient who needed cataract surgery to an ophthalmologist. The patient

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[9] Letter dated March 11, 2004 from Joseph R. Compoli, Jr., Attorney at Law, to Custom Tool & Gage, Inc.

[10] The NFIB Small Business Growth Agenda for the 108th Congress, at 15.

died in pre-op. Although this is a tragic story, the death was not caused by the optometrist's appropriate referral. Despite this fact, the optometrist was named as a defendant in the wrongful death lawsuit filed by the deceased's mother. The litigation has been ongoing for two years, and the NFIB member recently completed a lengthy deposition. In addition to time spent preparing for and attending the deposition, this NFIB member has spent many hours completing paperwork related to the suit and meeting with the member's attorney. As a result of the deposition, it appears that the optometrist will be dismissed from the wrongful death lawsuit.

"Let's not let the facts get in our way."

Plaintiffs, and even attorneys sometimes, go to great lengths to stage injuries for prospective lawsuits. These lawsuits pose severe difficulties for small-business owners. In these suits, if the business does not catch the plaintiff in a blatant lie early in the process, the small-business owner must suffer the costs of litigation or settle a fabricated claim.

For example, an NFIB member was threatened (in a "demand" letter) with a lawsuit for an injury that could not have possibly occurred. This roofing company, which requested to remain anonymous, delivered supplies to a convenience store parking lot in preparation for a future roofing job. A customer of the convenience store noticed the materials in the parking lot, and contacted an attorney. The attorney threatened the roofing company with a lawsuit claiming a rock fell from the roof striking the plaintiff and her car's windshield. The roofing company was not working on the project at the time of the alleged accident. Upon notification, the plaintiff's attorney immediately withdrew the threatened legal action. By catching the falsehood early, this company avoided any further threats or litigation.

Some members have not been so lucky. Four former employees of a small family owned restaurant sued the owners for sexual harassment after abruptly quitting. The NFIB members who own the restaurant have requested to remain anonymous. Two months prior to quitting, the four employees consulted an attorney who coached them on how to set up the lawsuit. Sent to work with secret tape recorders, the four employees gathered no useful evidence in the two months prior to quitting. The plaintiffs' attorney filed a complaint with the Equal Employment Opportunity Commission, and the state human rights agency. The restaurant owners went to mandatory mediation, and attended costly hearings and depositions.

Suddenly, one of the plaintiffs decided to withdraw. During depositions the plaintiff had generally denied any allegations raised by the complainants. In a sworn affidavit, the former plaintiff recanted all of her allegations, explained how the complaint filed on her behalf was untrue, and further explained the planning stages for the lawsuit during which she was routinely encouraged to lie by her former coworkers. The plaintiffs' attorney still would not withdraw the case. After $100,000 in defense fees, a second mortgage, and negative press, the defendants settled with the three remaining plaintiffs to avoid bankruptcy and further humiliation.

"Yellow Page Lawsuits"

These lawsuits are more commonly found in class action cases. In these cases, hundreds of defendants are named in a lawsuit, and it is their responsibility to prove that they are not culpable. In many cases, plaintiffs name defendants by using vendor lists or even lists from the Yellow Pages of certain types of businesses (e.g., auto supply stores, drugstores) operating in a particular jurisdiction.

Unfortunately, Tom McCormick, President of American Electrical, Inc. in Richmond, Virginia, knows these tactics all too well. Mr. McCormick's company was named in an asbestos lawsuit. According to Mr. McCormick, attorneys for the plaintiffs simply named as defendants vendors from a generic vendor library. If the lawyers had performed a simple review of the facts, they would have discovered that American Electrical did not yet exist during the period in which the plaintiffs allege the exposure occurred. Furthermore, American Electrical has never sold any products that contain asbestos. Fortunately, Mr. McCormick successfully had American Electrical removed from the defendant list. It still cost Mr. McCormick $8,000 in attorney's fees to resolve this dispute.

A petroleum company, an NFIB member who wishes to remain anonymous, has been sued twice in the past few years. In each lawsuit the plaintiff, suffering from cancer, sued over 100 companies, most listed as John Doe defendants. The product believed to contribute to the cancer was allegedly manufactured by Chevron. The petroleum company merely barreled the product. Yet the liability insurance carriers for each defendant settled the case for $1,500–$1,800 a piece. By distributing the costs of settling, the plaintiff received a huge payout, while the insurance companies and businesses avoided the large costs of a lawsuit.

"Yellow Page Lawsuits" also provide examples of forum shopping. Hilda Bankston, former owner of Bankston Drugstore in Jefferson County, Mississippi, saw her business named as a defendant in hundreds of Fen-Phen lawsuits brought by plaintiffs against a number of pharmaceutical manufacturers.[11] Ms. Bankston said that Bankston Drugstore was the only drugstore in Jefferson County and, by naming it in these lawsuits, the plaintiffs' attorneys were able to keep these cases in "a place known for its lawsuit-friendly environment." [12]

SOLUTIONS FOR SMALL BUSINESS

Surveys, statistics, and stories show that lawsuit abuse is alive and well in the United States, and small businesses are often the victims. It is for this reason that legislation is sorely needed to reform our nation's civil justice system. There are many bills pending before Congress that would take positive steps forward in stemming the tide of lawsuit abuse. However, one bill—H.R. 4571, recently introduced by Representative Lamar Smith, stands out, in my opinion, as particularly helpful in curbing, if not stopping, many of the types of suits I have described.

H.R. 4571 would put teeth back into Rule 11. Rule 11 sets forth requirements that attorneys must meet when bringing a lawsuit and permits judges to sanction attorneys if they do not meet those conditions. Specifically, Rule 11 requires every pleading to be signed by at least one attorney.[13] It also states that when an attorney files a pleading, motion, or other paper with a court he or she is "certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances [that:]

(1) it is not being presented for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, . . . are warranted by existing law or by a nonfrivolous argument for [a change] of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, . . . are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, . . . are reasonably based on a lack of information or belief." [14]

Importantly, it also provides attorneys with a 21-day window to withdraw a frivolous lawsuit after opposing counsel provides notice of intent to file a motion for sanctions. This is commonly referred to as Rule 11's "safe harbor" provision.[15]

Rule 11, in its current form, is the product of revisions made in 1993. These revisions rendered it nothing more than a "toothless tiger." As a result, unscrupulous attorneys, out to make a quick buck, know that the odds of being sanctioned under Rule 11 are remote. The 21-day "safe harbor" provision, in particular, provides an easy way for plaintiffs' attorneys to avoid sanctions by simply withdrawing a lawsuit. Unscrupulous attorneys receive something more like a "get out of jail free" card when they bring frivolous lawsuits.

H.R. 4571 would remedy this and other problems by:

(1) Making Rule 11 sanctions mandatory when an attorney or other party files a lawsuit before making a reasonable inquiry;

(2) Eliminating the "safe harbor" provision;

(3) Allowing for Rule 11 sanctions to be filed during discovery; and

(4) Permitting monetary expenses, including attorneys' fees and compensatory costs, against a represented party.

The legislation also would extend these protections to state cases that affect interstate commerce and curb forum shopping by only permitting the plaintiff to sue where he or she lives, was injured or in the location of the defendant's principal place of business.

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[11] Testimony of Ms. Hilda Bankston before the United States Senate Committee on the Judiciary, "Class Action Litigation," (July 31, 2002).
[12] *Id.*
[13] Fed. R. Civ. P. 11(a).
[14] *Id.* at 11(b).
[15] *Id.* at 11(c)(1)(A).

CONCLUSION

Frivolous lawsuits are hurting small-business owners, new business formation, and job creation. The growing number and costs of lawsuits, particularly those not based in fact, threaten to stifle significantly the growth of our nation's economy by hurting a very important segment of that economy, America's small businesses. We must work together to find and implement solutions that will stop this wasteful trend. On behalf of America's small-business owners, I thank this Committee for holding this hearing and providing us with a forum to tell our story.

We are hopeful that through your deliberations you can strike the appropriate balance to protect those who are truly harmed and the many unreported victims of our nation's civil justice system—America's small businesses.

Thank you.

Mr. SMITH. Thank you, Ms. Harned.

Mr. Eisenberg.

TESTIMONY OF THEODORE EISENBERG, HENRY ALLEN MARK PROFESSOR OF LAW, CORNELL LAW SCHOOL

Mr. EISENBERG. Thank you, Mr. Chairman.

There is a little bit of disjunction between the system we seem to be hearing about and what all major studies of litigation systems seem to reveal. So my job is trying to summarize, from the academic point of view, what the findings are.

First, the notion of awards increasing and lawsuits increasing just seems belied by the facts. The Rand Institute of Civil Justice researchers in a recent article in the Journal of Empirical Legal Studies did a 40-year long-term study of awards. They found, and I quote, it is on the page 4 of my testimony, "The growth or decline in awards does not appear to be substantial enough to support claims of radically changing jury behavior over the past 40 years."

The Government's Bureau of Justice Statistics confirms this, showing a 10-year decline in median tort awards. The National Center For State Courts, which is the leading clearinghouse for State court statistics, shows tort filings have declined in recent years, over the last decade. The increase in frivolous suits is remarkable since filings are down.

Americans are perceived as highly litigious. Mr. Howard refers to the culture. It turns out, Americans are far from the most litigious large industrialized nation. You can see a table, table 1 on page 3 of my testimony. All serious studies of punitive damages find they are rarely awarded. They are awarded largely in cases of intentional misbehavior. They are modest, and they are strongly correlated with the harm done by the defendants. These studies are done by the Rand Institute for Civil Justice, the Bureau of Justice Statistics, the American Bar Foundation, the General Accounting Office and Judge Richard Posner.

So it may turn out that our perceptions about the tort system have little to do with reality and much more to do with the rhetoric we are fed by tort reform advocates who rarely base it on systematic study of the system.

One of the key issues I think facing everyone is the connection between insurance premiums and tort outcomes, and we have some experience with this. First, looking at the cost of insurance through premiums without looking at insurance company investment returns is, of course, just economically naive. We are in an era of low inflation rates, insurance companies are getting much lower returns on their investments. They still have costs. They increase

their premiums, at least in part because their investment yields are down.

The estimates that some witnesses and students of the system make of the tort system simply look at insurance premiums and never look at insurance company sources of income. It is not necessarily liability increases that are generating increased premiums.

Yesterday, the Supreme Court rendered an already famous decision on health maintenance organizations limiting severely the amount that can be recovered against HMO's. Today, *The Washington Post* has a spokesman for the health maintenance organizations, and I will quote him, "In the industry, you may"—I underline—"see the premiums go down or not go up as much." That is, the insurance industry understandably has never been willing to link reductions in premiums, which is what a lot of the concern is, to tort reform.

When the Florida insurance industry in the last round of tort crisis was offered the following deal, "We will give you tort reform if you reduce insurance rates," they said, "No, we can't guarantee that." So it may be a pipe dream that tort reform is somehow going to eliminate the increase in insurance premiums, and the data, to date, do not support it.

Increased sanctions against lawyers: We had old rule 11, and it was in operation for a while, and we had studies of it. What it showed, as is suggested in my testimony, is that tort, if anything, was an area with less abuse than other areas. Where rule 11 fell hardest and, I believe, probably the reason for its modification, was it fell hardest on most civil rights plaintiffs, not on tort plaintiffs. That is, the most serious empirical study of rule 11 showed excess sanctions against civil rights claimants and indeed a rather low rate of sanctions against tort claimants.

A lot of what we are talking about today has to do with so called judicial hell holes. Serious study of formerly alleged hell holes revealed most of that to be myth. We've been told that the Bronx is a crazy jurisdiction for plaintiffs. In fact, Professors Vidmar and Roe have studied the Bronx and found no unusual damage patterns. We were told that Alabama was crazy on punitives. The Rand Institute of Civil Justice studied that and found no unusual pattern of punitive awards in Alabama. We just don't have the evidence to back up the behavior.

With respect to H.R. 4571, with all due respect, and I know it is well intentioned, I would label it not the Lawsuit Abuse Reduction Act. I would label it the Lawsuit Cost Increase Act because what is built into this bill is multiple hearings by the judge to decide if interstate commerce is affected and to decide the best way of doing things. Each one of those hearings is going to be an expensive matter before a State court judge, simply driving up the cost of the system, perhaps with a change in forum as a result, but the hearings will be unavoidable because the defense will come in and use every tactical advantage they can to raise the costs of the plaintiff. That's what the game is all about. Thank you.

[The prepared statement of Mr. Eisenberg follows:]

PREPARED STATEMENT OF THEODORE EISENBERG

I. Myths About the American Legal System

The title of these hearings, the sound-byte missives circulated among members of Congress, and some proposed reforms suggest definite beliefs about the state of civil litigation in the United States. The picture is one of an overly litigious society, with large and ever-increasing damages awards. The picture has rather little to do with what serious empirical scholarship about the legal system shows. The United States is far less litigious than is commonly believed and neither tort awards nor class action awards are constantly increasing.

A. Litigiousness

The United States is not so litigious as most people believe. Professor Patricia Danzon and colleagues found that "at most 1 in 10 negligent injuries results in a claim."[1] Professor Deborah Hensler and colleagues report a low rate of claiming for various accident types.[2] The Harvard Medical Practice Study estimates "that eight times as many patients suffer an jury from medical negligence as there are malpractice claims."[3]

In overall litigiousness, the United States is far from the leading countries. Professor Kritzer provides a useful summary of the evidence:

> On the litigiousness issue itself, patterns are not as clear as the popular perception might suggest. In his study of law and disputes in Morocco, Lawrence Rosen observed that "one seldom meets an American who has been involved in an actual lawsuit and almost no Moroccan who has not." My own comparative work on propensity to sue suggests that broad statements about differences in propensity have to be conditioned by the type of issue involved. While it may be the case that persons in the United States are more likely to bring claims and suits for personal injury, Britons may be equally likely to seek redress for consumer problems and perhaps more likely to pursue claims related to employment and rental residences. Finally, the most comprehensive effort to compile cross-national data on litigation rates [see Table 1] shows that the United

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[1] Patricia M. Danzon, Medical Malpractice: Theory, Evidence, and Public Policy 23-24 (1985).

[2] Deborah R. Hensler, M. Susan Marquis, Allan F. Abrahamse, Sandra H. Berry, Patricia A. Ebener, Elizabeth G. Lewis, E. Allen Lind, Robert J. MacCoun, Willard G. Manning, Jeannette A. Rogowski & Mary E. Vaiana, Compensation for Accidental Injuries in the United States 121 (1991).

[3] Harvard Medical Practice Study, Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York 7-1 (1990) .

States is not the most litigious nation, nor is the United States all that different from England and Wales.[4]

Table 1. Cases Filed Per 1,000 of Population

Country	Cases per 1,000 Population
Germany	123.2
Sweden	111.2
Israel	96.8
Austria	95.9
U.S.A.	74.5
UK/England & Wales	64.4
Denmark	62.5
Hungary	52.4
Portugal	40.7
France	40.3

Source. Christian Wollschlager, Exploring Global Landscapes of Litigation Rates, in Soziologie des Rechts: Festschrift fur Erhard Blankenburg zum 60. Geburtstag 587-88 (Jurgen Brand and Dieter Strempel eds., 1998).

To the extent tort reform proposals are based on some notion that the United States is markedly more litigious than other leading industrialized countries, the empirical evidence does not support tort reform.

B. Award Trends

Some premise tort reform on the need to control perceived ever-increasing tort awards. But empirical studies of litigation undermine this questionable perception.

Nicholas Pace, Seth Seabury, and Robert Reville of the RAND Institute for Civil Justice used data assembled by RAND to study the long-term trend in tort awards in the two major locales for which such data were available–San Francisco and Cook County. They reached a remarkable conclusion, published in the first issue of the *Journal of Empirical Legal Studies*. Tort awards over a 40 year period had increased *less* than real income. They wrote:

> Our results are striking. Not only do we show that real average awards have grown by less than real income over the 40 years in our sample, we also find that essentially all of this growth can be explained by changes in observable case characteristics and claimed economic losses

[4] Herbert M. Kritzer, Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?, 80 Tex. L. Rev. 1943, 1981 (2002).

> (particularly claimed medical costs). However, focusing on the average award masks considerable heterogeneity in the growth rates for different kinds of cases. In particular, we find that the average award in automobile cases declined after controlling for claimed medical costs, offsetting persistent and unexplained growth in the average awards for other tort cases. *In general, though, the growth (or decline) does not appear substantial enough to support claims of radically changing jury behavior over the past 40 years.* Rising claimed medical costs appear to be one of the most important factors driving increases injury verdicts.[5]

In April 2004, the Bureau of Justice Statistics issued a report on trial outcomes in 2001 for 46 of the largest counties in the United States. The vast majority of the counties in the 2001 data were the object of a similar BJS study covering fiscal year 1992 and calendar year 1996. The BJS found that, in real dollars, median tort awards had substantially declined since 1992.[6] The median total award was $33,000. The study's findings are consistent with the major time-trend findings by the RAND researchers. A study of class actions, also published in the *Journal of Empirical Legal Studies*, found no evidence that class recoveries have increased over the last decade.[7]

C. Punitive Damages

Social scientific study of punitive damages since the 1980s reveals a pattern of rational jury decisions. The social science consensus is that, with rare exceptions, the system operates reasonably.

1. Juries Rarely Award Punitive Damages But Do So More Frequently in Intentional Tort Cases

Juries infrequently award punitive damages. This is the consistent finding of more than a dozen studies of jury punitive damages awards in actual cases, including several multistate studies by government agencies (the U.S. Justice Department's Bureau of Justice

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[5] Seth A. Seabury, Nicholas M. Pace, and Robert T. Reville, Forty Years of Civil Jury Verdicts, 1 J. Empirical Leg. Stud. 1, 3 (2004) (emphasis added).

[6] Bureau of Justice Statistics, Civil Trial Cases and Verdicts in Large Counties, 2001 (April 2004).

[7] Theodore Eisenberg & Geoffrey Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Empirical Leg. Stud. 27 (2004).

Statistics ("BJS") in 2004, 2000, and 1995[8] and the U.S. General Accounting Office ("GAO")),[9] by prestigious, non-partisan research institutions (the American Bar Foundation [10]and the RAND Institute of Civil Justice),[11] by Judge Richard Posner and Professor William Landes,[12] and others.[13] The infrequency of punitive awards is also a principal finding of five individual state and county level studies.[14]

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[8] BJS 2004, supra note 6; U.S. Dept. of Justice BJS Bulletin, Civil Justice Survey of State Courts, 1996: Tort Trials and Verdicts in Large Counties (1996), p. 1 (August 2000) (about three percent of plaintiff winners in tort trials were awarded punitive damages; median award was $38,000); BJS Special Report, Civil Justice Survey of State Courts, 1992: Civil Jury Cases and Verdicts in Large Counties (1995), p.1 (about six percent of plaintiff winners received a punitive award; median award was $50,000).

[9] U.S. GAO, Product Liability Verdicts and Case Resolution in Five States, GAO/HRD-89-90 (Sept. 1989) 24, 29 (punitive damages awarded in 23 of 305 cases decided in five states).

[10] Stephen Daniels & Joanne Martin, Civil Juries and the Politics of Reform 214 (1995) ("punitive damage award activity suggests . . . the need for . . . skepticism with regard to claims about the increasing frequency of such awards").

[11] James S. Kakalik et al., Costs and Compensation Paid in Aviation Accident Litigation 27 (RAND 1988) ("punitive damages were not paid on any of the 2,198 closed cases"); Erik Moller, Trends in Civil Jury Verdicts Since 1985 33 (RAND 1996) ("punitive damages are awarded very rarely"); Mark Peterson, Syam Sarma & Michael Shanley, Punitive Damages: Empirical Findings 10 (RAND 1987) (fewer than seven punitive damages awards per year in Cook County and fewer than six in San Francisco from 1960-1984).

[12] William M. Landes & Richard A. Posner, The Economic Structure of Tort Law 304-07 (1987) ("insignificance of punitive damages in our sample is evidence that they are not being routinely awarded").

[13] Theodore Eisenberg et al., The Predictability of Punitive Damages, 26 J. Legal Stud. 623, 633-37 (1997) (summarizing studies on the decision to award punitive damages); Theodore Eisenberg et al., Juries, Judges, and Punitive Damages: An Empirical Study, 87 Cornell L. Rev. 743, 745 (2002) [hereinafter "Eisenberg et al., Juries & Judges"]; Thomas Koenig & Michael Rustad, The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability, 16 Justice System J. 21 (1993); Michael Rustad & Thomas Koenig, Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters," 47 Rutgers L. Rev. 975, 981-92 (1995) [hereinafter "Rustad & Koenig, Reconceptualizing"] (punitive damages rarely awarded in medical malpractice cases).

[14] For example, a recent Georgia study concludes, "punitive damages currently are not a significant factor in personal injury litigation in Georgia." Thomas A. Eaton et al., Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s, 34 Ga. L. Rev. 1049, 1094 (2000). A Florida study finds the frequency of punitive damages awards to be "strikingly low." Neil Vidmar & Mary R. Rose, Punitive Damages by Juries in Florida: In Terrorem and in Reality, 38 Harv. J. Legis. 487, 487 (2001). See also Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1 (1990) (two counties); Deborah Jones Merritt & Kathryn Ann Barry, Is the Tort System in Crisis? New Empirical Evidence, 60 Ohio St. L.J. 315, 388 (1999) (no punitive awards in medical malpractice or products liability cases in a twelve-year period in Franklin County, Ohio); Neil Vidmar, Medical Malpractice and the American Jury 254 (1995) (two punitive awards in 1,300 North Carolina medical malpractice cases).

These empirical studies of actual cases further show that juries award punitive damages especially rarely in products liability and medical malpractice cases. In contrast, juries award punitive damages more frequently in intentional tort cases. That is both appropriate and expected because, as Professor Cass R. Sunstein (the lead author of the recently published compilation of some of the key Exxon-funded research articles[15]) and numerous other scholars have noted, intentional torts merit greater punishment than unintentional torts and thus "provide particularly appropriate cases for punitive damages awards."[16] In summary, a broad social science consensus shows "a picture of reality quite different than the one portrayed" in tort reform proponents discussions.[17]

2. Punitive Damages Awards Strongly Correlate With Compensatory Awards

On the infrequent occasions when juries do award punitive damages, the overwhelming evidence is that most such awards strongly correlate with compensatory damages in the same case. BJS data, GAO data, RAND data, and other data all reveal this correlation.

3. Independent Reviews of Punitive Awards Find Them to Have Been Appropriately Awarded

Independent analysts who review individual cases of punitive damages rarely find such damages to have been inappropriately awarded. Rustad and Koenig reviewed hundreds of medical malpractice cases covering three decades and concluded that "punitive damages were awarded in only the most egregious cases involving healthcare practitioners."[18] These egregious cases not infrequently involve sexual contact between medical providers and their patients, including "predatory sexual assaults and abuses of transference techniques by medical personnel."[19]

Judge Posner and Professor Landes reached a similar conclusion after reviewing actual products liability punitive awards. They found "evidence of gross negligence or

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[15] Cass R. Sunstein, Reid Hastie, John W. Payne, David A. Schkade & W. Kip Viscusi, Punitive Damages: How Juries Decide (2002).

[16] Cass R. Sunstein et al., Assessing Punitive Damages (With Notes on Cognition and Valuation in Law), 107 Yale L.J. 2071, 2084 (1998). See, e.g., Landes & Posner, supra note 12, at 209; A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869, 909 n.120 (1998).

[17] Daniels & Martin, supra note 10, at 238.

[18] Rustad & Koenig, Reconceptualizing, supra note 13, at 1027.

[19] Id. at 1034-35 (footnotes omitted).

recklessness is plain" in eleven of thirteen cases surveyed[20] and concluded that "the cases as a whole are generally congruent with the formal legal standard for awarding punitive damages."[21] Eisenberg et al., reviewing the most "disproportionate" punitive awards in the BJS data, found the awards to be warranted.[22] Thus, "extreme" awards should be studied and not simply dismissed as pathological: "[f]ollow-up study of the most extreme punitive-compensatory ratios suggests the distortion introduced by relying on extreme awards without further inquiry."[23] Merely relying on headline-grabbing awards, without follow-up, to portray juries as erratic is not scientifically defensible.

II. Questionable Estimates of the Cost of the Tort System

Congress and the media are regularly supplied with estimates of the cost of the tort system. Two recent reports (the "*Tort Cost Reports*") seem to have strong publicity campaigns.[24] But these reports provide no basis for sound congressional policymaking. Since the *Tort Cost Reports* make no effort to quantify the benefits of the tort system, it is impossible for rational policymakers to act on the basis of the reports' analyses even if its analysis of costs were correct. Even without considering the benefits of the tort system, however, the reports' analysis of the tort system's costs is sufficiently questionable to preclude reliance on them by Congress. The reports attribute a wide range of insurance costs fully to the tort system, mischaracterize what should count as true economic costs, and fail to account at all for the tort system's benefits.

A. The Unstated Premise: Tort Reform Will Reduce Insurance Rates

Perhaps most importantly, one of the *Tort Cost Reports*, that by Pendell and Hinton, bases its estimates of the tort system's costs in part on the cost of insurance premiums.[25] Yet the report provides no insight into the relation between the insurance industry's investment cycle and insurance premium costs. It is well known that insurance premiums

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[20] Landes & Posner, supra note 12, at 185.

[21] Id.

[22] Eisenberg et al., Juries & Judges, supra note 13, at 756.

[23] Id. at 755-56 (footnote omitted). For example, one case involved sexual abuse of a child by a sports coach. Similar examples were found by Vidmar & Rose, supra note 14, at 500-05.

[24] Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update; Judith W. Pendell & Paul J. Hinton, Liability Costs for Small Business.

[25] Pendell & Hinton, supra note 24, at 9.

respond in part to the yield on insurance companies' investments. In periods of declining interest rates, premiums may increase to offset reduced investment yields. The key point is that insurance premiums can increase for reasons other than increased loss claims. By measuring tort costs through insurance premiums, Pendell and Hinton are assigning to the tort system costs that need to be differently accounted for.

This is especially important because the *Tort Cost Reports* are interpreted by some to mean that tort reform promises reduced insurance rates. As noted, insurance rates fluctuate with investment yields. And, although some evidence links tort reform and declining insurance rates,[26] one also has reason to be skeptical.[27] For example, when Florida's insurance industry was offered a legislative package in which tort reform would be tied to forced reductions in insurance rates, it claimed that the tort reform law would reduce general liability insurance premiums by only one percent.[28] My study of tort reform provisions with Professor James Henderson shows little linkage between fort reform laws and declining awards.[29] And in the midst of yet another insurance crisis atmosphere, the director of government affairs for the Risk and Insurance Management Society, which generally supports tort reform, expressed concern about linking an insurance availability crisis and tort reform legislation.[30]

B. Erroneously Attributing Insurance Payments to the Tort System

Pendell and Hinton attribute all insurance payments from a range of lines of insurance to the tort system. This approach assumes that all payouts under the insurance lines studied are attributable to the tort system. Under this view, no business or person would purchase insurance absent the tort system. This is questionable. The single largest component of tort system awards is automobile cases, which account for an astonishing 61

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[26] Blackmon & Zeckhauser, State Tort Reform Legislation: Assessing Our Control of Risks, in Tort Law and the Public Interest: Competition, Innovation, and Consumer Welfare 272 (P. Schuck ed. 1991); Moore, Premium Problem, Nat'l L. J., Feb. 14, 1987, at 366, 368 (significant tort reform reduced insurance rates).

[27] Kriz, Liability Lobbying, Nat'l J., Jan. 23, 1988, at 191, 192 (insurance officials say tort reform will not lower insurance rates); Moore, supra note 26, at 368 (When reform statutes were enacted, states wanted to know what rate reductions to expect. Insurers' answers were "at best incomprehensible and were never accompanied by any data."). Given the dominance of asbestos cases in products litigation, it would be helpful to see insurance company losses, volume, premiums, and profits stated with and without their asbestos experience.

[28] Moore, supra note 26, at 368.

[29] Theodore Eisenberg & James A. Henderson, Jr., Inside the Quiet Revolution in Products Liability, 39 UCLA L. Rev. 731-810 (1992) (figures 12, 13)

[30] Wasilewski, Tort Reform: Courting Public Opinion, 87 Best's Rev. Prop.-Casualty Ins. ed., June 1986.

percent of the total compensation paid in all tort claims, with and without lawsuits.[31] States *require* that drivers be insured. They do not require such insurance simply because a tort system exists. They require it primarily so that losses will be compensated, whether or not lawsuits are filed. Indeed, in the automobile field, two-thirds of the compensation paid is paid without the filing of a lawsuit.[32] To attribute this massive component of insurance payments to the tort system is questionable. There will be automobile insurance, or some similar mechanism with substantial costs, whether or not tort reform occurs.

Erroneously attributing the single largest component of insurance payouts to the tort system undermines the *Tort Cost Reports* accounting in another important respect. The reports attributes all insurance company overhead to the tort system. Yet the tort system is obviously not responsible for much of that overhead. There would be insurance companies without the tort system. This overhead charge to the tort system comprises about one-fifth to one-quarter of the tort cost estimates. Somehow the tort system is to be held responsible for the full compensation of insurance executives, many of whom would have to be paid even if the tort system were radically changed.

C. Misunderstanding the Tort System's Costs

The *Tort Cost Reports* cannot purport to be an accurate assessment of the tort system's costs because they treat all tort payments as costs to society. The substantial portion of every payment that goes to compensate losses is not a cost to society. It is a transfer payment by or on behalf of a wrongdoer to the victim. If a criminal defendant makes a restitution payment to a victim, no one would think of labeling that as a cost to society. The payment simply makes whole the loss to the victim. If a tortfeasor pays a wrongfully injured victim, that is not a cost to society. Nor is it viewed as a gain to the victim. Simple personal injury recoveries are not even taxed. There has been no accretion to wealth. Professor Marc Galanter has pointed out that "a significant portion of the wealth that flows through the litigation system is delivered to creditors and wronged parties who are entitled to compensation under the existing rules."[33]

Other studies suggest that liability insurance costs are modest. According to one study, the cost of products liability insurance premiums in 1993 was 13.5 cents per $100 of retail sales, a nearly 50 percent reduction from 25.9 cents in 1987.[34] A 1995 study of U.S. corporations found that total liability costs comprised 0.255% of total revenue or 25.5

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[31] James S. Kakalik & Nicholas M. Pace, Costs and Compensation Paid in Tort Litigation 36 (RAND 1986).

[32] Id.

[33] Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 U. Md. L. Rev. 1093, 1141-42 (1996).

[34] J. Robert Hunter, Product Liability Insurance Experience 1984-1993: A Report of the Insurance Group of the Consumer Federation of America (1995) (Exhibit A, col. N).

cents of every $100 dollars of revenue. The National Association of Insurance Commissioners similarly found that liability costs constituted 0.16% of retail sales in 1995.[35]

D. The Failure to Account for the Benefits of the Tort System

While clearly getting the costs of the system wrong, the *Tort Cost Reports* do not even bother addressing the benefits of the tort system. While difficult to quantify, such benefits undoubtedly exist and are widely recognized.

American products thrive in international markets in part because of their reputation for quality and safety. That reputation is a consequence of many factors, including the legal environment in which American companies operate. That environment includes the deterrent effect of the American tort system. The system discourages negligent behavior and filters out unsafe products. Conservative law-and-economics scholar and federal appellate Judge Richard Posner has noted that although "there has been little systematic study of the deterrent effects of tort law, . . . what empirical evidence there is indicates that tort law likewise deters."[36]

Automobile Safety. Automobile safety is especially important because of the number of automobile accidents and the dominance of automobile cases in the tort system. Consumers have clearly seen tort-related safety benefits in the automobile industry. The tort system, coupled with consumer safety efforts and increased regulation, has led to the withdrawal of unsafe cars, such as the Corvair, and to the development, and subsequent improvement, of new safety devices.

In analyzing the impact of products liability on automobile safety, John D. Graham of Harvard University found that, while liability was not the sole factor leading to safety improvements in cars, it may act as a catalyst and quicken the process "and sometimes result in more rapid safety improvements than would occur in the absence of liability."[37] Graham notes, for instance, that "the installation of rear-seat shoulder belts and the phaseout of belt tension relievers may have been hastened by liability considerations."[38] Liability risk may have been enough to spark safety improvements even when other important factors, such as consumer demand, regulation, and professional responsibility,

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[35] Daniel J. Capra, "An Accident and a Dream": Misinformation, Misstatement, and Misunderstandings About the Civil Justice System 6 (Jan. 29, 1999) (An independent study prepared for the New York State Bar Association).

[36] Landes & Posner, supra note 12, at10.

[37] John D. Graham, Product Liability and Motor Vehicle Safety, in Peter W. Huber & Robert E. Litan, eds., The Liability Maze: The Impact of Liability Law on Safety and Innovation 119, 181 (Brookings Inst. 1991).

[38] Id. at 181.

were not on their own sufficient.[39] Graham documents that liability considerations were a sufficient condition or a contributing factor to at least fourteen important auto safety improvements, including inadvertent vehicle movement, fuel tank design, occupant restraints, and all-terrain vehicle restrictions.[40]

Graham also finds that liability concerns do not impose an undue financial burden on manufacturers. The cost of liability was not all that important to industry: "The direct financial costs of liability are usually a relatively minor factor, at least from the perspective of large manufacturers."[41] Manufacturers are much more fearful of the adverse publicity that accompanies product liability suits, which may lessen consumer demand for unsafe products.[42]

Other Industries. The chemical industry has made significant safety improvements as a result of liability exposure.[43] MIT scholars Nicholas A. Ashford and Robert F. Stone found that the tort system has not only stimulated the development of safer products and processes, but also credit it with spurring significant technological innovations that have resulted in the reduction of chemical hazards.[44] Ashford and Stone conclude that the reforms suggested by traditional tort reformers are misplaced. In the chemical industry, recoveries should be made easier not more difficult.

> [T]he recent demands for widespread tort reform, while directing attention to dissatisfaction with the tort system, tend to miss their mark, since significant under deterrence in the system already exists. Thus proposals that damage awards be capped, that limitations be placed on pain and suffering and punitive damages, and that stricter evidence be required for recovery should be rejected. On the contrary, the revisions of the tort system should include relaxing the evidentiary requirements for recovery, shifting the basis of recovery to subclinical effects of chemicals, and establishing clear causes of action where evidence of exposure exists in the absence of manifest disease.[45]

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[39] Id.

[40] Id.

[41] Id. at 182.

[42] Id. at 181, 182.

[43] *See* Nicholas A. Ashford & Robert F. Stone, Liability, Innovation, and Safety in the Chemical Industry, in Huber & Litan, supra note 37, at 367.

[44] Id. at 368.

[45] Id. at 419.

Another scholar, Rollin B. Johnson of Harvard University, argues that the current liability system may provide incentives for safety and innovation, and that attempts to change the system may do more harm than good:

> It would be difficult to argue that the uncertainty and unpredictability of the tort system does not affect business planning to some degree. And some risk-averse companies may decide to abandon certain lines of research and development because of concern over liability, leaving those areas open to foreign competitors. But such actions arguably increase the average safety of products, while preserving opportunities for American competitors willing to assume the risk and creating incentives for producers to innovate to make alternative and even safer products.
>
> On the whole, it is difficult to evaluate the magnitude of the disadvantages of the present system and even more difficult to weigh them against the advantages of the deterrence they provide against the introduction of truly hazardous products. Furthermore, the possibility of an occasional "excessive" award may provide greater deterrent value at lower net cost to society than universally applicable regulations do. . . . The liability system might benefit from some fine-tuning to make the system more responsive, less expensive, and more equitable. But such attempts may actually make it less effective.[46]

Johnson concludes, "The claim that the product liability system unduly compromises the chemical industry is not well supported by the evidence."[47]

Experience in the pharmaceutical industry accords with these conclusions.[48] Pharmaceutical company attorneys credit the product liability system with providing a deterrent which has, in turn, led to safety improvements. One company attorney interviewed regarded the liability crisis as largely a myth.

> "For certain classes of drugs, liability concerns have probably led to safer products, in conjunction with FDA requirements. . . . I personally don't think that the litigation threat is that serious except for DES-type products where potentially significant risks are discovered well after the drug has been introduced. I believe--though it's heretical--that the liability crisis is largely a myth when one looks at the available information such as the actual number of cases."[49]

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[46] Rollin B. Johnson, The Impact of Liability on Innovation in the Chemical Industry, in Huber & Litan supra note 37, at 450.

[47] Id. at 452.

[48] Judith P. Swazey, Prescription Drug Safety and Product Liability, in Huber & Litan, supra note 37, at 291.

[49] Id. at 297.

Tellingly, this industry attorney concluded that tort reform proposals go way beyond what may be needed to fix the system. "Other than DES-type cases, the tort system for drug product liability 'ain't broke,' and the tort reform proposals go way beyond what is needed to fix it."[50] Another products liability attorney working for a pharmaceutical company agreed, "Overall, I think liability has had a deterrent effect for industry with respect to drug safety; safety has been improved as a result of causes of action under negligence."[51]

Risk Managers Agree That Tort Law Deters. Risk managers should have a useful perspective on whether or not tort law deters. They are responsible for reducing liability exposure for companies, associations, governments, and other organizations. In an effort to determine whether tort law deters, the late Professor Gary Schwartz of UCLA Law School interviewed risk managers for several public agencies in California, including managers from a city, the state motor vehicle department, and the UCLA Medical Center. He asked them about the impact of liability on their safety efforts, or whether the impetus to improve safety was simply a desire to do the right thing. He found that "[a]ll of them emphasized that their efforts were due to the combination of both. A risk manager starts with the idea that accident avoidance is a good for its own sake. But the prospect of tort liability provides an important reinforcement as well as an essential way to sell the risk manager's proposals to others in the organization."[52] In fact, this need to sell to others in an organization itself can be a function of the search for cost savings. As one Los Angeles city manager explained to Schwartz, "officials are not much affected by abstract appeals to safety. Indeed, funding will generally be denied 'unless we can tie it in to cost savings for the City.'"[53] Schwartz found that one risk manager started his job with considerable skepticism over whether the tort system effectively deterred, but his job experiences led him to believe that "tort liability exerts a significant influence."[54]

Similar results were obtained in a survey of risk managers for major corporations by the business-oriented Conference Board, which "found not only significant safety improvements on account of products liability, but also that the negative effects of products liability were not substantial."[55] The survey noted that, of 232 major corporations, concerns about products liability encouraged approximately twenty-two percent to improve manufacturing procedures, thirty-two percent to improve the safety design of products, and

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[50] Id.

[51] Id.

[52] Gary Schwartz, Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?, 42 UCLA L. Rev. 377, 415-416 (1994).

[53] Id. at 416 n. 196.

[54] Id. at 416.

[55] Id. at 409.

thirty-seven percent to improve labeling."[56] The appearance of the first survey, which countered tort reformers' arguments that the liability system was ruining American businesses, prompted a second survey of 2,000 corporate CEOs, a third of whom, despite decrying the anticipated effects of the tort system and having a self-interest in promoting tort reform, admitted that they had improved the safety of products and nearly one-half of whom improved their product warnings.[57]

Schwartz himself attempted a cost-benefit analysis of tort liability, focusing on the medical malpractice system. By comparing the cost of medical malpractice insurance and the estimated cost of practice changes due to liability, with the Harvard study estimate that the malpractice system reduces medical injuries by eleven percent and the number of medically negligent injuries by twenty-nine percent, Schwartz concluded,

> Given the $130 billion total for actual medical injuries in 1984, the malpractice system can be understood as having reduced the cost of injuries by $19.5 billion. Since this estimated safety benefit is considerably higher that the $15 billion estimated costs of the medical malpractice regime, that regime seems to have been cost justified.[58]

The empirical evidence thus demonstrates substantial benefits that outweigh the costs that may legitimately be charged to the tort system. A sober, business-oriented magazine published abroad voices envy of the American system. *The Economist* has observed:

> So much fury is leveled at litigation in America that the merits of its civil justice system are often forgotten. Unlike in Britain, almost anyone can uphold his rights in the courts. That means redress for consumers against unscrupulous firms and protection for voters against unaccountable public officials. Neither should be sacrificed lightly.[59]

E. The *Tort Cost Reports* Fail to Reconcile Their Inflated Estimates of the Tort System's Costs with More Sober Estimates

It takes no economic training to recognize that the *Tort Cost Reports* failure to account for the benefits of the tort system is questionable. But even on the incredible assumption that one can focus only on costs, the *Tort Cost Reports* fail to test the figures most essential to their analysis, their estimates of the cost of the tort system. In particular,

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[56] Id. at 408-09.

[57] Id. at 409.

[58] Id. at 440.

[59] The Way Those Crazy Americans Do It, The Economist, Jan. 14, 1995, at 29 (British ed.).

they fail to explain why their figures differ so drastically from figures used by more neutral observers.

Reconciling the *Tort Cost Reports'* figures with one notable study of the tort system is especially important. In 1986 the RAND's Institute for Civil Justice published a more refined estimate of national tort system costs. Unlike the *Tort Cost Reports*, the RAND researchers actually studied tort litigation payments. And they used two complementary methods to estimate tort litigation payments. One method rested on insurance industry data; the other on individual lawsuit survey data.[60] The researchers, Kakalik and Pace, noted that the two different methods of estimation of litigation payments yielded similar results. Excluding automobile torts, nationwide in 1985, they estimated the total compensation paid in all tort claims with and without lawsuits to be $17.4 billion in 1984 dollars.[61] The RAND researchers estimated national expenditures for tort litigation in 1985 to be $29 to $36 billion.[62] One of the *Tort Cost Reports* estimates of tort expenditures for 1985 is $83.7 billion,[63] approximately three times the methodologically more precise RAND estimate.

Why the vastly different estimates? The *Tort Cost Reports* took into account no actual aspects of tort litigation; they look only to external measures of costs, such as insurance payments. The basic flaws in this methodology are described above. In contrast, the RAND study actually studied the tort system.

Furthermore, the RAND study reveals what the *Tort Cost Reports* mask–of the total expenditures in the tort system, a large fraction constitute reimbursement for losses, not true economic costs. Well over half the amounts transferred, 56 percent, constitute payments to injured victims.[64] The true costs of the tort system, are a small fraction of the *Tort Cost Reports* estimates and likely are outweighed by the benefits the *Tort Cost Reports* ignore.

III. Uncertain Effect of Reallocating Attorney Fees; Loser Pay Rules

To the extent, H.R. 4430 builds on the theme of a losing party having to pay attorney fees, Congress should know about how such rules have fared in the past in the United States.

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[60] Id. at 35.

[61] Kakalik & Pace, supra note 31, at 36 (Table 3.5).

[62] Kakalik & Pace, supra note 31.

[63] Tillinghast-Towers Perrin, supra note 24, at Appendix 1a, p. 1.

[64] Kakalik & Pace, supra note 31, at 70.

A. U.S. Experience with Fee-Shifting

Florida. In an earlier period of purported tort crisis, the Florida legislature was persuaded to adopt (but later repeal) fee-shifting in medical malpractice cases. Economists Edward Snyder and James Hughes studied cases disposed of before, during, and after applying fee-shifting to Florida medical malpractice cases in the 1970s and 1980s.[65] The studies covered about ten years of medical malpractice cases and include over 25,000 cases. The samples included substantial numbers of cases (about 50%) subject to the fee-shifting rule and substantial number of cases not subject to the fee-shifting rule. The authors found several interesting effects, including that the average settlement was higher and the average defense cost was higher under the fee-shifting rule.[66] But perhaps of greater immediate interest is the fate of the legislative experiment with fee-shifting. It was "the Florida Medical Association, which had backed the adoption of the English [fee-shifting] Rule, that ultimately sought its repeal, partly because of early cases awarding the full contingency fee percentage to the plaintiff as the fee shift, and partly because the defendants came to realize the difficulty in collecting the shifted fee when the plaintiff had no resources from which to pay it."[67]

Alaska. With certain exceptions and limitations, Alaska's Civil Rule 82 entitles a prevailing party to partial compensation for attorney's fees from the loser.[68] In 1994, the Alaska Judicial Council studied the effect of Rule 82. The study yielded no firm conclusions about the effect of fee-shifting on filings. The rate of tort filings in Alaska did not seem materially different from those in states without fee-shifting.[69] In Alaska's largest population center, Anchorage, the Judicial Council found a higher rate of tort cases going to trial, but it is not clear that this increase was attributable to fee-shifting.[70]

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[65] Edward A. Snyder & James W. Hughes, The English Rule for Allocating Legal Costs: Evidence Confronts Theory, 6 J.L. Econ. & Org. 345 (1990) [hereinafter Snyder & Hughes, The English Rule]; James W. Hughes & Edward A. Snyder, Litigation and Settlement Under the English and American Rules: Theory and Evidence, 38 J.L. & Econ. 225 (1995) [hereinafter Hughes & Snyder, Litigation and Settlement].

[66] Hughes & Snyder, Litigation and Settlement, supra note 65, at 243-44.

[67] Kritzer, supra note 4, at 1950, discussing Snyder & Hughes, The English Rule, supra note 65, at 356.

[68] Alaska Civ. R. 82 (2002).

[69] Susanne Di Pietro et al., Alaska Judicial Council, Alaska's English Rule Attorney's Fee Shifting in Civil Cases (1995) [hereinafter Alaska's English Rule]; Susanne Di Pietro, The English Rule at Work in Alaska, 80 Judicature 88 (1996).

[70] Alaska's English Rule, supra note 69, at 138 (finding that the rule "seldom plays a significant role in civil litigation").

The Alaska experience revealed some surprises. As summarized by Professor Herbert Kritzer:

> One surprising finding was that fee awards were made in only about one-half of the state cases surveyed and one-quarter of the federal diversity cases where they were authorized by Rule 82. A partial explanation for this infrequency might have been the existence of post-judgment settlements in which the prevailing party agreed to forego a fee award in return for the losing party's agreement not to file an appeal. A second surprise was that only a small portion of fee awards came in tort cases.[71]

The Alaska study also explored the effect of Rule 82 on filing rates, settlements, and litigation by interviewing attorneys and judges, which provided information on the perceptions of these actors. The interviews yielded some surprising results. For example, as summarized by Kritzer, "only thirty-five percent of the attorneys could recall even a single instance in which Rule 82 played a significant role in a prospective client's decision not to file a suit or assert a claim."[72] This effect may be consistent with Florida's aborted experiment with fee-shifting. Many individuals are not sufficiently wealthy to make them worth pursuing for fees after a loss. And a court is unlikely to make a substantial fee-shifting award against individuals of modest means. So the downside when such a person brings an unsuccessful lawsuit may not be materially affected by the risk of having to pay attorney fees. If the "average" plaintiff is not amenable to a fee-shifting award, and the average defendant is, the effect of fee-shifting is likely to be to increase costs to the very defendants sought to be assisted by the fee-shifting rule. Rather than having the plaintiff's attorney's fee come out of the plaintiff's recovery, the fee is an added cost for the defendant. This effect is consistent with one Alaska defense attorney's comment, "It's just an extra ten percent added to the amount my client will pay in the end."[73]

Each interviewed Alaska attorney was asked whether Rule 82 affected their settlement strategy in two recent cases. Only about one-third reported an effect on settlement strategy. Rule 82 increased the value of plaintiff's claim when only damages was at issue and liability was clear. To the defendants, the Rule sometimes increased plaintiff's claim beyond the face amount of the insurance policy. A plaintiff's attorney recalled several instances in which clients with strong claims settled for less than the value

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[71] Kritzer, supra note 4, at 1951 (footnotes omitted).

[72] Id. at 1952.

[73] Alaska's English Rule, supra note 69, at 110-11.

of their claims due to Rule 82 concerns.[74] Defense lawyers believed that the threat of a Rule 82 induced plaintiffs with weak cases to accept early settlement offers.[75]

The key to Rule 82's effect thus seem to be plaintiff assets and perceived strength of claims. Attorneys believed that Rule 82 enhanced their positions when their clients had strong cases; but the dominance of low-asset plaintiffs may have produced a net diminution in defendants' positions.

Federal Civil Rights Cases. One empirical study assessed modern experience with Congress changing statutory incentives in an important, widely used, civil rights law.[76] In 1976 Congress enacted the Civil Rights Attorneys Fees Award Act.[77] It provided for attorney fees for the prevailing party in cases brought under section 1983, section 1981 and other non-Title VII federal civil rights statutes. Experience with the effect of the statute suggests congressional humility in forecasting the effect of tinkering with attorney fees. At the time of the 1976 Act's adoption, some feared that it would lead to a flood of new civil rights claims. Indeed, some observers, including Supreme Court justices, pronounced that the fee-shifting statute led to many new claims.

Yet the available evidence does not support the theory that enactment of the fee-shifting statute opened the floodgates. As Figure 1 shows, after enactment of the fee-shifting statute the rate of growth in nonprisoner civil rights cases looks little different from the rate of growth in all other federal civil cases. In most years civil rights filings increased at a slower rate than other filings. In total, from 1975 to 1984, other filings increased 125% and civil rights filings covered by the fee-shifting statute increased only 94%, a relative *decline* of 31%. The feared flood of litigation never occurred. Changes in section 1983 doctrine and constitutional law during the relevant period led us to conclude that the decline probably is not attributable to a legal climate that became substantially less hospitable to civil rights claims during the period studied.[78]

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[74] Id. at 111.

[75] Id. at 112-13.

[76] Theodore Eisenberg & Stewart Schwab, Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant, 73 Cornell L. Rev. 719 (1988). The discussion of civil rights cases is based on my prior congressional testimony, "Civil Rights Act of 1990: Hearings on H.R. 4000 Before a Joint House Comm. on Education and Labor and the Judiciary," 101st Cong. 2d Sess. (March 13, 1990).

[77] 42 U.S.C. § 1988.

[78] Theodore Eisenberg & Stewart Schwab, The Reality of Constitutional Tort Litigation, 72 Cornell L. Rev. 641 (1987).

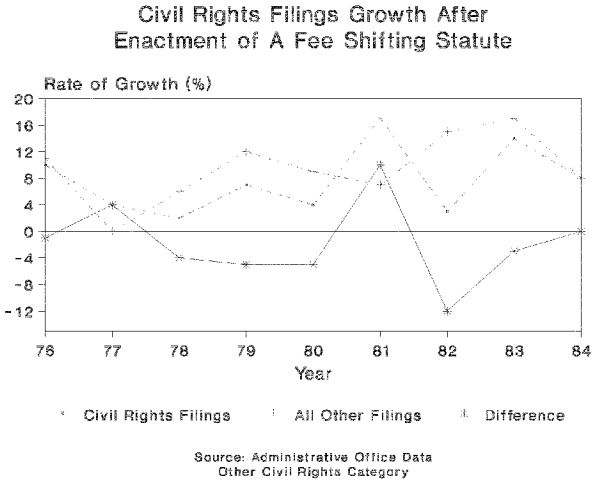

Figure 1

B. Rule 68-Like Proposals

Under the existing version of Rule 68, parties can put the opposing party at risk for certain costs by making a formal settlement offer. As I understand proposed H.R. 4430, attorneys' fees would effectively be added to these costs. Preliminarily, such a fee-shifting rule might be expected to generate effects similar to loser-pays type fee-shifting discussed above. Judgment-proof plaintiffs cannot be expected to pay fees, and judges are unlikely to order them to do so. Business plaintiffs and defendants, on the other hand, as experience with attorney fee-shifting in Florida and Alaska suggests, may well be ordered to pay fees when their opponents prevail. The net effect may be precisely the kind of counterrevolution observed in the Florida medical malpractice experiment.

Although quite tentative, experimental evidence confirms this as a likely effect. Professor Kritzer reports that two studies have examined the potential impact of attorney fee-shifting in the context of settlement offers under Rule 68.[79] Both studies include an

[79] Kritzer, supra note 4, at 1958. The studies are summarized in Thomas D. Rowe, Jr. & David A. Anderson, Empirical Research on the Success of Settlement Devices, in Dispute Resolution: Bridging the Settlement Gap (David A. Anderson ed., 1996). The studies are: Thomas D. Rowe, Jr. & Neil Vidmar, Empirical

attorney fee-shifting rule into offers of settlement such as Rule 68. Both studies suggest that such a rule increased the maximum amount that defendants are willing to pay and decreased the minimum amount that plaintiffs were willing to accept. In the real world, with fewer than plaintiffs than defendants fearful of attorney fee awards, one might expect the defendant increases to hold firm, while the plaintiff decreases might be more likely not to be realized.

IV. The Effect of Fee-Shifting Under Rule 11

The 1983 version of the Federal Rules of Civil Procedure included a fee-shifting element. Rule 11 provided that lawyers who filed cases or motions that were too weak could be sanctioned by the court.[80] The sanction was commonly calculated to include fees incurred by the opposing party to respond to the weak case or motion. The sanction amount was payable to the aggrieved party. A congress considering fee-shifting and Rule 11 should be aware of how the 1983 rule functioned. The 1983 version of Rule 11 was "very controversial"[81] and was modified in 1993 to eliminate the fee-shifting component.

Given the tort reform focus of these hearings, perhaps most important is the actual operation of the pre-1993 Rule 11. A principal concern about the Rule was its disproportionate effect on civil rights cases. Table 2 is based on a leading study of Rule 11 by Professor Marshall et al.[82] The table shows the four types of cases that account for the largest number of civil cases filed in federal court (excluding prisoner petitions and government collection cases). It shows that they also account for the largest share of Rule 11 activity. The researchers found that the most interesting findings related "to the frequency of civil rights cases as compared to other types of cases. Although civil rights cases made up 11.4% of federal cases filed, our survey shows that 22.7% of the cases in which sanctions had been imposed were civil rights cases."[83]

Research on Offers of Settlement: A Preliminary Report, Law & Contemp. Probs., Autumn 1988, at 13 and David A. Anderson & Thomas D. Rowe, Jr., Empirical Evidence on Settlement Devices: Does Rule 68 Encourage Settlement?, 71 Chi.-Kent L. Rev. 519, 520 (1995).

[80] Fed. R. Civ. P. 11 (1983) (repealed 1993).

[81] Kritzer, supra note 4, at 1954. Kritzer reports the following illustrations of this controversy: Lawrence M. Grosberg, Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11, 32 Vill. L. Rev. 575 (1987); Victor H. Kramer, Viewing Rule 11 as a Tool to Improve Professional Responsibility, 75 Minn. L. Rev. 793 (1991); Judith A. McMorrow, Rule 11 and Federalizing Lawyer Ethics, 1991 BYU L. Rev. 959 (1991); Georgene M. Vairo, Rule 11: A Critical Analysis, 118 F.R.D. 189 (1989).

[82] Lawrence C. Marshall et al., The Use and Impact of Rule 11, 86 Nw. U. L. Rev. 943 (1992).

[83] Id. at 965-66.

Table 2[84]
Rule 11 Activity by Subject Area of Case

	Contracts	Other Commercial	Civil Rights	Personal Injury	N
Rule 11 sanction imposed	15.9%	18.7%	22.7%	15.1%	251
Cases filed	23.0%	9.8%	11.4%	19.2%	

Notes. The areas of law included in the table are those with the greatest Rule 11 activity. Subject areas are not necessarily exclusive (i.e. a small number of cases are counted in more than one area of law); the base of the percentages in each row is the 'n' for that row.

"Other Commercial" combines 'commercial litigation,' antitrust, 'corporations law,' banking law, insurance coverage, lender liability, securities, dealership and franchise, copyright, patents, and other intellectual property, and trademarks.

The number of cases filed is computed from data supplied by the Federal Judicial Center based on data submitted to the Administrative Office (AO) of the United States Courts; in the AO data, only one area is designated for each case. In computing percentages, prisoner petitions and government collection cases are excluded.

Of more immediate interest is the disproportionately low rate of sanctions in personal injury cases. Table 2's second row shows that personal injury cases constitute 19.2% of cases filed but its first row show that they account for only 15.1% of Rule 11 sanctions. Thus, personal injury cases were found to be the subject of abuse at a rate less than that present in other civil litigation. A Congress considering reinstating the fee-shifting aspect of Rule 11 in the name of tort reform should understand what it will be doing. It will be discouraging the civil rights cases disproportionately affected by old Rule 11 in the name of addressing purported "abuse" in an area of law, personal injury tort, found to have less abuse than other areas of law.

V. More Certain Abuses that Congress Should Address

"Tort reform" is somewhat synonymous with rule changes that favor defendants. Yet an important source of abuse for both plaintiffs and defendants' clients is abuse of the right to remove a case from state to federal court. Such removal in diversity cases is proper when the case could have been brought in federal court. But defendants' lawyers increasingly remove cases with no credible claim to federal jurisdiction. Both anecdotal evidence and systematic evidence strongly suggest that defendants are increasingly abusing the removal process. Wrongful removal increases costs to plaintiffs and defendants, and

[84] Table 2 is based on id. Table 9, at 965.

delays proceedings while simultaneously increasing fees to defendants' counsel for acts that generate deadweight economic losses to the system.

A. Documented Litigation Abuse: Instances of Abusive Defendant Removals

1. *Smith v. Life Insurance Company of Georgia*

At the anecdotal level are some genuine horror stories. Consider the case of *John Smith et al. v. Life Insurance Company of Georgia, et al.*, No. 4:04CV97, N.D. Miss. *Defendant Life Insurance Company of Georgia has wrongfully removed this case to federal court four times.* The most recent removal was during the middle of trial in a Mississippi state court.

On March 5, 2002, John Smith, Dorothy Harris, and Dorothy Williams filed suit against Life Insurance Company of Georgia ("Life of Georgia"), and its agents Willie Thomas Taylor, Jr., Billy Franklin Taylor, and Weldon Poole in the Circuit Court of Sunflower County, Mississippi. Plaintiffs asserted claims for relief under Mississippi law based on illegal conduct by Life of Georgia and its agents in the sale of insurance policies. All of the plaintiffs in the case and the agent defendants were citizens of Mississippi, thereby defeating federal diversity jurisdiction. *See* 28 U.S.C. § 1332.

Despite the absence of federal diversity jurisdiction, Life of Georgia, by August 11, 2003, had wrongfully removed the case three times on what the district judge found to be essentially the same grounds. The Court specifically found that "Defendants are filing notice of removal *for a third time* upon essentially the same grounds that this Court . . . previously rejected." *Order for Summary Remand*, No. 4:03CV330, N.D. Miss., Aug. 11, 2003. (Emphasis added).

Not content with three wrongful removals, in February, 2004, Life of Georgia engaged in further maneuvers to delay the case. It moved to sever the claims of plaintiffs Harris and Williams from those of plaintiff Smith based on alleged improper joinder under Rule 20. Mysteriously, instead of waiting for the Mississippi state trial judge to rule on its severance request, Life of Georgia sought an interlocutory appeal to the Supreme Court of Mississippi as to severance of the claims. On April 1, 2004, the Supreme Court of Mississippi granted Life of Georgia's request for an interlocutory appeal and stayed all proceedings in the Circuit Court of Sunflower County with respect to the claims of plaintiffs Harris and Williams. However, plaintiffs Harris and Williams were not immediately severed from the state court case. The Mississippi Supreme Court specifically held that the claims of plaintiff Smith were not stayed and should proceed to trial.

Consistent with the order of the Supreme Court of Mississippi, on April 2, 2004, more than two years after the the case's 2002 filing, trial began in the Circuit Court of Sunflower County on Plaintiff Smith's claims against Life of Georgia. On April 5, 2004, while the parties were selecting a jury in Mississippi state court, Life of Georgia filed a notice of removal in the United States District Court for the Northern District of

Mississippi, asserting federal jurisdiction based upon diversity of citizenship. *This was the fourth time Life of Georgia had removed the case*; in fact, after Life of Georgia's third attempt to remove the case, District Judge Pepper of the Northern District of Mississippi ordered Life of Georgia not to attempt further removals of the case.

Although the claims of plaintiffs Harris and Williams were not severed from those of plaintiff Smith, Life of Georgia's notice of removal identified the case as being solely between plaintiff Smith and Life of Georgia, and omitted any mention of the non-diverse agents. On April 6, 2004, counsel for plaintiffs requested an emergency remand. Obviously fed up with Life of Georgia's tactics, the same day, the federal district court issued a *sua sponte* remand order. *Order*, No. 4:04CV97, N.D. Miss., April 6, 2004. Meanwhile, the trial judge in the Circuit Court of Sunflower County agreed to hold the venire pool in the hope that the state court trial could be salvaged.

The following day, April 7, 2004, counsel for Life of Georgia filed an "emergency" petition for mandamus with the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit granted Life of Georgia's petition for mandamus, holding that the district court did not have authority to issue a *sua sponte* remand order. The district court subsequently entertained full briefing and oral argument on the issue. Two days after briefing and oral argument, the district court issued an order remanding the case, noting that it had been "taken aback" at Life of Georgia's aggressive removal tactics. *Memorandum Opinion*, No. 4:04CV97, N.D. Miss., May 28, 2004

Despite the district court's consistent rulings and the efforts of the state court judge to salvage the trial, Life of Georgia succeeded in derailing the state court trial of the plaintiffs. Because of Life of Georgia's dilatory tactics, the state court judge was forced to release the jury venire and plaintiffs are now forced to try to obtain another trial date on the state court's crowded docket. A case filed in 2002 was delayed for well over two years by what the federal district court regarded as abuse of the removal removal process. Well over two years after filing, and after a state court trial had been commenced, the proceeding was delayed for a fourth time.

No sane civil justice system can tolerate four wrongful removals in the same case without some system for presumptively sanctioning such behavior.

2. *Willis v. Life Insurance Company of Georgia*

In *Lucy Evon Willis et al. v. Life Insurance Company of Georgia*, No. 4:02CV65, 2002 WL 32397242 (N.D.Miss. Apr. 24, 2002), the federal district court remanded a case that had been wrongfully removed twice. The second removal was not based on any document filed in the removed case but on an exaggerated reading of a letter relating to another case. The most plausible interpretation of the defendant's behavior was that removal was being used as a delaying tactic that pushed the limits of good faith behavior. Indeed, the district court found that the letter relied on for the second removal "contains

nothing substantially different than the information contained in the complaint." *Id.* at *5.

3. The Defendant that Never Was: ICAROM plc

Another defendant has repeatedly "creatively" used the removal process by removing cases in which it was not even named as a defendant (perhaps to secure advantage for fellow insurers who were actual defendants) in state court. In *Richard P. Ieyoub, Attorney General ex rel., State of Louisiana v. The American Tobacco Company, et al.*, No. 97-1174, W.D. La., the district court found that an entity not even named as a defendant, ICAROM plc, (formerly Insurance Company of Ireland) had injected into proceedings and was not authorized to remove the action. Since parties rarely voluntarily appear in court to be sued as defendants, the behavior was highly suspicious. Defendant status in the state court action sought to be removed is a fundamental prerequisite to a party's authority to remove. No disagreement exists in the cases on this issue. *E.g.*, *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 578 (1954); *Ballard's Serv. Center, Inc. v. Transue*, 865 F.2d 447 (1st Cir. 1989) (§ 1446 authorizes removal only by defendants).

Any doubts about whether ICAROM's behavior in removing the action was an innocent mistake or a conscious effort to secure procedural advantage fades in light of its prior behavior. In *Aluminum Company of America v. Admiral Insurance Company*, No. 93-32C (W.D. Wash. 1993) (Rec. Excerpt No. 8 in *Ieyoub*, supra), ICAROM's attempt to remove a case to which it was not a party formed the basis for remand to state court. The court concluded that "ICAROM lacked standing to file the notice of removal." *Id.* at *1.

ICAROM injected itself into proceedings solely for the purpose of securing removal. This was unlikely to have been an innocent mistake. As an insurance company that frequently litigates in the United States, ICAROM cannot credibly deny knowledge of who may remove cases. It further strains credulity to argue that a sophisticated insurance company that participates in the London insurance market is unaware of the importance of precisely naming parties.

B. Systematic Evidence of Increasing Removal Abuse

Multiple wrongful removals in the same case, sometimes simply to delay trial, and removals by entities not even parties to cases appear to be just the tip of the iceberg of growing removal abuse. Preliminary results from research for an article by my colleague Trevor Morrison and me, to appear in the *Journal of Empirical Legal Studies*, suggest that the problem is more widespread and of increasing concern.

Defendants seem to be increasingly removing cases to federal court for the purpose of delay and to increase expense to plaintiffs. The evidence is that federal courts are increasingly having to remand removed actions to state court. The net result is a deadweight loss to the system–jockeying over where the case should be, and abusing

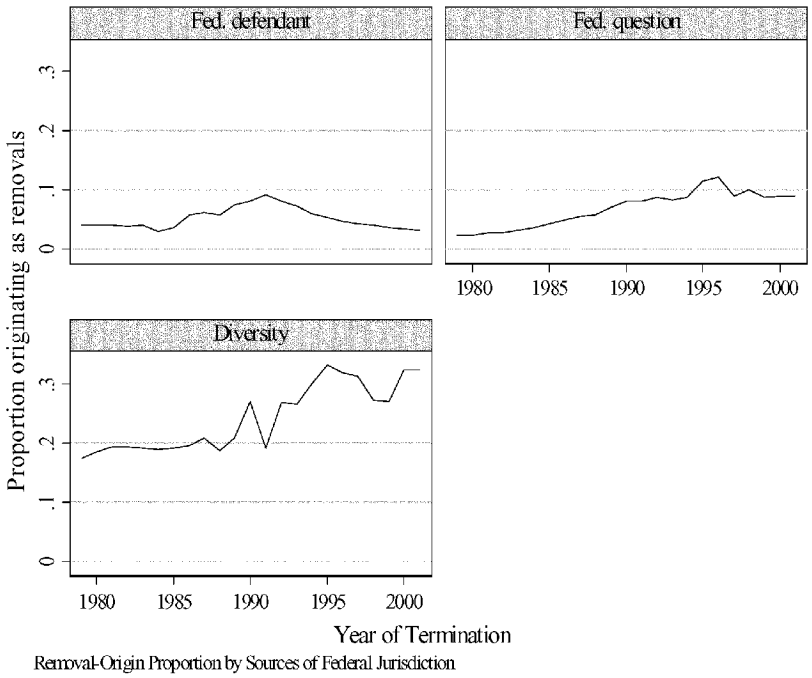

Figure 2. Proportion of Federal District Court Cases Originating as Removals from State Court, by Source of Federal Jurisdiction

mechanisms to choose forum, increases costs without furthering the progress of the litigation.

Summarizing the evidence of increasing removal abuse requires fitting together a few facts. First, tort filings are not up in state courts. The National Center for State Courts, the best source for information about state court filings, has found that, across 17 states from 1993 to 2002 tort filings have decreased 5%.[85] Across 35 states, tort filings decreased 4%.[86] Despite the shrinking pool of state-court filings, diversity-based tort removals from state to federal court have not noticeably declined. In 1993, 8,128 diversity tort cases terminated in federal court that had originated as removals in state court. In 2000, the last

[85] National Center for State Courts, Examining the Work of State Courts, 2003.

[86] Id.

full year for which numbers are readily publicly available, the number had held fairly steady at 8,030, a decline of about one percent. So a shrinking pool of state court tort cases has not resulted in a similarly shrinking pool of removed diversity csaes. Defendants are removing about the same number of cases despite shrinking state court tort dockets. As Figure 2 shows, the proportion of the federal docket originating via removal cases in increasing. In diversity cases, case origination in federal court as the result of a removal account for about 30% of the federal docket.

More importantly, the non-shrinking number of removals is accompanied by an increase in federal court remand orders. That is, remand rates are increasing over time. Figure 3 shows the increasing remand rate over time. In recent years, more than 20% of diversity tort cases removed to federal court have been remanded to state court. Such wrongful removal increases the costs to both sides, delays resolution of the matter for both sides, and is a deadweight loss to the system. As the anecdotal evidence suggests, some of these removals are repetitive and not well-founded. In one district where we have checked every removal by inspecting the docket sheets, when plaintiffs seek remand, the court finds the removal to have been erroneous in about 80% of the cases.

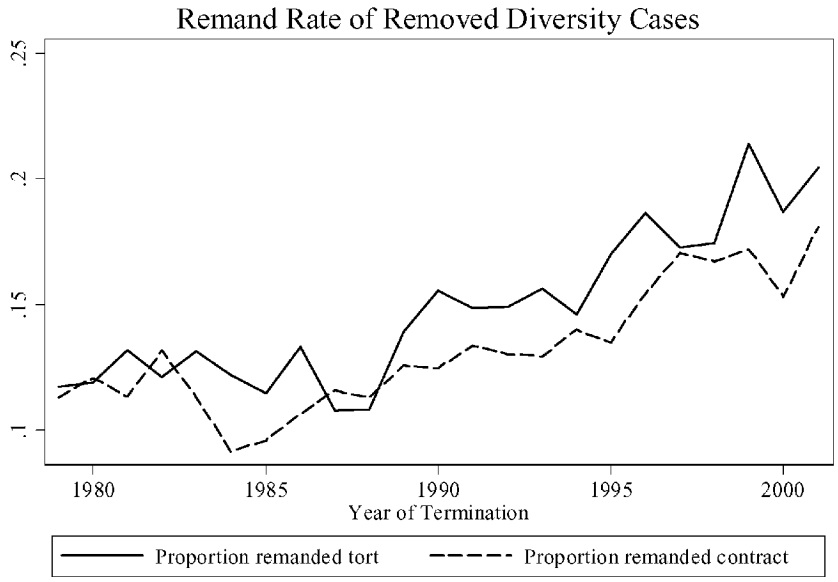

Figure 3. Remand Rate of Diversity Cases Removed to Federal Court Tort and Contract

The systematic and growing abuse of removal suggests an important area of litigation reform for this Committee to consider. This abuse is far better documented that unsupported assertions of claims of systematic litigation abuse.

Mr. SMITH. Thank you, Mr. Eisenberg.
Mr. Schwartz.

TESTIMONY OF VICTOR E. SCHWARTZ, GENERAL COUNSEL, AMERICAN TORT REFORM ASSOCIATION

Mr. SCHWARTZ. Good morning, Mr. Chairman, Mr. Conyers. I always enjoy coming before this Committee. I remember dialogues with Mr. Scott, Mr. Watt, Mr. Keller. I'm glad that you're addressing frivolous lawsuits.

Frivolous lawsuits are kind of a death by a thousand cuts. Lawyers like myself have large clients, but we also have small ones. And I remember, about 14 years ago, being called by a little pub in Atlantic City by Cathy Burke, and she was getting lawsuits, and she claimed they were absolutely baseless. These were so-called Dram Shop acts where somebody claimed that they were served while they were intoxicated. They went out and had an accident, and then they sued her.

I looked at these cases that she had, and I found that many of them were baseless. In one, a person had not even been in her bar. The police report showed that. And we were able, under rule 11, to have a sanction put against the lawyer who brought the claim. But under the weaker rule 11—that happened later—that would not have happened.

Frivolous claims today have a way of really hurting small businesses, and this is why: Some plaintiffs' lawyers—and it is really just some, just like some bad doctors, some bad engineers—understand how to work this system. So they will make an offer that is just under the defense costs. And then the insurer is put in a predicament. If he does not settle the case and it goes to court and something goes wrong, that insurer can be subject to a bad faith claim. If they settle the case, then the costs of insurance—and it will, I mean, insurance pays out over time—will go up for that small businesses. And there is nothing really left to defend it.

Rule 11 was weakened, and it was weakened in a very severe way. And when it was weakened, as my testimony will show, there were studies that said it worked very well. And in the beginning, when rule 11 first came in, there were some problems, but they were corrected. And rule 11 only applies when a lawsuit is completely baseless or when a suit is based not on existing law or any reasonable extension of that law.

So if somebody is moving in a new area of law and it is a reasonable extension, the sanctions of rule 11 do not apply at all. There are correctives purported to change when judges make the corrections, but corrections don't work. The Supreme Court itself and Justice Rehnquist has said, when we are dealing with these rules, we don't really have time to look at them. And these changes are not really approved by the Supreme Court, particularly this one. And then Congress has 7 months to try to correct what the Committee on Rules does.

And Members here, think of how many bills that you've worked on that were enacted into law in this body in 7 months that didn't deal with a national crisis. So there really is no corrective.

We've had now 11 years to look at the changes, and they aren't very good. And what Mr. Smith's bill does is deal with these

changes in a very good way. First, the changes were to weaken the judges' power to impose sanctions. This restores it. Second, the change in the rule allowed a plaintiff's lawyer to play "heads, I win; tails, you lose." They could withdraw the frivolous claim within 21 days and pay absolutely no penalty. And this has been a devastating thing because there's no cost to bring a frivolous claim. This is a rule that needs to be addressed. It doesn't deprive anyone of their rights.

There is a second part to your bill, sir, that is very important and that deals with what I call litigation tourists. Litigation tourists visit certain areas of our country that we do call judicial hell holes. And unlike some of the things that the professor referred to—and I ask that this be entered in the record, Mr. Chairman.

Mr. SMITH. That will be made a part of the record.

[The information referred to follows in the Appendix]

Mr. SCHWARTZ. It is entertaining reading, but it's also disturbing reading.

These are areas that are magnets for plaintiffs, and the plaintiffs are litigation tourists because they have absolutely nothing to do with where they are visiting. They go to Madison County. They don't pay taxes there. They don't live there. They weren't hurt there. They have nothing to do with the place. The only reason they're there is because it's perceived that the court will give them a very favorable ruling.

What the second part of your bill does wisely is, a person can sue where they were hurt, where they lived, the defendant's principal place of business. That's fair. There's no reason to shop around and go anywhere else.

You were kind to give my introduction. One thing was it mentioned is that, for 14 years, I have done plaintiffs work. And there was a plaintiffs lawyer who is a very well-known plaintiffs lawyer, and I will just close with this, who said the following—one of the best plaintiffs lawyers of the United States of America, he is not practicing any more—he said that "frivolous lawsuits waste people's time and hurt real victims." That's why he has proposed that lawyers who bring frivolous lawsuits should face tough mandatory sanctions, and that's exactly what your bill does. And the plaintiffs lawyer who said that is named John Edwards. I believe he is now a senator from North Carolina.

Thank you very much for your attention.

[The prepared statement of Mr. Schwartz follows:]

PREPARED STATEMENT OF VICTOR E. SCHWARTZ

Mr. Chairman, thank you for inviting me today to share my views regarding "Safeguarding Americans from a Legal Culture of Fear: Approaches to Limiting Lawsuit Abuse." There is a dire need for legislation to address this very problem, and H.R. 4571, the Lawsuit Abuse Reduction Act of 2004, is a positive step toward that goal.

By way of background, I have been an active participant in the development of personal injury or tort law since I served as law clerk to a federal judge in 1965. I was a professor of law and dean at the University of Cincinnati College of Law. I practiced law on behalf of injured persons for fourteen years. I also served at the U.S. Department of Commerce under both Presidents Ford and Carter, and chaired the Federal Inter-Agency Task Force on Insurance and Accident Compensation. For the past 25 years, I have been a defense lawyer. I have co-authored the most widely used torts casebook in the United States, *Prosser, Wade & Schwartz's Torts* (10th ed., 2002).

I have had a deep interest in improving our civil justice system and currently serve as General Counsel to the American Tort Reform Association, on whose behalf I am testifying today. I wish to make clear that the views I am expressing today are my own.

THE PROBLEM OF FRIVOLOUS LAWSUITS

The expression, "Death by a Thousand Cuts," fits the problem of frivolous lawsuits. Most frivolous lawsuits are not high-ticket items, but relatively modest. They are brought against small businesses including mom and pop stores, restaurants, schools, dry cleaners and hotels. Let's take an example that occurred to one of my clients over a decade ago. The client, who runs a successful Irish pub, called me because a barrage of frivolous claims threatened her business. For example, an individual who alleged that he had been served alcoholic beverages when he was already inebriated brought a claim against the pub. The individual drove while intoxicated, and was involved in an automobile accident. He sued the pub. Police records showed, however, that he had visited numerous bars. Omitted from the list was my client's place of business.

Working with the pub's own lawyer, we were able to get the claim dismissed and have the plaintiff's lawyer pay the legal costs generated by the frivolous claim brought by his client. Those costs were several thousand dollars. Unfortunately, that would not be likely to occur today because, as I will show, the rules against frivolous lawsuits have been materially weakened.

This is what occurs today when a small business is hit with a frivolous claim. The defendant contacts a lawyer, usually one supplied by his insurer. The defendant's lawyer would call the plaintiff's lawyer, and suggest that there is proof that the plaintiff was never at the client's establishment. The plaintiff's lawyer could respond, "Well, I know there is a dispute about this, and I have asked for $50,000, but I think we can settle this for about $10,000." The plaintiff's lawyer realizes that the cost to the insurer of defending the case will be more than $10,000.

The defendant's insurer is then placed in a dilemma—if it fights the case and a judge allows the case to go to a jury, and the jury renders a verdict above policy limits, the insurer could be subject to a claim by its insured for wrongful failure to settle. On the other hand, if the insurer settles such a case, over time such action will cause the defendant's insurance costs to increase exponentially. Because there is currently no swift and sound sanction against frivolous claims, the "death by a thousand cuts" will continue. It can destroy a small business.

The scenario just outlined makes clear why the alleged "screening effect" of the contingency fee does not work. In debates, some plaintiffs' lawyers often say that the contingency fee screens out frivolous claims. As plaintiffs' lawyers have said, "Why would a personal injury lawyer bring a claim on a contingency fee, when he knows it is baseless; he will not recover any money." In the real world, this is not true. It costs little more than a $100 filing fee and often takes little more time than generating a form complaint to begin a lawsuit. Additional defendants, who may have nothing to do with the case, can be named at no charge, as in the case of my client. It costs much more for a small business to defend against it. The system is rigged to allow, in effect, legal extortion.

THE WEAKENING OF RULE 11:
UNSOUND POLICY FALLING BETWEEN THE CRACKS OF CORRECTION

Slightly more than ten years ago, the Federal Rules Advisory Committee, an extension of the federal judiciary which has the primary responsibility to formulate the Federal Rules of Civil Procedure, announced an amended and weakened Rule 11. The Advisory Committee recommended weakening the rule despite the result of a survey it conducted of federal court judges, those who deal with the problem of lawsuit abuse on a day-to-day basis. That survey found that 95% of judges believed that the now abandoned version of Rule 11 had not impeded development of the law.[1] Eighty percent found that the prior rule had an overall positive effect and should not be changed.[2] Three-quarters of those judges surveyed felt that the former Rule 11's benefits in deterring frivolous lawsuits and compensating those victimized by such claims justified the use of judicial time.[3] The Advisory Committee itself recognized that while there was some legitimate criticism of Rule 11's application, such

[1] Federal Judicial Center, Final Report on Rule 11 to the Advisory Committee on Civil Rules of the Judicial Conference of the United States, May 1991.
[2] *See id.*
[3] *See id.*

criticism was "frequently exaggerated or premised on faulty assumptions."[4] The Advisory Committee has made many sound decisions, but it did not do so when it revised Rule 11 in 1993.

There are in place so-called "systems for correction of mistakes," made by the Federal Rules Advisory Committee. The first is that the Advisory Committee decisions about rule changes are reviewed by the Supreme Court of the United States. That occurred after Rule 11 was weakened. But when the weakened Rule 11 was transmitted by the Supreme Court to Congress for its consideration, Chief Justice William Rehnquist included a telling disclaimer: "While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted."[5] Justice White warned that the Court's role in reviewing proposed rules is extremely "limited" and that the Court routinely approved the Judicial Conference's recommendations "without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity."[6] Justices Scalia and Thomas went even further, and criticized the proposed amendment to Rule 11 as "render[ing] the Rule toothless by allowing judges to dispense with sanction, by disfavoring compensation for litigation expenses, and by a providing a 21-day 'safe harbor' [entitling] the party accused of a frivolous filing . . . to escape with no sanction at all."[7] The bottom line is that the Supreme Court corrective against unsound rule changes did not work in this instance.

THE FEDERAL RULES ENABLING ACT: THE PLACE FOR FINAL CORRECTION MAY NOT WORK

The Federal Rules Enabling Act of 1938 created a system where Congress delegated its power to the Federal Rules Advisory Committee to formulate Federal Rules of Civil Procedure. Congress has maintained the ultimate authority to change proposals from the Federal Rules Advisory Committee. In the mid-1970s, it did so with respect to the Federal Rules of Evidence. But with the system established in 1938, Congress only has seven months to make a "correction."[8] Apart from matters of urgent national concern, it is rare in 2004 that a bill can be passed by the Congress within seven months. Often, significant legislation that impacts the courts requires debate that can span one or more Congresses in order to reach consensus. Despite the introduction of legislation in both the House and Senate to delay the effective date of the proposed changes to Rule 11, time ran out before Congress could act and the revisions went into effect on December 1, 1993.[9]

Shortly after the revised Rule 11 took effect, Congress attempted to repeal the Federal Rules Advisory Committee's action to weaken Rule 11.[10] By that time, some practitioners had already referred to the new Rule 11 as a "toothless tiger."[11] The repeal passed the House.[12] Those opposing the bill, however, felt that there had not yet been adequate time to determine the effectiveness of the amended rule in practice.[13]

It is now more than a decade since the Federal Rules Advisory Committee acted to weaken Rule 11, and the problem of frivolous claims has only increased. We know the consequences that flow from the weakening of the Rule. They are adverse to our society.

Since Rule 11 has been weakened, frivolous claims have led to higher health costs, job losses, and an almost total failure of attorney accountability. As officers of the court, personal injury lawyers should be accountable to basic, fair standards: they should be sanctioned if they abuse the legal system with frivolous claims.

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[4] *Amendments to Federal Rules of Civil Procedure and Forms,* 146 F.R.D. 401, 523 (1993).
[5] *Id.* at 401 (1993) (transmittal letter).
[6] *Id.* at 505 (Statement of White, J.).
[7] *Id.* at 507–08 (Scalia, joined by Thomas, J.J., dissenting).
[8] *See* 28 U.S.C. § 2074(a) (providing that the Supreme Court transmits to Congress proposed rules by May 1, and that such rules take effect no earlier than December 1 of that year unless otherwise provided by law).
[9] *See* H.R. 2979 and S. 1382, 103rd Cong., 1st Sess. (1993).
[10] *Attorney Accountability Act of 1995,* H.R. 988, § 4, 104th Cong, 1st Sess. (1995).
[11] *See, e.g.,* Cynthia A. Leiferman, *The 1993 Rule 11 Amendments: The Transformation of the Venomous Viper into the Toothless Tiger,* 29 TORT & INS. L. J. (Spring 1994) (concluding that "[o]n balance, the changes made appear likely to undermine seriously the deterrent effect of the rule").
[12] Role No. 207, 104th Cong., 1st Sess. (Mar. 7, 1997) (passed by a recorded vote of 232–193). The Senate did not act on H.R. 988.
[13] *See* H. REP. NO. 104–62, at 33 (dissenting views).

SANCTIONS AGAINST FRIVOLOUS CLAIMS WILL NOT IMPEDE JUSTICE

Some consumer groups have argued that placing sanctions against frivolous claims will somehow impede justice and hurt the ordinary consumer. This is simply not true. If we look to the words of Rule 11 of the Federal Rules of Civil Procedure and congruent state rules, frivolous claims include those "presented for improper purpose" or to "harass or cause unnecessary delay or needless increase in the cost of litigation."[14] They also include claims that are not "warranted by existing law"[15] or those with an absence of factual or evidentiary basis.[16] But they do not include claims based on "nonfrivolous argument[s] for the extension, modification, or reversal of existing law or the establishment of new law."[17] This last point is important, because certain groups have argued, incorrectly, that sanctions against frivolous claims will stifle the growth of law. The very words of Rule 11 allow for growth, but not for frivolous extensions of the law.

WHAT REPRESENTATIVE SMITH'S BILL DOES, AND WHY IT IS SOUND

Chairman Sensenbrenner, Representative Lamar Smith of Texas has introduced a vitally needed bill that restores Rule 11 to its strength and purpose prior to the 1993 changes. That bill, the Lawsuit Abuse Reduction Act of 2004, H.R. 4571, reverses the 1993 amendments that made sanctions discretionary rather than mandatory. Unfortunately, the 1993 amendments allowed judges to ignore or forget sanctions. For that reason, irresponsible personal injury lawyers could game the legal system: They knew that it would be unlikely that they would have to pay for bringing frivolous claims.

The 1993 amendments also allowed unscrupulous plaintiffs' attorneys to play the game, "heads I win and tails you lose." They could bring a frivolous claim and hope that they could succeed in getting an unjust settlement just as I outlined above. But if a Rule 11 motion was brought against the personal injury lawyer, they had 21 days to withdraw their lawsuit without the imposition of any sanction. When the 1993 amendments weakening Rule 11 were admittedly rubber stamped, as I have indicated, Justice Scalia dissented from the process, noting that,

> In my view, those who file frivolous suits and pleadings, should have no 'safe harbor.' The Rules should be solicitous of the abused (the courts and the opposing party), and not of the abuser. Under the revised Rule [11], parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: If objection is raised, they can retreat without penalty.[18]

Finally, Representative Smith's proposed legislation wisely reverses the 1993 amendments to Rule 11 that prohibited money sanctions for discovery abuses. Perhaps more than any other abuse that has become worse in the last decade has been the rampaging, harassing abuse of discovery. A small or even a large business could be devastated by such activity. They are often asked to produce materials that have nothing to do with the merits of the case. It is another weapon to force an unfair settlement. An example is going on now in Madison County, Illinois. There, a plaintiff's lawyer in an asbestos case is trying to "discover" the names of civil justice organizations to which the defendants are affiliated, and how much money is given to those organizations. This information has absolutely nothing to do with the case before the Madison County court. We desperately need the legal power to stop such discovery abuses.

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[14] Fed. R. Civ. Proc. 11(b)(1).
[15] *Id.* 11(b)(2).
[16] *Id.* 11(b)(4).
[17] *Id.* 11(b)(2). Some have argued that the manner in which judges implemented the pre-1993 version of Rule 11 disproportionately impacted civil rights plaintiffs. Even if this was initially the case, by 1988, a survey conducted by the Federal Judicial Center as well as other scholarship demonstrated that courts were construing Rule 11 more favorably to most litigants and practitioners, especially civil rights plaintiffs. *See* Carl Tobias, *Reconsidering Rule 11,* 46 U. MIAMI L. REV. 855, 860–61, 864–65 (1992) (citing Thomas Willging, Deputy Research Director of the Federal Judicial Center, Statement at Advisory Committee Meeting, Washington, D.C. (May 23, 1991); Elizabeth Wiggins et al., Rule 11: Final Report to Advisory Committee on Civil Rules of the Judicial Conference of the United States, § 1D, at 1 (Federal Judicial Ctr. 1991)). This led even some critics with "the general impression that Rule 11's implementation was not as problematic as many civil rights plaintiffs and attorneys had contended." Tobias, *supra,* at 864–65
[18] *Id.* at 508.

THE DOMINO EFFECT OF THE MODIFICATIONS IN RULE 11

If the 1993 weakening of Rule 11 only affected the federal courts, that would be bad enough. In that regard, it has had a domino effect on state procedures because many states routinely accept modifications to the Federal Rules of Civil Procedure and implement them into their state's law.[19] There is some general wisdom to such provision, so that state procedural rules will not vary between state and federal courts. In this instance, that general wisdom resulted in state courts being unwittingly led into the same problem that face federal courts—they lacked adequate force to stop frivolous claims.

Hopefully, if Representative Smith's legislation were enacted into law, it might trigger reversals of the 1993 amendments in some states. But a number of states may not be covered by that process. For that reason, Representative Smith's bill covers state court decisions that involve interstate commerce. That will assure that those state courts use their power to impose sanctions against frivolous claims. This aspect of Representative Smith's bill is needed because if only federal courts receive the power to block frivolous claims, much of the lawsuit abuse problem would continue unabated.

FRIVOLOUS CLAIMS SANCTIONS AND LOSER PAYS DISTINGUISHED

Some have advocated that judges in the United States adopt a "loser pays" system. Under the "loser pays" system, the party who loses must pay the other party's attorney's fees. There is a great deal of controversy about such a process. Some believe that it could chill bringing legitimate lawsuits because plaintiffs would fear having to pay very large defense costs. Regardless of the merits of the "loser pays" argument, it is important to note that Rule 11 comes into play long before a jury is ever impaneled. The decision about whether a claim is frivolous is in the hands of a judge. As I indicated by quoting the Rule, it only applies when the claim has no basis in existing law or any reasonable extension of that law.

Mr. Chairman, in sum, for the United States economy, the wellbeing of our legal system and the preservation of small business, the strength of Rule 11 needs to be reinforced now.

STOPPING LITIGATION TOURISTS FROM VISITING JUDICIAL HELLHOLES

Apart from dealing with frivolous claims, Representative Smith's bill addresses a major problem in our current national judicial system: forum shopping. Forum shopping occurs when what I call "litigation tourists" are guided by their attorneys into bringing claims in what the American Tort Reform Association ("ATRA") has called "judicial hellholes™."

As indicated in ATRA's Judicial Hellholes Report, which I ask to be made part of the record, there are certain jurisdictions in the United States where law is not applied even-handedly to all litigants. The words carefully chiseled on the top of the Supreme Court, "Equal Justice Under Law," are ignored in practice. As ATRA's "Judicial Hellholes™" (Report documents, a few courts in the United States consistently show "a systematic bias against defendants, particularly those located out of the state."[20] Objective observers are remarkably candid about the nature of these "Judicial Hellholes™." For example, some are located in West Virginia. Former West Virginia Court Justice and currently plaintiff's lawyer Richard Nealey said that when he sat on the Court,

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[19] For example, when Minnesota revised its own Rule 11 to conform to the 1993 amendment of the federal rule, the state advisory committee commented:

> While Rule 11 has worked fairly well in its current form . . . , the federal rules have been amended and create both procedural and substantive differences between state and federal court practices. . . . On balance, the Committee believes that the amendment of the Rule to conform to its federal counterpart makes the most sense, given this Committee's long-standing preference for minimizing the differences between state and federal practice unless compelling local interests or long-entrenched reliance on the state procedure makes changing a rule inappropriate.

Minn. R. Civ. Proc. 11, Advisory Comm. Comments—2000 Amendments; *see also* N.D. R. Civ. Proc. 1 ("Scope of Rules"), Explanatory Note ("As will become readily apparent from a reading of these rules, they are the Federal Rules of Civil Procedure adapted, insofar as practicable, to state practice.") and Rule 11, Explanatory Note ("Rule 11 was revised, effective March 1, 1996, in response to the 1993 revision of Rule 11."); Tenn. R. Civ. Proc. 11, Advisory Comm'n Comment 1995 (noting that Tennessee amended its Rule 11 to track the 1993 federal revision, despite the fact that the state had seen not seen widespread abuse of the previous rule).

[20] American Tort Reform Association, "Bringing Justice to Judicial Hellholes 2003" at ix, *available at* <http://www.atra.org/reports/hellholes/report.pdf>.

> As long as I am allowed to redistribute wealth from out-of-state companies to injured state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families and their friends will re-elect me . . . It should be obvious that the in-state local plaintiff, his witnesses and his friends, can all vote for the judge, while the out-of-state defendants cannot be relied upon [even] to send a campaign donation.[21]

My friend and very prominent Mississippi plaintiff's lawyer, Dickie Scruggs, did not disagree with ATRA's designation that some places are judicial hellholes. He disagreed with what they should be called.

As he stated,

> What I call the "magic jurisdiction," . . . [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're popul[ists]. They've got large populations of voters who are in on the deal, they're getting their [piece] in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money. . . . These cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or law is.[22]

While comedians may make fun of what goes on in these hellholes, they thwart the fundamentals of basic justice and fairness. As the ATRA Report documents, the hellholes have become a powerful magnet for out-of-state plaintiffs that have absolutely nothing to do with a local judicial hellhole jurisdiction. The plaintiff was not injured in the jurisdiction, he never lived in the jurisdiction and he does not work in the jurisdiction. He has absolutely nothing to do with the place. With the guidance of his plaintiff's attorney, he is a pure "litigation tourist." The litigation tourist is only there to sue.

Litigation tourists do not help the states that they visit. They pay no taxes, only burdening the courts of that state that are paid for by local taxpayers. They delay justice to those who live there.

Fortunately, some states that have been a haven for judicial hellholes, such as Mississippi, have recently enacted local legislation to block litigation tourists. If we were to wait for state-by-state action on this issue, however, it could be decades before—if ever—the situation is properly corrected. Frequently, the plaintiffs' lawyers who bring these out-of-state cases have local and very strong political power to thwart even the most basic of reforms that would stop the very worst type of forum shopping.

What Mr. Smith's bill provides is what is needed: a national solution to end unjustifiable forum shopping to "judicial hellholes™". It does so with equity and justice. It allows a plaintiff to file a case where he resides at the time of filing, or where he resided at the time of the alleged injury, or the place where circumstances giving rise to the injury occurred and also in the defendant's principal place of business.

For the welfare of our economy and basic fairness in our legal system, your bill to prevent reckless forum shopping should be enacted now.

I thank you very much for the opportunity to testify today.

Mr. SMITH. Thank you, Mr. Schwartz. You actually used a quote that I was planning to use later so thank you for bringing that out.

Mr. Howard, let me direct my first question to you. You mentioned, both in your written and oral testimony, the role of judges when it comes to determining the outcome of frivolous lawsuits. You said that judges are required to make decisions of what's frivolous, and they should not hesitate to impose penalties when the case is frivolous. How much of a problem do we have with attor-

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[21] Richard Nealey, The Product Liability Mess: How Business Can Be Rescued From the Politics of State Courts, 462 (1998).

[22] Asbestos for Lunch, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference, (May 9, 2002), in Industry Commentary (Prudential Securities, Inc., N.Y., New York) June 11, 2002, at 5.

neys who try to game the system? How much of a problem do we have with judges who fail to recognize or act on frivolous lawsuits?

Mr. HOWARD. Well, there are many responsible attorneys, a great majority, I believe, and there are some who game the system in ways that I believe are unethical. I think there are few trial judges in this country who believe it is their job to do what Justice Holmes and Justice Cardoza and the great liberal Justice Roger Taney admonished them to do which is to act as gatekeepers issuing rulings to give life to the common law principles.

If the fly ball gets lost in the sun, it is not sufficient to simply read the instruction on assumptions of risk and give it to the jury. Because what happens in most cases is there never is a verdict. The person settles rather than face the 1 percent chance of the million dollar verdict, in that case for $25,000.

I believe that judge in that case and in all cases has the duty to say, to ask the question, "will my allowing this case to go forward affect the freedom of other people who want to coach Little League in this country," and to render a ruling that says I hold, under the undisputed facts here, that, under the doctrine of assumption of risk, this either was or was not an assumption of risk. And judges are simply not doing that in this country today.

Mr. SMITH. Thank you, Mr. Howard.

Ms. Harned, you mention in your testimony that in a poll of small business owners, that the cost and availability of liability insurance has gone from 13 in 2000 to number two today. You didn't explain why you think that is. Why is that such a growing concern among small business owners? And what has happened to cause that concern to increase?

Ms. HARNED. I think it is twofold. I think that, as Mr. Howard so ably discussed this morning, the fear that is out there really is driving everyday decision-making. And also, for the small business owner, settlements are a big issue, and if they have not had to settle a case, they know somebody that has. In addition, they have seen their insurance, their liability insurance rates go up.

In a poll that was conducted recently, we found that about half of the small business owners surveyed were either "very concerned" or "somewhat concerned" about the possibility of being sued. This is something that they really do think about every day.

Chairman SMITH. Thank you, Ms. Harned.

Mr. Schwartz, in some ways, we already know how the Lawsuit Abuse Reduction Act would work because that is the way things were largely prior to 1993 when rule 11 was changed. Another reason we know how well it would work, according to a survey done back then, 95 percent of the judges believed that the now-abandoned version of rule 11 had not impeded development of the law, but, most importantly, 80 percent found that the prior rule had an overall positive effect and should not be changed.

Given the good experience we had with rule 11 before it was changed, given that I would like to see it returned to the point where we have a rule 11 as it existed prior to 1993, why was rule 11 ever changed? And was there a good reason it was ever changed? And was there really a focus on and the implications considered before it was changed?

Mr. SCHWARTZ. Well, I think it was a problem of people dealing with yesterday's newspaper. There had been a problem when rule 11 was first changed until the bugs got out of it and people knew how to use it. And it was, in some instances, used in civil rights cases where it should not have been used. I know that your bill does not affect civil rights cases. But by the time the Committee acted in 1993, the rule was working well. It was not impeding in any way development of existing law. But people were dealing with the problem from the mid-80's that had been corrected by the judges themselves, and the judges knew that. And that is why, in that survey, you had this overwhelming response to the judges saying that it worked well.

Now it does not work well because, if somebody files a frivolous lawsuit—just think about this: They file a frivolous lawsuit. They know it is frivolous. They hope that it will get a settlement. A motion is made against them, and they have 21 days just to say, "Oh, I'm sorry." Meanwhile, you have been subject to $5,000, $6,000 in legal bills, and so it doesn't work very well at all.

Mr. SMITH. Thank you, Mr. Schwartz.

The gentleman from Michigan, Mr. Conyers, is recognized for his questions.

Mr. CONYERS. Thank you, Mr. Chairman.

I appreciate the testimony of all of the witnesses.

Ms. Harned, everyone on this Committee is very concerned about the health of small businesses. I mean, they are the economic backbone of this Country. So we are very interested in what they say and what is happening to them and how we can make their economic plight stronger.

Now, have you ever received a copy of H.R. 4571, the bill that is before us today?

Ms. HARNED. I am somewhat familiar with it, yes.

Mr. CONYERS. But you never got a copy of it?

Ms. HARNED. I have received a draft version.

Mr. CONYERS. A draft version. Did you know it was introduced exactly 1 week ago?

Ms. HARNED. Yes, I believe so.

Mr. CONYERS. Could I ask Attorney Howard, have you seen H.R. 4571?

Mr. HOWARD. Yes, sir.

Mr. CONYERS. Did you read it?

Mr. HOWARD. I did. I couldn't recite it.

Mr. CONYERS. Well, most of us cannot either, so don't feel badly about that.

Now, we are honored to have Attorney Schwartz, professor, writer of law, and I think you're counsel or one of the leaders in the American Tort Reform Association.

Mr. SCHWARTZ. Yes, sir, I'm general counsel, and I'm testifying on their behalf today.

Mr. CONYERS. And we have 50 representative members of ATRA, the American Tort Reform Association founded in 1986, and I would like to put the names of these multinational corporations and national corporations into the record.

Chairman SMITH. Without objection, they will be made a part of the record.

[The information referred to was not received by the Committee at time of press]

Mr. CONYERS. Now, Attorney Schwartz, the tobacco industry isn't mentioned in this list of the 50 representative ATRA membership. Is that because they are not a member?

Mr. SCHWARTZ. Well, those are founding members, sir.

Mr. CONYERS. Yes.

Mr. SCHWARTZ. Well, they may not have been a founding member, and I think they probably are members, and I don't have that information—I can supply it—as to who, which companies are members.

Mr. CONYERS. Well, the ATRA, the sheet that came from your organization, said the following are 50 representatives of ATRA's membership. They did not say founding.

Mr. SCHWARTZ. Okay.

Mr. CONYERS. Why was tobacco left off?

Mr. SCHWARTZ. I do not know, sir.

Mr. CONYERS. You don't know.

Now, we are dealing with these lawsuits that Mr. Howard started off with. For so many, the fear of litigation—let me ask you this question, Mr. Howard, who files more lawsuits, businesses against individuals and consumers or consumers against businesses in America?

Mr. HOWARD. I believe there is far more business litigation than there is tort litigation.

Mr. CONYERS. Thank you very much.

And do you ever find or any of your reading or organizations find any necessity to criticize excessive business litigation, or do you find that there is excessive business litigation?

Mr. HOWARD. The legal system can be abused by businesses as well as individuals.

Mr. CONYERS. But that is not what I asked you, is it? I asked if you find a need to criticize excessive business litigation, because you are here criticizing excessive consumer citizen litigation.

Mr. HOWARD. Well, actually, I am here talking about the effect on the culture, and our focus in our coalition has been health care and schools, which has not been—which were not areas where the businesses are typically involved.

Mr. CONYERS. So, in other words, corporations are free to sue everybody's pants off with the biggest lawyers, but the thing that bothers you in the culture is all the little people threatening lawsuits?

Mr. HOWARD. I would not agree with that characterization.

Mr. CONYERS. Would you correct my characterization?

Mr. HOWARD. Yes, we believe that the legal system should be based on rulings that all can read and see about what's right and reasonable and what is not. We think that, in an open-season type litigation philosophy, anyone, whether it is an individual seeking to gain an advantage, perhaps someone injured when the doctor didn't make a mistake, as well as by a company, which either may be suing or trying to avoid liability when it did something terrible by dragging out litigation for 5 years. So, for example, in our coalition, we have been advocating the idea of specialized medical health courts with neutral experts which, among other things, with a lib-

eralized standard of recovery that would allow patients who are injured by mistakes to recover more quickly and with lower attorneys fees. That is one of our principal focuses.

So again, I would not agree with the characterization that we are just trying to eliminate or stop litigation. We are trying to separate the wheat from the chaff.

Mr. SMITH. Mr. Coble is recognized for his questions.

Mr. COBLE. Mr. Chairman, I have had to alternate my time between Transportation and Judiciary, so I may have to go back to transportation. As a result, I missed most of the testimony, but I appreciate you all being here.

I will just make a brief statement, Mr. Chairman. I will not use my 5 minutes.

It appears to me that aggrieved parties who have been injured, who have incurred damages to which they did not contribute, should be made whole. On the other hand, parties who initiate lawsuits who have not been injured, who have not suffered damages and whose lawsuits involve only nuisance value, I think those matters should be examined very carefully. And I believe, Mr. Chairman, that is the purpose of, the purport of your bill. I don't mean to be speaking for you, but that nonetheless is my comment.

Since I missed most of the testimony, I will not put questions, but I will stay as long as I can.

Thank you, Mr. Chairman.

Mr. SMITH. Thank you Mr. Coble.

The gentleman from Virginia, Mr. Scott, recognized for his questions.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Eisenberg, you indicated some data relating premiums, malpractice premiums, to the awards actually given. Where can we find out whether or not the amount of awards, increase in awards, was the reason the premiums went up substantially over the last couple of years?

Mr. EISENBERG. I think that is one of the very important questions about the tort system, and I believe you could find it out from the insurance companies; that is, get their libraries of revenue, what comes in from premiums, what comes in from investment income and try and relate the two.

Mr. SCOTT. Do you have that information?

Mr. EISENBERG. I tried to do that in the 1990's and could not get beyond—the public data about insurance companies' losses and revenues is opaque. And in an article I wrote about product liability in the early 1990's, I tried very hard to get behind it, and I couldn't.

What I do know is, when the insurance industry has been offered tort reform in exchange for guaranteed reductions in premiums, they rejected the deal.

Mr. SCOTT. Mr. Howard, you mentioned teachers hugging students. If you have a sex-abusing teacher, is litigation appropriate?

Mr. HOWARD. Of course, and firing the teacher and criminal sanctions.

Mr. SCOTT. And civil cases?

Mr. HOWARD. And a civil case as well. I believe, in conduct like that, it depends on the nature of the harm, that the principal, the

traditional method of accountability was through the State and its criminal process in putting people in jail because it is sometimes hard to measure damages.

Mr. SCOTT. In terms of a civil suit, how would you know it is frivolous until you have heard the evidence?

Mr. HOWARD. You would not.

Mr. SCOTT. If the teacher is believed and the child is not believed, does that convert it into a frivolous case?

Mr. HOWARD. If it turns out that a case has been brought which did not have a foundation in fact, but you could not determine that until after all of the evidence and such, I believe that is an extremely important case for sanctions, not because the claim was frivolous, but because it was unfounded. It had no basis in fact. But you couldn't have made that determination at the outset.

Mr. SCOTT. If the teacher lied, and the jury believed the teacher's lies, that would convert what was a bona fide case into a frivolous case?

Mr. HOWARD. Well, you changed the facts on me here. We have a court system that—where there will be, in a case like that, a finding of facts. And if the facts found, which is the best the justice system can be, if the facts found are, there was never a basis for the claim, that it was made up, then I believe that is an appropriate case for sanctions. If the facts found are, maybe, there was smoke, but there was no fire, then perhaps it is not a case for sanctions.

Mr. SCOTT. No, there is just a conflict in testimony. The child says, "I was sexually abused." The teacher says, "It didn't happen," and they found for the teacher.

Mr. HOWARD. Then it is probably not a case for sanctions. There are cases of sexual abuse where it is clear at the end of case that there was never any foundation for the claim, and if it were clear that there was never any foundation, not just a credibility difference, then if it is clear, I think it would be appropriate for sanctions. If it is not clear, it is not appropriate in my view.

Mr. SCOTT. Mr. Schwartz, does this rule apply to frivolous defenses?

Mr. SCHWARTZ. Yes, it does, sir.

Mr. SCOTT. And how do you—if a case is brought up, inconsistent with established law, does that make the case frivolous? Like when *Brown* v. *Board of Education* was brought, everybody knew what the law of the land was. Was that a frivolous case?

Mr. SCHWARTZ. No, it wasn't because as——

Mr. SCOTT. If it had been thrown out, as it was in lower court, would it have been frivolous?

Mr. SCHWARTZ. No, it wouldn't. And that is why the rule is very, very carefully worded about allowing claims that are based on some reasonable extension of existing law. I have read the briefs in *Brown* v. *Board*. Those briefs are very powerful briefs. That case took a long, long time to develop. We are not talking about that.

Mr. SCOTT. I am running out of time, and I just want to get just one other question in. What about defending the partial birth abortion ban without a health exception?

Mr. SCHWARTZ. I think that is a matter of controversy, and it is not frivolous. The words of rule 11, I hope they are in the record,

so we know what we are talking about. We are talking about cases that are being presented for improper purposes, such as to harass or to cause unnecessary delay. The claims, defenses and other legal contentions are not warranted by existing law or by a nonfrivolous argument for extension, modification of the law, or the factual contentions have no evidentiary support. This is a very narrow area, sir.

Mr. SMITH. The gentleman's time has expired.

Mr. SCOTT. My time has expired, but that would apply to trying to defend the partial birth abortion law when it doesn't have a health exception.

Mr. SMITH. Mr. Schwartz, would you want to respond to that very briefly?

Mr. SCHWARTZ. I think that is a controversial area of law, and I don't think there would be a judge in America that would deem that frivolous.

Mr. SMITH. Thank you.

The gentleman from Ohio, Mr. Chabot, is recognized for his questions.

Mr. CHABOT. I thank the Chairman.

The purpose of this act, of course, is it aims at preventing frivolous lawsuits that victimize innocent people. Under the act, represented parties can be sanctioned, including monetarily, from these frivolous lawsuits. And my question is, does this mean that clients would be sanctioned for the frivolous legal theories that are put forward by their attorneys? So how do you protect the clients from their attorneys? Because, oftentimes, it's going to be the attorney that would come up with this theory, and is there a chance that the plaintiff is victimized? In other words, who would be responsible for this?

Mr. SCHWARTZ. Under rule 11, the attorney is responsible.

Mr. CHABOT. So the plaintiff would essentially be protected?

Mr. SCHWARTZ. That's correct.

Mr. CHABOT. Next question, relative to federalism, what this does, of course, is it limits where lawsuits can be brought, to a certain extent. Would anybody want to comment on federalism here?

Mr. EISENBERG. I would. In fairness to the bill, I haven't had a chance to sit and contemplate it. It was recently proposed, and I only recently looked at it.

It strikes me as perhaps the most aggressive intrusion on State court systems since Reconstruction. It will affect every personal injury case in State court. It will require State courts to hold hearings on whether there is interstate commerce and where the most appropriate forum is.

And, I mean, I think it sort of turns federalism on its head. I am not aware of such a far-reaching sort of intrusion on State prerogatives, even in recent tort reform proposals.

Mr. CHABOT. I see the other panel members wouldn't necessarily agree with that.

Mr. SCHWARTZ. We will submit to you an article that was done for the Journal of Harvard Law and Public Policy that will outline case support that is crystal clear for the measures that are in this bill.

I don't want to get into a professor war here. I have great respect for the professor. But I think you will find that those cases support what is in the bill.

[The information referred to follows in the Appendix]

Mr. EISENBERG. I'm not saying it is unlawful. I am saying, as a matter of policy, it is a massive intrusion.

Mr. CHABOT. Thank you.

Excuse me. Under this act, the plaintiff would be able to—to bring an action in his location or the principal business where the defendant is located. Could you compare that with, under existing law, where one can bring cases?

Mr. SCHWARTZ. That's a good question. A number of States now have—this is—lawyers call it venue. I know there are lawyers on this Committee, but some may not know what the word is. Venue defines where you can bring a case.

In many States, you can bring a case where you live, where you have been hurt or the defendant's principal place of business. But in some States, that is not true. As long as somebody does business in that State—and that can be as much as just selling food—a person can bring a claim in that State, even though he or she has nothing to do with that State.

And you get to the issue of, why? If you live in Massachusetts, and you're hurt in Massachusetts, why would you bring a case in Madison County, Illinois, a place you have never been to? Think about it. The only reason would be that you think this is a particular place where the words on the top of the Supreme Court, "equal justice under law," may not be applied. And it is not you, the injured person, it is your lawyer who is figuring this out.

And I believe that there is full, complete power under interstate commerce to regulate what is this rampant forum shopping that is going on in this country right now. And from the point of view of the individual State in your State, why would you want somebody coming in, using your court system, your State's tax dollars, for somebody who doesn't live there and has nothing to do with the jurisdiction? I don't think you would want that.

Mr. CHABOT. I note the yellow light is on, and I yield back the balance of my time.

Mr. SMITH. Thank you, Mr. Chabot.

The gentleman from North Carolina, Mr. Watt, is recognized for questions.

Mr. WATT. Thank you, Mr. Chairman.

Ms. Harned, you haven't been asked any questions. You have been sitting quietly. You talk about, as one of your four points, a situation where you don't let the facts get in the way. Has your foundation bothered to take a look at the facts that have been recited by Mr. Eisenberg?

Ms. HARNED. I have read Mr. Eisenberg's testimony, and I'm aware of these studies.

Mr. WATT. I'm not talking about Mr. Eisenberg's testimony. I'm talking about the studies which would be, I presume, the facts that might get in the way of some of your conclusions.

Ms. HARNED. I do not want to impugn these studies because quite honestly——

Mr. WATT. Have you read the studies? Has your foundation reviewed the studies? That's all I am asking now.

Ms. HARNED. We have not. But it is relatively easy to——

Mr. WATT. That's fine. I just was interested whether you all might be interested in letting some facts get in the way. That's all.

Mr. Schwartz.

Mr. SCHWARTZ. Yes, sir, Mr. Watt.

Mr. WATT. I am especially interested, and I am going to direct this question to you because you know you are a fine lawyer and you would do——

Mr. SCHWARTZ. Uh-oh, something bad is coming.

Mr. WATT. No, no, and I think you will deal with this fairly. Even though, you know, your testimony is contrary to many of my beliefs. I think you do tend to deal with things fairly.

Have you looked at the language on page 3 of the bill? I'm especially fascinated with this section that starts at line 11 and goes through line 18, "In any civil action in State court, the court, upon motion, shall determine whether, 30 days after the filing of such motion, whether the action affects interstate commerce. Such court shall make such determination based on an assessment of the cost to the interstate economy, including the loss of jobs, were the relief requested granted."

Now, as a fair plaintiff's lawyer or defense lawyer, for that matter, what would it take for you to get ready for a hearing on this issue? How would you marshal the facts, having walked into court, sued somebody on a tort claim, an automobile accident claim, let's say, and all of a sudden you are having a hearing about the loss of jobs and the economy and the impact on interstate—I'm just—I'm just fascinated with how you, as a lawyer, would approach marshalling the facts. What would you do to prepare for that hearing?

Mr. SCHWARTZ. Well, good question, Mr. Watt. And first and I've done, as you know, both plaintiff and defense work, and now I'm principally doing defense work——

Mr. WATT. Okay. As a defense lawyer, how would you prepare for it? As a plaintiff's lawyer, how would you prepare for it?

Mr. SCHWARTZ. Well, a plaintiff's lawyer doesn't have to do anything. The burden of proof is on the defense lawyer.

Mr. WATT. Okay. Put on your defense hat. Let's hear what you would do to get ready for this.

Mr. SCHWARTZ. I think that you would have a very, very difficult burden to assess the type of findings that would be made here. You might be——

Mr. WATT. How would you prepare?

Mr. SCHWARTZ. I think—I think I would try to find out from insurers some cost of what frivolous claims were in that particular jurisdiction. I don't know, sir. You know that I'm always—I answer straight.

Mr. WATT. That's why I asked you the question.

Mr. SCHWARTZ. Whether I could assemble that material, I think it would be a very, very difficult job to do it.

Mr. WATT. It would take a lot of time and drive up the cost of this litigation, I presume.

Mr. SCHWARTZ. I think it would be a very difficult burden. And I think it is going to be an unusual case where this rule were, as written, to apply in State courts.

Mr. WATT. Now, let me just talk about my experience, because, I mean, you know, I did a lot of trial work in the 22 years I was in the practice of law.

Mr. SCHWARTZ. Yes, sir.

Mr. WATT. And I met a lot of defense lawyers on the other side, all of whom were on the clock with some insurance company, some deep-pocket defendant, who would just love to spend 5 or 6 days preparing for this kind of motion, because in a lot of cases, they weren't about to settle a case, even a meritorious case, until they had milked every dime out of the defense of that case.

Now, I take it you have never—honestly now, Mr. Schwartz, you know some defense lawyers that have been in that posture, don't you?

Mr. SCHWARTZ. There are defense lawyers——

Mr. SMITH. Mr. Schwartz, after you answer this question, the gentleman's time has expired. But I do want you to answer the question.

Mr. WATT. I want him to answer the question, too, because I know he is going to answer it honestly.

Mr. SMITH. The gentleman's time has expired, but the witness will respond to the question.

Mr. SCHWARTZ. Thank you, Mr. Chairman and Mr. Watt.

Yes, there are defense lawyers who run up costs. I don't think they would do so here because we are talking about smaller claims.

Mr. SMITH. Thank you.

Thank you, Mr. Watt.

The gentleman from Florida, Mr. Keller, is recognized for questions.

Mr. KELLER. Well, thank you, Mr. Chairman. I think Ms. Harned was really right here, based on my observations, that the biggest problems we face are the small suits against the small businesses. And I base that as someone who is a litigator my whole life and a partner in a litigation firm. I have tried cases of every type and against every kind of lawyer, the elite super-highly-paid plaintiff's personal injury lawyer, like the John Edwards type, and the guy who scrapes by on a few phone calls from the Yellow Pages and barely pays his rent.

I have not seen a lot of the frivolous suits against the elite—by the elite personal injury lawyers. They get paid a contingency, and they want a big hit, and they don't bring a lot of frivolous suits, frankly. And I will say that, sometimes, a contingency fee is a good thing, because it is a key to the courthouse for a lot of people.

But I have seen a heck of a lot of suits from the low-end lawyers against small employers. I am not going to go through a nightmare list of things. You heard those. But just to give you a microcosm of the problem, first of all, you always hear about tort claims. My biggest observation, the most frivolous suits I have ever seen—and it is not politically correct to say it, but I am going to say it—is in the employment context and so-called civil rights claims. And I'll just give you an example.

I represented an employer. And a lady, who was a very weak employee with frequent absences and poor job performance and an abrasive personality, didn't get a promotion. And she filed a big Federal lawsuit saying that it was because she is black, and that it was age discrimination. Well, and the person who got the promotion was black and was older than she was. But nevertheless, to show that we are going to allow all claims to go forward, the judge allowed exhaustive discovery, and after spending $100,000 and giving this lady her day in court, the suit was thrown out on summary judgment.

The employer won. And what did he win? He paid $100,000. Under Civil Rights Attorneys Fee, Provision 42 USC 1988, the case law in my jurisdiction, as in most, is, when the employer loses, they usually pay the fees. When the employee loses, they don't. And no fees were ruled under rule 11. Courts are reluctant to award fees to the prevailing party. This is a big problem, and I share your concern with that. So what do we do about this type of problem?

Mr. Schwartz, let me make an observation and ask for your opinion. I like the loser-pays provision, like they have in England. But frankly, one of my concerns, take a med-mal case, when the doctor loses, he's got the money to pay. When the plaintiff loses, they almost never do. So it has not been a big deterrent.

One of the things we did in Florida to combat that is, when a person loses and you also have a finding of frivolousness by the judge, the attorney who brought the frivolous suit is required to pay half the attorneys' fees to chill these type of suits from being brought. What is your opinion about that sort of approach, requiring the person bringing the suit to pay half the fees if there is a finding of frivolousness?

Mr. SCHWARTZ. Well, I believe the responsibility is with the officer of the court, whether it is a defense attorney who makes a frivolous defense as Mr. Watt was referring to or whether it is a plaintiff's lawyer who is bringing a frivolous claim. And I do distinguish in my written testimony between the so-called English rule, the loser-pays rule, and frivolous claims. Loser-pays has not been something that I think can work well in this country, because it ends up exactly, Mr. Keller, as you said, when the loser is the defendant, he pays. When the loser is the plaintiff, he doesn't.

But rule 11 is at a level of seriousness of frivolousness that is very, very high. It is very, very important for this Committee to appreciate that this only comes in when there is absolutely a baseless suit, no possible reasonable extension of the law. Judges are reluctant to apply it. But when they do, it has an effect against the part of the bar that you are talking about. It is not John Edwards and Dickie Scruggs and Fred Barron. They never bring a frivolous claim. It is that marginal claim against a school. It is that marginal claim against a restaurant. And by the way, for the record, I will be very brief, the National Restaurant Association and its 400,000 members has endorsed this bill. Those are the people who are concerned about these frivolous claims, little businesses.

Mr. KELLER. One of the things we are doing, we are making these sanctions mandatory under rule 11. Is there anything else

under rule 11 that we could do to strengthen our ability to prevent frivolous suits?

Mr. SCHWARTZ. I think you have done the three most important things. You have made it mandatory. You have also gotten rid of that very bad provision that lets people withdraw the frivolous claim and escape punishment. You also have sanctions against discovery abuses on either side.

Mr. KELLER. Thank you. Mr. Chairman, I yield back.

Mr. SMITH. Thank you, Mr. Keller. The gentlewoman from California, Ms. Waters, is recognized for questions.

Ms. WATERS. Thank you very much, Mr. Chairman.

I note that Professor Eisenberg's testimony seems to indicate that the cost to the tort system appears to be declining as a percentage of income or sales, not expanding. So there does not appear to be any evidence that this problem is getting worse or that any action is required. And if that is true, is there anything in these tort reform proposals that would require insurance companies to lower their insurance premiums to the extent that claims experience pools lower because of the changes that are being proposed? Where is the evidence that small businesses or anyone else could save one dime in premiums if any of these proposals are adopted?

I guess I would like Mr. Howard to comment on that. And after you comment on that, I'd like to get some discussion going on some of what I'm reading in the *Collapse of the Common Good*, some interesting observations about the problem with discrimination lawsuits and African-Americans.

Mr. HOWARD. Well, to answer your first question, the area that we focused on and the only one I can really comment on is health care where the verdicts have increased significantly in the last 10 years and where, obviously, the premiums have also increased. I do think it is an important area to understand as to what, you know, why the premiums have increased.

The studies that I've seen suggest that it's partially due to the investment environment, but that it's primarily due to the actuarial reality of the increase in the cost of verdicts and the costs of settlements and in the costs of defense. And while it's also true, as Professor Eisenberg suggested, that tort suits have declined somewhat in the last 10 years, by far the largest component of that has been the result of the passage of no-fault insurance laws which was a great reform which got many automobile accident cases—which is the largest component, out of the——

Ms. WATERS. I'm going to interrupt you for a moment. If you would hold that for a moment, I'd like Mr. Eisenberg to respond. I don't have the empirical data that he is alluding to. Do you know anything about the health care data that he——

Mr. EISENBERG. I guess, there are excellent studies of how the medical malpractice system operates. And one of the difficulties of basing tort reform on external views of the legal system without studying how the legal system operates is that you may get it wrong.

Basically, medical malpractice litigation is one of the best studied areas because we have the opportunities, after the fact, for doctors, after the fact, to review charts and see whether neutral medical adjudicators found negligence.

Almost all of those studies suggest that the medical malpractice system in court—maybe there are frivolous cases being filed, but when they get to court, the system works quite well. The strongest cases are the ones that get the largest settlements. The weakest cases are weeded out.

We have studies from excellent researchers, Professor Farber at Princeton, Professor Vidmar at Duke, who really got into the State medical systems and found, if anything, the systems were overly favorable to defendants.

Ms. WATERS. All right, then I will go back to you, Mr. Howard, so that we can get into the second part of your observation on African-Americans and the system. And I guess you are referring to discrimination lawsuits in your book?

Mr. HOWARD. Well, in my book, I have a section on discrimination law in which I discuss, based on other people's studies—I didn't do the empirical research myself—what is perceived as a chilling of relations that were, I think, never great to begin with in the workplace between the races.

And one of the things I address in the book is the prospect that the fear of litigation, as it has in health care and in other areas, has—has created a kind of invisible barrier that prevents candor or impedes candor in the workplace so that it is very hard to have mentoring relationships and the like with people in the workplace. And all one has to do is go to a workshop that most big companies hold, so-called diversity workshops, in which you are trained not to say what you really think.

Ms. WATERS. What is the point of this discussion, I'm sorry, as it relates to litigation?

Mr. HOWARD. Well, the point that I made in my book is that, while discrimination laws are obviously incredibly important in the society, if we don't—that perhaps letting one angry person bring a claim into court that is very hard to prove and very hard to disprove has had a counterproductive effect on race relations. That is the point. It's not a point that my group is undertaking, because I understand it's kind of a third rail, and so it's nothing I ever talk about. And indeed the book reviewers never mentioned it, because it is a difficult subject to discuss. But I thought it was important to put it on the table, and I did so in the book, and so that is what I suggest.

Ms. WATERS. Sir, the part that I was able to read did not discuss whether or not there are angry people filing lawsuits because of this lack of mentoring and this lack of discussion. And I did not see any discussion about whether or not there appeared to be valid criticisms of those in power who have the possibility to make the workplace better, who have the possibility of correcting attitudes in the workplace that would not lead to lawsuits. Because most of these claims are documented cases of racism and acts that are taken that can be proven in court.

Mr. HOWARD. Well, I don't—again, it is not the reason I'm here. But I was recently at the Second Circuit Judicial Conference in which they had a program on employment cases, and they showed the rapid—how much of the docket consists of employment cases. And it appeared to be the view of the Federal judges in that con-

ference that a great many of those cases were baseless and that were using up a lot of their time.

So I think there are, clearly, valid claims. I don't think this is an area that this bill or this hearing is particularly addressing, because it is a very difficult area. But I will just—like I say, again, it is very hard to prove and very hard to disprove a claim of unlawful discrimination when you only have one person. And that makes it a very tricky area of the law to try to manage, because the ultimate goal is, obviously, to minimize or eliminate discrimination. And, you know, and that's—that's the important goal here.

Mr. SMITH. Thank you, Ms. Waters.

The gentleman from Virginia, Mr. Forbes, is recognized for his questions.

Mr. FORBES. Thank you, Mr. Chairman.

And thank you, ladies and gentlemen, for being here today.

I had the privilege of practicing law for a number of years before I came here, and I can attest to the fact that there are just as many bad insurance lawyers as there are plaintiff lawyers. But that is really not our issue today.

And one of the things that I think I could also tell you, my good friend and colleague from Virginia, Congressman Scott, could come in here today with charts and tell you how, from the time that President Bush was sworn into office, the economy went to hell in a hand basket and make a case for that. I could come in with charts that could tell you how wonderful the economy is doing today.

But if somebody in my district comes to me and their company is closed and they are out of business, I can't just cite those statistics to them. I have to tell them something to help them.

Mr. Eisenberg, let me just tell you, just from personal experience, and also what I hear from my constituents of some true cases. I've seen situations where we will have plaintiffs sit on the other side, and they will say, "We don't have a claim, but we think you ought to settle with us anyway because the cost of this is going to be enormous to you." That happens in the real world all the time.

I have doctors that sit through 4 years of litigation when they know that they have no claim, but their stomachs turn. Their families worry through that whole process, even though it is a frivolous suit, and the jury is out 3 minutes and comes back in with a decision in their favor. But they have had 4 years of their lives just gone.

We are getting more and more political suits today where, when somebody doesn't do what you want, they think they can file a suit against somebody. And recently, I saw one filed by a lady who just had a stroke because somebody didn't like the political positions she has had. A small businessman I saw 2 years ago, he was faced with a $300,000 suit, but his litigation costs were going to be $500,000. He ended up having to settle, even though everybody acknowledged, including his lawyers, it was a frivolous suit. It cost too much. I could go on and on.

Mr. Eisenberg, if not this legislation, what do I tell these individuals when they come to me and they tell me their lives have been ruined by frivolous lawsuits? You look in their eyes. These are not insurance people. They are not plaintiffs. These are just people that

you represent whose lives have been ruined. Do I just cite to them the statistics around the country and tell them that everything is fine? What do we do if not this legislation?

Mr. EISENBERG. If you believe, think this legislation will fix the truly unscrupulous lawyer from bringing a weak claim and not hiding somehow, it is a pipe dream. There will always be people who abuse the system.

On the other side, when we had rule 11 studied in Alaska, we had approximately 20 percent of the lawyers who said, "We failed to bring a meritorious claim that we believed in or failed to assert a meritorious defense that we believed in, because of the possibility of fee shifting and sanctions."

So I don't have a happy answer for people who are done in by the system on either side. It is a balance. It is an awesome burden that Members of Congress have to strike. What one hears as the motivating force behind the current list is increasingly abusive lawsuits, an increase in the frivolous numbers. The individual anecdotes cannot get behind that; only large-scale statistics can.

What I need to hear, if I were a policymaker, is, "You are telling me frivolous suits are up and the filings are down, please explain that."

Mr. FORBES. And for the rest of you on the panel—Mr. Eisenberg doesn't think this legislation will help. To these individuals, they are real. They are hurting their lives. They're, in many cases, destroying their lives. Do you believe this legislation will help in those cases?

Mr. SCHWARTZ. I think it will help, Mr. Forbes. And it is important right now to put aside the data wars. If there are a million claims, and they are all good, there should be a million claims. But if there are 10,000 claims and half of them are frivolous, they shouldn't be brought. And your constituencies, and the same State as I am, are facing a situation where they have no remedy, where there is legal extortion.

And it is the one, two, tens and hundreds, what happened to Cathy Burke up in Atlantic City. So it is not data that says whether that person has a problem or not. It is whether that person has a problem or not and whether there is some remedy in the law to stop it. And that is why this reform is very, very important.

One other point that has not been made. When the Federal rule was changed, automatically the rule was changed in a number of States because the States' procedural laws will mirror changes in the Federal law. So there was no hearing, no real thought given to it. All of a sudden, State persons didn't have a weapon to stop a totally baseless claim. That needs to be changed. If the law is changed, some States will change almost automatically to mirror this law.

Ms. HARNED. If I may, I would like to say the thing that makes this bill attractive, from my perspective, is that it does level the playing field for the small-business owner because it provides them legal resources that they do not have right now when these claims are brought against them.

And to your point and the others have made against the studies Professor Eisenberg has brought to our attention, all I can tell you is what I am hearing from small-business owners every day. And

it is not surprising to me that the studies—well, his studies do not capture a critical number that I don't think they can, which is, how many of these claims are settled out of court? Those are the folks I'm talking to. Those are the statistics that you really can't get at. And one of the main reasons is that, often, these settlements are confidential, and they stay confidential, and it is therefore hard to measure this.

I get call after call after call with story after story after story. I believe that it is very much a problem today. It is unbelievable to me that frivolous lawsuits are not going on. And I do commend you all for looking at this legislation.

Mr. HOWARD. Very briefly?

Mr. SMITH. Yes. Briefly.

Mr. HOWARD. In order to have ethical conduct, you must enforce it. And in my experience as a practicing lawyer over the last 30 years, lawyers have gotten away with more and more, and they are pushing the envelope more and more. And judges almost never have the willpower to enforce rule 11 sanctions. I think it's very important to have a statement from Congress in the form of this bill to reinforce the backbone of judges to enforce ethical behavior.

Mr. SMITH. Thank you, Mr. Forbes.

The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Ms. Harned, you indicate—has your foundation conducted any studies on this issue?

Ms. HARNED. In my testimony, I reference a number of small business surveys in which small-business owners are posed questions.

Mr. DELAHUNT. I heard you say that, and that is polling data in terms of whether they are concerned. I think that is a measurement of sentiment as opposed to hard empirical data. Let me restate it. You indicate that it is not so much the lawsuit, but, rather, it is the settlement issue that seems to create this fear, if you will, this fear that they are living with on an everyday basis that they are anguishing over. Have you conducted any studies in an empirical way that determines the number of settlements made that are considered frivolous?

Ms. HARNED. Again, all I can tell you about is the small business owners that I talk to and what they are saying. It is not just——

Mr. DELAHUNT. I appreciate that.

Ms. HARNED. It is——

Mr. DELAHUNT. Okay. I don't have a lot of time, Ms. Harned. Please. I understand that the answer is no. And I understand that you speak to a lot of small business owners. But I'm asking for some hard data. Because I guess I would posit this question to Mr. Eisenberg and to Mr. Schwartz. You know, the only stakeholder that is not here is the insurance industry. And from what I understand in terms of previous hearings, they're never at the table to speak to this particular issue.

But if there is, if there is, in fact, if the data would support that there are frivolous settlements creating this culture of fear, I would think that we would need them at the table.

Is there any obligation on the part of the insurance carriers, the insurance industry where there is a frivolous—I direct this to pro-

fessor Eisenberg—is there an obligation to not just simply settle those claims but to litigate those claims?

I mean, I find it, you know, a rather dismissive way of saying, well, you know, the small business owner, I'm sure most small business owners are insured. Everybody has coverage today. And yet, if the insurance carriers are settling these claims and they are frivolous, they are unsubstantial, what is the role and the responsibility of the insurance carrier, Mr. Eisenberg, if there is any?

Mr. EISENBERG. I'm not an expert on insurance law, so I wouldn't opine to it. I think you touch upon an important point, and probably the slice of society that has the best information on the litigation system is the insurance industry. And it would be extremely useful to systematically get data from that industry about many of the issues that the Committee on both sides is concerned about. Because when I try to get behind insurance company publication of data, I just find it nothing I'm willing to stand behind before an august body such as this.

Maybe you folks have the prestige, power, whatever, to get behind what is going on in litigation in insurance, but I don't.

Mr. SCHWARTZ. Mr. Delahunt, may I answer?

Mr. DELAHUNT. Sure.

Mr. SCHWARTZ. Here is the problem, which I'm sure, as an expert, which you are, you will understand. A claim is brought, and an insurer thinks it has no basis. If they don't settle it, in some parts of our country, and this does have backup——

Mr. DELAHUNT. I understand. Madison County. But——

Mr. SCHWARTZ. Just let me just complete my sentence, they then will get a potential claim against them for bad faith or failure to settle. So they are put a little bit——

Mr. DELAHUNT. I understand that, but what you are suggesting to me, Mr. Schwartz, and those clearly are exceptional cases. I think you will grant that to me. I think it was your phrase, absolutely—that this will impact only "absolutely baseless claims," this particular litigation.

I share the same concern that Mr. Forbes articulated as far as constituents and how they feel about the system. I think it is important, even if there is data that indicates that the reality is somewhat different.

But what I find frustrating is, here we are, we are having hearings, yet we don't have the information from the insurers about probably the concern that most small businesses have about the settlement issues.

I think, once you file a complaint, a bill of complaint, it goes through, then you have some data. But if we can't get the information—and you know, I would call on the Chairman of this Committee and the Chairman of the full Committee to work with the respective Ranking Members to attempt to get from the insurance industry some hard data on the settlement issue so that we can then have a thoughtful discussion without talking simply in an anecdotal way and guess and speculate.

We have Mr. Howard talking about, you know, I think his language was, most judges, you know, are abdicating their responsibility. Well, that is a statement that anybody can make, but it has

no basis in fact. Let's get the information here and see if we can address the issues Plaintiff Forbes and myself and others.

Mr. SMITH. Thank you, Mr. Delahunt.

The gentleman from Texas, Mr. Carter, is recognized for questions.

Mr. CARTER. Thank you, Mr. Chairman.

I've got to tell you, when you look at what—I happen to support this piece of legislation, but I have questions about it. In reality, you two gentleman, Mr. Schwartz and Mr. Eisenberg, you both are associated with law schools. Law schools still teach lawyers that they have a responsibility to their client to give them a good analysis of their case and how the law applies to their case and whether or not it is a good claim that they bring forward.

So if they don't give that client a good piece of advice and we go forward and get this sanction—and let's say Randy is giving advice to Exxon, so he gives Exxon bad advice, we are going to say there is a sanction imposed against one or the other. Well, we all know, everybody goes for the deep pockets, so Exxon might have to pay the bill, when Randy was at fault because Randy happens to not be insured this year. So there is a lot here to be concerned about.

Something I thought about a lot in 20 years on the bench—and I have seen a lot of bogus lawsuits filed in 20 years on the bench—is, how about punching the lawyer's ticket? If we have got a lawyer and we go to Houston—I don't even practice in Houston, but I sat down there on three or four occasions, and there are thousands of personal injury lawsuits that are filed in Houston and settled in Houston, maybe hundreds of thousands. And maybe many of them are bogus lawsuits. And they are all filed by the same maybe 35 or 40 lawyers in that area.

Why can't we just punch the ticket, reach a point where, if there are a lot of bogus lawsuits filed by a lawyer, that a judge can say, you have lost your practice of law in Texas?

Mr. SCHWARTZ. In general, the regulation of the bar is by States, and actually, Senator Edwards has proposed a three-strikes-you're-out rule on frivolous lawsuits.

Mr. CARTER. I would turn the same thing around on frivolous defense.

Mr. SCHWARTZ. That is right. That is a matter that is worthwhile to discuss for the State bar of Texas. That goes to whether or not a man or woman can continue to practice law and is licensed by the State.

Mr. CARTER. Another question was asked here about business litigation. As a matter of fact, filing frivolous lawsuits in business litigation is a tool of competition in today's industry. Would you agree with that or not?

Mr. SCHWARTZ. I am glad you raised that because there were very good questions raised earlier about frivolous lawsuits among businesses. This change in rule 11 would apply to businesses. And if a frivolous lawsuit is brought merely for competition purposes, it would give the defendant, which is often a smaller business, an ability to invoke rule 11.

Mr. CARTER. And another question was asked—and anybody can answer this, I don't care who. The question was asked: Why did the original rule 11 change? And nobody gave—we talked about it, but

we didn't say why. Did the courts say it was taking too much court time, which is my guess, or what reason did the court give in changing rule 11?

Mr. SCHWARTZ. It was really a committee of judges, not the court, and they changed it because there was a perception that the rule 11, with its sanctions, was causing—and you used the exact word—collateral litigation, litigation over whether the claims were frivolous and then the principal litigation of whether or not somebody was going to be liable.

And over time, I want to put a date, in 1980, rule 11 was changed to make it look like the rule would look if this legislation were to pass Congress. And the rule 11 originally was very weak. It only applied when a lawyer intentionally was violating the legal system, and all of, you know, it is hard to prove intent.

So, in 1980, rule 11 was made tougher. The early experience with rule 11 that was, it did develop collateral litigation, and also there was the experience where some legitimate civil rights cases were impeded by rule 11. When the committee operated in 1993 and made its decision, they were thinking about things that occurred in the early 1980's. But those matters have been corrected.

Mr. CARTER. I have one more question. I will direct this to Mr. Eisenberg. Mr. Eisenberg, I was looking at your statistics on lawsuits per capita, showing Germany, Sweden, Israel and Austria being ahead of the United States.

Mr. EISENBERG. Yes, those are not mine. They are in my testimony.

Mr. CARTER. Well, they are in your——

Mr. EISENBERG. They are in my testimony, right.

Mr. CARTER. Isn't it true that they don't have anything near or anything resembling a tort system like we do in those companies? I think in Germany, for instance, they just have a schedule of damages, and the only thing you really try is if it is so offensive that it should be above the schedule.

Mr. EISENBERG. I think there are major differences which make cross-country comparisons difficult. I think one is our tort system is certainly different from most other countries, and two, so is our system of social insurance and protection. And it may be we necessarily have more tort activity because we have a smaller social safety net than those other countries. That is, the person who has a brain-damaged child as a result of perhaps an innocent medical mistake and needs to maintain a child for the rest of its life may have no choice but to sue because we do not have a safety net like other countries might have for them.

Mr. SMITH. The gentleman is recognized for an additional minute without objection.

Mr. CARTER. I just want to point out, in Germany, in order to recover, you have to file a lawsuit. And then you go—it becomes like an administrative hearing after that point in time. So it is just a matter of course you file your lawsuit. They don't have contingent fees. They tell the lawyer what he will get paid for that lawsuit. They tell, if they prove their case, what it will pay. It will be X amount of marks for this kind of damage. And the only thing really to try, fee-wise, is 10 percent recovery if it is more serious than

was conceived when they published the schedule. So it's not that they are more litigious; they've got to do it to get there.

Mr. EISENBERG. It may be. There's lots of ways to decide that.

Mr. CARTER. Statistics are fun.

Thank you.

Mr. SMITH. Thank you, Mr. Carter.

The gentleman from Florida, Mr. Wexler, is recognized.

Mr. WEXLER. Ms. Harned talked about what small business people are saying in terms of their complaints. What I hear from small businesses, whether they are small businesses or whether they're physician groups or so forth, what they're complaining to me is what they say are the crippling rate increases in their insurance premiums. To me, that is the whole issue.

I am from Florida, like Mr. Keller. We have watched the Florida legislature adopt tort reform measure after tort reform measure, whether it's medical malpractice or business litigation or what have you. And the insurance premiums for business and doctors have not come down.

Mr. Schwartz, if I understand your writings and beliefs over the years, you have been, I think, very clear in saying that restricting litigation will not lower insurance rates. Is that true? That's your view?

Mr. SCHWARTZ. I said that about one bill that was in the United States Senate, and unfortunately, that quote has been repeated by some groups where it was not about that specific bill. I am sure you and all Members of the Committee have had that happen to them. There was a bill in the Senate that had no teeth in it. So that is all.

Mr. WEXLER. That's fine.

Mr. Delahunt talked about the fact that insurance companies aren't represented here. But, Mr. Schwartz, you, again, I presume on a different occasion, your position was, and I am quoting, tell me if this is just an isolated event too, "Insurance was cheaper in the 1990's because insurance companies knew that they could take a doctor's premium and invest it, and $50,000 would be worth $200,000, 5 years later when the claim came in. An insurance company today can't do that."

Mr. SCHWARTZ. And that is an accurate quote. And the end of the quote was, "Because they can't do it, they must look at the reality of the claim system and measure the actual losses against premiums."

Mr. WEXLER. So the problem here as much or maybe even more so according to your quote isn't the explosion or the alleged explosion in litigation; it is the fact that, in the 1990's, insurance companies were making a better return on their investments than they are now, and because of the market conditions that insurance companies invest their money in being much less favorable, therefore, insurance rates go up.

Mr. SCHWARTZ. I follow you to the therefore. There is an additional insight here. The insurance rates have gone up, and we're not here about medical malpractice, but insurance rates have gone up because they have to now look at how much premium they have, so that smog that was there isn't around anymore.

Mr. WEXLER. Right. If the economic environment changed again, and we were back in the situation we were in the 1990's, then insurance premiums—there wouldn't be any cause for tort reform, would there, because income to the insurance companies would be up again?

Mr. SCHWARTZ. That is not entirely true. First, only a small amount—they are not allowed to invest in common stock.

Mr. WEXLER. Let's talk about the supposed litigation explosion, and I appreciate the comments earlier. Ms. Harned said she just has a sense. And we talked about individuals, and the experience of individuals is very important, no doubt, but what we're talking about is systematic change here. And of course, most tort reform, really, the application is in State courts. Most tort cases are brought in State courts, not in Federal courts. Isn't it true, and these are the Department of Justice statistics, and this is where I get very confused, automobile tort filings, which make up a majority of tort claims, have fallen by 14 percent from 1992 to the present? That's the Department of Justice's statistics. Would you agree those are accurate?

Mr. SCHWARTZ. I don't have any question with that.

Mr. WEXLER. All right. Medical malpractice filings per 100,000 population have fallen by 1 percent, according to the Department of Justice over the same period. Some people say those are misleading because you are just talking about the actual amount of cases filed and not the recoveries. So I figure we're filing a smaller number of cases, but the recoveries must have just ballooned. Same statistics, the Department of Justice, the trend in award size was down. The median inflation-adjusted award in all tort cases dropped 56.3 percent between 1992 and 2001. So where is the explosion?

Mr. SCHWARTZ. As Ms. Harned said earlier, those data do not capture cases that are settled; 95 percent of the cases are settled.

Mr. WEXLER. But weren't 95 percent of the cases settled before, too? We're just talking about relativity here, 1992 to 2001.

Mr. SCHWARTZ. I'll try to get the information for you, Mr. Wexler, if I can. I think, at least in my experience, more cases are settled now; and the ones that go to court, when they're ready to go to court, they are the ones where the defendant really believes they have a good shot at winning.

Mr. SMITH. The gentleman's time has expired.

The gentleman from Utah is recognized for his questions.

Mr. CANNON. I thank the Chairman, first of all, for holding this hearing. As the gentleman knows, I am deeply concerned about this issue. I want to apologize to the Chairman of the panel for not having been here. Today, is my primary election in Utah, and I have been fielding telephone calls.

This is, in fact, an extraordinarily important issue. Before I did Congress, I actually did venture capital and ended up associating with and funding a large number of lawsuits for a couple of reasons. In the first place, we have had a transformation in America away from large business employing most of the people in America and toward small business creating the real jobs of the future. And this has evolved somewhat. I think I was part of that process.

In fact, I was certainly funding many of these small companies at the beginning of this that resulted in pay by larger companies who felt like they needed to dominate everything. I think there's been a shift in theory in large business that, in fact, encouraging entrepreneurs with the company to leave the company and then come back to the company is good for the large company. But there clearly is an ongoing tension between small business and starting up and taking market share from large companies. And litigation has been a major tool in that process.

We kept track at one point in time. Let me just say that, for a long time, we tried to do dispositive rulings like summary judgment motions and had remarkable success with those in these frivolous cases. They were expensive. And then we always applied for attorneys fees up rule 11 or the State corollary and never, ever got any compensation. The collateral litigation issue became one that we looked at: Is it worth now suing because the judge wouldn't give us the compensation we were due? That has been a terrific problem, I believe, and continues to be.

Then, of course, when a business fails, everybody goes after the deep pockets, so you still get this frivolous litigation just because you funded or have been associated with the company.

The effect of that has, I believe, been to chill small businesses. In other words, people who are thinking about going into business for themselves say, is it worth the cost? The second effect has actually been to raise, significantly raise, the cost of capital. So we're dealing with what I think is a fundamental problem in America. We're looking at these brilliant people who can organize a company and hire people and create technologies or otherwise improve our system, and we're saying to them, here is a hurdle. If you trip over this hurdle, you're down and out for the count.

So, Mr. Eisenberg, actually, if you could respond to that. We are not talking here about doctors and malpractice litigation. We are talking about the people who are looking at the system and saying, I have got a great idea. I can employ people. I can improve the way the world functions. And yet if I get sued, I lose everything. If you could respond to that?

Mr. EISENBERG. I think, from just sort of a rigorous, hard core, analytical perspective, it is very difficult to link specific instances of legal——

Mr. CANNON. May I just object and refine the question because I agree with you. It is very hard to get data. But the data is the function of the question you ask.

What I am suggesting here, I don't think anybody has asked this question. So if you'll just deal with the concept, which is, is there a chilling going on that is negative, that hurts our society, that causes business not to grow as fast as it otherwise could?

Mr. EISENBERG. Here is the one datum I have in mind. We cut back on rule 11 in the early nineties. It was followed by the greatest peace time expansion in history.

Mr. CANNON. Mr. Howard, you appear to have a response to that.

Mr. HOWARD. There's a failure to appreciate—and in part, it comes from the fact that it is very hard to get data on this—the second-level effects of any change in the structure of a society. There's no question, because I am a lawyer and I represent small

companies and big companies on a regular basis, that the legal system has created a series of barriers that significantly favor larger companies, because you have to be able to deal with a whole—not only regulatory barriers but now the cost, indeed, the inevitability of litigation.

Mr. CANNON. I will cut you off, Mr. Howard, because my time is about to expire.

Let me just point out, I was doing business in the nineties and I suffered great pain in this regard. I think many other people suffered great gain. I think it is, despite the serious handicap that our legal system provides, that we actually did do great things in the nineties.

Now, we have a transformation. We build on a much higher platform. It is one of those defectors of entrepreneurialism that I think we need to focus on.

I thank the Chairman. I am a cosponsor of this bill, and I think that it will probably do good just to have the discussion. Hopefully, we actually implement it by passing legislation. I yield back the balance of my time.

Mr. SMITH. Thank you, Mr. Cannon.

The gentlewoman from Texas, Ms. Jackson Lee is recognized for questions.

Ms. JACKSON LEE OF TEXAS. I thank the distinguished Chairman for yielding. I thank the Committee for holding what is an important reflection. I think we meet this way on an annual basis in a continuing siege on the access of litigants to the courthouse.

Let me, Professor Eisenberg, let me engage you. I could spend my time with the other distinguished witnesses, engaging in one of my skills, cross examination, as a lawyer, but I think the key is to try to find the truth. And one-upmanship on adversaries at this point may not be the best approach to take to let me try to cull from you or pull from you pithy responses to what I think is the overall failing, the fatal flaw of where we were today.

Let me just put on the record that I think this whole question of tort reform and the siege and overburden of the system, let me caution and say, I recognize that courts like mine, Southern District of Texas, there certainly are delays in getting to the courthouse, partly because in the Southern District, we have an enormous list of drug cases. So there are many reasons why civil plaintiffs, if you will, have a long line to wait behind.

And I also recognize that we have to bring some relief to our small businesses, and we work with our small businesses, and I think some of the points may be at the level of exaggeration.

But in any event, we have documentation that shows that, before a civil action that appeared before a jury in 2001, the median jury award was $37,000, and that represented a 43.1 percent decline over the last decade. Limiting that amount as to only tort cases, a median jury award stood at $28,000 as a result of a 56.3 percent decrease over the decade.

The false image that there are $1 million cases dropping every 5 minutes, quite contrary to the constituents that I represent, the 18th Congressional District, traditionally poor, traditionally working-class, middle-class, and take their heart in their hand when they go into a courthouse because most times they are poured out.

Our judges are elected. They are dominated by Republicans in the State of Texas, and I don't think there's a good day for plaintiffs most times in the State system. So in essence, there is a balance.

My question to you would be, the application of rule 11 and the new legislation that we are proposing, is the crux of the matter the idea of frivolous lawsuits only or is the idea of increasing insurance rates that cannot be legitimized also a problem? And how would you respond to the legislation that proposes to make rule 11 mandatory?

Mr. EISENBERG. I'm concerned about it, again, I haven't had much time to study it, but I'm concerned about its raising the cost, potentially in every case, every case in which a defendant has enough money to fund a serious defense. Under section 3, upon motion, the trial court, every State court must decide whether the action affects interstate commerce.

Well, that could be one of the most complex factual inquiries we have. The Supreme Court has struggled with it and shifted gears on it over the years. That cost will go up substantially.

Ms. JACKSON LEE OF TEXAS. So there lies a cost surge that is supposed to bring about a cost decrease, but there may be a potential increase.

Mr. EISENBERG. The evidence is that, understandably, defendants litigate as well as they can once they decide to go to court and not settle. But, for example, they will litigate——

Ms. JACKSON LEE OF TEXAS. In the course of your answer, just because my time is short, can you answer that question regarding insurance rates versus frivolous lawsuits?

Mr. EISENBERG. Well, I think it's been a theme of the hearings, we don't know the relationship between insurance rates and frivolous lawsuits. We have no idea that frivolous lawsuits are increasing. That's clear. And we have no evidence that insurance rates go down when you sanction attorneys. So I hope that is an answer.

Ms. JACKSON LEE OF TEXAS. You can finish your other point.

Mr. EISENBERG. The one point you raised about costs and delays in getting justice in the Southern District, one of the reasons Federal courts are a bit behind is because we have a, I think, documented trend in abuse by defendant removals. The defendant can stay any case simply by removing it to Federal court. It is an automatic stay.

We have, in my testimony, one case where a defendant removed a case wrongfully, not once, not twice, not three times, but four times, increasing the cost to both sides, a dead weight loss to the system, litigating over where we should sit around the table. And that type of abuse, I think, if you are going to address lawsuit abuse would be an important addition to the bill.

Ms. JACKSON LEE OF TEXAS. Undermining a vulnerable plaintiff because the plaintiff may invariably have less money than some defendants.

Mr. EISENBERG. Then the plaintiff's lawyer will ask for a bigger fee because the case was so complicated, and they will get hammered because they got a big fee when they were moved four times.

Ms. JACKSON LEE OF TEXAS. And in essence, shuts the door to many litigants in the system?

Mr. EISENBERG. Yes, that's the game.

Ms. JACKSON LEE OF TEXAS. I thank the gentleman.

I yield back.

Mr. SMITH. Before we adjourn, I just want to make an observation. Maybe it's personal; maybe it's legal. I don't know. But it seems to me that, ultimately, people are more important than statistics. And I read a monograph in college—and I am not saying it is applicable here—but the title was, How to Lie with Statistics. We can always use statistics to prove almost everything.

It is important to use Mr. Watts' phrase a while ago: *Not only to get the facts but to get the facts behind the facts.* For example, I've been told that tort filings declined by 9 percent, and most all of that decline came in routine car crash lawsuits and that there was an 8 percent drop in filings in fiscal year 2003, primarily as a result of decreases in personal-injury, product-liability cases involving asbestos suits, because they had all been filed. In other words, that puts into context a lot of the figures that we might or might not have heard.

I think the main point—and, Mr. Schwartz, you brought it out—is that, basically, this is all irrelevant. We're not talking about the meritorious cases that need to be filed. We're talking about the frivolous lawsuits that have been filed by real people and against real people who have been hurt and damaged in the process. I think we need to get back to the point of the hearing which was the abusive nature of so many frivolous lawsuits.

With that, let me thank the witnesses for their testimony today. It has been very informative and we stand adjourned.

Ms. WATERS. Mr. Chairman, I ask unanimous consent to submit the opening statement for the record.

[The information referred to was never received by the Committee at the time of press]

Mr. SMITH. We previously recognized all Members to do that, but in any account, we will be glad to do so.

Thank you.

[Whereupon, at 12:01 p.m., the Committee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Statement of the U.S. Chamber of Commerce

ON: LIMITING LAWSUIT ABUSE

TO: HOUSE COMMITTEE ON THE JUDICIARY

DATE: JUNE 22, 2004

BY: THE U.S. CHAMBER INSTITUTE FOR LEGAL REFORM

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance – is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 98 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

STATEMENT ON AMERICA'S LEGAL CRISIS

BY
U.S. CHAMBER INSTITUTE FOR LEGAL REFORM
SUBMITTED TO THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
JUNE 22, 2004

The following comments are submitted to the House Committee on the Judiciary as testimony for the Committee's meeting scheduled for June 22, 2004. Please make these comments part of the official record of that meeting.

The U.S. Chamber of Commerce founded the Institute for Legal Reform (ILR) in 1998 with the mission of making America's legal system simpler, fairer and faster for everyone. These statements are hereby submitted on behalf of the U.S. Chamber of Commerce and ILR.

$233 billion.

It has become commonplace in Washington, DC to speak flippantly about such huge sums of money, but $233 billion truly is a massive number.

$233 billion is almost four times what the federal government spends on Education, over eight times what it spends on Homeland Security, and over ten times what it spends on the Department of Justice.

$233 billion is also greater than the economies of most states and, in fact, larger than the GDPs of the majority of countries throughout the world.

Amazingly, $233 billion is also the amount of money the tort system is draining from the U.S. economy. To further quantify, that translates into approximately $3,200 a year that every American family of four ($809 per person) is paying because of our costly tort system. Those numbers were compiled and released in a 2003 annual report by world-renowned actuarial firm Tillinghast Towers Perrin.

Yes, our tort system is out of control – and we're all paying for it.

The plaintiffs' bar will tell you that this money is a small price to pay as fair compensation for victims for injuries suffered at the hands of what they refer to as "big business." There are, however, more than a few problems with that argument.

The U.S. Chamber Institute for Legal Reform strongly supports the idea that all who have been truly injured need to have access to just compensation through our legal system. That is what America's civil justice system was originally designed to do. America's legal crisis, however, is preventing these "true victims" from receiving their just compensation.

For example, take a look at the asbestos litigation crisis. As many as 90% of the people filing asbestos claims are not sick. As a result, our courts have become so

clogged with asbestos lawsuits that a majority of compensation is going to people who are not genuinely impaired. Furthermore, people who have become truly sick as a result of their exposure to asbestos are not receiving the compensation they need and deserve. Transaction costs, including lawyers' fees and expenses, have consumed more than half of total asbestos spending.

Furthermore, statistics show that America's legal crisis is hurting our employers – large and small. The Tillinghast report found that more than half of the total cost of the tort system ($129 billion) is borne by America's businesses. A recent study conducted for ILR by NERA Economic Consulting, however, found that small businesses with $10 million or less in annual revenue bear 68% of that cost, paying $88 billion a year. That translates to about $150,000 a year per small business in tort liability costs – money that could be used to hire new employees, increase employee benefits (such as expanded or improved health care benefits), reinvest into the business or otherwise put to more productive use.

The NERA data further shows that very small businesses ($1 million or less in annual revenue) bear 26% of the business cost, paying $33 billion a year. That translates to about $17,000 in tort liability costs a year for each of these very small businesses.

The bottom line is that America's litigation explosion is hurting our employers and threatening American jobs. Companies that aren't driven out of business by the costs associated with excessive litigation are forced to raise their prices – and that means a higher cost of living for U.S. consumers.

Despite these facts, those opposed to legal reform will continue their efforts to demonize American business. These attacks ignore the fact American businesses are responsible for creating unprecedented wealth and prosperity in this country.

They ignore the fact American business is responsible for the development of life-saving drugs and medical techniques that have expanded our life-spans and improved our standards of living.

They ignore the fact that American business is responsible for supplying our troops, securing our homeland, putting safe and affordable food on our tables, and making this country the beacon of opportunity for the rest of the world.

While American business continues to drive our engines of economic growth, a select group of wealthy, billionaire trial attorneys is fueling a legal crisis that is raising our prices, crippling our employers, destroying our jobs, decreasing shareholder value, and threatening the health and well-being of our families and children.

What should be done to fix America's legal crisis?

First, ILR strongly urges Congress to enact bills that cut back on frivolous litigation, such as the Class Action Fairness Act and the Fairness in Asbestos Injury Resolution Act. ILR also supports medical malpractice reform legislation, as well as the host of

pending legislation providing liability protection for manufacturers of lawful goods and services under certain circumstances.

ILR also supports the recently introduced Lawsuit Abuse Reduction Act (H.R. 4571). This legislation would curb frivolous lawsuits by strengthening the enforcement provisions of Rule 11 of the Federal Rules of Civil Procedures, *mandating* monetary sanctions against attorneys who file frivolous lawsuits.

Most importantly, the legislation would also prevent venue-shopping by requiring that civil litigation may only be filed in the state and county (or federal district) where the plaintiff resides, where the injury occurred, or in the state and county where the defendant's principal place of business is located. This provision is vital to stopping the surge in lawsuits being filed in certain "problem areas" of the country, such as Madison County, Illinois. In 1998 only two class actions were filed in Madison County courts. During 2003, however, 106 class actions were filed – an increase of more than 5,000 percent.

The provision would address one of the major problems in "jackpot jurisdictions" such as Madison County -- judges allowing cases to be heard that have little or no connection to the jurisdiction. For example, Madison County courts handed down a $250 million asbestos settlement to a man who was from Indiana and was allegedly injured in Indiana – with no connection whatsoever to Illinois.

The most recent ILR/Harris State Liability Systems Rankings Study illustrates how the problem of venue-shopping is drastically impacting the economies of states with poor legal climates. This study included a poll of a national sample of in-house general counsels and other senior litigators on how reasonable and fair the tort liability system is *perceived* to be by U.S. business. An overwhelming 80% of those surveyed in this year's poll reported that the litigation environment in a state could affect important business decisions at their company, such as where to locate or do business. That statistic does not bode well for poorly-ranked states looking to attract new jobs and improve economic development.

Lawyers from around the country flock to these local problem jurisdictions to file lawsuits against employers located across America. So while those courts are threatening local jobs, they're also having an impact on our entire nation's economic well-being. It is unacceptable that a handful of these problem courts are unfavorably deciding the fates of workers, businesses, and communities all over the country.

The Lawsuit Abuse Reduction Act would be a major step forward in bringing common sense and fairness back to the system by ending this rash of venue-shopping, putting teeth back into Rule 11, and drastically increasing the accountability of plaintiffs' attorneys.

There are obviously a variety of measures that can be taken to bring common sense and fairness to our civil justice system. But, while supporters of legal reform have

recipes for fixing America's legal crisis, opponents of reform are blocking our access to the kitchen. In other words, success depends on breaking the political logjam that has been placed in our way by the plaintiffs' bar.

In conclusion, it is imperative that we look beyond the mere rhetoric of legal reform opponents to see how excessive litigation is threatening the livelihoods of all Americans. Just look at the case of the Girl Scouts in Metro Detroit, who, according to a report by *The Detroit News,* are forced to sell 36,000 boxes of cookies each year just to pay for liability insurance. Former Girl Scout Laurie Super was quoted in *The New York Times* as saying, "it's getting harder to sell [cookies] ... Our local Wawa stores said they couldn't let the girls set up their booth anymore, because of liability issues."

The Girl Scouts. Big business? Not quite.

For these reasons, the U.S. Chamber Institute for Legal Reform strongly urges this Committee, as well as the full Congress, to continue their efforts to make our legal system simpler, fairer and faster for every individual, every family, and every employer throughout the country.

PREPARED STATEMENT OF AMERICAN MEDICAL ASSOCIATION

The American Medical Association (AMA) appreciates the opportunity to express its views on approaches to limiting lawsuit abuse and applauds the Chairman and the Committee for holding a hearing on this important issue. Medical liability reform is the AMA's number one legislative priority and limiting lawsuit abuse through the reduction of meritless claims would be an important step toward reducing the soaring medical liability premiums that many physicians are forced to pay.

Every time a lawsuit is filed, the physician and the physician's insurance company are forced to expend considerable resources to defend the suit regardless of whether or not the case actually has merit. Even though experts have found that nearly 70% of all lawsuits are dismissed before trial, the average cost to defend a claim that ultimately gets dropped or dismissed is approximately $24,669 per lawsuit.[1] For those cases that actually go to trial, including the 7% of claims that go to a jury verdict, physician defendants prevailed 82.4% of the time.[2] However, the cost to defend those cases averages $91,803.[3]

The costs add up significantly when nearly every physician in the U.S. can expect to be sued at some point in his or her career. A recent study of South Florida physicians found that physicians across all specialties were sued an average of 1.10 times during their career while physicians in high-risk specialties, such as neurosurgeons, were sued an average of 4.5 times during their careers.[4]

Findings have shown that approximately 80% of medical liability claims show no signs of a negligent injury.[5] One of the authors of the "Harvard Study," Troyen A. Brennan, along with two colleagues, conducted a follow-up study in 1996.[6] They found that the only significant predictor of payment to medical liability plaintiffs in the form of a jury verdict or a settlement was disability, and not the presence of an adverse event due to negligence.[7]

A Harris interactive study conducted in 2002 illustrates just how detrimental the litigious nature of our society is to physicians and other health care professionals. This study reveals the extent to which the fear of litigation affects the practice of medicine and the delivery of health care. Specifically, the study found that three-fourths (76%) of physicians believe that concern about medical liability litigation has negatively affected their ability to provide quality care in recent years.[8] Additionally, the study found that a majority of physicians (59%) believe that the fear of liability discourages open discussion and thinking about ways to reduce health care error.[9]

Physicians and their insurance companies are not the only ones paying the price for having to defend meritless lawsuits. The federal government has reported that:

> The cost of the excesses of the litigation system are reflected in the rapid increases in the cost of liability insurance coverage. Premiums are spiking across all specialties in 2002. When viewed alongside previous double-digit increases in 2000 and 2001, the new information further demonstrates that the litigation system is threatening health care quality for all Americans as well as raising the costs of health care for all Americans.[10]

Patients are further impacted when their access to critical services are reduced due to physicians paring back services or relocating their practices in order to avoid the high premiums required to insure themselves against medical liability claims. Additionally, in 2002, the American Hospital Association reported that more than one-fourth of the nation's hospitals reported either a curtailment or complete dis-

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[1] U.S. Department of Health and Human Services, July 24, 2002.

[2] PHYSICIAN INSURERS ASS'N OF AM., PIAA CLAIM TREND ANALYSIS: 2002 ed. (2003), exhibit 6a.

[3] Lori A. Bartholomew of PIAA, Remarks to the Am. Coll. Of Radiology (May 13, 2003).

[4] *Floridians for Quality Affordable Healthcare,* Physician Professional Liability Survey, December, 2002, Conducted by RCH Healthcare Advisors, LLP.

[5] *Id.*

[6] Troyen A. Brennan, Colin M. Sox & Helen R. Burstin, *Relation between Negligent Adverse Events and the Outcomes of Medical-Malpractice Litigation,* 335 N. ENG. J. MED. 1963 (1996).

[7] *Id.*

[8] HARRISINTERACTIVE INC., COMMON GOOD, COMMON GOOD FEAR OF LITIGATION STUDY: THE IMPACT ON MED. 65 (2002), *available at* http://ourcommongood.com/library/download/litrprt.pdf?item—id=10032 (last visited Feb. 12, 2004).

[9] *Id.*

[10] *See* OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING AND EVALUATION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., UPDATE ON THE MEDICAL LITIGATION CRISIS: NOT THE RESULT OF THE "INSURANCE CYCLE" (2002), *available at* http://heal-fl-health-carepdf.netcomsus.com/resources—update—report.doc (last visited Feb. 3, 2004).

continuation of at least one service as a result of liability premium expenses growing by over 100%.[11]

The crisis facing our nation's medical liability system has not waned—in fact, it is getting worse. Escalating jury awards and the high cost of defending against lawsuits, even meritless ones, have caused medical liability insurance premiums to reach unprecedented levels. Just recently, the AMA added another state, Massachusetts, to its list of states in crisis due to the effects of rising medical liability costs—putting the number at 20.

The AMA agrees with the findings of the Joint Economic Committee from its study in May 2003, where it stated that "reform of the medical liability system could yield significant benefits that could:

- Yield significant savings on health care spending;
- Reduce unnecessary tests and treatments motivated out of fear of litigation;
- Encourage systematic reform efforts to identify and reduce medical errors;
- Halt the exodus of doctors from high-litigation states and specialties;
- Improve access to health care, particularly benefiting women, low-income individuals and rural residents;
- Produce $12.1 billion to $19.5 billion in annual savings for the federal government; and
- Increase the number of Americans with health insurance by up to 3.9 million people."[12]

The AMA again thanks the Chairman for holding this hearing and looks forward to the opportunity to work with the Committee to identify new ways to reduce lawsuit abuse and to achieve these important goals for the country.

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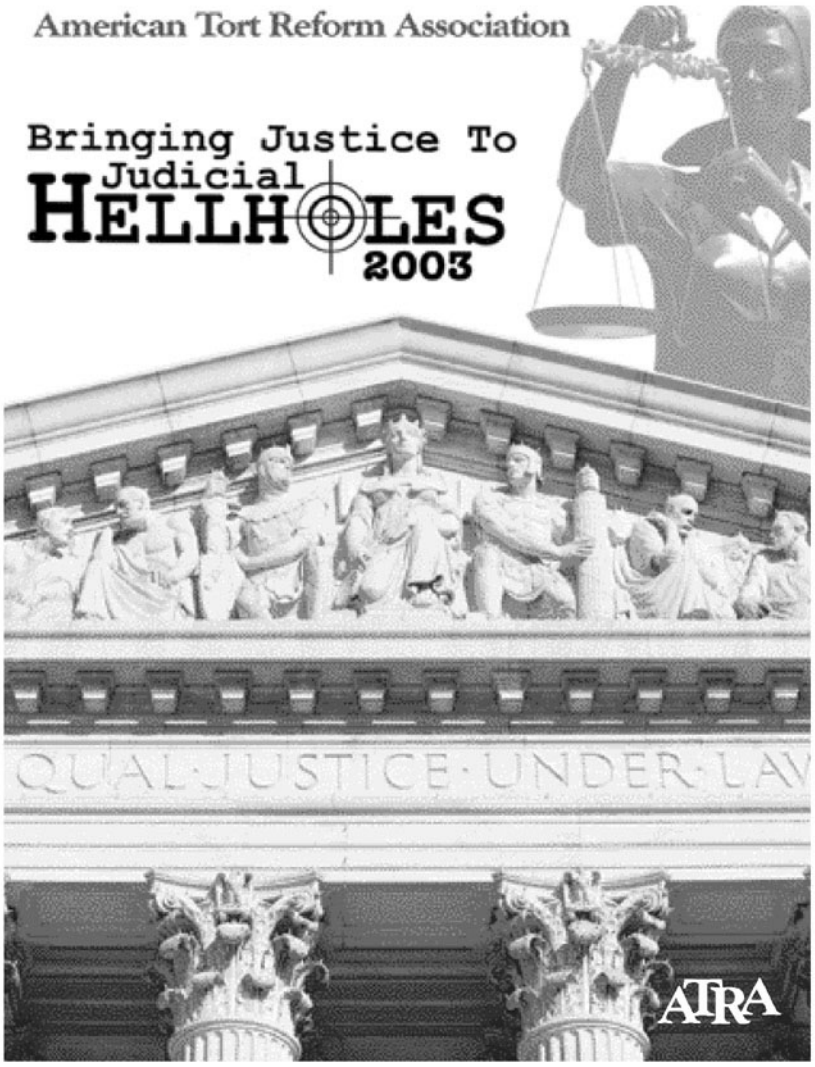
[11] American Hospital Association and the American Society of Hospital Risk Management study, statement by AHA before the Federal Trade Commission, September 9–10, 2002.

[12] LIABILITY FOR MEDICAL MALPRACTICE: ISSUES AND EVIDENCE, A Joint Economic Committee Study for the Joint Economic Committee, United States Congress, May 2003.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ATRA

Table of Contents

What I call the "magic jurisdiction,"...[is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're popul[ists]. They've got large populations of voters who are in on the deal, they're getting their [piece] in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money....These cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or law is.[1]

*— **Richard "Dickie" Scruggs**, trial lawyer, whose firm collected $1.4 billion in legal fees from tobacco settlements.*

Preface

This report presents the results of the second annual survey of the membership of the American Tort Reform Association ("ATRA") and serves to document litigation abuses that occur in jurisdictions identified by ATRA's members as "judicial hellholes." Judicial hellholes are places where court procedures and the law are systematically applied in an unfair and unbalanced manner against defendants. Often, plaintiffs' lawyers choose these jurisdictions to bring their cases because of their reputation for pro-plaintiff decisions and high verdicts, and their lower standards for the admissibility of expert testimony and the certification of class action lawsuits.

ATRA has identified many areas that might be considered judicial hellholes and chosen to focus on 13 cities, counties, or judicial districts that were most frequently identified by the respondents to ATRA's survey, and verified by independent research. We have collected anecdotal information and stories reported in the media to provide examples of the litigation abuses that occur in hellholes. We appreciate that there may be other jurisdictions that are judicial hellholes, and that there are additional examples of the litigation abuses in hellholes discussed in this report.

ATRA seeks fair and balanced application of the law so that all litigants can receive a fair trial. We wish to make clear at the outset that ATRA's judicial hellhole project is not an effort to obtain a special advantage for defendants in these areas. This report does not have as its focus the change of tort law, although there is certainly an important civil justice need and one that is the subject of a number of ATRA initiatives. In this report, ATRA's goal is to restore "Equal Justice Under Law," the motto etched on the façade of the Supreme Court of the United States, but sometimes forgotten in judicial hellholes.

This 2003 report incorporates a new section highlighting "points of light," recognizing judges and legislators whose recent actions may help quench the fire in judicial hellholes.

Identifying a problem can be useful in drawing attention to it, but to do so without offering any solutions does little to improve the situation. In the final section of this report, we suggest certain changes that can be made in judicial hellholes to restore fair and equal justice under the law.

ATRA welcomes information from readers with additional facts about the judicial hellholes identified in this report, as well as information about other jurisdictions where equal justice under law is denied in civil litigation. Please send such information to the attention of Michael Hoira, Director of Legislation and Communications, at mhotra@atra.org or write the American Tort Reform Association at 1101 Connecticut Avenue, N.W., Suite 400, Washington, D.C. 20036.

About the American Tort Reform Association

Founded in 1986, ATRA is a District of Columbia corporation designated by the Internal Revenue Service as a 501(c)(6) organization. ATRA has grown to become a broad-based, bipartisan coalition of more than three hundred large and small businesses, corporations, municipalities, associations, professional firms, nonprofit organizations, and physician groups that support civil justice reform. Its mission is to bring greater fairness, balance, and predictability to the civil justice system through public education and legislative reform.

ATRA monitors developments in tort law, supports legislation to further its mission, publishes reports, and submits *amicus* briefs to state and federal appellate courts when issues are relevant to its goals. The Association works with local and statewide grassroots citizen-activist groups around the country. ATRA publishes a weekly *Legislative Watch* that keeps its members apprised of tort reform initiatives at the state and federal level, as well as a bi-weekly *Leaders' Update* report to state tort reform organization leaders on current developments on civil justice issues. ATRA also hosts conferences at which coalition leaders meet to discuss past successes and future strategies in support of its goals.

For more information about ATRA, visit its website www.atra.org.

Executive Summary

"Judicial hellholes" are cities, counties, or judicial districts that attract lawsuits from around the nation or the region because they are correctly perceived as very plaintiff-friendly jurisdictions. They are places where the law is not applied evenhandedly to all litigants. In these areas, there is a systematic bias against defendants, particularly those located outside of the state. West Virginia State Supreme Court Justice Richard Neely candidly described one of the reasons behind this phenomenon in his recent book: "As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone's else money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me....It should be obvious that the in-state local plaintiff, his witnesses and his friends, can all vote for the judge, while the out-of-state defendants can't even be relied upon to send a campaign donation."[1]

ATRA has conducted a survey of its members to determine which areas they would identify as judicial hellholes based on their experience. ATRA interviewed individuals familiar with litigation in the hellholes in an effort to determine what makes each area a judicial hellhole, and to document the litigation abuses that occur in hellholes. ATRA conducted independent research of press accounts, studies, court dockets, and other publicly available information to verify and substantiate these claims. While high profile issues, such as medical malpractice, asbestos lawsuits, and class action abuse, dominate the headlines in some hellholes, we believe that such examples indicate a broader lack of fairness that is occurring in these courthouses. Any individual or employer has reason to fear a lack of due process if sued in a judicial hellhole.

This year, 13 areas were most frequently named by ATRA's members as judicial hellholes and supported by ATRA's study: 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. The following pages will highlight litigation abuses that have occurred in these areas and provide an explanation why these areas are considered judicial hellholes.

Judicial hellholes are sometimes referred to as "magnet courts" or even "magic jurisdictions" – magic in that they can seemingly pull million or billion dollar verdicts out of a hat and create causes of action previously unknown or procedural rules that are foreign to due process.

In addition to these 13 hellholes, the report also includes anecdotal information on three additional areas: Hampton County, South Carolina; the Northern Panhandle of the State of West Virginia; and appellate level courts in New Mexico. These areas are awarded a "dishonorable mention," as areas also named by several survey respondents as judicial hellholes, and this report highlights a particular abusive practice or warped litigation environment in these jurisdictions.

After pointing out the problems in hellhole jurisdictions, ATRA highlights "points of light"— places where judges and legislators have recently intervened to stem abusive practices. Such positive actions include the recent enactment of comprehensive tort reform in Texas, a package of tort reforms in Mississippi, and the stemming of forum shopping in Pennsylvania and West Virginia. It also includes the clamping down on the flood of mass joinders flowing into Jefferson County, Mississippi, by Judge Lamar Eckard.

The examples above illustrate, there are several reforms that judges and legislators can adopt to restore balance to judicial hellholes. First, ATRA supports the strengthening of venue and *forum non conveniens* laws. Venue laws determine the appropriate county within a state for a plaintiff to file a lawsuit. A fair venue rule would allow suits to be brought where the person lives, where he or she was injured, or where the defendant's principle place of business is located. The doctrine of *forum non conveniens*, a

related concept, allows a court in one state to dismiss a claim when the court finds that it would be more appropriately heard in another state. Likewise, courts should ensure that the doctrine of *forum non conveniens* is applied in a manner that requires a meaningful connection with a jurisdiction. Finally, Congress should enact the Class Action Fairness Act of 2003, which would provide some solace to those hauled into judicial hellholes that their case can be heard in a more neutral, federal forum, as envisioned by the Founders crafting of "diversity jurisdiction" of the federal courts. It is also important for courts to faithfully fulfill their "gatekeeping" role by ensuring that expert testimony is reliable and keeping "junk science" from the courtroom. Frequently overlooked is the importance of improving the jury system. The collective wisdom of a representative jury can provide the foundation for hearing and deciding cases in a fair and balanced way and help avoid outlier verdicts. ATRA encourages employers to adopt jury-friendly policies. The Association also supports legislation, such the model Jury Patriotism Act developed by the American Legislative Exchange Council, that is designed promote jury service and ensure that juries include the wide range of knowledge and experience of the community to make informed and fair decisions.

While legislation can help alleviate the problems identified in this report, one of the most effective ways to improve the litigation environment in hellhole jurisdictions is through the fair and full attention of the media and action by readers of this report. ATRA believes that by placing a spotlight on the litigation abuses that occur in hellholes, the public and the media can persuade the courts in hellholes to apply the law fairly to all litigants.

Introduction to Judicial Hellholes in the United States: Equal Justice Under Law?

There are very few institutions in America more hallowed than the judiciary. American courts are a place where truth is to be pursued, justice is to be blind, and the rights of the parties are to be protected. In many courtrooms throughout America, judges uphold these tenets and serve their communities proudly. Not so in judicial hellholes. In these courtrooms, as Dickie Scruggs pointed out in the remarkable moment of candor noted earlier, the notion that black robes and jury boxes create impartial judges and representative juries is a fallacy. What increasingly appears to be true, though, is that these jurisdictions have been targeted and cultivated as places where justice can be skewed by the plaintiffs' bar for its own benefit.[1]

What judicial hellholes have in common is that they systematically fail to adhere to core judicial tenets or principles of the law. They have strayed from the mission of being places where legitimate victims can seek compensation from those who caused their injuries. Weaknesses in evidence are routinely overcome by pre-trial and procedural rulings. Product identification and causation become "irrelevant because [they know] the jury will return a verdict in favor of the plaintiff."[2] Judges approve novel legal theories so that plaintiffs do not even have to be injured to receive "damages." Defendants are named not because they may be culpable, but because they have deep pockets or will be willing to settle at the threat of being subject to the jurisdiction. Not surprisingly, judicial hellholes have become magnets for personal injury cases against out-of-state employers, as plaintiffs' lawyers from around the country choose these jurisdictions to file their cases – especially when those cases are weak or speculative.

The purpose of ATRA's judicial hellholes initiative is to show the litigation abuses that occur in these jurisdictions. Our goal is to help change the litigation environment in these areas so that it is fair and balanced.

While some have suggested that entire states may be labeled hellholes, as respondents to ATRA's survey have demonstrated, it is usually only specific counties or courts in the state that deserve this title. This list is by no means exclusive or exhaustive. In many states, including some that have received national attention, the majority of the courts are good and the publicity is a result of a few bad apples. Because tort law is generally court-made, and judicial decisions are so determinative in the outcome of individual cases, it may only take one or two judges who stray from the law in a given jurisdiction to become a hellhole.

To the extent possible, ATRA has tried to be specific in explaining why defendants are unable to achieve fair trials within these jurisdictions. Because ATRA members may face lawsuits in these jurisdictions, some members were justifiably concerned about reprisals if their names and their cases were identified in this report – a sad commentary about the hellholes in and of themselves. This concern is not hypothetical or speculative. In June 2003, The Lakin Law Firm, which represents itself as the "Best Personal Injury Law Firm"[3] and is active in class action and asbestos litigation, sought to haul civil justice activists across the country into a Madison County court as a result of their advocacy. After a joint press event to discuss the unfair legal treatment that many civil litigants have received in Madison County, leaders of ATRA, the Illinois Civil Justice League, the Illinois Chamber of Commerce, and the U.S. Chamber of Commerce were subpoenaed in a class action product liability lawsuit, involving claims of defective automobile paint.[4] ATRA had no knowledge of facts of this case, which was totally unrelated to the press event. The subpoena served on ATRA sought to compel the organization to release confidential financial information and membership lists, and require it to either pay the travel expenses of appearing for a deposition in Madison County or the legal fees in fighting the subpoena. ATRA believes the purpose of the subpoena was to intimidate and silence ATRA and its right under the First Amendment of the U.S. Constitution to discuss why it believes Madison County is a judicial hellhole. ATRA filed a motion to quash the subpoena based on the violation of its fundamental rights of speech and association of ATRA and its members that would result from such an unconstitutional invasion,[5] and was prepared to file a

motion for sanctions against the plaintiffs' lawyers for their clear abuse of process in using the court's subpoena power for an ulterior purpose unrelated to the pending case.[8] Five weeks later, the law firm withdrew its subpoena, which ATRA views as a clear vindication of its rights and as confirmation that the subpoena had no ground to stand on in the first place.

Understandably, in an effort to respect the confidentiality of its members, ATRA has, therefore, relied primarily on news articles and other publicly-available sources to find representative examples of injustice in each hellhole. Citations for these sources can be found in the over 250 endnotes following this report.

Common Problems in Hellholes

Each hellhole section of this report contains unique decisions and verdicts, but there are common themes that bind these jurisdictions together. Some of these issues have been prevalent for years, while others are relatively new.

- *Forum Shopping:* As verdicts and settlements have increased dramatically, plaintiffs' lawyers from other jurisdictions around the country are finding it more lucrative to join with plaintiffs' lawyer in judicial hellholes and split the take, rather than file the cases on their own in their own area. This only exacerbates the problem. When local courts are burdened with too many out-of-state cases, they tend to shortcut the rights of the parties. The endless stream of cases that belong elsewhere into a local courthouse cause needless delays for proper cases brought by local residents and places an unfair burden of paying for the increase workload in the judicial system on local taxpayers, who effectively subsidize the processing of these out-of-state claims.
- *Improper Class Certifications:* Judges and trial lawyers in judicial hellholes know that when classes are certified, companies are under extraordinary pressure to succumb to "blackmail settlements"[9] regardless of the merits of the case. In some hellholes, judges are notorious for certifying classes that do not meet the criteria specifically laid out in the law: that the class is sufficiently large, that each class member's claims are based on a common question of law or fact, that the class representative's case is typical of the other class members and that there is a fair and adequate protection of class interests by the lawyers who have brought the class action.
- *Mass Actions:* Where class certification is not an option, the same dynamics can be achieved through mass joinders or consolidations, a tactic that has been used more frequently in recent years. In these instances, judges combine tens, hundreds, or even thousands of individual claims against various defendants into one mass trial in an effort to clear their dockets. The goal of mass actions is to force companies to settle, rather than have the cases determined on the merits. With so many plaintiffs and defendants, individual parties are deprived of their rights to have their cases fully and fairly heard by a jury.
- *The "Asbestos Exemption" from Actual Injury and Due Process Requirements:* It used to be that to sue in tort litigation, a plaintiff needed to be injured. Now, judges in judicial hellholes are allowing suits for "damages" where no injury or impairment exists. And plaintiffs are being allowed to recover for "fear" that they may become sick at a later date. Mass actions and expedited trials are especially prevalent in asbestos litigation, which encroach on the constitutional due process rights afforded to all.
- *Cozy Relationships:* It is becoming more and more clear that judges in judicial hellholes are elected of, by, and for plaintiffs' lawyers. While businesses are hauled into court all over the country, local trial lawyers work with the same judges year in and year out. In these hellholes, they contribute to their campaigns and routinely socialize with them.
- *Expedited Trials:* In some jurisdictions, courts schedule many trials on the same date, but then call few of those cases. This practice makes it difficult for a defendant to prepare its cases and pressures it to settle.

Of course, there are many other commonalities: the admission of "junk science;" the failure to dismiss frivolous claims; skyrocketing medical malpractice liability; and excessive verdicts that actually can reach into the billions. Judicial hellholes have earned their reputation because judges in these jurisdictions do not miss many opportunities to find for the plaintiffs…and their lawyers.

A Look Back: The 2002 Judicial Hellholes

In 2002, ATRA members named 11 areas most frequently as judicial hellholes: Alameda County, California; Los Angeles County, California (particularly, the Civil Central West Division); San Francisco County, California; Madison County, Illinois; Orleans Parish, Louisiana; Mississippi's 22nd Judicial District; the City of St. Louis, Missouri; Jefferson County, Texas; Hidalgo County, Texas; Nueces County, Texas; and Starr County, Texas. In addition, several counties in Alabama; Hampton County, South Carolina; and West Virginia were given a "dishonorable mention" as areas that have also been named as judicial hellholes by numer-

ous individuals with whom we spoke. ATRA's 2002 Judicial Hellholes report achieved its goal of shining light on the abuses of these jurisdictions. The report was covered in the national media as well as in local newspapers in many of the states containing judicial hellholes. ATRA's focus on the troubling practices of these courts and the difficulty in obtaining a fair trial was helpful to passage of tort reform in Mississippi and Texas, and medical liability and venue reform in West Virginia in 2002. For example, as the Dallas Morning News recognized, "[t]he shadow of Beaumont and other alleged 'hellholes,' including three other Texas counties, hovered over the Legislature this spring as lawmakers overhauled state tort laws."[3]

The 2003 Judicial Hellholes

This year, 13 areas were most frequently named by ATRA's members as judicial hellholes. Of these, eight areas are veteran hellholes of ATRA's 2002 survey, or "repeat offenders" (designated with an *). They are presented in this report and ranked based on the frequency by which they were named.

1. Madison County, Illinois*
2. Jefferson County, Texas*
3. Mississippi's 22nd Judicial Circuit (Copiah, Claiborne and Jefferson Counties)*
4. Hidalgo County, Texas*
5. Orleans Parish, Louisiana*
6. West Virginia, and particularly Kanawha County
7. Nueces County, Texas*
8. Los Angeles County, California*
9. Philadelphia Court of Common Pleas, Pennsylvania
10. Miami-Dade County, Florida
11. City of St. Louis, Missouri*

12 & 13. Holmes and Hinds Counties, Mississippi

In addition, Hampton County, South Carolina; the Northern Panhandle of West Virginia; and appellate courts in New Mexico are awarded a "dishonorable mention" as areas in order that have also been named as judicial hellholes by many individuals with whom we spoke.

This report highlights the litigation abuses that have occurred in these areas and provides an explanation as to why these jurisdictions are considered hellholes. It also considers "points of light," recent actions by judges and legislators that have sought to restore fairness and balance to the judicial system.

Madison County, Illinois

There is a reason that plaintiffs' lawyers throughout Illinois, and indeed the entire nation, flock to a courthouse in a small, rural county that covers just 725 square miles in southwest Illinois.

Follow the Personal Injury Lawyer Money

Some say, "follow the money."[4] The locally elected judges of the Circuit Court of Madison County receive at least three-quarters of their campaign funding from the lawyers who appear before them to represent plaintiffs in personal injury, class action, or medical malpractice cases.[5] While the answer may not be so simple, such contributions combined with the favorable rulings of the court and its willingness to hear cases that are seemingly beyond its jurisdiction is cause for at least a suspicious eyebrow.

The Jackpot Jurisdiction

Another reason may be Madison County's reputation for exorbitant awards. Not once, but twice, the Chicago Tribune crowned Madison County as a "jackpot jurisdiction."[6] As the newspaper recognized, "[t]he number of suits has shot through the roof, and local newspapers sport advertisements looking for the local plaintiff who can provide a convenient excuse to file in Edwardsville.... [T]he Madison County phenomenon also provides a dramatic illustration of the potential for poor public policy when things get carried away."[7] Even retired Madison County judge, John DeLaurenti, weighed in that it took Madison County four decades to earn its reputation, "but now, it is so big with so much money and potential influence on people's careers that is has become very difficult to limit it in any way."[8]

The Courthouse is Open for Business

Madison County judges are infamous for their willingness to take cases from across the country, with little or no local connection, and offer decisions that regulate entire industries nationwide. Through artful pleading, lawyers are skilled at stopping defense lawyers from moving their cases to a more neutral forum by including a named plaintiff from the defendant's home state or toying with the amount in controversy to defeat the requirements of federal diversity jurisdiction. Madison County's over-eagerness to hear cases from other parts of the state has even been criticized

by the Supreme Court of Illinois.[16] The most recent case to gain public scrutiny is *Gridley v. State Farm Mutual Automobile Insurance Co.*, a class-action suit over allegedly fraudulent practices stemming from the sale of a car in Louisiana to a Louisiana resident.[17] The Supreme Court of Illinois is expected to rule on whether the case is another instance of pure forum shopping that should be moved either to a more appropriate Illinois county or dismissed and sent back to Louisiana. Some believe that this case provides the Court with the opportunity to again express its frustration with the Madison County debacle and strengthen Illinois' rules regarding *forum non conveniens* – that is, the issue of where a case ought be filed and decided.[18]

Because the purpose of this report is to foster change, it is only fair to recognize when positive action takes place. During the writing of this report, Judge Byron, a Madison County Circuit Judge, fairly dismissed an action filed in Madison County under the *forum non conveniens* doctrine and directed the plaintiff back to his home state.[19] The dismissed case concerned a lifetime resident of Washington, who worked in Washington, and was allegedly exposed to asbestos and injured in Washington, received no medical treatment in Illinois, and had no witnesses to testify on his behalf in Illinois.[20] So, what was the plaintiff's connection with Illinois? A 10-day family vacation almost 50 years ago.[21] While it seems outrageous that the plaintiff's attorney even attempted to bring the case in Madison County it draws further attention to some trial attorneys' wild attempts to have their cases heard in Madison County. This report commends Judge Byron for his dismissal of the action, which thwarted the plaintiff's attorney attempt to present the case in an improper, but perhaps more profitable, jurisdiction.[22]

A "Class Action Paradise"

As class action lawsuits find their way to Madison County with increasing frequency, the county has become known by some as the "lawsuit capital of the world" and a "class-action paradise."[23] It recently earned its own segment on 20/20.[24] Indeed, Madison County experienced an extraordinary 2,050% increase in class action lawsuits in three years between 1998 and 2001, and the increase was expected to reach 3,850% by 2002.[25] Plaintiffs' lawyers know how easy it is to certify a nationwide class in Madison County, persuade the court to apply favorable law, and then extract a court-approved settlement that compensates the lawyers far in excess of the victims, who often receive no more than a "coupon recovery."[26] As legal ethics Professor Susan Koniak of Boston University School of Law observed, "Madison County judges are infamous for approving anything put before them, however unfair to the class or suggestive of collusion that is."[27]

Likewise, Benjamin N. Cardozo School of Law legal ethics Professor Lester Brickman concludes that "the rule of law has been displaced by the 'rule of class action lawyers.'"[28] The Supreme Court of Illinois recently took a small step forward to address class action abuse by changing its rules to allow a party to seek leave for an interlocutory appeal of class certification orders.[29] This change, which became effective in 2003 after millions of dollars in settlements and judgments,[30] is a positive first step, and more needs to be done to solve the substantial problem of forum shopping.

Locally elected judges in Madison County have, and continue to, set nationwide policy with respect to the insurance, communications, and various other industries. One recent example is a Madison County judge's approval of a $350 million settlement in a class action lawsuit against AT&T and Lucent in November 2002 that alleged customers were being billed to lease telephones at an exorbitant rate. Forty-four lawyers from four law firms who worked on the case will split $80 million of the settlement for legal fees and about $4 million for expenses. The customers, on whose behalf these lawyers brought the case, took an average loss of $6.49. They are eligible for a $15, $40, or $80 payment based in part on how long they paid to lease phones.[31]

Blockbuster seems to be a favorite target of class action lawyers. In 2001, lawyers filed a national class action lawsuit against the video renter in another judicial hellhole, Jefferson County, Texas, alleging that the company had charged excessive late fees.[32] Blockbuster thought this lawsuit was over when the court approved a settlement that provided customers with discount coupons for rentals, while their attorneys divided up a $9.25 million fee award.[33] But the sequel was yet to come. In April 2002, Blockbuster found itself subject to another nationwide class action lawsuit – this time in Madison County – alleging that the company was cheating members of its "rewards" program out of free rentals, which give one free rental for every five paid rentals. The lawsuit alleges that Blockbuster did not give customers credit for "re-rentals" – claiming that late charges on returns should be counted toward the program. An editorial in the *Belleville News-Democrat* declared that the pending lawsuit "is giving new meaning to the word 'frivolous.'"[34]

Asbestos Central

Asbestos cases, in particular, seem to find their way to Madison County Circuit Court at a surprising rate. Madison County (population 259,000) now hosts more mesothelioma claims than New York City (population 8,000,000), and a nine member law firm with one office in Madison County claims to handle more mesothelioma cases than any firm in the country.[35] Why? According to former U.S. Attorney

General Griffin Bell, it is because its judges accept cases from throughout the state and place them on extraordinarily expedited schedules that do not provide defendants with adequate time to prepare for trial.[36] With the deck heavily stacked in favor of plaintiffs, defendants are forced to settle, regardless of the merits. When such cases do make it to trial, the court does not permit defendants to introduce evidence that the plaintiff was exposed to asbestos at a job with, or by a product of, another company or that the plaintiff may have engaged in other activities that could have been responsible for the negative health effects. Given such a procedures, some may have foretold this year's $250 million verdict to a single plaintiff for his injuries from asbestos exposure,[37] or the $34.1 million dollar award to a single asbestos plaintiff in 2000.[38] At the time, the $34.1 million award was the largest asbestos verdict in Illinois history and one of the largest asbestos verdicts in the nation.

Appeal? That Will Be $12 Billion Dollars!

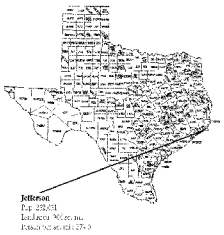
It almost cost a $12 billion bond to appeal an excessive verdict from a Madison County court.[39] First, Philip Morris was hit with a $10.1 billion verdict out of a nationwide class action alleging that the company defrauded "lights" smokers by suggesting to them Marlboro Lights and Cambridge Lights were actually less hazardous than their full-flavor brands.[40] Then, to add insult to injury, the company was ordered by the Madison County trial judge, Nicholas Byron, to post a $12 billion bond in order to stay enforcement of the judgment during appeal.[41] After lengthy hearings, Judge Byron decided instead to require the company to place a $6 billion note owed to the company, the $420 million annual interest the note generates, and an additional $800 million in cash payable in quarterly installments in an escrow account controlled by the court clerk.[42] Nevertheless, the plaintiffs' lawyers, unsatisfied that Philip Morris had escaped bankruptcy, appealed. The Illinois Fifth District Court of Appeals ruled that Judge Byron exceeded his authority by setting a bond lower than the amount of the judgment, plus interest and costs.[43] The Supreme Court of Illinois reinstated the $6 billion bond and took direct appeal.

And They Are Mad...

As fully discussed in the introductory pages of this report, some plaintiffs' lawyers are not happy that ATRA and others are documenting the litigation abuses occurring in Madison County. They are seeking to retaliate against nonprofit organizations and employers that advocate for civil justice reform. ATRA encourages its members and all those seeking justice and fairness, to not be intimidated by such attempts to stifle the freedom of speech and association upon which this country is founded.

Jefferson County (Beaumont), Texas

Refusing to accept a case in Jefferson County can get you killed. In an incredible and sad story, that is what happened to a well-respected plaintiffs' attorney when he declined to take an asbestos case and his distraught would-be client responded with a shotgun.[44]



Jefferson County, located in Southeast Texas, is known as a particularly plaintiff-friendly jurisdiction where "suing is one of Beaumont's biggest industries."[45] *The Austin American-Statesman* has recognized that "[o]ver the past few decades, personal injury lawyers have claimed this territory as their own, establishing Beaumont, Port Author, Orange, and nearby towns as an enclave where class-action lawsuits are pursued with a vengeance and juries often pass down sizable judgments."[46] As one defense lawyer who has tried cases in Jefferson County stated, "I'm not looking for a pro-defendant place…I just want a fair trial. I want the playing field to be level."[47]

Asbestos Lawsuit Magnet Court

Jefferson County is a magnet for asbestos claims. For instance, the list of active cases in the 58th and 172nd Civil District Courts, located in Jackson County, includes hundreds, perhaps thousands, of asbestos cases.[48] In order to address this situation, in 2003, the Senate State Affairs Committee approved a bill that would have provided for an inactive docket program and required that claims satisfy objective medical criteria.[49] Similar programs have proven successful in protecting the rights of those who are not sick to sue should they become ill, while keeping such claims from clogging the judicial system and preserving limited resources to compensate the truly sick. Unfortunately, despite several weeks of negotiation between the Texas Asbestos Consumers Coalition, the trial bar, and several Texas Senators, as well as Lieutenant Governor Dewhurst and Governor Perry, the asbestos reform bill failed to reach the 21 votes necessary for rule suspension and was not brought to a floor vote. As the Texas Legislature is now out-of-session until 2005, the asbestos litigation crisis is likely to continue in Jefferson County courts.

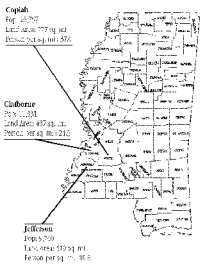
"The Barbary Coast of Class Action Litigation"

As ATRA recognized in its 2002 Judicial Hellholes report, Jefferson County, Texas, has also been called the "the Barbary Coast of class action litigation."[50] A recent study by the Manhattan Institute found that the number of class actions filed in Jefferson County nearly doubled between 1998 and 2000.[51] The same study also revealed that in class actions filed in Jefferson County between 1998 and 2001, only 13 of 173 defendants were based in Jefferson County, and only 64% of plaintiffs were county residents.[52] It is a place where entrepreneurial lawyers have sued out-of-state employers and profited from millions in legal fees, while their clients, most of which were located outside of Jefferson County and may not have even known about the lawsuit, received only coupons similar to that which one might clip from the Sunday newspaper.[53]

Doctors Flee from Rising Medical Malpractice Liability

As in other judicial hellholes such as Philadelphia, Pennsylvania, medical liability has caused insurance rates to soar, sending Jefferson County neurosurgeons, obstetricians, and other doctors fleeing the area.[54] According to a Texas Senate Committee study, jury awards in medical malpractice lawsuits tripled on average to $3.5 million from 1994 to 2000.[55] According to the Jefferson County Medical Society, more than half of doctors in Jefferson County saw their insurance rates increase by at least 55% between 1999 and 2002, with most medical malpractice insurance carriers leaving the Texas market altogether.[56]

22nd Judicial Circuit (Copiah, Claiborne & Jefferson Counties), Mississippi



Fayette, the county seat of Jefferson County, Mississippi, has the distinct privilege of holding the title of "jackpot justice capital of America."[57] It is a small, rural county where the number of plaintiffs rivals the number of residents.[58] The national media, including the *Los Angeles Times*,[59] *The New York Times*,[60] and the *Washington Times*,[61] have all recognized the Jefferson County phenomenon as a front-page story. In November of 2002, the popular news program, "*60 Minutes*," devoted a program to explaining why Mississippi's 22nd Judicial Circuit, which includes Copiah, Claiborne, and Jefferson County is a favorite place for plaintiffs' lawyers to flock from all over the Nation.[62] It is more than ironic after the airing of the *60 Minutes* program, Media General Operations, which owns the local CBS-affiliate, the *60 Minutes*' producers', and several individuals who commented in the program, found themselves named as defendants in a $6.4 billion defamation lawsuit in Jefferson County.[63] It is representative of the abuse that occurs in Jefferson County.

Anyone Can Sue in Jefferson County

Plaintiffs' lawyers routinely avoid federal diversity jurisdiction by naming a local company as a defendant, thus avoiding the complete diversity necessary to remove a case involving parties in different states to federal court. One small business, Bankston Drug Store, has been called "ground zero" in the pharmaceutical litigation business because, as the only pharmacy in Jefferson County, it has been named in hundreds of lawsuit alleging the defective manufacture of consumer prescription drugs in order to bring a large, out-of-state pharmaceutical company into local court.[64] The costs are real. As Ms. Bankston explained, "I've searched record after record and made copy after copy for use against me....I've had to hire personnel to watch the store while I was dragged into court on numerous occasions to testify. I have endured the whispers and questions of my customers and neighbors wondering what

we did to end up in court so often. And I have spent many sleepless nights wondering if my business would survive the tidal wave of lawsuits cresting over it."[75]

Extraordinary Verdicts Under Investigation

In recent years, the 22nd Judicial Circuit has handed out numerous awards of $100 million or more.[76] In fact, in June 2003, it was reported that the Federal Bureau of Investigation was probing possible judicial corruption in South Mississippi as well as these multimillion-dollar awards in Jefferson County.[77]

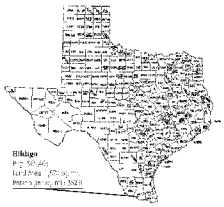
Unfairness in Mass Actions

Jefferson County's willingness to permit "mass joinders," which allow multiple plaintiffs with disparate injuries to join in a single case, may also be changing for the better. Mississippi is one of only two states that does not have a class action rule that requires at least some measure of factual and legal similarity between the claims at issue. Between 1999 and 2000, the number of mass actions in Jefferson County grew from 17 to 73. Many of these claims had no relation to Jefferson County, were brought by lawyers from all over the country against out-of-state employers, included one local defendant to avoid federal diversity jurisdiction, and were clearly stacked with plaintiffs, who may or may not have had a valid claim, in order to compel settlement.

Real Effects on Real People

The effects of lawsuit abuse on the people of Mississippi are significant. Mississippi's insurance commissioner says that 71 insurance companies have stopped doing business in the state, obstetricians are few and hard to find due to skyrocketing medical malpractice premiums, and thousands of jobs have been lost.[78]

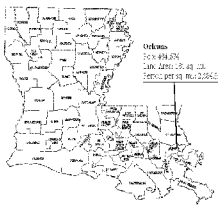
Hildalgo County, Texas



This year, the Hildago County District Courthouse was the setting for a plot almost sufficient for a TV movie involving conspiracy, theft, a plaintiffs' lawyer and a corrupt government employee. In January 2003, a federal jury convicted attorney W. Iassiter Holmes III of conspiring with then Hildago County district clerk Pauline Gonzalez, to backdate a medical malpractice claim that he filed in May 1999. Holmes placed the lawsuit in an envelope with a cancelled 1996 postage mark and filed it with Gonzalez, who stamped it as filed in 1996 so that Holmes could avoid the statute of limitations that would otherwise not permit him to file the lawsuit. Although Holmes made up a cockamamie story about the suit being filed in 1996, amended, lost, and found in 1998, expert testimony at the trial indicated that the watermark on the paper was not manufactured until 1997.[79] After three postponements, Holmes still awaits sentencing where he can face a $250,000 fine and as much as five years in prison.[80] Gonzalez, 75, was also accused of stealing $44,000 from her office, but has not gone to trial due to a serious illness.

While it is unlikely that this type of conspiracy is to blame for the county's legal woes, according to the Texas State Insurance Department, the rate of medical malpractice claims in the Rio Grande Valley are 211% above the statewide average. Malpractice premiums were among the highest in the nation resulting in many Hildago doctors to close down or flee the state. Dr. Frances Mitchell was forced to shut down her family practice, the only one in a small town on the banks of the Rio Grande, due to the tripling of insurance premiums. As she recalled, "It was extremely painful....There were grown men in my office in tears, who cried on my shoulder as I left. It was heartbreaking."[81] Dr. Mitchell is just one of the many doctors who cheered the passage of Proposition 12, discussed as a "point of light" later in this report.

Orleans Parish, Louisiana



Orleans Parish is the birthplace of million and billion dollar awards against those who have the misfortune of being sued there. It is a place where judges actually take photo ops with plaintiffs' lawyers and raise campaign donations at funerals, where mold litigation is becoming the new asbestos, and the threat of coming face-to-face with an angry jury and plaintiff-friendly court compels defendants to settle regardless of the merits.

Photo-Ops and Funeral Fundraising

The most blatant and widely-reported questionable conduct in the New Orleans Civil District Court involve Judge C. Hunter King. Judge King recently presided over a streetcar accident case with a whopping $51.4 million verdict, which appears likely to be a result of the strong passion of a jury confronted with a sad injury to a child, rather than a reflection of the defendant's responsibility for the harm.[73] Counsel for the girl's family consisted of local attorney Robert Harvey, Sr., a contributor to and lender for the judge's campaigns,[74] who brought in big-name attorney, Johnnie Cochran.[75] As jurors exited Judge King's courtroom after the astoundingly huge verdict, the hallway erupted into a "partylikeatmosphere" as the judge allowed jurors to pose for photographs with him and Cochran.[76] Press accounts suggested that the judge "managed to bring down the judiciary into a little more disrepute by posing for festive photographs," and that this behavior might in fact raise questions about his impartiality as the trial was going on.[77]

It gets worse. At a funeral, no less, Judge King sold $250-a-plate tickets for his personal campaign fundraiser.[78] According to press reports, he also forced his employees, on threat of losing their jobs or bucking up the money themselves, to sell twenty of the same $250 campaign tickets during their work hours.[79] The Honorable King then allegedly made good on his threat and fired his court reporter who did not make her sales quota.[80] Judge King stands accused of lying about his actions eighteen times in a sworn statement to the state Judiciary Commission, only to admit he was lying when confronted with audio tapes of his conversations with his staff.[81] When judges themselves lie in sworn statements, it does not send a good message for the value they place on the sanctity of the judicial process inside their courtrooms.

In Orleans Parish, Mold is Gold

While campaign tickets can rake in the money for Orleans Parish judges, mold is gold for Orleans Parish lawyers. Plaintiffs' class action lawyers hold the infamous mold, *Stachybotrys Chartarum*, to blame for what is now known as "sick building syndrome," which is blamed for every ailment from ear infections and headaches to memory loss and respiratory problems.[82] The problem is that the Center for Disease Control has not even linked this slimy black, often white-speckled, mold to the cause of any of these unique health conditions.[83]

Who is to blame for the allegedly toxic mold? Building owners? Contractors? Maintenance firms? Architects? Engineers? Landlords? Former owners? Plaintiffs' lawyers can and will slap any and all of the above with a toxic mold lawsuit.[84] Regarding the many unlucky possible defendants in any given toxic mold case, a New Orleans lawyer remarked "[i]f the case goes to the jury, the jury will throw up its hands and say everyone is responsible."[85] There have been no judicial decisions in Louisiana on toxic mold cases yet, but there are dozens of cases pending across the state and several high-profiles cases in Orleans Parish, and which, even if without merit, may have a settlement value in the millions.[86] The attorney for the plaintiffs in the largest of these cases has remarked, "I truly believe that this is going to replace the asbestos rage."[87]

Runaway Jury Awards Upheld

Defense attorneys in Orleans Parish are caught between a rock and a hard place. On the one hand, they are forced to defend cases in very unfriendly lower and appeals courts that are just looking for a reason to let plaintiffs win. On the other hand, the alternative – settlement – never even gives defendants a chance to reach the merits of their case. The juries are so hostile to defendants that even plaintiffs' attorneys in Orleans County recognize huge verdicts "reflect an angry jury."[87] Over and over again, defendants in "hellhole" jurisdictions have decided to bite the bullet and settle.

One example of the quandary defendants face is the case of *In re New Orleans Train Car Leakage Fire Litigation*.[88] In this case, over eight thousand plaintiffs joined in a class action lawsuit against CSX Transponation, Inc., AMF-BRD, Inc., Nova Chemicals, Inc. (Polysar), and six other companies, including Phillips Petroleum.[89] The plaintiffs claimed damages after they were forced to evacuate their homes when a railroad tank car leaked the chemical butadiene and caught fire, spreading smoke and ash over the plaintiffs'

neighborhood.[48] Fortunately, there were no injuries and the fire burned itself out after two days.[49] Nevertheless, the Orleans Parish jury found in favor of the plaintiffs and smacked CSX with $2.5 *billion* in punitive damages and four other defendants with a total of $865 million in punitive damages.[50] The trial court later reduced the punitive damages against CSX to $850 million.[51]

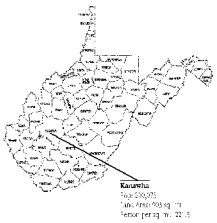
After defendants in Orleans Parish rise from the onslaught of angry jurors and judges at the civil district courts, they must face appellate court judges who affirm these lower court decisions. That is just what happened when Louisiana's Fourth Circuit Court of Appeal upheld the award against CSX, notwithstanding the trial court's constitutionally-suspect practice of awarding punitive damages after it had only determined compensatory damages of twenty of the eight thousand plus plaintiffs.[52] This procedure goes astray of the Supreme Court's due process requirement that punitive damages bear a reasonable relationship to the harm suffered.[53] To justify the huge award, the appellate court considered a parade of horrors of all the potential harm that could have happened, but did not happen, as a result of the gas leak, including "hundreds or even thousands of deaths and injuries [which] could have ensued."[54]

After learning of the appellate court's decision, CSX settled with the plaintiffs for $220 million, stopping short its appeal to the Louisiana Supreme Court.[55] Not too surprisingly for this "judicial hellhole," the judge set aside 40% of the $220 million judgment for the plaintiffs' attorneys.[56]

Want to Sue Exxon? Jump in Line!

Last year, this report featured a New Orleans case that was the second highest verdict awarded in the nation in 2001. In that case, a former Louisiana state court judge sued Exxon Mobil Corp. for leaving radioactivity on land involved in an oil-field pipe operation.[57] The jury awarded the former judge $145,000 for lost property value and $1 *billion* in punitive damages.[58] Following this extraordinary verdict, more Orleans Parish citizens have jumped in line to file suit against Exxon and other oil companies for contamination on the site, including at least seven class-action suits against Exxon, as well as a suit by five individuals who worked or resided in the area.[59] In fact, the day after the award against Exxon came down, eleven men who cleaned oil pipes in the area filed suit for damages for their fear of developing cancer and for medical monitoring.[60] Days after that, another woman filed a class action suit for contamination on her family's property.[61] Obviously, the 2001 decision was just the spark to a giant rush of litigation against oil companies in ultra plaintiff-friendly Orleans Parish.

West Virginia, particularly Kanawha County



One step forward, two steps back. That seems to be the situation in West Virginia, which repeats its distinction as the only statewide judicial hellhole in our survey. Litigation activity has increased 53.6% more rapidly in West Virginia than in the nation as a whole over the last ten years.[62] And when Harris Interactive ranked the nation's civil justice systems, West Virginia's ranked 49th.[63] Only Mississippi finished worse.[64] Due to the slew of tort reform measures Mississippi has since passed, West Virginians may no longer be able to say, "Thank goodness for Mississippi."[65]

West Virginia's capital county has become particularly well known for the insular nature of the legal community and the invention of judicial shortcuts and causes of action that result in million dollar damage awards for people who are not even injured. Within the last fifteen months, the local courts have received significant national attention for their "creativity" and "family ties," making them a bona fide "judicial hellhole."[66]

Instead of being a place where plaintiffs and defendants may each present their positions fully and fairly in having their disputes resolved by an impartial jury, Kanawha County turned its judicial system – with the help of the state's highest court– into a commodity business, akin to an ATM for claim filers.

Judicial Shortcuts Sidestep Due Process

The most glaring, high-profile shortcut in Kanawha County involves asbestos litigation. The County grabbed national headlines in the fall of 2002 when it consolidated into one mass trial more than 8,000 claims against more than 250 defendants.[67] These cases were hatched together despite the fact that they had nothing to with each other: they involved many different types of alleged injuries (including no injuries at all), were alleged to have occurred in places all over the country, and involved literally hundreds of different products. The only commonality of the claims was the word "asbestos," as the process abandoned traditional concepts of individualized proof that is the foundation of our fault-based tort system.[68] Writing separately upon the

West Virginia Supreme Court of Appeals' upholding of the trial court's consolidation, Justice Maynard expressed that he was "deeply concerned" regarding the trial court's practices and noted that the defendants had likely been denied due process for a myriad of reasons "and some federal court will eventually tell us so."[11]

The goal of the consolidation was never for justice to be done. It was to force settlement, despite the injustice. Not surprisingly, nearly all the claims settled, irrespective of their merits or the culpability of the defendants. When one company settled for about a quarter million dollars over a product still available in home improvement stores today, it considered it a major victory. At a forum hosted by the American Tort Reform Association, Fred Baron, former head of the Association of Trial Lawyers of America even admitted the consolidation was probably unfair.[13]

The Kanawha County Court took another ill advised shortcut for workers' compensation claims. Under workers' compensation, a company can only be sued directly if it deliberately intended to harm employees – a serious charge meant for the worst corporate actors. But to save time, the courts "constructively concluded" a local employer was guilty of "deliberate intent" and allowed direct suits to be filed without any hearing on the issue. The court said it was close enough that in a previous trial, a court found the company may have been negligent in contributing to a similar health hazard for some local contractors. As noted in an op-ed after the decision, the cases were "fundamentally different – from factual, legal and moral perspectives."[14]

Inventing Causes of Action

Kanawha County also received national attention for its "fear for cancer" cause of action, which allows people to collect damages even though they do not have the disease. The U.S. Supreme Court allowed the ruling to stand, saying the Federal Employees Liability Act, which was at issue in the case, did not preclude the Kanawha County Courts from allowing rail workers to recover "fear of cancer" damages in addition to the damages they received for other non-cancerous injuries.[16] In an unrelated decision, but one certain to affect future rulings in Kanawha County, the West Virginia Supreme Court continued its degradation of traditional tort law by allowing noninjured people to collect cash damages. In February 2003, the Court expounded on its creation of a "medical monitoring" cause of action, saying that people receiving "medical monitoring" damages could keep the cash and do not need to be monitored for any medical condition.[115]

Admittedly Pro-plaintiff

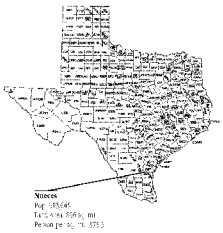
"I have a hard time not being lenient, as a jurist, on behalf of those people," current Chief Justice Larry Starcher has been quoted as saying.[16] That certainly explains why the Court ruled for the claimant in 434 of the 494 workers' compensation claims it accepted for review in 2002.[17] In 2002, the Court ruled that a man driving his family to church was within his scope of employment so he could collect from his employer's insurance company, that stress is compensable without a preceding physical incident, and that a worker can be awarded damages for "prolonged sitting."[18] Justice Starcher's statement may also explain the court's mass consolidation into one trial of the asbestos claims of some 8,000 plaintiffs (no one knows exactly how many) against 250 corporations, despite the utter lack of any similarity between the work sites, locations, diseases, and extent of injury of the plaintiffs.[15]

Family Affairs

Given the family ties between the local plaintiffs bar and those running the justice system in West Virginia's capital county, it is not likely that civil justice will be restored any time soon. Two of the more high profile family ties were profiled by the *Wall Street Journal* last year.[120] Most interesting is the marriage of Scot Segal, Kanawha County's top plaintiffs' lawyer, to Robin Davis, a Supreme Court Justice. She supported the new causes of action while her husband was the lead lawyer in a number of class action suits seeking those damages. Not surprisingly, he was also the lead plaintiffs' attorney in the mass consolidation of asbestos cases referenced above. The Segal-Davis 20,000 square-foot, $5 million estate was featured in *Southern Living* magazine.[12]

In addition, Supreme Court Justice Warren McGraw's son is a plaintiffs' lawyer who brought several medical monitoring cases with claims in the billions of dollars after his father authored a decision directly impacting those claims.[121] Justice McGraw's brother, Darrell V. McGraw, is the Attorney General who handpicked the lawyers (including Mr. Segal) who split $33.5 million in legal fees from the state's tobacco settlement. McGraw's own department kept just $714,635 in fees.[122]

Nueces County, Texas



On May 29, 2003, the Nueces County District Court had its busiest day in five years. Trial lawyers thought it might be the last chance to file medical malpractice lawsuits to avoid the limits on damages in legislation pending before the Texas Legislature.[24] It was akin to filing ones taxes on April 15. Their strong effort was in vain, since Texas's new medical malpractice statute did not take effect until July 1, but the situation does show how this county is one of the most litigious in the Lone Star State.

It is also one of the jurisdictions in which plaintiffs' lawyers like to forum shop. Every once in a while, they get caught going too far. Take the case of the Beaumont-based law firm of Provost & Umphrey, which represents hundreds of plaintiffs in asbestos cases pending in Nueces County. In late 2002, Texas Judge Nanette Hasette slapped it with $500,000 in sanctions for actions that threaten "the integrity of our judicial system."[25] According to press accounts, defense attorneys alleged that four, single-plaintiff asbestos lawsuits were filed in one hour in February in Nueces County.[26] Each complaint was identical and was filed against the same defendants. Then began the shell game. The first two cases were assigned to Judge Hasette, the third to Judge Jose Longoria, and the fourth to Judge Martha Huerta. The law firm then dismissed the case assigned to Judge Longoria. It amended the complaint assigned to Judge Huerta to include more than 300 plaintiffs and then moved to Judge Hasette's court, apparently because they felt she was a sympathetic judge. Apparently not. Judge Hasette was not amused by these antics and order the firm to pay individual filing fees and service costs for each of the plaintiffs named in the lawsuit, in addition to the $500,000 in sanctions. [27] The *Wall Street Journal* praised Judge Hasette for her "brave ruling" which imposed "normal judicial ethics" on one of the "kingpins of the trial bar."[28]

Los Angeles County, California – Central Civil West Division

How do you change an excessive award into one that is not unconstitutionally excessive? In Los Angeles County's Central Civil West Division, the answer is simple and can be accomplished quickly on any word processor. Either delete three of the zeros or change the letter "b" to the letter "m." Just following ATRA's release of the 2002 Judicial Hellholes report arrived the news of a $28 billion punitive damage award against Philip Morris to a single plaintiff, a 64-year-old former smoker. How did this court address the unbelievable jury award? Easy, the court reduced the $28 *billion* award to $28 *million*.[29]

A History of Astronomical Awards

The Central Civil West Division's reputation for high jury verdicts is well deserved. This jurisdiction is such a money-maker for plaintiffs' lawyers that it is known to them as "the Bank."[30] For instance, the $28 billion award comes on the heels of a $3 billion verdict in the Central Civil West Division to another single smoker in 2001, which was, at the time, one of the highest verdicts in history. [31] It also follows a $4.9 billion verdict against GM in 2000 involving the explosion of a Chevy Malibu, where the defense was not permitted to tell the jury that the driver who rear ended the car at over 70 miles per hour, was both speeding and drunk. [32] Meanwhile, the court allowed the plaintiffs' attorney to present testimony regarding GM's supposed lobbying to limit fuel-tank safety regulations, but did not permit the defense to present the testimony of "high-ranking former public servants" to rebut the plaintiff's testimony.[33] And we still remember the $760 million punitive damage award in a toxic pollution case in 1998, where the jury responded to a judge's call to "send a notice out to the world."[34] While each of these awards were reduced by a judge, the sheer magnitude of the amounts, even after the reduction, is cause for alarm.

Breaking the Bank

At this rate, the sum of verdicts coming out of the Central Civil West Division may exceed the total wealth of some small countries. The Bank clearly needs to hire a guard who will stop the looting and apply the law.

Philadelphia, Pennsylvania (Court of Common Pleas)

How much is a routine slip-and-fall case worth: $5,000, $25,000, $50,000? In Philadelphia's lawsuit lottery, tripping over a raised manhole cover in the parking lot of a major employer, Home Depot, is worth a cool $1 million. [35]

The impact of extraordinary awards is most noticed in the healthcare industry, where, according to *The Philadelphia Inquirer*, "hitting the 'malpractice lottery' is a made-for-Philadelphia phrase."[36]

The Focal Point for the Pennsylvania Medical Liability Insurance Crisis

According to a 2003 study by the Pew Charitable Trusts, which devotes an entire section to "The Special Case of Philadelphia," Pennsylvania has one of the worst situations in the nation in providing affordable liability insurance for physicians and hospitals. [37] The report shows that, in Philadelphia, plaintiffs are twice as likely to win jury trials as in the rest of the nation and a substantial percentage of cases result in verdicts greater than $1 million.[38] In fact, the median verdict in medical liability cases from 1994 through 2001 in Philadelphia county was $972,900, compared with $410,000 in the rest of the state, according to a representative of the Pennsylvania Medical Society.[39] In recent years, the amount of medical malpractice verdicts in Philadelphia (population 1.5 million) accounted for about 70% of the total in Pennsylvania (population 12.3 million).[40] According to one researcher, "between 1999 and 2001, Philadelphia courts returned verdicts of $1 million or more an average of 29 times a year, compared to an average 37 times a year in all of California" and plaintiffs won 44% of trials in Philadelphia compared to 20% nationally.[41] While some claim that the number of medical malpractice verdicts over $1 million has fallen in recent years in Philadelphia,[42] data also suggests that payments to settle malpractice cases continues to rise, with some insurers reporting record payouts, as doctors and hospitals fear risking trial.[43]

As a cardiologist who attended a rally to focus attention on rising premiums observed, "Talk to a doctor these days and you're likely to hear tales of misery."[44] Philadelphia obstetricians, with a median national compensation of about $210,000, must pay $150,000 per year in insurance costs – an amount that has doubled in the last three years. Highlyskilled surgeons who find themselves faced with $240,000 premiums in Philadelphia pack their bags for states where rates are substantially lower.[45] Hospitals also find themselves in a bind. The President of a major Pennsylvania hospital testified before Congress that medical liability costs at his hospital rose 133% between 2001 and 2003.[46] Speaking from his hospital's experience in getting hit with a $100 million award because the plaintiff's mother perceived the private-practice physicians who treated her infant to be employed by the hospital, the President questioned, "is it right to take $100 million out of the health care system and give it to one family – after the lawyers receive their 40 or more percent?"[47]

According to *The Patriot-News*, "while it is impossible to put numbers on the problem, anecdotal evidence suggests that skyrocketing insurance premiums have persuaded far too many physicians, especially those working in such specialties as obstetrics and neurosurgery, to retire early, move to another state, or give up practicing their specialty."[48] For those who continue to practice in Pennsylvania, the drastic increase in premiums may be negatively impacting the standard of care. According to a 2001 poll by the Pennsylvania Medical Society, 72% of doctors contacted said they did not hire staff or buy new equipment as a result of the sudden increase in their liability insurance.[49] The *Pittsburgh Post-Gazette* reported that Frankford Hospital's trauma unit in Philadelphia temporarily closed when its orthopedic surgeons decided to give up operating rather than renew their malpractice insurance.[50] Small business owners are concerned that they will need to drop or cut back health insurance for their employees, and the public is concerned that they will both have to pay more for heath care and have less access to doctors due to the liability crisis.[51]

Miami-Dade County, Florida

In recent weeks, a hotly contested debate concerning medical malpractice reform has grabbed headlines in Miami-Dade County.[58] But this newcomer to the judicial hellholes list has more problems than just skyrocketing medical malpractice rates.

Punitives to Plaintiffs With No Economic Harm

Just ask businesses such as Texaco Refining and Marketing. In July 2003, a Miami-Dade jury pummeled it with a $33.8 million punitive damages judgment.[59] This huge punitive award came *after* the jury had found the plaintiff had suffered no economic damages as a result of Texaco's actions.[60] This award appears unconstitutional in light of the recent U.S. Supreme Court ruling in *State Farm* v. *Campbell*, in which the Court ruled that a punitive damage award must have some relation to the size of the compensatory award.[61] The award is even more questionable considering the recent decision by Florida's Third District Court of Appeals, that in cases of fraud or where actual harm is an underlying element of the claim, the plaintiff must have actually suffered harm in order to receive punitive damages.[62] The Court of Appeals correctly reasoned that if no compensatory damages are awarded, it is impossible to measure what is a reasonable punitive award for the plaintiff's harm.[63]

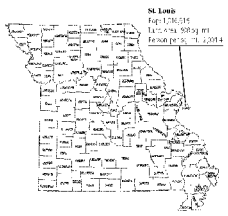
Remember Engle: Appellate Court Decision Overturns $145 Billion Award and Highlights Shoddy Legal Practices

This is the same "hellhole" responsible for the largest civil judgment in this country's history, *Engle* v. *RJ Reynolds*, a $145 *billion* punitive damage award to a class of approximately 700,000 Florida smokers against the tobacco industry back in 2000.[64] In a decisive ruling in May 2003, the Third District Court of Appeals scrapped the record breaking award based on a laundry list of egregious errors that occurred in the Miami-Dade Circuit Court trial.[65] The appellate court opinion is perhaps the most revealing of the kinds of antics that are going on in the Miami-Dade county courthouses. In their first move to strike down the colossal award, the appellate court rejected the class-action certification on the grounds that members of the proposed class did not have sufficiently similar claims to share a common trial.[66] The appellate court then held that an award that would result in bankrupting the defendants was excessive and in violation of federal and Florida law. In addition to violating both Federal and state law, the trial was conducted in an unconstitutional manner. According to the appellate court, the trial court essentially punished the defendants without first finding them guilty, in violation of their Due Process rights, when they allowed punitive damages to be awarded without establishing the defendant's fault and liability towards the individual plaintiffs.[67] While these are only a few of the grounds the appellate court relied on to reverse the outrageous verdict, perhaps the most telling was when the appellate court blamed the "'runaway' jury award" largely on the plaintiffs' counsel's outrageous use of inflammatory, racially-charged arguments and "racial pandering" throughout the trial and "incited the jury to disregard the law."[68]

Warning: Using a Cell Phone While Driving Can Lead to Million Dollar Verdicts

It is not just the jury verdicts that are making headlines, so are the kinds of suits being brought in the Miami-Dade courts. Miami-Dade in one of the first counties to try a case linking negligence in car accident cases with cell phone usage at the time of the crash.[69] It appears that the trial lawyers have found a willing jury pool in Miami-Dade for their new theory. By December 2002, there had already been two multi-million dollar verdicts based on the new theory. In one case, a jury awarded $21 million to a 74-year-old woman injured in a crash that occurred while the driver of the other car was talking on his cell phone.[70] In another similar trial shortly thereafter, a Miami-Dade jury awarded the widow of a 75-year-old man $5.2 million.[71]

City of St. Louis, Missouri



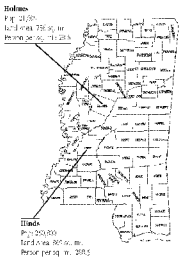
According to *Missouri Lawyers Weekly*'s annual survey, 2002 was a banner year for plaintiffs in Missouri.[166] The survey showed that even after taking out the top verdict, a $2.2 billion verdict against a pharmacist who diluted medications, the next nine highest verdicts of 2002 totaled a whopping $156 million compared with the relatively "paltry" $106 million total for 2001's top ten awards.[167] The infamous St. Louis City Circuit Court, which enters it second consecutive year as a judicial hellhole, awarded eight of the twenty-one highest plaintiffs' verdicts in Missouri (38%), a state made up of forty-five judicial circuits and two federal district courts.[168] It is also home to an even greater percentage of the highest settlements of 2002 – half.[169] Along with rising verdicts, the St. Louis City Circuit Court has seen a rise in personal injury / medical malpractice claims.[170] Between 2001 and 2002, there was a 9.1% increase in malpractice cases filed, with 1,207 malpractice defendants named in 231 cases compared with 1,090 malpractice defendants named in 214 cases filed in 2001.[171] This is a 13.7% rise from 2000.[172] In an October 30, 2002 hearing on professional liability insurance before the Missouri Department of Insurance, Dr. Erol Amon, the President of the St. Louis Metropolitan Medical Society, testified that many of these cases are not settled because of any legitimate malpractice that occurred, but for strictly economic reasons or the risk of being slapped with an even larger award in counties like pro-plaintiff St. Louis City.

It is no secret that St. Louis City Circuit Court "is the place to be" if you are a plaintiff.[173] Many lawyers view St. Louis judges and juries to be friendlier, even more generous to plaintiffs.[174] Plaintiffs move cases to St. Louis City because "St. Louis city is a better venue," said one St. Louis plaintiffs' attorney.[175] The Missouri Court of Appeals recognized that plaintiffs "pretensively" joined a company vice president responsible for finance for the purpose of obtaining venue in St. Louis City, and denied venue in one case.[176] Even Missouri Supreme Court Judge Michael Wolff has recognized that "[t]he preponderance of anecdotal evidence is that jurors in the city of St. Louis are far more favorably disposed toward injured plaintiffs' claims than are their counterparts in suburban St. Louis County or in most other counties in the state."[177]

The Missouri Supreme Court tried to stop forum shopping by ruling in October, 2001, that venue must be redetermined any time a plaintiff adds another defendant to a case.[178] This decision helps prevent plaintiffs from choosing the most friendly venue by filing a suit against an out of state defendant, and then after venue was determined to their liking, amending the original petition to include a Missouri resident.[179] Judge Wolff has also advocated merging the juror pool of St. Louis County with that of St. Louis City in an effort to end the major motivation behind city-county venue maneuvering and make the juror pool more representative of the community at large.[180] This sensible idea has not come about.

The good news for the unfortunate defendants that may find themselves in this judicial hellhole is that the national spotlight and criticism may be slowly having an impact. The St. Louis Post-Dispatch referenced ATRA's classification of St. Louis City Circuit Courts "among the nation's 'judicial hellholes' of 'litigation magnets,'" as making the need for reform "more urgent."[181] Unfortunately, until the litigation environment becomes more balanced, St. Louis City Circuit Court continues on the list of judicial hellholes.

Holmes & Hinds Counties, Mississippi



As discussed in the "points of light" section of this report, the number of mass actions filed in hellhole Jefferson County, Mississippi, has begun to recently taper off, a fact attributed to a change in direction by the county's sole civil judge, Judge Lamar Pickard. [84] The result is that some of these cases are flowing to other Mississippi counties, such as Holmes and Hinds Counties, which show a willingness to permit abusive practices.[85] These counties were named by respondents to ATRA's survey as emerging judicial hellholes.

Holmes County

Holmes County has a number of the problems endemic to judicial hellholes. Cases with little connection to the area end up in Holmes County. For example, it was reported that one recent lawsuit had only 1 plaintiff out of 22, and only 1 defendant out of 66, from Holmes County.[184] This is the perfect formula for avoiding the jurisdiction of the federal courts and keeping a case with little or no relation to Holmes County in the judicial hellhole.

Holmes County also appears to share injustice in asbestos litigation with its hellhole colleagues. In December 2001, a Holmes County jury awarded $25 million each to six plaintiffs, for a total of $150 million, who alleged they were exposed to asbestos at several workplaces in Mississippi.[185] Their claims came from exposure in different environments, ranging from schools to shipyards and industrial boiler rooms.[186]

Hinds County

In *Jacobellis* v. *Ohio* (1964), Justice Potter Stewart said that he could not define pornography, "[b]ut I know it when I see it."[187] Could the same not be said of frivolous lawsuits? Well, not in Hinds County. This year, a debate raged in the Hinds County Circuit Court as to what the legislature meant when it passed a law that "frivolous lawsuits" are subject to a $1,000 fine. In that case, the plaintiff, Edward Keszenheimer filed a $27.5 million lawsuit against his own attorneys, claiming legal malpractice after they only partially won his disability case. While the judge dismissed the lawsuit and assessed court costs against the plaintiff, it did not impose the fine, leaving judges and commentators question when an appropriate instance exists for use of the new law.[188]

Dishonorable Mention

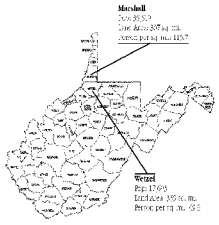
Some areas, although not the most frequently identified by respondents to ATRA's survey, are awarded a "dishonorable mention." This report highlights a particular abusive practice or warped litigation environment in these jurisdictions.

Hampton County, South Carolina

South Carolina law allows people to file an injury lawsuit against a company anywhere in the state in which it does business or owns property, regardless of where the plaintiff lives or was injured.[88] They choose Hampton County (pop. 20,000) for its reputation for high verdicts and friendly courts and juries, and have turned this county into a "litigation machine."[89][90] Corporations from around the state and nation are pulled into Hampton County.[91] A review of the Court of Common Pleas docket of cases set for jury trial over the next year include a substantial number of lawsuits against CSX Transportation, Inc., as well as several against other national companies, such as Monsanto, Ford, and General Motors, among others.[92] Although South Carolina allows courts to transfer cases when "there is reason to believe that a fair and impartial trial cannot be held" or "when the convenience of witnesses and the ends of justice would be promoted by the change,"[93] we are told by local attorneys that Hampton County judges, without fail, deny such motions, which are not appealable until after the conclusion of the trial.

A recent positive development is an April 2003 reversal of a Hampton County Circuit Court decision by the Supreme Court of South Carolina.[94] The Hampton County ruling would have allowed a nationwide class action against Monsanto to proceed despite a state law not permitting actions in state courts when the cause of action arose outside the state.[95] In a ruling that defies logic, the Hampton County court had found that since all of the class representatives were residents of South Carolina, the entire class, which might have included thousands of people from outside the state who could not have independently sued in the state, could sue in Hampton County.[96] Fortunately, the Supreme Court of South Carolina disagreed.[97] The Court's ruling may spare Hampton and other South Carolina counties from becoming the next Mecca of nationwide class action lawsuits. In addition, legislation pending in the South Carolina legislature would revise the state's venue law to allow claims against corporations (1) in the county of the corporation's principal place of business; or (2) in the county where the cause of action arose, and, (3) in the case of an out-of-state corporation, if neither (1) nor (2) applies, where the plaintiff resides.[98] Venue reform along these lines would help address the problem in Hampton County.

West Virginia's Northern Panhandle

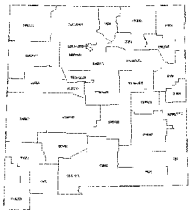


Recent lawsuits in West Virginia's Northern Panhandle, including Wetzel and Marshall Counties, have respondents to ATRA's survey on edge that, notwithstanding the entire state's designation as a judicial hellhole, justice in this region is becoming particularly difficult to find.

"Hog-tied in the middle of the courtroom" with "nowhere to run."[20] That's how one defense lawyer described his experience in a Wetzel County courtroom after the judge stripped the defendant of its right to present all of its possible defenses. The result – a $39 million verdict, including $34 million in punitive damages – the largest verdict by far in the county's history, one of the highest ever in the state, and one of the 100 largest in the country in 2002.[20] Could it be just a coincidence that the trial judge's greatest contributor was none other than the law firm that "won" the case?[22]

West Virginia has also become one of the first states in the nation to use its consumer protection statute to attack national major investment firms for allegedly providing overly optimistic advice.[23] State Attorney General Darrell McGraw chose to bring this lawsuit in the Marshall County Circuit Court, which has no apparent connection to the case, showing that even the state can forum shop, particularly when it is in bed with plaintiffs' lawyers. The attorney general is seeking fines of $300 million or more from the firms. If found liable, will the investors receive any of this reward? "It is possible," McGraw says, but obviously the motivation is a windfall for the state treasury and the benefit of the private attorneys hired to bring the case. In fact, the Attorney General handpicked private law firms to pursue these suits, without any open and competitive bidding or legislative approval, and they will profit more than the alleged victims. At least three of the four law firms involved were contributors to AG McGraw's recent election campaigns.[24]

New Mexico Appellate Decisions Raise Cause for Concern



Recent appellate level decisions in New Mexico have caused concern among survey respondents that justice in the state may be headed south.

Consider these facts. An individual brings his car to the shop for repairs. As instructed by the repair shop, he leaves his keys in the car. A criminal gains entry to the shop and steals the car. The next day, the thief, while being chased by police and driving at speeds of up to ninety miles per hour, crashes head-on into another vehicle, killing one occupant and severely injuring a passenger. Who is responsible for this accident: (A) the thief; (B) the police; (C) the owner of the stolen car; or (D) the repair shop? Believe it or not, according to the Supreme Court of New Mexico, if you guessed (C) or (D), you would be correct. In a May 2003 ruling, the court found that it is foreseeable that a car left unattended with its keys in the ignition will be stolen and used for joyriding, and that a police chase resulting in an accident is also a probable result of this chain of events.[25] Thus, one who owns or is in possession of a vehicle that is left with its keys can be held responsible for the independent actions of a criminal who is trying to evade the police and anyone hurt or killed in the process. You did not leave your keys in the car, did you?

Another expansion of liability came from the Supreme Court of New Mexico in March 2003, when it became the first state court to allow "unmarried cohabitants" to recover for loss of consortium. In that case, the male domestic partner suffered a back injury in a car accident.[26] His partner, whom he had lived with for many years and with whom he had three children, but never formally married, sought damages because their social and sexual relations had deteriorated after the accident. Ordinarily, loss of consortium damages can only be recovered by a person's spouse or the parents of a child. Nevertheless, instead of looking to whether the two partners were legally married at the time of the accident, the court extended the ability to receive loss of consortium damages to anyone with an "intimate familial relationship," which would be determined based on "a myriad of factors."[27] The court's opinion attempts to nar-

row the scope of this claim to people in committed and exclusive relationships that are living in what might be considered common law marriage, and recognizes that a defendant should not have the burden of "fighting off" multiple claims for loss of consortium.[19] However, the elimination of the marriage requirement opens the door to novel loss of consortium claims, which may be permitted by lower courts. This is a case where stretching legal principles to fit sympathetic facts makes bad law. ATRA is concerned with the expansion of liability in this area by the courts, and takes no position on the underlying social issue, which is a policy decision best considered by the state legislature.

The Supreme Court of New Mexico has another chance to expand liability in a case pending before it. In a February 2003 decision, the New Mexico Court of Appeals ruled that a third party who is injured in a car accident by an insured person can sue their insurance company if it does not "mediate, resolve, and settle" her action.[20] It did so, on the urging of the state's trial lawyer association, despite a compelling argument that the legislature consciously decided not to grant such a cause of action to third parties.[21] Under prior law, only the insured party could make such a claim. If the opinion is upheld, it may cause significant increases in automobile insurance premiums.

These recent appellate decisions raise cause for concern over how the courts will view further expansions of liability, such as in the class action litigation coming out of Santa Fe, New Mexico. "Modal" lawsuits,[22] have been called the "poster child for class-action abuse,"[23] and many would call frivolous.[24] In these suits, plaintiffs' lawyers claim insurance companies failed to adequately disclose an alleged "annual percentage rate" to policyholders who pay their premiums in installments rather than paying annually.[25] Insurers point out that the extra charge is a legitimate administrative fee because it costs more to process multiple checks than to process single yearly checks, that the rates are fully disclosed and approved by state regulators, and that policyholders can easily calculate their yearly rates by simple multiplication.[26] The lawyers walk away with millions of dollars in the bank, while their clients receive next to nothing or nothing at all.[27] As one policyholder remarked about yet another modal litigation case, "that's just another case where the lawyers made the money and the individual public citizens got nothing."[28] It is also an example of "regulation through litigation," where plaintiffs' lawyers are seeking to impose requirements that have never been sought by the New Mexico Insurance Division – a government agency with a statutory duty to ensure that consumers receive full and fair disclosure from insurers.

Points of Light

"Points of light" is a section that is new to ATRA's Judicial Hellhole's report. These are areas where judges and legislators recently intervened to stem abusive practices, providing a sense of hope that their respective courthouse, city, county, or state will emerge from the depths of its hellhole status.

Texas's Civil Justice Reform

The Texas Legislature reacted to the state's medical insurance crisis, and class action and general lawsuit abuse in jurisdictions such as Jefferson County, by passing the Texas Omnibus Civil Justice Reform Act of 2003, H.B. 4.[20] This comprehensive reform legislation provides meaningful reform in many areas, including products liability, class actions, proportionate responsibility, appeals bonds, and multi-district litigation. In addition to various other positive measures in the bill, the new law includes venue and "*forum non conveniens*" reform, which helps ensure that claims are brought in a county with a rational relationship to the lawsuit.

H.B. 4 provides great cause for optimism for restoring fairness to Texas courts. It is too early, however, to declare the problem fixed, as the new law will undoubtedly face constitutional challenges from the trial bar. A 1999 decision by the Texas Supreme Court, which upheld an amendment to Texas law that closed a loophole in its *forum non conveniens* statute that allowed thousands of out-of-state residents to clog Texas courts with asbestos claims,[21] is a good sign for the viability of H.B. 4. Just to be safe, on September 13, 2003, Texas voters passed a constitutional amendment, Proposition 12, that explicitly authorizes the Texas Legislature to limit noneconomic damages in medical liability and other cases. This Amendment should help avoid constitutional challenges to the noneconomic damages cap provided in H.B. 4, and may allow future reforms to avoid judicial nullification.[22]

Tort and Expert Testimony Reform in Mississippi

Although abuse remains prevalent in Jefferson, Holmes, and Hinds Counties, there is reason for hope that the situation will improve. On December 3, 2002, the Mississippi Legislature intervened and passed a broad tort reform package, H.B. 19, with the support of business, labor, and doctors.[23] The new law, which was signed by Governor Ronnie Musgrove and became effective on January 1, 2003, includes joint liability reform, a modest cap on punitive damages, and a limitation on duplicative recovery of "hedonic," or lost enjoyment of life, damages. The Act, also includes sections that limit advertising by out-of-state attorneys and authorizes the imposition of a small penalty for frivolous pleadings. It provides some protection for small businesses, such as the Bankston Drug Store, by providing that a defendant whose liability is based solely on its status as a product seller, may be dismissed from the action, so long as there is another defendant from whom the plaintiff may recover.

Following passage of the legislation, there was a rush on Mississippi courts by plaintiffs' lawyers to file thousands of "last-minute lawsuits" before the new law went into effect,[24] particularly in judicial hellholes Jefferson, Holmes, and Hinds counties.[25] While it may take a few years to get through all of the cases filed before the law went into effect, there are good signs that the new legislation is causing a "tremendous decrease in the number of cases filed..."[26] Just 100 civil cases have been filed in Jefferson County in the first nine months of 2003, compared to the 2002 total of 391 filings, while approximately 72 mass tort cases were filed in the first six months of 2003 compared to around 969 for the entire year of 2002.[27] There is no certainty that the decline in filings is due to the recent legislation and there are still several avenues that allow for lawsuit abuse under Mississippi law.[28] In addition, H.B. 19 unfortunately does not change Mississippi's "good-for-one, good-for-all" rule of civil procedure, which allows plaintiffs' attorneys to choose to bring a lawsuit in any county in the

state in which a single plaintiff resides, no matter the number of plaintiffs. Thus, mass joinders continue to loom large over the Mississippi legal landscape.

The Mississippi Supreme Court also deserves recognition for its recent action to clamp down on junk science in the courtroom. As early as 1961, Mississippi applied the *Frye* "general acceptance" test as the standard for the admissibility of expert testimony in the state's courts.[20] It continued to apply this standard even after the Supreme Court of the United States adopted the more rigorous *Daubert* test in 1993. In May 2003, the Mississippi Supreme Court amended Mississippi Rule of Evidence 702 to adopt the *Daubert* standard.

Judge Pickard Takes a Positive Step to CurtaiL Mass Action Abuse in Jefferson County, Mississippi

The number of mass actions filed in Jefferson County has begun to recently taper off, a fact attributed to a change in direction by the county's sole civil judge, Judge Lamar Pickard, in July 2001.[21] Judge Pickard deserves praise for his willingness to scrutinize his court's joinder practices and for reaching the conclusion that joinder is not proper "where you have different work sites, different defendants, different exposures, plaintiffs from different places and different injuries."[22] Since that time, Judge Pickard has reportedly only permitted joinder if all plaintiffs reside in Jefferson County.[23] The result is that smart plaintiffs lawyers are slowly moving into other Mississippi counties, which show a willingness to permit such practices.[24]

Venue Reform in West Virginia

The West Virginia state legislature deserves credit for closing West Virginia's loose venue law, which had allowed plaintiffs from around the nation to file suit in the state's plaintifffriendly courts. The 2003 law requires a person's alleged injury to occur in the state in order for them to file suit there.[25] Studies had shown that the average West Virginian was spending $997.96 each in an addition "tax" for the thousands of out-of-staters who filed lawsuits in West Virginia despite never stepping foot in the state.[26] Unfortunately, the legislature has done little to address the judicial system itself, which has been largely left unfettered and unchecked in its regular abuse of power.

Pennsylvania Takes Steps to Address Forum Shopping

In 2002, the Pennsylvania General Assembly took a laudable step to address forum shopping by strengthening the state's venue law to require medical malpractice lawsuits to be tried in the county in which the patient received care. Commentators hope that the new rules will "help end the all-too-common practice of plaintiffs suing defendants with peripheral involvement in a medical liability action merely because one defendant is in Philadelphia or some other 'jackpot' county."[27] Additional medical malpractice reform efforts in Pennsylvania face a major constitutional obstacle, as the Pennsylvania Constitution prohibits the General Assembly from placing limits on damages in personal injury lawsuits, except in workers' compensation cases.[28]

During the drafting of this report, it was reported that Philadelphia Common Pleas Judge Norman Ackerman began tossing out lawsuits by people from around the country, saying the claims should be dealt with in other states.[29] The ruling occurred in the cases of five plaintiffs from Washington, Hawaii, Missouri and Arizona, who said they suffered strokes after taking Alka-Seltzer Plus Cold medicine, allegedly due to a former ingredient in the popular pill. According to Judge Ackerman, who is chief of a special Philadelphia court that hears complicated product liability cases involving huge numbers of plaintiffs, "Most of those cases, like this one, involve out-of-state plaintiffs who chose to file [in Philadelphia] for no apparent reason other than the fact that their attorneys have their offices here."[30] Judge Ackerman's ruling may help stem forum shopping in the hundreds of other suits filed in Philadelphia's Complex Litigation Center.

Addressing the Problems in Hellholes

ATRA's hellholes initiative seeks not only to identify the problems in hellhole jurisdictions, but also to suggest ways in which to change the litigation environment so that these jurisdictions can shed the hellhole label and restore the fundamental concept of "Equal Justice Under Law."

Media Attention

Perhaps the best way in which to change the attitude in hellhole jurisdictions is for the media to help make the surrounding community aware of the litigation abuses in hellholes and the adverse effects of those abuses. By any measure, the 2002 report was a great success bringing to light the abuses in certain courts and branding these jurisdictions with a common name, "judicial hellholes." ATRA's survey was featured in reports by *USA Today*, *Business Week*, the *Financial Times*, the *Wall Street Journal*, the *National Law Journal*, *Baton Rouge Advocate* (La.), the *Times-Picayune* (La.), the *Belleville News-Democrat* (Ill.), the *Chicago Tribune* (Ill.), the *Pantagraph* (Ill.), the *St. Louis Post-Dispatch* (Mo.), the *Sun-Herald*, the *Dallas Morning News* (Tex.), and the *Charleston Gazette* (WVa.), among others. Public light and public pressure may inspire judges to become more evenhanded jurists; and the counties in which they sit may shed the title of judicial hellhole.

Venue and Forum non conveniens *Reform*

Venue and *forum non conveniens* are two concepts that relate to ensuring that lawsuits have a logical connection with the jurisdiction in which they are heard. Venue rules govern where, within a state, an action may be heard. As our hellhole examples demonstrate, certain areas in a state may be perceived by plaintiffs' attorneys as an advantageous place to have a trial. As a result, plaintiffs' attorneys may try to bring their claims there. A fair venue reform would require plaintiffs to bring their cases where they live or where they were injured, or where the defendant's principal place of business is located. This reform would help stop the forum-shopping that allows hellholes to become magnet jurisdictions.

Forum non conveniens, a related concept, allows a court to refuse to hear a case if there is a more appropriate forum in which the case could and should be heard. Although similar to venue, *forum non conveniens* contemplates that the more appropriate forum will be in another state, rather than in a different area of the same state. *Forum non conveniens* reform would oust a case brought in one jurisdiction where the plaintiff lives elsewhere, the injury arose elsewhere, and the facts of the case and witnesses are located elsewhere. By strengthening the rules governing venue and *forum non conveniens*, both legislatures (who pass the rules) and courts (who apply the rules) can ensure that the cases are heard in a court that has a logical connection to the claim, rather than a court that will produce the highest award for the plaintiff.

The Class Action Fairness Act

Class actions and mass joinders, when their abuse is permitted by the courts, allow plaintiffs' lawyers to bring hundreds or thousands of claimants together in a favorable state court, and put enormous pressure on defendants to settle even non-meritorious claims.[35] As this report goes to press, federal legislation, the Class Action Fairness Act of 2003, has passed the House of Representatives and awaits a floor vote in the United States Senate.[36] This legislation, if enacted into law, may help alleviate lawsuit abuse in such hellholes as Madison County, Illinois; Jefferson County, Mississippi; and Kanawha County, West Virginia.

The federal class action reform law, which would include mass actions within its scope, would allow a defendant to move these mass actions from state to federal court when a substantial percentage of the plaintiffs are not residents of the state in which they are filed. The legislation would authorize federal courts to exercise discretion over cases where 25%-75% of plaintiffs are from out-of-state. It would allow cases with 100 or less plaintiffs to remain in state court, however, which would continue to provide plaintiffs' lawyers with an opening to manipulate the system. In sum, the Class Action Fairness Act is positive legislation

that should be enacted by Congress now. It may help curtail class action and mass consolidation abuse, however, it leaves some opportunity for plaintiffs' lawyers to steer clear of their provisions.

Strengthening Rules on Expert Testimony

Junk science pushed by pseudo "experts" has tainted tort litigation for decades. The more complex the scientific matters, the more trials tend to be determined by which "experts" the jury likes the best or believes the most and not on the sound principles of science. Typical trial lawyer tactics are to use statistics and anecdotes to cover up the scientific flaws in their theories, use family doctors to testify on matters completely unrelated to their expertise and try unreliable scientific techniques to engineer studies in their favor.[58]

Large-scale injustice is the result. Contrary to in-court findings, it is now accepted scientific fact that silicon breast implants do not cause systematic disease, and there is no connection between Bendectin and birth defects. Another example is Dalkon Shield litigation, where the plaintiffs' experts "showed almost compete [sic] disregard for epidemiologic principles in its design, conduct, analysis and interpretation of results."[59] Nevertheless, billions of dollars were lost, products were taken off the market and thousands of innocent workers lost their jobs.

Ten years ago, the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[71] told courts that it was their responsibility to act as gatekeepers to ensure that junk science stays out of the courtroom. The *Daubert* standard provides that, in determining reliability, the court must engage in a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue."[72] In addition, when determining scientific reliability the trial judge should consider (1) whether the proffered knowledge can be or has been tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error, and (4) whether the theory or technique has gained general acceptance in the relevant scientific discipline.[60]

Still, twenty-two states have not adopted anything close to the *Daubert* principles.[61] Even in states where *Daubert* governs, some judges are not doing their jobs effectively, as they have difficulty distinguishing between real and fake science[62] – the same problems that juries have faced for years. By adopting *Daubert*, taking their gatekeeper roles seriously, and seeking competent independent science experts, judges can take more control over their courts and restore the essential burden on plaintiffs to prove causation in tort cases.

Encourage and Improve Jury Service

Litigators frequently observe that if juries included a fair share of business owners, professionals, and working Americans, then they would be more likely to reach well-reasoned decisions and there might be fewer excessive and bizarre verdicts. All of us must do our part to encourage jury service. Some employers may see jury service as a burden on their business. This attitude must change. Employers should adopt juror-friendly policies, such as continuing employee compensation during jury service and not penalizing employees by requiring them to use leave time to serve. Business owners and managers should lead by example by serving on juries themselves and encouraging their employees to serve.

While there are some steps that employers and citizens can take to promote jury service, there is also a need for legislative reform. Although Americans overwhelmingly support the jury system, many citizens fail to appear for jury duty when summoned or strive to get out of jury service once they enter the courthouse. Most of these individuals do not lack a sense of civic duty. Rather, they are discouraged from jury service by the hardship and headache imposed by antiquated systems that leave little or no flexibility as to the dates of service, require long terms of service, and allow for the possibility of service on a lengthy trial with no more than nominal compensation. Exemptions available to members of certain professions provide some privileged members of society with an easy way out of service, while loosely defined hardship exemptions provide many others with a means of escape. The result of many current jury laws is that many people cannot or will not serve. This leads to a jury pool that excludes the perspectives of many in the community.

The American Legislative Exchange Council (ALEC), the nation's largest bipartisan membership organization of state legislators, has developed model legislation, the Jury Patriotism Act, that addresses and breaks down each of the barriers to jury service. The Act increases the flexibility of jury service by providing an easy postponement procedure, guarantees that a juror who is not selected for trial on the first day of service would return to work by the next business day, and provides wage replacement or supplementation to those who are selected to serve on long trials through a fund financed by court filing fees. The model act

also makes it more difficult for citizens, particularly professionals, to avoid jury service by eliminating all automatic disqualifications or exemptions based on occupation, ensuring that only those who will experience true hardship will be excused from service. Legislation based on the model act was adopted in 2003 in Arizona, Louisiana, and Utah.[246] ATRA supports these reforms, which will make it easier for people of all backgrounds to participate in jury service and provide for more representative juries.

Addressing the Asbestos Crisis

Forum shopping, mass consolidations, expedited trials, multiple punitive damages awards against defendants for the same conduct, and the overall lack of due process afforded to defendants were issues repeatedly raised by respondents in the asbestos litigation context. The Supreme Court of the United States has described the litigation as a "crisis."[247] The number of asbestos cases pending nationwide doubled from 100,000 to more than 200,000 during the 1990s.[248] Ninety thousand new cases were filed in 2001 alone.[249] Most of these claimants are not sick and may never develop an asbestos-related disease.[250] These claims siphon limited resources away from those who need it most, while lawyers get rich off the litigation. Already, at least 67 companies have been driven into bankruptcy.[251] Plaintiffs' lawyers have responded by casting their litigation nets farther and wider. As a result, lawsuits are now piling up against companies with only a peripheral connection to the litigation, such as engineering and construction firms, and plant owners.[252]

Several state courts should be applauded for adopting trial plans that give priority to sick claimants. Some of these courts have adopted "inactive" or "deferred" docket plans, which place a lawsuit on inactive status until the plaintiff meets certain medical criteria. Boston, Chicago, and Baltimore were the first to adopt such plans in the late 1980s and early 1990s.[253] In the past two years, New York City, Syracuse, and Seattle followed.[254] Other jurisdictions have adopted innovative case management orders to simply dismiss claims of unimpaired plaintiffs without prejudice, with the understanding that they can re-file should they develop a disease.[255] The federal courts have also adopted a system to prioritize the claims of sick people.[256] Some courts also have adopted standing orders that sever claims for compensatory and punitive damages to ensure that limited resources go first to medical bills.[257] Each of these solutions protects those who have been exposed to asbestos by allowing them to bring a claim should they become ill in the future, while preserving resources for those who need it now. Other state courts should consider adopting similar practices.

The Supreme Court of the United States, lower court judges, commentators, and public policy organizations have repeatedly called on the United States Congress to address the asbestos litigation crisis. At the time of this writing, a the Fairness in Asbestos Injury Resolution Act ("FAIR Act") is awaiting a floor vote in the U.S. Senate, and has proceeded further than any asbestos bill in the past decade. That bill, which is sponsored by Senator Orrin G. Hatch (R-Utah), would establish a trust fund, financed by contributions from insurers and defendant companies, that would pay compensation to claimants who meet certain medical criteria. Senator Don Nickles (R-Oklahoma) has also introduced a bill with a more narrow approach. It would provide that courts must dismiss asbestos claims of those who do not meet a set of objective medical criteria until such time as they meet the standards provided in the legislation. Both approaches have merit and would greatly help curb out-of-control asbestos litigation, which is bad for those who are sick and for the Nation's economy.

Conclusion

The 2002 Judicial Hellholes report concluded, "Judicial hellholes do not need to remain hellholes." The litigation abuses highlighted in that report helped spur legislative and judicial interventions that provide reason for optimism that "equal justice under law" can be restored to those jurisdictions. Just as important, the 2002 report sent a message to hellhole jurisdictions: someone is watching. As this year's report shows, there is much work to be done, and state legislatures and courts can support the reforms suggested by ATRA above. Most importantly, individual judges should strive to improve the situation in judicial hellholes by applying existing law and procedural rules in a fair and evenhanded manner.

Endnotes

[1] *The Real Class Warfare: Predatory Class Action Lawsuits Drive Up Consumer Costs and Reduce Innovation*, <http://www.triallawyersinc.com/html/part04.html#notes> (quoting Richard Scruggs, Asbestos for Lunch, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), in Industry Commentary (Prudential Securities, Inc., N.Y., New York), June 11, 2002, at 5).

[2] Richard Neely, The Product Liability Mess: How Business can be Rescued From the Politics of State Courts 4, 62 (1998).

[3] *See* John Stossel, Commentary, *The Lawsuits of Madison County*, Sept. 5, 2003, *available at* <http://abcnews.go.com/sections/2020/GiveMeABreak/gmab_madisoncounty030905.html> (aired on 20/20 on Sept. 5, 2003).

[4] Medical Monitoring and Asbestos Litigation – A Discussion with Richard Scruggs and Victor Schwartz, 17 Mealey's Litig. Rep.: Asbestos, Mar. 1, 2002 at 1, 6.

[5] *See* <http://www.lakinlaw.com/> (referring to Sept. 21, 2001 article in the St. Louis Riverfront Times).

[6] Phillips v. Ford Motor Co., No. 99-L-1041 (Madison County Cir. Ct.).

[7] ATRA's motion to quash is available online at <http://www.atra.org/files.cgi/7589_motion.pdf.>

[8] Even the attorney who issued the subpoena admitted that his motives had nothing to do with the pending case: "My one and only goal in this action is to demand that these groups speak out, and fully and honestly disclose the membership of their organizations and who is paying for this multimillion-dollar public relations campaign." Brian Brueggmann, *Business Group Subpoenas Defended*, Belleville News-Democrat, July 2, 2003, *available at* 2003 WL 2461485 (quoting Bradley M. Lakin).

[9] *See in re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, J.), *cert. denied*, 516 U.S. 867 (1995).

[10] Terry Maxon, *Beaumont Known for Torts*, Dallas Morning News, July 20, 2003, *available at* <http://www.dallasnews.com/sharedcontent/dallas/tsw/stories/ 072003dnspobeaumont.58d51.html>.

[11] *See* John Stossel, Commentary, *The Lawsuits of Madison County*, Sept. 5, 2003, *available at* <http://abcnews.go.com/sections/2020/GiveMeABreak/gmab_madisoncounty030905.html> (aired on 20/20 on Sept. 5, 2003).

[12] See Illinois Lawsuit Abuse Watch & Illinois Civil Justice League, Justice for Sale: The Judges of Madison County 2 (2002), *available at* <http://www.atra.org/reports/IL_justice/report.pdf>; *see also* Mike Fitzgerald, *Where Money Talks*, Belleville News-Democrat, Oct. 5, 2003, at 1A (reporting that Madison County Judge, Nicholas Byron collected $10,000 in donations for his election campaign from among 18 others, the plaintiffs' attorney who won settlements in Madison County against Ameritech for $133 million, Lucent for $350 million, and the history making $10.1 billion verdict against Philip Morris USA); David Bailey, *Illinois County Court a Corporate "Hellhole,"* Reuters, Oct. 5, 2003 (quoting a retired Madison County Judge, "Eventually, because of the money created through the plaintiffs bar and the power that money brings, I believe there became and idea that the system was beholden to the plaintiffs bar.").

[13] *See* Editorial, *A Madison County Jackpot*, Chic. Trib., Apr. 2, 2003, at 22; Editorial, *The Judges of Madison County*, Chic. Trib. Sept. 6, 2002, at 22.

[14] *Id.*

[15] *See* Bailey, *supra* note 12.

[36] Both the Madison County Circuit Court and the Fifth District Court of Appeals have been reversed many times in cases in which they denied defendants' motions to transfer venue. In January 2002, the Supreme Court of Illinois counted fourteen cases since 1995 in which it ordered the Madison County Circuit Court to transfer venue. In another ten cases, the Supreme Court ordered the Fifth District to consider vacating its denial of a defendant's *forum non conveniens* motion. *See First Nat'l Bank v. Guerine*, 764 N.E.2d 54, 64-66 (Ill. 2002) (appendix).

[37] 767 N.E.2d 896 (Ill. App. Ct. 2002), *review granted*, 786 N.E.2d 183 (Ill. 2002).

[38] *See* Kevin McDermott, *Big Companies Aim to Dent County's Popularity as Venue for Lawsuits*, St. Louis Post-Dispatch, Sept. 14, 2003, at C9.

[39] *See Holbrook v. Genuine Parts Co.*, Judicial Order Granting Defendants Motion to Dismiss, No. 03-L-536 (Madison County Cir. Ct, Ill. Sept. 26, 2003).

[40] *See Motion to Dismiss of Defendant Genuine Parts Co., Holbrook v. Genuine Parts Co.*, No. 03-L-536, Exh. 2 at 88-89, lns. 21-23 (Madison County Cir. Ct., Ill.).

[41] *See id.*

[42] According to attorneys in Madison County, Judge Byron also recently warned that he does not want cases from across the country being brought to his court. We have also heard that Judge Byron is considering adopting an inactive docket program that would place the asbestos claims of those who are not injured on hold, which would allow limited resources to go to those who need it most. These actions are also worthy of praise and are positive signs for Madison County.

[43] *See* Brian Brueggemann, *Study: Metro-East is 'Lawsuit Capital of the World.'* Belleville News-Democrat, May 1, 2002, at 1B; Editorial, *Class-Action Paradise*, Belleville News-Democrat, Apr. 1, 2002, at 4A.

[44] *See* Stossel, *supra* note 11.

[45] *See* John H. Beisner & Jessica Davidson Miller, Manhattan Inst., Ctr. for Legal Pol'y, Class Action Magnet Courts: The Allure Intensifies 1 (July 2002), *available at* <http://www.manhattan-institute.org/cjr_05.pdf>.

[46] *See* Stossel, *supra* note 11 (discussing class action lawsuit filed against the phone company Ameritech in which the lawyers received $16 million and the clients on whose "behalf" they sued received checks for small amounts, with most receiving credits, discounts to rewire their house, and phone cards that gave them a maximum of $15 in calls – calls that had to be made at Ameritech's pay phones).

[47] *See* Adam Liptak, *Court has Dubious Record as a Class Action Leader*, N.Y. Times, Aug. 15, 2002, at A14.

[48] Lester Brickman, Manhattan Inst., Ctr. for Legal Pol'y, Anatomy of a Madison County (Illinois) Class Action: A Study of Pathology 47 (Aug. 2002), *available at* <http://www.manhattan-institute.org/cjr_06.pdf> (analyzing Schuppert v. Down, No. 00-L-223 (filed Mar. 10, 2000, settled Nov. 20, 2001).

[49] *See* Ill. S. Ct. Rule 306 (providing the Court of Appeals with discretion as to whether to hear an interlocutory appeal of a class certification order). A previous, more useful, version of the rule would have permitted appeal of a class certification order as a matter of right.

[50] *See* John H. Beisner et al., Manhattan Inst., Ctr. for Legal Pol'y, One Small Step for a County Court…One Giant Calamity for the National Legal System, Civil Justice Rep., No. 7, at 31 (Apr. 2003), *available at* <http://www.manhattan-institute.org/html/cjr_7.htm>.

[51] *See* Brian Brueggemann, *$350 Million Settlement Ok'd Against AT&T, Lucent: Lawsuit Based on Leased Phone Billings*, Belleville News-Democrat, Nov. 5, 2002, at 30.

[52] *Scott v. Blockbuster Inc.* (No. D162-535, Jefferson County, Tex. 2001).

[53] *See Judge OKs Blockbuster Plan on Fees*, Assoc. Press, Jan. 11, 2002; *see also* Notice of Proposed Settlement, available at <http://promo.blockbuster.com/default.asp?site=evf&page=settlement.html>; Blockbuster Settlement website maintained by Buchanan & Burke, LLP, <http://www.blockbustersettlement.com/>.

[54] *See* Editorial, *Frivolous Redefined*, Belleville News-Democrat, Apr. 30, 2002, at 4A.

[35] *See Asbestos Case Leads to $5.1 Million, Sanction*, NAT'L L.J., Dec. 2, 2002, at A4 (reporting on the Simmons Firm, http://www.simmonsfirm.com/attorneys_staff.html).

[36] *See* Griffin B. Bell, *Asbestos & the Sleeping Constitution*, 31 PEPPERDINE L. REV. — (forthcoming 2003) (providing transcript of April 5, 2003 Symposium on "Asbestos Litigation and Tort Law: Trends, Ethics, and Soultion").

[37] *See* Brian Brueggemann, *Man Awarded $250 Million in Cancer Case*, BELLEVILLE NEWS-DEMOCRAT, Mar. 29, 2003, at 40. The plaintiff was a 70-year-old Indiana man who was exposed to asbestos during his thirty-one year tenure at a Gary, Indiana steel mill. The case, which landed in Madison County because the plaintiff named several defendants located in Madison County that settled before trial, is believed to be one of the largest awards given to a single asbestos plaintiff and the largest award ever in Madison County. The parties subsequently settled for an undisclosed amount. *See U.S. Steel Settles Asbestos Lawsuit*, CHIC. DAILY HERALD, Apr. 1, 2003, at 1.

[38] At the time, the award was the largest asbestos verdict in Illinois history, and one of the largest asbestos verdicts in the nation. *See* Terry Hillig, *Record Verdict in Asbestos Case Pleases Man With Cancer: Madison County Jury Awards $34.1 Million; Shell Oil Plans Appeal*, ST. LOUIS POST DISPATCH, May 25, 2000, at C1.

[39] Ill. S. Ct. Rule 305(a) provides that in cases where the judgment is for money only, the enforcement of the judgment is stayed so long as the bond shall "is in an amount sufficient to cover the amount of the judgment, interest and costs."

[40] *See Price v. Philip Morris Inc.*, No. 00-L-112 (Cir. Ct. Madison County, Ill. Mar. 21, 2003), available at http://news.findlaw.com/hdocs/docs/tobacco/pricepm32103jud.pdf; *see also* Ameet Sachdev, *$10 Billion Smoking Judgment Philip Morris Deception Found Over Light Cigarettes*, CHI. TRIB., Mar. 22, 2003, at 1.

[41] *Id.*; *see also* Ameet Sachdev, *No Way, Firm Says of Bond of $12 Billion Philip Morris Raises Prospect of Bankruptcy*, CHI. TRIB., Mar. 25, 2003, at 1.

[42] *See Price v. Philip Morris Inc.*, No. 00-L-112 (Cir. Ct. Madison County, Ill. Apr. 14, 2003), *available at* <http://news.findlaw.com/hdocs/docs/tobacco/pricepm41403bo.pdf>; *see also* Susan Skiles Luke, *Philip Morris's Bond Cut; Ill. Judge Halves Order, to $6 Billion*, WASH. POST, Apr. 15, 2003, at E4.

[43] *See Price v. Philip Morris Inc.*, 793 N.E.2d 942 (Ill. App. Ct. 2003); *see also* John Schmeltzer, *$12 Billion, Then Philip Morris' Appeal; Judge Boosts Bond in 'Light' Lawsuit*, CHI. TRIB., Aug. 16, 2003, at 1.

[44] *See* David Pasztor, *As Quinn Laid to Rest, Mourners Contemplate Irony of His Slaying*, AUSTIN AM.-STATESMAN, June 16, 2002, at A1; Jim Suydam, *Beaumont Lawyer Shot at Work; 79-year-old Kills Noted Litigator Cris Quinn for Refusing Case, Police Say*, AUSTIN AM.-STATESMAN, June 14, 2002, at A1.

[45] *See* Terry Maxon, *Beaumont Known for Torts*, DALLAS MORNING NEWS, July 20, 2003, *available at* <http://www.dallasnews.com/sharedcontent/dallas/tsw/stories/072003dnspobeaumont.58d51.html>.

[46] Pasztor, *supra* note 44.

[47] Maxon, *supra* note 45 (quoting Terry Murphy, a Dallas County lawyer who has tried cases in Jefferson County).

[48] *See* <http://co.jefferson.tx.us/disterts/58th.htm> and <http://co.jefferson.tx.us/disterts/172nd.htm>.

[49] *See* S.B. 496, 108th Leg., Gen. Sess. (Tex. 2003).

[50] *See* Stuart Taylor, Jr., *How I Hit the Class Action Jackpot*, NAT'L L. J., Nov. 13, 1999, at 3292 (quoting Professor Lester Brickman of Cardozo Law School).

[51] *See* JOHN H. BEISNER & JESSICA DAVIDSON MILLER, CENTER FOR LEGAL & POL'Y AT THE MANHATTAN INST., CLASS ACTION MAGNET COURTS: THE ALLURE INTENSIFIES, Civil Justice Rep. No., at 185 (July 2002).

[52] *Id.* at 164.

[53] *See, e.g.*, *id.* at 189 (discussing the filing of a nationwide class action against Best Buy alleging that extended warranties on the computers purchased by the plaintiffs covered less than they expected when they purchased the warranties); *see also Blockbuster Customers to be Reimbursed for Late Fees*, ASSOC. PRESS NEWSWIRE, Jan. 11, 2002 (discussing the settlement of a nationwide class action lawsuit against Blockbuster on behalf of individuals who paid late fees, in which the plaintiffs received discount coupons on future purchases, while the law firms involved split $9.25 million in legal fees).

[54] *See, e.g.*, Andrea Wright, *Beaumont, Texas, Area Loses Doctors to High Cost of Malpractice Insurance*, KNIGHT-RIDDER TRIB. BUS. NEWS, Nov. 6, 2001.

[55] *See* Diana Reinhart, *Medical-Malpractice Insurance Costs Drive Specialists Out of Texas County*, KNIGHT RIDDER TRIB. BUS. NEWS, Jan. 3, 2003 (citing Texas Senator Jane Nelson (R-Lewisville), who chaired the committee that studied the issue).

[56] *See id.*

[57] Transcript, *Jackpot Justice*, 60 MINUTES, Nov. 25, 2002.

[58] *See* Robert Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001, at A1 ("Jefferson County, with 9,740 residents, is a small county, but litigation there is a big business. An affidavit…said that more than 21,000 people were plaintiffs in Jefferson County from 1995 to 2000.").

[59] *See* Ken Ellingwood, *Mississippi Curbs Big Jury Awards Caps on Liability Verdicts Are Seen as Pro-Business. Critics Say Companies Will be Less Accountable*, L.A. TIMES, Dec. 4, 2002, at A1.

[60] *See* Robert Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001, at A1.

[61] *See* Tim Lemke, *Best Place to Sue?*, WASH. TIMES, June 30, 2002, at A1.

[62] *Jackpot Justice*, *supra* note 57.

[63] *See Judge Dismisses Two Mississippi Defendants from "60 Minutes" Defamation Lawsuit*, MERCURY NEWS, July 3, 2003, *available at* <http://www.siliconvalley.com/mld/mercurynews/entertainment/television/ 6228349.htm>. The lawsuit was filed by two former jurors who were offended by the program. *See id.*

[64] *See* Jerry Mitchell, *Jefferson County Ground Zero for Cases*, CLARION-LEDGER, June 17, 2001, at A1.

[65] Tom Wilemon, *Judicial Probe Looking at Big Jury Awards*, SUN HERALD, July 12, 2003, *available at* <http://www.sunherald.com/mld/sunherald/6070078.htm>.

[66] *See* Betty Liu, *The Poor Southern County That's Big on Lawsuits*, FINANCIAL TIMES, Aug. 20, 2001, *available at* 2001 WL 25578228.

[67] *See* Wilemon, *supra* note 65; *see also* Tom Wilemon & Beth Musgrave, *Indictments Cast Doubt on Trial Lawyers. Mississippi Justice System*, SUN HERALD, July 26, 2003, *available at* 2003 WL 56832103.

[68] *See* George Will, *Placing Our Bets on the Tort Law Wheel*, FT. WORTH STAR-TELEGRAM, Sept. 29, 2002, at 6.

[69] *See* Rosanna Ruiz, *Lawyer is Convicted of Conspiracy; Suit was Backdated in Plot with Official*, HOUSTON CHRON., Jan. 18, 2003, at 37; *see also* U.S. Dep't of Justice, U.S. Attorney's Office, Southern Dist. of Tex., News Release, *Hidalgo County District Clerk and McAllen Attorney Indicted in Mail Fraud Scheme*, July 22, 2002, *available at* <http://www.usdoj.gov/usao/txs/releases/July%202002/020722-gonzalez.htm>.

[70] *See* Sarah Ovaska, *Judge Considers New Trial for Local Attorney. Pushes Back Sentencing*, THE MONITOR, Sept. 2, 2003, *available at* <http://www.themonitor.com/NewsPub/ News/Stories/2003/09/02/10625596112.shtml>.

[71] See James Pinkerton, *To Amend? Proposition 12 / Valley at Epicenter of Debate on Malpractice Caps*, HOUSTON CHRON., Aug. 26, 2003, at 1.

[72] *See* Susan Finch, *Girl Wins $51 Million in Streetcar Case; Contractor Faulted for Mangled Arm*, NEW ORLEANS TIMES-PICAYUNE, Aug. 29, 2003, at 1. In this sad case, a girl fell out of the window of a streetcar and as a result, her arm was mangled. The jurors bought Johnny Cochran's emotional appeal and dished out roughly the exact award he asked of them: $49.4 million for the girl, including $12 million for pain and suffering and $4 million for medical expenses; and $2 million to the girl's parents, even though the defense claimed the parents were not properly supervising their daughter. *See id.*

[73] Harvey's personal injury law firm appears to have contributed at least $5,000, and Harvey personally contributed $2,000, toward Judge King's campaign from 1999 to 2000. *See Campaign Fin. Disclosure Reports*, La. Bd. of Ethics (30 Days Prior to Primary Election Report) (07/16/1999-09/13/1999) [1999 Report], *available at* <http://www.ethics.state.la.us/cgi-bin/laimg/?118312>; *Campaign Fin. Disclosure Reports*, La. Bd. of Ethics (90 Days Prior to Election Report) (04/17/1999-07/15/1999), *available at* <http://www.ethics.state.la.us/cgi-bin/laimg/?118312> (the entity contributing the money is listed as Harvey & Jacobson, A PLC, and though Harvey's current practice is listed as Robert G. Harvey, A PLC, one of his prior firm names is listed as Harvey, Jacobson & Glaco, A PLC, on the Louisiana Secretary of State's website's listing of individual corporations, *available at* <http://www.sec.state.la.us/cgibin?rqstyp=crpdtl&rqsdta=34335422D>). Beside political contributions, the 1999 Disclosure Reports show Harvey loaned the judge $5,000, as did Harvey's wife. See Campaign Fin. Disclosure Reports, La. Bd. of Ethics (Supplemental Report/Registration Form) (10/31/1999-12/31/1999), *available at* <http://www.ethics.state.la.us/cgi-bin/laimg/?118312>. In August of 2002, the Disclosure Reports reflect Harvey and his wife together loaned the judge $10,000 at 12% interest, only to be repaid $13,000 that same day by the judge's campaign committee. *See Campaign Fin. Disclosure Reports*, La. Bd. of Ethics (30 Days Prior to Primary Election Report) (01/01/2002-08/26/2002), *available at* <http://www.ethics.state.la.us/cgi-bin/laimg/?118312>.

[74] *Id.*

[75] *Id.*

[76] *See* James Gill, *Photo Op: What's Wrong with this Picture?*, NEW ORLEANS TIMES-PICAYUNE, Sept. 10, 2002, at 7.

[77] *See* Gwen Filosa, *Judge Asks for 1-year Penalty; 'The Right Thing To Do,' King's Attorney Says*, NEW ORLEANS TIMES-PICAYUNE, June 14, 2003, at 1.

[78] *See* Gwen Filosa, *Court Rejects Judge's Offer; King Must Face Misconduct Hearing*, NEW ORLEANS TIMES-PICAYUNE, June 21, 2003, at 1; *see* Gwen Filosa, *Judge Tells Court he is Sorry; Louisiana Justices to Decide Penalty for Lies He Told*, NEW ORLEANS TIMES-PICAYUNE, Sept. 11, 2003, at 1.

[79] *See* Filosa, *supra*; *see also* Gwen Filosa, *Contrite Judge Seeks Second Chance; His Lawyers Argue for Suspension Only*, NEW ORLEANS TIMES-PICAYUNE, Sept. 10, 2003, at 1. Judge King explanation for his improper campaign actions was that he was under pressure to pay off campaign debts from his 1999 race because the "political establishment in this city…hated my guts." *See* Finch, *supra* note 72.

[80] *See* Filosa, *supra* note 78.

[81] *See* Greg Thomas, *Mold Excluded From La. Claims; Texas Suits Prompted Insurance Petition*, NEW ORLEANS TIMES-PICAYUNE, Feb. 22, 2002, at 1; Greg Thomas, *Mold Lawsuit Spawns Contempt Ruling; Judge Slams Tower Owners*, NEW ORLEANS TIMES-PICAYUNE, Mar. 16, 2002, at 1.

[82] *See* Greg Thomas, *Toxic Mold's Dangers Still Up in the Air*, NEW ORLEANS TIMES-PICAYUNE, June 16, 2002, at 6.

[83] *See* Greg Thomas, *La. Braces for Mold Lawsuits; Texas Already Tackling Issue*, NEW ORLEANS TIMES-PICAYUNE, May 18, 2002, at 1.

[84] *See id.*

[85] *See id.* A $1.1 million settlement in neighboring St. Bernard parish may indicate the likelihood of a push for defendants to settle toxic mold cases, rather than bringing the cases to justice in the courts. *See* Greg Thomas, *Mold Lawsuit Blazes Trail; But Settlement Fails to Clarify Issues*, NEW ORLEANS TIMES-PICAYUNE, Dec. 13, 2002, at 1.

[86] *See* Greg Thomas, *A Growing Concern: Mold is Nothing New in New Orleans, but a Toxic Version of the Fungi is Posing Fresh Challenges for the Real Estate Industry*, NEW ORLEANS TIMES-PICAYUNE, Nov. 11, 2001, at 1 (quoting Robert Creely, the attorney for the plaintiffs). The largest toxic mold case in Orleans Parish is a suit by dozens of state employees who worked in the Louisiana departments of Health, Hospitals, and Human Services against the building management company, its owners, an insurance company, and the state of Virginia. *See id.* Assistant district attorneys for Orleans Parish whose offices were in the building also have rushed to the courthouse to bring suit. *See id.*

[87] *See* Gwen Filosa, *Burned Woman Awarded $12 Million: Auto Maker, Driver Both Liable, Jury Says*, NEW ORLEANS TIMES-PICAYUNE, Mar. 14, 2002, at 1 (quoting the plaintiff's attorney after her client received a $12 million verdict against Ford).

[93] *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364 (La. Ct. App. 2001).

[97] *Id.* at 371.

[99] *Id.*

[91] *Id.*

[92] *Id.* at 372.

[93] *Id.* at 373. Prior to the trial court judge's rulings on post-trial motions, five out of the nine defendants settled for a total of $152.5 million, and Phillips Petroleum Co. settled for a whopping $62.5 million. *See* Susan Finch, *Battle Over Tank Car Fire Returns to Court Tuesday; Hearing to Decide Fairness of Settlement*, NEW ORLEANS TIMES-PICAYUNE, Mar. 30, 2002, at 1.

[94] *See In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d at 379, 398.

[95] *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996).

[96] *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d at 370. The appellate court's reasoning strays from the Supreme Court's guidance because it factored in all the harm that possibly could have happened, rather than only considering potential harm that was "likely to result" from the gas leak. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993).

[97] *See* Susan Finch, *Judge Approves CSX Settlement Amount; Firm Owned Track Where Fire Erupted*, NEW ORLEANS TIMES-PICAYUNE, Apr. 3, 2002, at 1.

[98] *See id.* The two remaining defendants are now negotiating with the plaintiffs. See id.

[97] *See* Sandra Barbier, *Family Awarded $1 Billion in Lawsuit: Exxon Mobil Hit for Radioactive Land*, NEW ORLEANS TIMES-PICAYUNE, May 23, 2001, at 1.

[100] *See id.*

[101] *See* Sandra Barbier, *Another Suit Filed Over Land in Harvey*, NEW ORLEANS TIMES-PICAYUNE, Mar. 19, 2002, at 1.

[102] *See* Sandra Barbier, *Ex-pipe Cleaners Suing Exxon: Lawsuit Comes after $1.06 Billion Ruling*, NEW ORLEANS TIMES-PICAYUNE, May 23, 2001, at 1.

[103] *See* Sandra Barbier, *Harvey Woman Alleges Exxon Contaminated Land: Property Value Hurt, Lawsuit Contends*, NEW ORLEANS TIMES-PICAYUNE, May 27, 2001, at 1.

[104] PERRYMAN STUDY, NEGATIVE IMPACT ON THE CURRENT CIVIL JUSTICE SYSTEM ON ECONOMIC ACTIVITY IN WEST VIRGINIA, (W.Va. Chamber of Commerce, Feb. 2003), *available at* <http://66.241.235.56/resources/>.

[105] HARRIS INTERACTIVE, U.S. CHAMBER OF COMMERCE, STATE LIABILITY SYSTEMS RANKING STUDY 9 (Jan. 2002), *available at* <http://66.241.235.56/resources/>.

[106] *See id.*

[107] Jack Bailey, *Lawsuit Climate Needs Help*, CHARLESTON DAILY MAIL, Jan. 9, 2003, at C1.

[108] Charles Lane, *Court Allows Suits Over Fear of Cancer; Workers Had Asbestos-Related Illness*, WASH. POST, Mar. 11, 2003, at A3; Robert S. Greenberger, *Case Study: Family Ties in West Virginia's Bar*, WALL ST. J., Nov. 15, 2002, at B1.

[109] *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419 (W.Va. 2002).

[110] JOHN H. BEISNER ET AL., CTR. FOR LEGAL POL'Y, MANHATTAN INST., ONE SMALL STEP FOR A COUNTY COURT…*ONE GIANT CALAMITY FOR THE NATIONAL LEGAL SYSTEM*, (Apr. 2003), *available at* <http://www.manhattan-institute.org/html/cjr_7.htm>.

[111] *State ex rel. Mobil Corp. v. Gaughan*, 565 S.E.2d 793, 794 (W.Va. 2002) (Maynard, J., concurring).

[112] ATRA Forum, Spring 2003.

[113] Brenda Nichols Harper, *W.Va. Courts Affect WVa. Jobs*, CHARLESTON DAILY MAIL, Jan. 18, 2003, at A5.

[114] *See Norfolk & Western Railway v. Ayers*, 123 S. Ct. 1210 (2003); *see also Justices Back Workers in W.Va. Asbestos Case; Supreme Court Says Fear of Cancer Enough*, ASSOC. PRESS, Mar. 10, 2003, *available at* 2003 WL 5450838.

[15] *In re W. Va. Rezulin Litig. and State v. Hutchison*, Nos. 30958, 30963, 2003 WL 21518104 (W.Va. Feb 26, 2003); Robert D. Mauk, Editorial, *McGraw Ruling Harms State's Reputation in Law*, CHARLESTON DAILY MAIL, Mar. 1, 2003, at A5.

[16] Court Watch, WEST VIRGINIA CHAMBER OF COMMERCE, July 2003, available at <http://www.wvchamber.com/Courtwatch%20July.pdf>.

[17] Robert D. Mauk, *Can't-say-no Courts Hurts Us All*, CHARLESTON DAILY MAIL, May 17, 2003, at A4.

[18] *Edwards v. Bestway Trucking*, 569 S.E.2d 443 (WVa. 2002) (Per Curiam).

[19] *See State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419 (W.Va. 2002).

[20] *See* Robert S. Greenberger, *Case Study: Family Ties in West Virginia's Bar*, WALL ST. J., Nov. 13, 2002, at B1.

[21] *See id.*

[22] Robert D. Mauk, Editorial, *McGraw Ruling Harms State's Reputation in Law*, CHARLESTON DAILY MAIL, Mar. 1, 2003, at A5.

[23] Cheryl Carlson, Editorial, *Our Grievances Pay Handsomely: Lawyer's Speaking on Citizens' Behalf Got $33.5 Million?*, CHARLESTON DAILY MAIL, Jul. 10, 2002, at A5.

[24] *See* Harvey Rice, *Rush to Beat Lawsuit Caps All for Naught*, HOUSTON CHRON., June 3, 2003, at 13.

[25] *News Roundup*, SAN ANTONIO EXPRESS-NEWS, Nov. 15, 2002, at 2B.

[26] *See Judge Orders Beaumont Law Firm to Pay $500,000*, ASSOC. PRESS NEWSWIRES, Nov. 14, 2002; Assoc. Press, *Beaumont Law Firm Must Pay $500,000*, HOUSTON CHRON., Nov. 15, 2002, at 38.

[27] *See* J.R. Gonzales, *Beaumont Firm Agrees To Filing Fees; Lawyers Accused of Shopping for Judge in Asbestos Cases*, CORPUS CHRISTI CALLER-TIMES, May 21, 2003, *available at* <http://www.caller.com/ccct/ local_news/article/0,1641,CCCT_811_1977745,00.html>.

[28] *See* Editorial, *Shopping for Justice*, WALL ST. J., Nov. 20, 2002, at A20.

[29] *See* Dan Ackman, In L.A., *Smoker Sets $28 Billion, Or, Million*, FORBES.COM, Dec. 19, 2002, <http://www.forbes.com/2002/12/19/cx_da_1219 top news.html>. (Check also supras).

[30] *See* Robert D. Crockett & Jonathan M. Jenkins, *Taking it to the Bank*, L.A. LAWYER, Sept. 2001, at 47.

[31] *See* Myron Levin & Dalondo Moultrie, *L.A. Jury Awards $3 Billion To Smoker Courts: Panel Orders Philip Morris to Pay Record Damages To Man With Incurable Cancer, Saying Firm Hid Risks*, L.A. TIMES, June 7, 2001, at A1.

[32] *See* Gary Gentile, *GM Appeals Billion-Dollar Verdict in Crash Case. Courts: Original Award Was a Record $4.9 Billion in the Fiery Malibu Accident*, ORANGE COUNTY REGISTER, Dec. 7, 2000, *available at* 2000 WL 29972745; Fred J. Hcistand, *Courts Out of Step With Common Sense*, BUS. PRESS (ONTARIO, CA), Mar. 6, 2000, at 27. The judge reduced the award to $1.09 billion. *See id.*

[33] *See* John H. Sullivan, Editorial, *Justice System Defective; Opportunity to Right a Wrong Missed By Judge Ruling on GM Damage Award*, L.A. DAILY NEWS, Sept. 2, 1999, at N1.

[34] *See* Kenneth Reich, *$700 Million Award May be Reduced Courts. Judge's Remarks in Lockheed Workers' Case Against Oil Firms May be Focus of Review, Experts Say*, L.A.TIMES, Aug. 10, 1998, at B1. The verdict was reduced to $380 million by the judge. *See Record $760 Million Lockheed Verdict Is Cut In Half By Superior Court Judge*, ORANGE COUNTY REGISTER, Nov. 19, 1998, at C4.

[35] *See* L. Stuart Ditzen, *Conflict Alleged in $1 Million Civil Suit; A N.E. Phila. Woman Slipped in a Store Parking Lot, Philadelphia Inquirer*, July 22, 2003, at B1. When the lawsuit was filed, the plaintiff sought only $50,000 in damages and reportedly considered settling the case for $40,000 after an arbitration panel awarded $25,000 in a non-binding proceeding. *See id.* The plaintiff rejected Home Depots final settlement offer of $32,000 million and deliberated only eight minutes before awarding $1 million. *See id.*

[36] Josh Goldstein, *Malpractice Lawsuits Thrive in City; Still, Few are Filed, and Few are Decided by a Jury*, PHILADELPHIA INQUIRER, Dec. 10, 2001, at A1.

[37] *See* RANDALL R. BOVBJERG & ANNA BARTOW, UNDERSTANDING PENNSYLVANIA'S MEDICAL MALPRACTICE CRISIS: FACTS ABOUT LIABILITY INSURANCE, THE LEGAL SYSTEM, AND HEALTH CARE IN PENNSYLVANIA (Pew Charitable Trusts 2003), *available at* <http://medliability-pa.org/research/report0603/>.

[38] *See id.* at 32.

[39] *See* Richard R. Kerr, *Philly, Northeast Pa Reeling from Practice Closings*, UROLOGY TIMES, Dec. 1, 2002, at 20 (quoting Chuck Moran).

[40] *See* David B. Caruso, *Lawyers May Find it Tougher to Seek Sympathetic City Juries*, ASSOC. PRESS, Nov. 7, 2002.

[41] *See id.* (citing Randall R. Bovbjerg, a researcher for Urban Institute).

[42] *See* Josh Goldstein, *Malpractice Issue May Not Be About Money, Study Says*, PHILADELPHIA INQUIRER, Feb. 3, 2002, at C1 (reporting that a study by Pennsylvania Judges John W. Herron and Albert W. Sheppard Jr. found that the number of malpractice jury awards over $1 million went down by one-third in 2001 over the previous year, yet noting that even with the reduction, Philadelphia malpractice awards and settlements still drastically overshadowed those from the rest of the state).

[43] *See* Josh Goldstein, *Medical Lawsuit Payouts Still High; Philadelphia Awards and Settlements Made up Nearly Half of the $348 Million Paid by a State Fund*, PHILADELPHIA INQUIRER, Sept. 22, 2002, at B1; Debbie Garlicki, *Trial Often "Tip of the Iceberg" in Medical Malpractice Cases, Jury Awards Don't Tell Story*, ALLENTOWN MORNING CALL, Apr. 1, 2002, at A1 (providing a list of high-profile medical malpractice settlements in Pennsylvania and around the nation).

[44] *See* Karl Stark, *More Doctors Using Insurer of Last Resort*, PHILADELPHIA INQUIRER, May 4, 2003, at E1.

[45] *See id.*

[46] *See* Before the Subcomm. on Labor, Health and Human Services, Education Comm. on Senate Approp., 108 Cong. (Jan. 30, 2003) (statement of Richard A. Anderson, President and Chief Executive Officer, St. Luke's Hospital & Health Network, Inc., Bethlehem, Pennsylvania); *see also* Tim Darragh, *Hospitals Insure Themselves; Many in Region Find Alternatives Because of Steep Rates, Difficulty in Getting Malpractice Coverage*, ALLENTOWN MORNING CALL, June 16, 2002, at A1 (reporting that "[m]alpractive premiums for all Pennsylvania hospitals already rose an estimated $180 million in the past year, as one insurer after another stopped doing business in the state after incurring enormous losses").

[47] *See* Statement of Mr. Anderson, *supra* note 145.

[48] Editorial, *Medical Crisis; Urgent Malpractice Insurance Issue Threatens Quality of Care in State*, PATRIOT-NEWS, Jan. 6, 2002, at B6 (recognizing that "Philadelphia, for reasons not entirely clear, has become renowned among trial lawyers for the generosity of its awards").

[49] *See* Jennifer Nejman, *Malpractice Debate Heats Up; Some Say the High Price of Liability Insurance is Pushing Doctors Out of Pa.*, YORK DAILY REC., Jan. 7, 2002, at A3.

[50] *See* Christopher Snowbeck, *Medical Malpractice Insurance Premiums Soar*, PITTSBURGH POST-GAZETTE, Jan. 21, 2001, at A13.

[51] *See* PENNSYLVANIA MALPRACTICE SURVEY (Pew Charitable Trusts 2002), *available at* <http://medliabilitypa.org/research/survey1002/>.

[52] *See* Mark Silva, *Voters Back Malpractice Caps the Governor's Push to Limit Awards in Lawsuits Has Strong Support in a Poll*, ORLANDO SENTINEL, Aug. 5, 2003, at A1; David Royse, *Doctors Ask for Malpractice Relief*, MIAMI HERALD, Mar. 28, 2003, *available at* <http://www.miami.com/mld/miamiherald/news/ state/5499379.htm>.

[53] Matthew Haggman, *Despite Lack of Compensatory Damages, Texaco Hit With $33.8M in Punitives*, BROWARD DAILY BUS. REV., July 3, 2003, at 1.

[54] *Id.*

[55] *See State Farm v. Campbell*, 123 S. Ct. 1513, 1519-20, 1521 (2003).

[56] *See Liggett Group Inc. v. Engle*, 853 So. 2d 434, 451 (Fla. Ct. App. May 21, 2003). The Engle decision is binding precedent on the Miami-Dade Circuit Court.

[57] *Id.*

[58] *See Engle v. RJ Reynolds Tobacco*, 2000 WL 33534572 (Fla. Cir. Ct. Nov. 6, 2000), rev'd, 853 So. 2d 434 (Fla. Ct. App. May 21, 2003); *see also* Susan R. Miller, *Now or Never, Dying Man Asks Court to Hear His Case Against Cigarette Makers Before Appeals Are Complete*, MIAMI DAILY BUS. REV., Mar. 27, 2002, at A8.

[59] *See generally Engle*, 853 So.2d 434; *see also* Jay Weaver, *Court Voids Big Smoking Case Award; Florida Appellate Judges Wipe Out $145 Billion in Punitive Damages*, MIAMI HERALD, May 22, 2003, at A1.

[60] *See Engle*, 853 So.2d at 446; *see also* Laurie Cunningham, *Process That Led to $145B Award in Tobacco Case Challenged Before Appeals Panel*, BROWARD DAILY BUS. REV., Nov. 7, 2002 at A1.

[61] *Engle*, 853 So.2d at 453-55.

[62] *See id.* at 458-62. Prior to the reversal of the $145 billion punitive damage award, a lone plaintiff in the class was awarded $37.5 million in a compensatory damages award. At the time, this was the highest compensatory verdict ever awarded in a tobacco lawsuit. *See* Jay Weaver, *Jury Awards Smoker $37.5 Million*, MIAMI HERALD, June 2, 2002, at A1.

[63] Matthew Haggman, *A Whopper of a Year: Shrugging Off Criticism That People Are Too Litigious, Florida Juries Last Year Produced Big Awards for Plaintiffs*, MIAMI DAILY BUS. REV., Dec. 16, 2002, at 6.

[64] *See id.*

[65] *See id.*

[66] *See* Missouri Lawyers Weekly, *Largest Verdicts & Settlements of 2002* (2003), *available at* <http://www.molawyersweekly.com/largverd_02.cfm>.

[67] *See id.*

[68] *See* Missouri Lawyers Weekly, *Largest Plaintiff's Verdicts of 2002 for Missouri* (2003), *available at* <http://www.missouri-law.com/top_verd_02.cfm>. The survey included data from state circuit courts and federal district courts and included verdicts awarded to individual plaintiffs or families for accidents before any review for remittitur. The survey does not include class actions or consolidated cases, uncontested verdicts, bench trials, or business versus business lawsuits. *See id.*

[69] See Missouri Lawyers Weekly, Largest Settlements of 2002 for Missouri (2003), available at <http://www.missourilaw.com/top_setl_02.cfm>.

[70] *See* OFFICE OF STATE COURTS ADMINISTRATOR, SUP. CT. OF MO., FY 2002 MISSOURI JUDICIAL REPORT AND SUPPLEMENT (July 1-June 30).

[71] *Id.*

[72] *Id.*

[73] *See* Roland Klose, *Venue's on the Menu For Lawyers Trying to Take a Bite of Doe Run. St. Louis is the Place to Be*, RIVERFRONT TIMES, Apr. 10, 2002, *available at* <http://www.riverfronttimes.com/issues/2002-04-10/news.html/Index.html>; Tim Bryant, *Question of Merging City, County Jury Pools is Revived; State Supreme Court Judge Suggested Move Last Year*, ST. LOUIS POST-DISPATCH, Nov. 27, 2002, at B1 (Discussing the suggestion by Missouri Supreme Court Judge Michael Wolff of joining the juror pools of St. Louis City and County because plaintiffs' lawyers are known for trying to get their personal injury cases into St. Louis City Circuit Court for a more sympathetic jury, to make the issue of venue less important).

[74] Klose, *supra* note 172.

[75] *Id.*

[76] The case was originally denied class certification in Jefferson County, after which, the plaintiffs dismissed the case without prejudice. The same day, the case was filed in the St. Louis City Circuit Court and in the third amended pleading, the plaintiffs added a resident of the City of St. Louis as a defendant. *See State ex rel. Doe Run Resources Corp. v. Neill*, No. ED81573, 2003 Mo. App. LEXIS 745 (Mo. Ct. App. May 20, 2003); *see also* Tim Bryant, *Judges Reject Trying Doe Run Lawsuits in St. Louis*, ST. LOUIS POST-DISPATCH, May 22, 2003, at B5.

[77] *See State ex rel. Linthicum*, 57 S.W3d 855, 859 (Mo. 2001) (Wolff, J., concurring in part, dissenting in part).

[78] *Id.* at 858.

[179] *Id.* at 857.

[180] *Id.* at 860, 862.

[181] Tim Bryant, *Question of Merging City, County Jury Pools Is Revived; State Supreme Court Judge Suggest Move Last Year*, ST. LOUIS POST-DISPATCH, Nov. 27, 2002, at B1.

[182] *See* Beisner, *supra* note 30, at 17.

[183] *See id.* at 30.

[184] *See* Becky Gillette, *Debate Heats Up With Unusual Coalition of Business, Labor, Doctors*, MISS. BUS. J., June 10-16, 2002 (citing Terry Carter, president of the Jackson County Chamber of Commerce).

[185] *See Mississippi Jury Awards $150M to Workers Exposed to Asbestos*, ASBESTOS. LITIG. REP., Dec. 13, 2001.

[186] *See id.*

[187] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

[188] *See* Jimmie E. Gates, *'Frivilous' Law Stirring Debate*, CLARION-LEDGER (Jackson, Miss.), Jan. 27, 2003, at 1.

[189] *See Thomas & Howard Co., Inc. v. Wetterau Inc.*, 353 S.E.2d 141 (S.C.,1987); *In re: Asbestosis Cases*, 266 S.E.2d 773 (1980).

[190] *See* Jim Duplessis, *Business Complains About Lawyers and Lawsuits are Older Than the State*, THE STATE (Columbia, S.C.), Jan. 12, 2003, at 4; Michael Freedman, *Home Court Advantage; How a Small-Town South Carolina Lawyer Instills Fear in Corporations Everywhere*, FORBES MAGAZINE, June 10, 2002, at 74.

[191] *See* Warren Wise, *Tort Reform Tops Agenda*, POST & COURIER (Charleston, S.C.), June 27, 2003, available at <http://ww.charleston.net/stories/062703/biz_27politics.shtml> (reporting on a lawsuit brought in Hampton County against a car manufacturer for head injuries suffered in an accident in Tennessee).

[192] *See* Hamilton County Clerk of Court, *Jury Case Roster Report*, June 16, 2003.

[193] S.C. Code Ann. § 15-7-100.

[194] *See Farmer v. Monsanto Corp.*, 579 S.E.2d 325 (S.C. 2003).

[195] *See id.* at 326 (citing S.C. Code Ann. § 15-5-150).

[196] *See id.* at 328.

[197] The South Carolina Supreme Court recognized that the state statute at issue had three important objectives: "1) it favors resident plaintiffs over nonresident plaintiffs; 2) it provides a forum for wrongs connected with the State while avoiding resolution of wrongs in which the State has little interest; and 3) it encourages activity and investment in the State by foreign corporations without subjecting them to litigation unrelated to their activity within the State." *See id.*

[198] *See* H. 3744/S. 446, 115th Sess. (S.C. 2003); S. 498, 115th Sess. (S.C. 2003).

[199] *See* Assoc. Press, *Supreme Court to Review $34 Million Award by Jury*, CHARLESTON DAILY MAIL, Sept. 11, 2003, at 6A. The case is on review before the state supreme court. *See id.*

[200] *See id.*

[201] According to public records, the Fitzsimmons law offices contributed $8,000 to Wetzel County Circuit Judge Mark Karl's campaign in 2000.

[202] *See* Toby Coleman, *State Sues Wall Street Firms, Attorney General Says Companies Gave Bad Advice*, CHARLESTON GAZETTE, June 25, 2003, at 1A.

[203] According to public records, the individuals associated with the law firms of Hill, Peterson, Carper, Bee & Deitzler , P.L.L.C.; DiTrapano, Barrett & DiPiero, P.L.L.C.; and Masters & Taylor, L.C., each of which is located in judicial hellhole Kanawha County, contributed several thousand dollars to McGraw's campaign fund between 1996 and 2001.

[204] *See Herrera v. Quality Pontiac*, 73 P.2d 181, 194 (N.M. 2003).

[205] *See Lozoya v. Sanchez*, 66 P.3d 948 (N.M. 2003).

[206] *See id.* at 957-58.

[207] *Id.* at 958.

[208] *See Hovet v. Lujan*, 66 P.3d 980 (N.M. Ct. App.), *cert. granted*, 66 P.3d 962 (2003).

[209] *See id.* at 985.

[210] These suits are dubbed "modal" litigation, since they stem from the fact that the represented consumers have paid more on their policies because they selected among different payment modes, such as quarterly or semi-annual installment payments.

[211] *See* Reynolds Holding, *Lawyer Gets Lion's Share in Class-Action*, SAN FRANCISCO CHRON., Feb. 18, 2001, at WB4.

[212] *See* Douglas G. Schneebeck, *"Modal" Insurance Premium Class Action Litigation: Coming to a Courthouse Near You*, INT'L ASS'N OF DEF. COUNSEL NEWSLETTER (Int'l Ass'n of Def. Counsel, Chicago, Ill.), Oct. 2002; Lawrence H. Mirel, *Plaintiff's Lawyers Have No Business Regulating Insurance*, 16 WASH. LEGAL FOUND., (Wash. Legal Found., Washington, D.C.), Apr. 6, 2001.

[213] *See id.*

[214] *See* Thomas J. Cole, *Lawyers Reap Millions in Suits Against Insurers*, ALBUQUERQUE J., Feb. 18, 2001, at A1.

[215] *See* Winthrop Quigley, *Insurance Firm Offers Settlement*, ALBUQUERQUE J., Sept. 26, 2002, at 1 (discussing settlement with John Hancock Financial Services in which policyholders will receive an extra $800 to $1,400 in life insurance, but the customers will have to die within a year to get the money, while plaintiffs' lawyers are expected to receive $8.9 million in fees and $95,000 in expenses); Assoc. Press, *Attorneys Getting Rich off Insurance Settlements*, SANTA FE NEW MEXICAN, Feb. 19, 2001, at A3 (discussing case against Primerica Insurance, where the lawyers walked away with $7.5 million, the two named policy holders with $30,000 each, and the rest of the class with no money at all); Beth Healy, *To Lawyer Go Spoils in Lawsuit While Attorney Nets $8M in Settlement, Clients Get $350,000*, BOSTON GLOBE, Jan. 25, 2001, at B1 (discussing proposed settlement with Massachusetts Mutual Life Insurance Company, where the plaintiffs' attorney would have received $5 million in attorney's fees, plus a hefty $3 million insurance policy, and a whopping $250,000 lifetime annuity, while five million former policyholders would receive nothing more than assurances of explicit disclosure of costs in the future); *see also* Bob Van Voris, *Lawyer Only One to Benefit from MassMutual Settlement. Since Dropped*, NAT'L L.J., Mar. 5, 2001.

[216] *See* ASSOC. PRESS, *Attorneys Getting Rich Off Insurance Settlements*, SANTA FE NEW MEXICAN, Feb. 19, 2001, at A3.

[217] H.B. 4, 78th Leg., Reg. Sess. (Tex. 2003).

[218] *See Owens Corning v. Carter*, 997 S.W.2d 560 (Tex. 1999). The 1997 law (S.B. 220, 75th Leg., Reg. Sess. (Tex. 1997)) was enacted to stem "forum shopping" from out-of-state plaintiffs in favorable Texas courts, such as those in Jefferson, Galveston, Harris, and Orange Counties, which had enabled thousands of out-of-state asbestos cases to siphon the resources of Texas trial courts. *See id.* at 565-66. The Texas Supreme Court's 2003 decision rejected a challenge from a group of Alabama residents, a positive ruling against the trend of judicial nullification of state civil justice reform laws. Nevertheless, some Texas courts, including those in Jefferson County, have resisted dismissing the cases of nonresidents, even when required to do so by the 1997 Act. *See E.I. Du Pont De Nemours & Co.*, 92 S.W.3d 517 (Tex. 2002) (ruling that trial courts in Jefferson and Orange County abused their discretion when they refused to dismiss the asbestos claims of 8,000 plaintiffs on the grounds that the claims arose outside of Texas at a time when the plaintiffs were not residents of Texas).

[219] Laylan Copelin & David Pasztor, *Limits on Damages Narrowly Approved Voters OK Proposition 12, All Other Amendments to Texas Constitution*, AUSTIN AMERICAN-STATESMAN, Sept. 14, 2003, at A1.

[220] *See* Gillette, *supra* note 183.

[221] *See* Jimmie E. Gates, *Caps Prompt Lawsuit Blitz*, CLARION-LEDGER (Jackson, Miss.), Jan. 1, 2003, at 1.

[222] *See* Assoc. Press, *Some Counties See Late Rush of Lawsuits*, SUN HERALD (Biloxi, Miss.), Dec. 31, 2002, at 3.

[223] *See* Matt Volz, *Jefferson County Lawsuit Filings Are Down*, ASSOC. PRESS, Oct. 5, 2003.

[224] *Id.*

[125] *Id.*

[126] *See Mattox v. State*, 128 So. 2d 368, 372-73 (Miss. 1961).

[127] *See* Beisner, *supra* note 30, at 17.

[128] *Id.* (quoting statement of J. Lamar Pickard, Tr. of Mot. Hearing at 9-10, Conway v. Hopeman Bros. (Cir. Ct. Jefferson County, Miss. July 25, 2001).

[129] *See id.*

[130] *See id.* at 30.

[131] *S.B. 213*, Reg. Sess. (WVa. 2003) (codified at W. Va Code Ann. § 56-1-1 (2003)).

[132] Perryman Study, Negative Impact on the Current Civil Justice System on Economic Activity in West Virginia 9 (W. Va. Chamber of Commerce, Feb. 2003), *available at* <http://66.241.235.56/resources/>.

[133] Andrew R. Rogoff & Imiebihoro T. Ahonkhai, *Impact of Venue and Certificate of Merit Reform*, Physician's News Digest, June 2003, *available at* <http://www.physiciansnews.com/law/603rogoff.htm>.

[134] Pa. Const. Art. 3, § 11 provides that, with the exception of workers' compensation laws, "the General Assembly [shall not] limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries…"

[135] *See* Assoc. Press, *Alka-Seltzer Suit Thrown Out*, Oct. 1, 2003.

[136] *See id.*

[137] *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, J.), *cert. denied*, 516 U.S. 867 (1995).

[138] The Class Action Fairness Act (H.R. 1115 / S. 274) passed the House of Representatives by a vote of 253-170 on June 12, 2003. Reports indicate that the Senate will vote upon the bill in October 2003 and the bill has a substantial chance of passage.

[139] *See* David J. Damiani, *Proposals for Reform in the Evaluation of Expert Testimony in Pharmaceutical Mass Tort Cases*, 13 Alb. L.J. Sci. & Tech. 517, 526 (2003).

[140] *Id.* at 527-28.

[141] *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993).

[142] *Id.* at 593-94.

[143] *See id.* at 593-95.

[144] Some of these states, such as Alabama, California, Florida, and Illinois, continue to apply the less rigorous Frye "general acceptance" test, which the federal courts abandoned with the adoption of the *Daubert* standard in 1993. *See, e.g., Courtaulds Fibers, Inc. v. Long*, 779 So. 2d 198 (Ala. 2000); *People v. Leahy*, 882 P.2d 321 (Cal. 1994); Flanagan v. State, *625 So. 2d 827 (Fla. 1993).; Donaldson v. Ill. Pub. Serv. Co.*, 767 N.E.2d 314 (Ill. 2002). Other states apply their own standard to determine the admissibility of expert testimony. *See, e.g., In re Robert R.*, 531 S.E.2d 301, 303 (S.C. 2000).

[145] Kathleen Burge, *Science of Evidence Puts Judges to the Test*, Boston Globe, May 19, 2002, at B1.

[146] More information and the text of the model legislation is available on ALEC's website, www.alec.org.

[147] *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

[148] *See* The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. on the Judiciary, 106th Cong. 4 (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School).

[149] Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A1.

[24] *See* JENNIFER BIGGS *ET AL.*, OVERVIEW OF ASBESTOS ISSUES AND TRENDS 3 (Dec. 2001), *available at* <http://www.actuary.org/mono.htm> [hereinafter Biggs]; STEPHEN CARROLL *ET AL.*, ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT 20 (RAND Inst. for Civil Justice, Supp. 2002) [hereinafter RAND Rep.]. *See also* James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815 (2002).

[25] *See* Mark A. Behrens & Rochelle M. Tedesco, *Two Forks in the Road of Asbestos Litigation*, MEALEY'S LITIG. REP.: ASBESTOS, Vol. 18, No. 3, Mar. 7, 2003, at 1.

[26] *See* Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, WALL ST. J., Mar. 5, 2001, at A1.

[27] *See Mass. State Ct. Asbestos Pers. Injury Litig.*, Order (Commw. of Mass., Middlesex Super. Ct., Sept. 1986) (adopting adopted the Massachusetts Inactive Asbestos Docket); *In re Asbestos Cases* (Cir. Ct., Cook County, Ill. Mar. 26, 1991) (Order to Establish Registry for Certain Asbestos Matters); *Asbestos Pers. Injury and Wrongful Death Asbestos Cases*, File No. 92344501 (Cir. Ct. Baltimore City, Md. Dec. 9, 1992) (Order Establishing an Inactive Docket for Asbestos Personal Injury Cases).

[28] *See In re New York City Asbestos Litig., Order Amending Prior Case Mgmt. Orders* (S. Ct. N.Y. City, N.Y. Dec. 19, 2002); *In re Fifth Jud. Dist. Asbestos Litig.*, Am. to Am. Case Mgmt. Order No. 1 (N.Y. Sup. Ct. Jan. 31, 2003); Letter from Judge Sharon S. Armstrong, King County, Wash., to Counsel of Record, Moving and Responding Parties, at 1 (Dec. 3, 2002).

[29] *See In re Wallace & Graham Asbestos-Related Cases*, Case Mgmt. Order (Greenville County, SC 2002); *In re Cuyahoga County Asbestos Cases*, Gen. Pers. Injury Asbestos Case Mgmt. Order No. 1 (as amended Jan. 4, 2002). Multnomah County (Portland), Oregon Circuit Court Judge John Wittmayer currently is circulating a draft order that would "abate" claims filed by unimpaired asbestos claimants "while preserving for the litigants their positions on any statutes of limitations issues." *In re All Asbestos Exposure Cases Filed in Multnomah County*, First Amended Draft Gen. Order Re: Asymptomatic, Untreated, or Inchoate Disease Cases, No. 0003-0000B, at 5 (Cir. Ct. Multnomah County, Or. 2002).

[30] In 1992, Judge Weiner adopted procedures, which although not technically an inactive docket, had the purpose of prioritizing "malignancy, death and total disability cases where the substantial contributing cause is an asbestos-related disease or injury." *In re Asbestos Prod. Liab. Litig. (No. VI)*, MDL 875, Admin. Order No. 3, at 1 (E.D. Pa. Sept. 8, 1992) [hereinafter MDL 875, Admin. Order No. 3].

[31] *See, e.g.*, Abate v. A.C. & S., Inc., No. 89236704, slip op. at 26 (Md. Cir. Ct. Dec. 9, 1992); Keene Corp. v. Levin, 623 A.2d 662, 663 (Md. App. 1993) (noting that Judge Levin deferred payments of punitive damages "until all Baltimore City plaintiffs' compensatory damages are paid."); In re Asbestos Litig., No. C0048AB200100003, slip Order, at 1 (Pa. Ct. Com. Pl. Jan. 11, 2001); Yancey v. Raymark Indus., Inc., No. 1186 (852), Asbestos Order No. 0001, slip op., at 5 (Pa. Com. Pl. Oct. 1986); *$64.65 Million Awarded in Four Asbestos Cases*, Vol. 4, No. 3 MEALEY'S LITIG. REP. TOXIC TORTS 16 (Dec. 15, 1995) (reporting on the New York case of *Falloon v. Westinghouse Electric* in which the trial court severed and deferred punitive damages indefinitely); *see also* In re Collins, 233 F.3d at 812 ("It is discouraging that while the Panel and transferee court follow this enlightened practice, some state courts allow punitive damages in asbestos cases. The continued hemorrhaging of available funds deprives current and future victims of rightful compensation.").

PREPARED STATEMENT OF THE HONORABLE ELTON GALLEGLY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Thank you for holding this important hearing, Mr. Chairman. *Newsweek* recently ran a story that painted a picture of a nation held hostage by fear of frivolous lawsuits: ministers afraid to counsel their flock, teachers afraid to discipline, doctors afraid of tending to the ill. They are not afraid they are wrong, mind you. Nor are they afraid they are not being careful enough. They are afraid that an opportunist could file a lawsuit against them that, though it has no merit, would subject them to thousands and thousands of dollars in legal fees to defend themselves. It is a problem that dominates modern culture.

Of course meritorious claims should see their day in court, but frivolous lawsuits and the threat of frivolous lawsuits should not hold Americans hostage and keep

them from doing their jobs. The rest of us should not be burdened with the cost of frivolous lawsuits in higher taxes, higher prices, and higher insurance rates, either.

I am looking forward to the testimony of the witnesses and their ideas about ways to legislatively curb these abuses of the legal system.

Thank you, Mr. Chairman. I yield back my time.

Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

June 22, 2004

Hon. James Sensenbrenner
Hon. Lamar Smith
Hon. John Conyers
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: Hearing on H.R. 4571, the "Lawsuit Abuse Reduction Act of 2004."

Dear Representatives:

While I have the utmost respect for Victor Schwartz, even Homer nodded; therefore I am writing to bring to the Committee's attention an inaccurate statement Mr. Schwartz made during today's hearing on H.R. 4571, the "Lawsuit Abuse Reduction Act of 2004."

Mr. Schwartz indicated that under current law, what he called "litigation tourists" may travel from places like Massachusetts to Madison County, Illinois to bring lawsuits. That is not correct. I practiced law in Illinois for thirteen years. Illinois follows the doctrine of *forum non conveniens*. As far back as the case of Bland v. Norfolk and Western Ry. Co. 506 N.E.2d 1291, Ill.(1987) the Illinois Supreme Court has declined to allow personal injury lawsuits resulting from incidents that took place outside Madison County from being brought in that county's courts. The Illinois Supreme Court reaffirmed that doctrine just last year, in the case of Dawdy v. Union Pacific R.R.

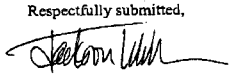
Madison County has been the subject of business community complaints about nationwide class action lawsuits filed there. It is important to note that class action suits brought in that venue must involve some sort of business activity that took place there; see Boxdorfer v. Daimler Chrysler Corp., 790 N.E.2d 391 (2003).

I can understand why Mr. Schwartz would want to use Madison County as a kind of shorthand designation of a "magnet jurisdiction," but in this instance doing so gave the Committee a distorted picture. Most states follow the *forum non conveniens* doctrine; some which did not have recently adopted stricter venue rules: e.g., Mississippi and Pennsylvania. Oddly enough, one jurisdiction that does not have such rules lies just across the river from Madison County: Missouri. But so-called "litigation tourism" is an

isolated phenomenon and such anomalies should not cast doubt on a civil justice system that generally works quite well.

I would ask that this letter be made a part of the hearing record.

Respectfully submitted,



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Pursuing Justice

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June 29, 2004

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515-6216

Dear Mr. Chairman:

I am writing to you regarding the hearing your Committee held June 22, 2004 on H.R. 4571, legislation to make changes in Rule 11 of the Federal Rules of Civil Procedure; make an amended Rule 11 of the Federal Rules of Civil Procedure applicable to cases filed in state courts if such cases affect interstate commerce; and make changes relating to jurisdiction and venue for personal injury cases filed in state and federal courts.

The ABA opposes the provisions in the legislation that would change the Federal Rules of Civil Procedure without going through the process set forth in the Rules Enabling Act. The ABA fully supports the Rules Enabling Act process, which is based on three fundamental concepts: (1) the central role of the judiciary in initiating judicial rulemaking, (2) procedures that permit full public participation, including by the members of the legal profession, and (3) recognition of a congressional review period. We view the proposed rules changes to the Federal Rules in H.R. 4571 as a retreat from the Rules Enabling Act.

In 28 U.S.C. §§ 2072-74, Congress prescribed the appropriate procedure for the formulation and adoption of rules of evidence, practice and procedure for the federal courts. This well-settled, Congressionally-specified procedure contemplates that evidentiary and procedural rules will in the first instance be considered and drafted by committees of the United States Judicial Conference, will thereafter be subject to thorough public comment and reconsideration, will then be submitted to the United States Supreme Court for consideration and promulgation, and will finally be transmitted to Congress, which retains the ultimate power to veto any rule before it takes effect.

This time-proven process proceeds from separation-of-powers concerns and is driven by the practical recognition that, among other things:

1) Rules of evidence and procedure are inherently a matter of intimate concern to the judiciary, which must apply them on a daily basis;

2) Each rule forms just one part of a complicated, interlocking whole, rendering due deliberation and public comment essential to avoid unintended consequences; and

3) The Judicial Conference is in a unique position to draft rules with care in a setting isolated from pressures that may interfere with painstaking consideration and due deliberation.

We do not question congressional power to regulate the practice and procedure of federal courts. Congress exercised this power by delegating its rulemaking authority to the judiciary through the enactment of the Rules Enabling Act, while retaining the authority to review and amend rules prior to their taking effect. We do, however, question the wisdom of circumventing the Rules Enabling Act, as H.R. 4571 would.

We also have serious concerns about the provisions in H.R. 4571 that would impose the Federal Rules on the state courts and would impose the changes relating to jurisdiction and venue for personal injury cases filed in state and federal courts. We hope your Committee will not move on legislation containing such departures from current law until we and others have sufficient time to analyze the impact they would have on the state courts and so we will be able to present our views to you on these very important matters.

We respectfully request that this letter be made part of the permanent hearing record of June 22, 2004.

Sincerely,

Robert D. Evans

Robert D. Evans

cc: Members, House Judiciary Committee

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July 22, 2004

Hon. James Sensenbrenner
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Re: Response to Letter Submitted by Public Citizen re: Hearing on H.R. 4571, the "Lawsuit Abuse Reduction Act of 2004"

Dear Chairman Sensenbrenner:

I was somewhat surprised by the letter to you from learned counsel Jackson Williams of Public Citizen, in which he claims that I made an inaccurate statement in my testimony before the Committee on the Judiciary on Tuesday, June 22. Mr. Williams took issue with my assertion that out-of-state residents bring lawsuits in Madison County, Illinois, and he said that my statement regarding Madison County forum shopping was incorrect.

First, Mr. Williams' letter misunderstood my testimony. My testimony before the Committee was that the fundamental principles of law are not being applied even-handedly to all litigants in certain jurisdictions in the United States, including Madison County, Illinois. Mr. Williams notes that there are existing principles of law from the Supreme Court of Illinois that would prevent Illinois courts from welcoming cases that have nothing to do with the state. The example Mr. Williams provides is *forum non conveniens*. As this letter will show, principles of *forum non conveniens* are not being applied in Madison County.

In that regard, Mr. Williams' letter suggests that non-Illinois residents with no connection to Madison County do not bring lawsuits in Madison County. To the contrary, the Madison County Circuit Court routinely refuses to dismiss or transfer such cases brought by non-residents. As a retired Madison County judge has stated, "When people come

Geneva
Houston
Kansas City
London
Miami
New Orleans
Orange County
Overland Park
San Francisco
Tampa
Washington, D.C.

from hither and thither to file these cases, there's gotta be an inducement. … They're not coming to see beautiful Madison County."[1]

Numerous cases are brought by non-residents where the plaintiff and defendant are not located in Illinois, the plaintiff's harm occurred outside the state, medical treatment was provided outside the state, all witnesses live outside the state, and no evidence relates to the state.[2]

In one example from 2003, an Indiana plaintiff filed a claim in Madison County against U.S. Steel for injuries he allegedly sustained as a result of asbestos exposure during his thirty-one years of employment at a U.S. Steel plant in Indiana.[3] The plaintiff had no significant connection to Illinois, much less to Madison County. Nevertheless, the plaintiff was allowed to proceed with his claim and obtained a $250 million verdict. This case is believed to have resulted in one of the largest verdicts ever awarded to a single plaintiff for injuries allegedly associated with asbestos exposure.[4] It is a well-known example of forum shopping.

The fact that forum shopping is alive and well in Madison County can be verified by a simple search of claims filed at the Madison County's clerk office. For example, according to papers filed in one case, 75 percent of the mesothelioma claims set for trial against one defendant during two trial settings in 2003 "lacked any connection to Illinois, let alone Madison County."[5] And this trend is not slowing, over 65 percent of the hundreds of pending mesothelioma cases against one defendant party "have little or no connection to Illinois."[6] To make matters worse, a vast majority of the 35 percent of the

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1 Martin Kasindorf, *Robin Hood is Alive in Court, Say Those Seeking Lawsuit Limits*, USA TODAY, Mar. 8, 2004, at A1, *available at* 2004 WL 58552753.

2 *See, e.g.*, Brian Brueggemann, *Man Awarded $250 Million in Cancer Case*, BELLEVILLE NEWS-DEMOCRAT, Mar. 29, 2003, at 40, *available at* 2003 WL 2460712; *U.S. Steel Settles Asbestos Lawsuit*, CHI. DAILY HERALD, Apr. 1. 2003, at 1, *available at* 2003 WL 17446579; Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 PEPP. L. REV. 1, 7 (2004).

3 Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 PEPP. L. REV. 1, 7 (2004).

4 See Brian Brueggemann, *Man Awarded $250 Million in Cancer Case*, BELLEVILLE NEWS-DEMOCRAT, Mar. 29, 2003, at 40, *available at* 2003 WL 2460712; *U.S. Steel Settles Asbestos Lawsuit*, CHI. DAILY HERALD, Apr. 1. 2003, at 1, *available at* 2003 WL 17446579.

5 Union Carbide Corp. v. Hon. Ralph J. Mendelsohn, Case No. 02-L-1428, Union Carbide Corp.'s Memorandum and Explanatory Suggestions in Support of Its Motion for a Direct Appeal or, in the Alternative, Motion for a Supervisory Order, at 9 (Ill. Apr. 10, 2003).

6 Union Carbide Corp. v. Hon. Nicholas Byron, Case No. 03-L-1294, Union Carbide Corp.'s Memorandum and Explanatory Suggestions in Support of Its Motion for a Direct Appeal or, in the Alternative, Motion for a Supervisory Order, at 11 (Ill. May 6, 2004).

pending mesothelioma claims that have some connection to Illinois have no connection to Madison County and should at minimum be transferred to another county.[7]

The Madison County Circuit Court also allows cases to remain in Madison County even though they would be more appropriately heard in another Illinois county. An Illinois appellate court recently reviewed two cases that focused on whether the cases were appropriately tried in Madison County. In *Hefner v. Owens-Corning Fiberglas Corp.*, the plaintiff had never lived or worked in Madison County.[8] His alleged asbestos exposure occurred in a different county in Illinois and none of the fact witnesses or treating physicians were in Madison County. The physicians treating the plaintiff's mesothelioma were even beyond the reach of Illinois subpoena power because they were in a different state. Despite all of these factors, the Madison County Circuit Court denied the defendant's *forum non conveniens* motion. Perhaps most telling was the trial judge's statement that the claim should remain in Madison County because the nature of asbestos litigation gave this case "nationwide implications."[9] The judge did not explain the nature of those implications.

In the second case, *Dykstra v. A.P. Green Industries*, the Madison County court allowed a case to proceed that had no factual connections to Madison County.[10] The plaintiff was allegedly exposed to asbestos in Cook County, Illinois and Lake County, Indiana. All witnesses lived in Indiana, except one who lived in Minnesota. All the plaintiff's physicians practiced in Chicago or Indiana. In both *Hefner* and *Dykstra*, the Illinois Fifth District Appellate Court affirmed the Madison County trial judges' orders denying the defendants' motions for *forum non conveniens* – even though there was no logical connection to Madison County in either case.[11]

Unfortunately, these cases are just the tip of the iceberg. Many cases improperly brought and allowed to remain in Madison County are never appealed. In many cases, Madison County defendants would rather settle then risk having to pay a potentially bankruptcy-inducing award.[12] Of approximately 4,000 asbestos cases set for trial in Madison County

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7 *Id.*

8 Hefner v. Owens-Corning Fiberglas Corp., 659 N.E.2d 448 (Ill. App. Ct. 1995).

9 *Id.* at 454.

10 Dykstra v. A.P. Green Indus., Inc., 760 N.E.2d 1034 (Ill. App. Ct. 2001).

11 *See Hefner*, 659 N.E.2d at 454; *Dykstra*, 760 N.E.2d at 497.

12 *See* Noam Neusner, *The Judges of Madison County*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 39 (stating that "plaintiffs' lawyers know to expect a call from their opponents -- with an expensive settlement offer – " after they file a claim in Madison County); Editorial, *The Judges of Madison County*, CHI. TRIB., Sept. 6, 2002, at 22, *available at* 2002 WL 26771990 (calling Madison County a place where defendants "shak[e] in their boots" over the idea of going to trial).

between 1996 and 2003, only four went to verdict.[13] Three of the four resulted in huge awards inflated by punitive damages, including the $250 million verdict discussed earlier.[14] The risks of such large verdicts serve as a warning to defendants to settle.

The depth of the problem in Madison County is further illustrated by one Madison County Circuit Court judge's stubborn insistence on more than one occasion that if expedited mesothelioma cases "are from the United States, I'm certainly not going to bar them, and [I'm going to] provide for justice if they think they can get it here faster."[15] Additionally, this judge acknowledged his well-known liberal policy on *forum non conveniens* by declaring, "Every time Madison County is publicized, ... more plaintiffs' attorneys want to have their cases brought here. You know, I can't help that we have judges that are more understanding, perhaps."[16]

Madison County, a small rural community of 260,000 residents, continues to attract national attention. This is not only because of the sizes of awards but also because the

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13 *In re:* All Asbestos Litig. Filed in Madison County, Memorandum In Support of Joint Motion To Amend The Madison County Case Management Order, at 3 (Madison County Cir. Ct., Ill. Apr. 9, 2003).

14 *See* Brian Brueggemann, *Man Awarded $250 Million in Cancer Case,* BELLEVILLE NEWS-DEMOCRAT, Mar. 29, 2003, at 40, *available at* 2003 WL 2460712 (describing *Whittington v. A.W. Chesterton* (2003), in which an asbestos plaintiff was awarded $250 million, including $200 in punitive damages); *Illinois Jury Awards $16 Million to Living Meso Victim,* ANDREWS ASBESTOS LITIG. REP., Vol. 24, No. 2, Dec. 20, 2001, at 3 (discussing *Crawford v. AC & S Inc.* (2001), in which an asbestos plaintiff was awarded $16 million, including $7 million in punitive damages); Terry Hillig, *Record Verdict in Asbestos Case Pleases Man With Cancer: Madison County Jury Awards $34.1 Million: Shell Oil Plans Appeal,* ST. LOUIS POST-DISPATCH, May 25, 2000, at C1, *available at* 2000 WL 3527609 (discussing *Hutcheson v. Shell Oil Co.* (2000), in which an asbestos plaintiff was awarded $34.1 million, including $25 million in punitive damages – at the time, the largest asbestos verdict in Illinois history, and one of the largest asbestos verdicts in the nation).

15 *See* Union Carbide Corp. v. Hon. Nicholas Byron, Case No. 03-L-1294, Union Carbide Corp.'s Memorandum and Explanatory Suggestions in Support of Its Motion for a Direct Appeal or, in the Alternative, Motion for a Supervisory Order, at 11 (Ill. May 6, 2004) (quoting Madison County Cir. Ct. Report of Proceedings at 36 (July 9, 2003)). The same judge said he was "certainly not going to bar [out of state cases] and [was going] to provide for justice if they think they can get it faster [in Madison County]. I don't know why they can't get it faster in Canada or some other state, but it appears we have a pretty good program here." *Id.* (quoting Madison County Cir. Ct. Report of Proceedings at 35-36 (July 8, 2003)). On a more recent occasion, the judge also said, "One thing about this jurisdiction [and people wonder why so many cases have been filed here. Well, you know my philosophy is give an American dying of mesothelioma, or even lung cancer if they make the case, a forum." Madison County Cir. Ct. Report of Proceedings Pre-Trial Motions Vol. I(A) (Morning Session) at 27 (May 11, 2004).

16 *Id.* (quoting Madison County Cir. Ct. Report of Proceedings at 35-36 (July 8, 2003)).

cases involve plaintiffs that have no business bringing their claims in Madison County. Madison County courts persist in allowing claims to proceed that have no logical relation to the County.

I understand the reason for Mr. Williams' letter and respect his experience as a lawyer who has practiced in Illinois, but facts are facts. This letter shows why legislation such as H.R. 4571 is needed in this country. Rampant forum shopping adversely affects interstate commerce and creates disrespect for our judicial system. Cases should only be heard where a plaintiff works, where he has been injured, where he lives, or where the defendant has its principal place of business. The courts of Madison County should be left for the people who live and work there. They should not control and impact commerce in other states.

With appreciation for this opportunity to respond, I am,

Respectfully yours,

Victor E. Schwartz/jmc

Victor E. Schwartz

cc: Honorable Lamar Smith,
Honorable John Conyers Jr., and
Other Members of the House Judiciary Committee

NFIB
LEGAL FOUNDATION
Protecting the Rights of America's Small Business Owners

June 28, 2004

Honorable F. James Sensenbrenner, Jr.
Chair, Judiciary Committee
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-4909

Dear Chairman Sensenbrenner:

Thank you for inviting me to testify on June 22, 2004 about "Safeguarding Americans from a Legal Culture of Fear: Approaches to Limiting Lawsuit Abuse". I appreciated the opportunity to discuss the ever-growing problem of frivolous lawsuits and the impact of litigation on small business.

I am writing to clarify the record in response to Representative Delahunt's questions regarding the National Federation of Independent Business (NFIB) research studies, which I referenced in my testimony. I believe that the enclosures clearly demonstrate that detailed and methodical analyses, not anecdote, support the NFIB studies cited in my testimony. I respectfully request that this letter and its attachments be included in the official record of this hearing due to the questions raised by members of the Committee.

First, I have included the methodology for NFIB's *Small Business Problems and Priorities*. Additionally, I have included copies of the data collection methods for the NFIB National Small Business Poll, "Liability," (2002) and the NFIB National Small Business Poll, "Business Insurance," (2002). The Gallup Organization, the premier data-collection and polling group, conducted both the "Liability" and "Business Insurance" polls for the NFIB Research Foundation. Amongst the "Liability" poll's most significant findings was the determination that approximately half of all small businesses felt either very or somewhat concerned about the possibility of being sued. Additionally, the poll found that nearly one-quarter of small employers were either sued or credibly threatened with suit in the last five years. For further information about the research methods from the "Liability" and "Business Insurance" polls, please refer to the enclosed copies of the "Data Collection Methods".

National Federation of Independent Business
1201 F Street NW, Suite 200 • Washington, DC 20004 • 202-554-9000 • Fax 202-484-1566
website: www.nfiblegal.com • email: legalfoundation@nfib.org

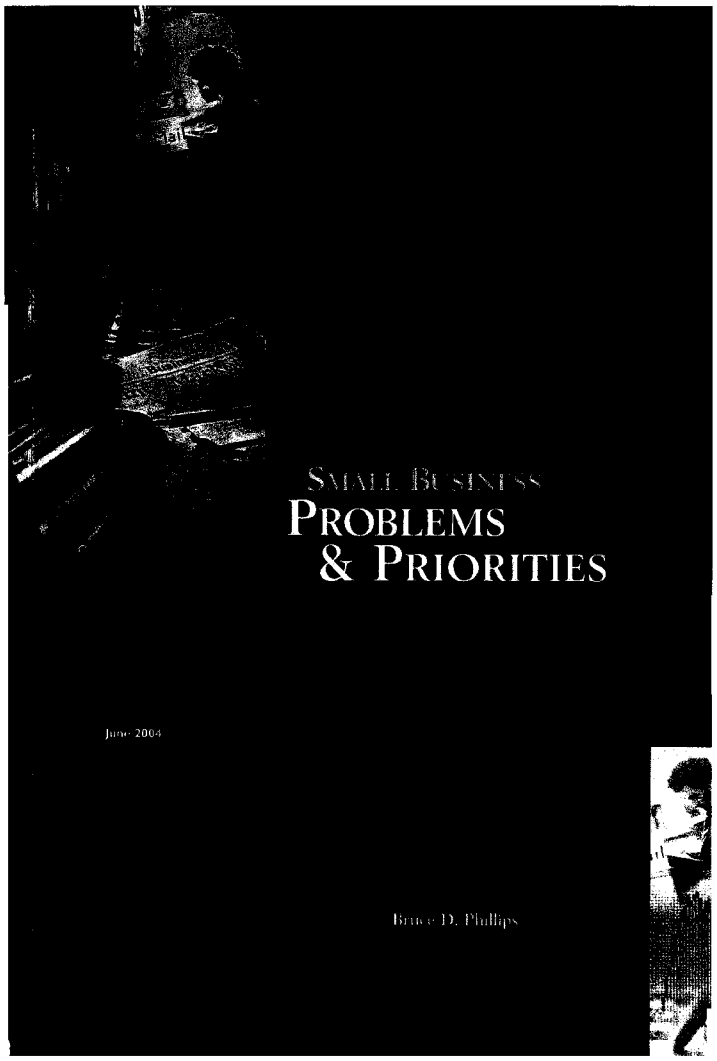
Thank you again for inviting me to testify and for providing us with a forum to tell our story.

Sincerely,

Karen R. Harned, Esq.
Executive Director

Enclosures

cc: Representative John Conyers, Jr.
Representative William Delahunt
Representative Lamar S. Smith


SMALL BUSINESS
PROBLEMS
& PRIORITIES
June 2004
Bruce D. Phillips

METHODOLOGICAL APPENDIX

The survey on which *Problems and Priorities* is based was conducted from mid-January to mid-March of 2004 across a randomly drawn sample of 20,000 members of the National Federation of Independent Business (NFIB). Sampled small-business owner members received a three-page mail questionnaire and up to two follow-ups. They provided 4,603 useable responses by the April cut-off date for a response rate of 23 percent.

NFIB's membership file lists more than one-half million small-business owners located throughout the country. Approximately one of every 11 small employers is a member and they represent virtually every industry of for-profit business in the NAICS codes. Appendix Table 1 provides a comparison between NFIB members and the small employer population by employee size of business and industry, the two most important variables distinguishing respondents in the survey. Note that NFIB member respondents have marginally larger businesses than the population. But the distributions are reasonably similar and certainly reflect the large skew toward the smallest firms. Note also that NFIB member respondents contain 8.6 percent non-employers. (The population also contains non-employers for the week in which the data were collected. But those non-employers did have employees at some time during the preceding year, information not available for NFIB non-employers.) Totals will therefore marginally reduce concern over employee-related problems and somewhat overstate concerns with certain regulatory issues. Yet, the fit is quite good.

The comparison between NFIB member respondents and the population is not as satisfactory, in part due to the detail of the NAICS codes. If some NAICS categories were consolidated, such as wholesale and retail trade into distribution, the match would improve notably. The major discrepancy is that respondents more frequently have businesses in traditional industries, such as manufacturing and construction, and less frequently in rapidly growing newer services industries. Agriculture represents the most pronounced difference because official statistics do not include farmers and ranchers in the population and NFIB does. The result of these differences is that the concerns of the services will be muted in totals, though far from unrepresented, while those from production will be louder than its population's share. Still, significant numbers of respondents reported from every major industrial sector and industry differences are revealed in the industry break-out.

The sampling frame could lead to modest biases, but they are likely to be minimal. Certainly they will not alter the relative position of any problem by more than a rank or two. Problems that are of great concern would remain problems of great concern even with a weighted result while problems in the middle would remain in the middle and those at the bottom would remain at the bottom.

Despite being only three pages, the questionnaire could easily become tedious for the respondent. To avoid possible bias brought about by respondent fatigue, half of the sample received version A of the questionnaire and half received version B. The two versions are identical except that version B is inverted. The first question on version A is the last question on version B, and so on. The purpose is to ensure that should fatigue set in, it would not affect one half of the questionnaire's responses any more than the other. The data collected from version B was inverted prior to tabulation to produce a unified data set.

Small-business owners respondents evaluated each of the 75 potential problems presented to them on a scale of "1" to "7." The former represents a "Critical Problem." The latter represents

'Not a Problem." The numbers between represent varying degrees of problem difficulty within the 1-7 extremes. An average for each problem was calculated and it served as the basis for ranking or rank-ordering problems. There are two associated issues. Non-response could be treated as non-interest, effectively relegating it to the lowest rating ("7"), or it could be treated as indecision or oversight, effectively giving the problem average score. The latter was selected because non-response seemed to generate no pattern across problems. The second issue is the rank of those problems with the identical average score. Ties led to the arbitrary decision to give precedence to those with a higher standard deviation.

small business

PROBLEMS & PRIORITIES

William J. Dennis, Jr.
Senior Research Fellow
NFIB Education Foundation

Methodological Appendix

The data for Small Business Problems and Priorities were obtained from a mail survey directed by the author earlier this year. The following three sections explain the survey's conduct, the survey sample, and how to read the tables.

Survey Conduct

This survey research project was intended to do more than collect data for *Small Business Problems and Priorities*. It was also designed to test means to increase survey response and to investigate, in some detail, potential response bias in small business surveys. The former affected the survey's conduct by subjecting different parts of the sample to different treatments, though it assuredly had no influence on the results. The latter did not affect the survey's conduct. It only involved collection of additional information from return envelopes and extensive analysis of the date of response receipt.

The survey on which *Small Business Problems and Priorities* is based was conducted during the months January, February and March of 2000. Sixteen thousand (16,000) members of the National Federation of Independent Business (NFIB) were randomly drawn from the membership file and sequentially assigned to 128 groups of 125 members each. Each group received a different combination of treatments. Half of the sample received an introductory letter in mid-January encouraging them to respond. (The other half did not.) All 16,000 in the sample were mailed a questionnaire one week later. The second wave of questionnaires was mailed in mid-February and the third in early March. Three weeks separated each wave. Four thousand forty-four (4,044) usable responses were received by the early April cut-off date. The response rate was 25 percent.

The questionnaire could become tedious for the respondent. To avoid possible bias brought about by respondent fatigue, half of the respondents received version A of the survey and half received version B. The two versions were identical except that version B was inverted. The first question on version A was the last question on version B. The second question on version A was the second to the last question on version B, and so on. The data collected from version B was inverted prior to tabulation in order to produce a unified data set. Version A/Version B and the introductory letter were two of the seven treatments applied to the sample. Other treatments included personalized address and not, color and black and white, Dillman form and NFIB form, Monday/Friday mailing day, and stamped/metered mail.

Lengthy, statistically based reports will detail the results of investigations into response bias issues and treatments to improve

response rates. The intention is to examine these issues not just for the population as a whole, but for categories of small businesses and small business owners within it. These reports are not yet available. Preliminary results suggest no major response biases, but the data have not yet been adequately analyzed to make any determination about better and worse methods to stimulate response.

Sampling Frame

The sampling frame is the membership file of the National Federation of Independent Business (NFIB). NFIB is a national small business organization consisting of more than one-half million small business owners located throughout the country. Membership is open to all "independent" business owners, i.e., owners of businesses which are not publicly held or held by someone who is publicly held. However, as a practical matter, independent business is small business.

A common method to determine if a sampling frame is representative of the total population is to compare known characteristics of the sampling frame with known characteristics of the population. Since NFIB obtains comparatively little demographic information on its members and their businesses, respondent demographics were substituted. Respondent demographics provide greater detail than the membership file and, where comparable, yield the same distributions as the sampling frame.

A comparison of survey respondents and the 1995 "universe" as developed by various agencies of the federal government is presented in Appendix Table 1. The table displays the distributions of three important dimensions for each population. The more closely the distribution of respondents approximate the distribution of the small business universe, the more likely survey respondents will reflect the views of the total population. In the ideal world, the two would match. But since the two do not match, it is important to understand where the differences lie.

The first panel on Appendix Table 1 presents industry distributions. Comparing either the percent or valid percent of survey respondents with SBA's universe, it is clear that the services are underrepresented among survey respondents. Thirty-nine (39) percent of the small business universe falls into the narrow services industry. The population of respondents in the services (services and professional services) is only one-half that size. That implies that the views of owners in the services are underrepresented. But if the views of service business owners were adequately represented, how would the results change? Fortunately, owners of service businesses evaluate the list of problems very much as does the population. The differences are so minor that the text outlining the peculiarities of owner assessments from those in the service industry consist of one brief paragraph. The three industries overrepresented among respondents are construction, manufacturing/mining, and agricultural service. The latter occurs because the SBA profile does not include production agriculture, i.e., farms. NFIB does allow farmers to

be members, though the proportion remains small. Agricultural services still has a heavy component of businesses like nurseries and logging. The primary impact from the disproportionately large numbers in agriculture results in exaggerated concern over the state of the economy and environmental regulation than would otherwise be the case. Since manufacturers like those in the services seem to assess the problem list much like the population, their overrepresentation has little impact. Too many contractors offset too many farmers in the economic sphere as contractors have been enjoying particularly good times. But, they increase the population's concern over health and safety issues including workers' compensation.

The second panel on Appendix Table 2 presents the distributions by employment size of business. It shows that survey respondents are somewhat larger on average than is the population. But the difference is negligible. The median employment size of the population is a little over three employees. The median employment size of survey respondents is somewhat over four. It is highly unlikely that the size deviation between the two has any practical impact on survey results.

The third panel on Appendix Table 2 compares the distribution of respondents and the universe by region of the country. The most obvious observation from the data is that respondents are overrepresented in the middle of the country and underrepresented on both coasts. With the exception of New England, the regions that border the oceans produce too few respondents and the remainder produce too many (except the East South Central which is proportionate). Part of the explanation is the overpresentation of agriculture which is concentrated in the middle of the country such as in the West North Central region. Any influence on the results is not obvious. Problem evaluations from those in the Mid-Atlantic states, an underrepresented area, are very much like the population's. The same is true of the Great Lakes and Mountain regions, both of which are overrepresented. The South Atlantic is notable because owners expressed greater concern over problems in general than did others. Owners in the Pacific are particularly concerned over regulatory issues.

While there are discrepancies between the two populations, the fit is a good one on balance. No major portion of the population are unrepresented by respondents. None dominate the distribution, either. That implies the results obtained from the survey accurately represent the views of small business owners across the country. But, the major representativeness issue cannot even be addressed. It is clear that respondents on average have owned their businesses longer than has the population. However, it is difficult to determine how much longer. Even governmental statistical agencies do not capture many businesses until a year or more after they have been established. Some never enter their files. The most that can be said is that survey respondents represent the owners of operating businesses rather than the owners of emerging businesses. That is true of every survey (for all intents and purposes)

conducted among small business owners including those of the most capable private firms and government agencies.

Reading the Tables

Small business owner respondents evaluated each of the 75 potential business problems on a scale of "1" to "7." The former represents a "Critical Problem." The latter represents "Not a Problem." The numbers between represent varying degree of problem difficulty within the "1" and "7" extremes. The author calculated an average for each problem. A low average score implies a relatively difficult problem. A high average score implies a relatively easy one. The average appears on virtually every table under the heading, "Mean." (Non-response on any particular problem was low. The median non-response was 2.5 percent and highest 5.0 percent. Differing from the last edition of *Small Business Problems and Priorities*, the decision was made to assume that non-respondents feel no differently about a particular problems than respondents. Non-response was therefore omitted from calculation of the average.)

All tables have a column headed by "Rank." Rank is the rank order of the problem among the 75 evaluated. The rank is based on the mean (average) calculated from owner responses. The problem with the lowest mean has the rank of "1" and the problem with the highest mean has the rank of "75." The other problems fall accordingly.

Most tables also include a column marked, "Percent Critical Problem." The data in the column are the percentage of respondents evaluating the problem a "1," or the most serious rating that they could give. Table 1 also includes a column marked, "Percent Not a Problem." The data in the column are the percentage of respondents evaluating the problem as a "7," the least serious rating they could give.

"Standard Deviation" is a measure of dispersal from the mean or average. The higher the standard deviation, the less small business owners agree about importance of the problem. The lower the standard deviation, the more small business owners agree about the importance. This measure reveals nothing about whether small business owners consider the problem severe or not. It reveals whether owners agree or disagree on their evaluation.

NFIB National
Small Business
Poll

Liability

Volume 2, Issue 2
2002
ISSN - 1534-8326

William J. Dennis, Jr.
NFIB Research Foundation
Series Editor

Data Collection Methods

The data for this survey report were collected for the NFIB Research Foundation by the executive interviewing group of The Gallup Organization. The interviews for this edition of the *Poll* were conducted between March 28 - April 23, 2002 from a sample of small employers. "Small employer" was defined for purposes of this survey as a business owner employing no fewer than one individual in addition to the owner(s) and no more than 249.

The sampling frame used for the survey was drawn at the Foundation's direction from the files of the Dun & Bradstreet Corporation, an imperfect file but the best currently available for public use. A random stratified sample design was employed to compensate for the highly skewed distribution of small-business owners by employee size of firm (Table A1). Almost 60 percent of employers in the United States employ just one to four people meaning that a random sample would yield comparatively few larger small employers to interview. Since size within the small-business population is often an important differentiating variable, it is important that an adequate number of interviews be conducted among those employing more than 10 people. The interview quotas established to achieve these added interviews from larger, small-business owners were arbitrary but adequate to allow independent examination of the 10-19 and 20-249 employee size classes as well as the 1-9 employee size group.

This survey included liability and administration of the state sales tax as its topics. Five small states, Delaware, Montana, New Hampshire, Oregon, and South Dakota do not have a sales tax. As a result, the sample did not include small employers from those states or about three percent of the population. Any impact from this exclusion will therefore be negligible.

NFIB National
Small Business
Poll

Business Insurance

Volume 2, Issue 7
2002
ISSN - 1534-8326

William J. Dennis, Jr.
NFIB Research Foundation
Series Editor

Data Collection Methods

The data for this survey report were collected for the NFIB Research Foundation by the executive interviewing group of The Gallup Organization. The interviews for this edition of the *Poll* were conducted between September 3 - September 27, 2002 from a sample of small employers. "Small employer" was defined for purposes of this survey as a business owner employing no fewer than one individual in addition to the owner(s) and no more than 249.

The sampling frame used for the survey was drawn at the Foundation's direction from the files of the Dun & Bradstreet Corporation, an imperfect file but the best currently available for public use. A random stratified sample design was employed to compensate for the highly skewed distribution of small-business owners by employee size of firm (Table A1). Almost 60 percent of employers in the United States employ just one to four people meaning that a random sample would yield comparatively few larger, small employers to interview. Since size within the small-business population is often an important differentiating variable, it is important that an adequate number of interviews be conducted among those employing more than 10 people. The interview quotas established to achieve these added interviews from larger, small-business owners were arbitrary but adequate to allow independent examination of the 10-19 and 20-249 employee-size classes as well as the 1-9 employee-size group.

Joseph R. Compoli, Jr.
Attorney At Law

Telephone: 216-481-6700
Facsimile: 216-481-1047

612 East 185th Street
Cleveland, OH 44119

March 11, 2004

Custom Tool & Gage, Inc.
Attn: President or CEO
5765 Canal Rd.
Cleveland, OH 44125

Re: Our Client: James Brown
File No.: 03-0912-01

Dear Sir/Madame:

This office represents the above referenced client. We have been retained to bring a lawsuit against Custom Tool & Gage, Inc., in connection with your transmitting of one unsolicited facsimile ("fax") advertisement to our client. A copy of this fax is enclosed for your convenience.

Kindly be advised that it is a violation of the federal Telephone Consumer Protection Act (TCPA), Title 47, United States Code, Section 227, to transmit fax advertisements without first obtaining the "prior express invitation or permission" of the recipient. *See,* 47 U.S.C. 227(a)(4) and 227(b)(1)(C). In addition, Ohio courts have declared that a violation of the TCPA is a "unfair or deceptive" act or practice under the Ohio Consumer Sales Practices Act (CSPA), Section 1345.02(A) of the Ohio Revised Code.

We are sending you this letter for the purpose of offering you an opportunity to resolve this matter without the expense of court litigation and attorneys fees. We are authorized to amicably settle this claim for the amount of **$1,700.** This amount represents the sum of $1,500 under the TCPA and $200 under the CSPA for each unsolicited fax advertisement which was received by our client.

The TCPA provides for statutory damages in the sum of ***One Thousand Five Hundred Dollars ($1,500)*** per each unsolicited fax advertisement received, if the fax was sent "willfully." 47 U.S.C. 227(b)(3). "The term 'willful,' when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision" of the statute. See, 47 U.S.C. 312 (f)(1).

In other words, the term "willfully" simply means that you acted voluntarily, under your own free will, and regardless of whether you knew you were acting in violation of the statute. *See,* e.g., *In Re: Audio Enterprises, Inc.,* 1988 WL 486782; 3 FCC Rcd. 7233 (1988); *Smith v. Wade,* 461 U.S. 30, 41 (1983).

In addition, the Ohio CSPA provides for minimum damages of ***Two Hundred Dollars ($200)*** per each violation. See, R.C. Section 1345.09. The statute further authorizes an award of reasonable attorneys fees. *See,* e.g., *Einhorn v. Ford Motor Co.*, 48 Ohio St. 3d 27 (1990).

We believe that our proposed settlement is very fair and reasonable under the circumstances. We will leave this offer open for fifteen (15) days from the date of this letter.

Recently, in the case of *Nicholson v. Hooters of Augusta,* a court in Georgia awarded over $11.8 million dollars in a class action lawsuit under the TCPA. Also, more recently, in the case of *Gold Seal Termite & Pest Control v. Prime TV LLC*, a court in Indiana has certified a **nationwide class action** against Prime TV for sending unsolicited fax advertisements.

If it becomes necessary for our office to file a lawsuit, we will pursue all legal remedies, including seeking certification of the case as a Class Action under the TCPA. This could result in a court order for *you* to pay *$1,500* to each and every person to whom you have sent unsolicited fax advertisements.

If you have an insurance agent or company, please forward this letter to your agent or insurance company. If not, please contact our office directly.

Sincerely,

JOSEPH R. COMPOLI, JR.

JRC/kh

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO
CIVIL DIVISION

JAMES BROWN **420 Portage Blvd.** **Kent, OH 44240**	)	**CASE NO.:**
	)	**JUDGE:**
Plaintiff	)	**COMPLAINT FOR MONEY DAMAGES AND INJUNCTIVE RELIEF, WITH CLASS ACTION STATUS**
-vs-	)	
CUSTOM TOOL & GAGE, INC. **5765 Canal Rd.** **Cleveland, OH 44125**	)	**JURY DEMAND ENDORSED HEREON**
Defendant	)	

Now comes Plaintiff, **James Brown**, by and through Counsel, who alleges and says:

PRELIMINARY STATEMENT

1. This matter is a civil action for damages and injunctive relief against the defendant, under the federal **Telephone Consumer Protection Act (TCPA),** Title 47, United States Code, Section 227. This court has jurisdiction and authority to hear and decide the plaintiff's claim, pursuant to Section 227(b)(3), United States Code, Title 47, which grants **exclusive** jurisdiction to State courts.

2. This matter is also a claim for damages and injunctive relief against the defendant, under the Ohio Consumer Sales Practices Act (CSPA), Section 1345.02(A), Ohio Revised Code. This court has jurisdiction and authority to hear and decide the plaintiff's claim,

pursuant to Section 1345.04 of the Ohio Revised Code.

FACTS

3. Defendant engaged in acts or practices which violated the federal TCPA and the Ohio CSPA, to the detriment of plaintiff, as herein described in this Complaint.

4. The federal TCPA and Ohio CSPA are both remedial statutes. Section 1.11 of the Ohio Revised Code requires that "Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice."

5. The federal Telephone Consumer Protection Act (TCPA) provides that **it is unlawful for any person within the United States to use any telephone facsimile machine to send an unsolicited advertisement to a telephone facsimile machine.** See, Section 227(b)(1)(C), United States Code, Title 47.

6. An "unsolicited advertisement" is defined by Section 227(a)(4), United States Code, Title 47, to mean "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."

7. The plaintiff, James Brown received one (1) unsolicited facsimile ("fax") advertisement transmitted by or on behalf of the defendant **Custom Tool & Gage, Inc.,** advertising the commercial availability or quality of its goods or services, as follows:

8. Sometime in the year 2003, the plaintiff **James Brown** received one (1) unsolicited fax advertisement on his facsimile machine.

9. The aforementioned unsolicited fax advertisement was transmitted by or on behalf of defendant **Custom Tool & Gage, Inc.,** advertising the commercial availability and quality of goods or services.

10. Defendant ***did not*** obtain "prior express invitation or permission" before sending its fax advertisement.

11. The defendant transacts business in Ohio through solicitation and/or sales of goods or services.

12. The defendant has committed tortious injury in Ohio, through acts and practices in violation of the federal Telephone Consumer Protection Act and the Ohio Consumer Sales Practices Act, as described in this Complaint.

FIRST CLAIM

13. Plaintiff re-alleges paragraphs One (1) through Twelve (12) of this Complaint, as if fully rewritten herein.

14. Defendant's aforementioned unsolicited fax advertisement was transmitted in violation of the federal Telephone Consumer Protection Act (TCPA), Section 227(a)(4) and 227(b)(1)(C), United States Code, Title 47.

15. Defendant's transmission of unsolicited fax advertisements constitutes an ***unlawful taking*** of Plaintiff's fax paper, toner ink and electricity, as well as an ***unauthorized use*** of Plaintiffs', fax machines. The TCPA provides a statutory remedy against Defendant's implicit acts of theft, invasion of privacy, trespass and conversion. See, 47 U.S.C. §§

227(b)(1)(C) and 227(b)(3).

16. The plaintiff is entitled, under Section 227(b)(3), United States Code, Title 47, to bring an action in this court to enjoin further violations, and to receive damages in the sum of **Five Hundred Dollars ($500)** for each separate violation, or **Triple Damages ($1,500),** if the fax advertisement was transmitted willfully.

17. A defendant acts "willfully" if it acts voluntarily, and under its own free will, regardless of whether the defendant knew that it was acting in violation of the statute.

18. The defendant, **Custom Tool & Gage, Inc.,** acted voluntarily, and under its own free will, and thus ***willfully*** sent, or caused to be sent, unsolicited advertisements by fax.

19. The defendant ***knew*** that it was sending, or causing to be sent, unsolicited advertisements by fax.

20. Defendant is therefore liable for the sum of **$1,700** in damages, for its unsolicited fax advertisement, pursuant to Section 227(b)(3)(B), United States Code, Title 47.

21. Defendant is also subject to liability for an injunction to be granted to prohibit and prevent future violations.

SECOND CLAIM

22. Plaintiff re-alleges paragraphs One (1) through Twenty-One (21) of this Complaint, as if fully re-written herein.

23. In Ohio, the definition of a "consumer transaction" includes any "solicitation to supply" consumer goods or services. See, Ohio R.C. § 1345.01(A) of the Ohio Consumer

Sales Practices Act.

24. Defendant's fax advertisement was a "solicitation to supply" consumer goods or services.

25. The aforesaid fax advertisement was transmitted, by or on behalf of the defendant, to plaintiff **James Brown**, without his "prior express invitation or permission", in violation of the federal Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227(a)(4) and 227(b)(1)(C).

26. Ohio courts have declared that a violation of the federal TCPA, Section 227, United States Code, Title 47, constitutes a breach of the Ohio Consumer Sales Practices Act, Section 1345.02(A) of the Ohio Revised Code.

27. It is a violation of the federal Telephone Consumer Protection Act, 47 U.S.C. § 227 (a)(4), to transmit faxes advertising the availability or quality of goods or services, without obtaining the "prior express invitation or permission" of the recipient.

28. Ohio court decisions have declared that any violation of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. 227(a)(4), is a breach of Section 1345.02(A) of the Ohio Consumer Sales Practices Act, (CSPA).

29. Ohio court decisions have declared that the sending of any unsolicited fax advertisements is an unfair or deceptive act or practice, in violation of Section 1345.02(A) of the Ohio Consumer Sales Practices Act (CSPA), and that each unsolicited fax advertisement is a separate violation.

30. Defendant has thereby engaged in acts or practices, as described in this Complaint, which have been declared by Ohio courts to violate the Ohio Consumer Sales Practices Act (CSPA), Section 1345.02(A) of the Ohio Revised Code, and these court decisions are on file in the Public Inspection File (PIF) of the Attorney General of the State of Ohio, pursuant to R.C. § 1345.05 and 1345.09(B) of the Ohio Revised Code.

31. Defendant's acts or practices of sending uninvited and unrequested commercial fax advertisements is an ***inherently unfair and deceptive*** solicitation, within the meaning of R.C. §§ 1345.01(A) and 1345.02(A), since the solicitation is made through the ***unlawful taking*** of plaintiffs' fax paper, toner ink and electricity, as well as an ***unauthorized use*** of Plaintiffs' fax machines.

32. Defendant is liable, under Section 1345.09(B) of the Ohio Revised Code, for engaging in unfair or deceptive acts or practices, including acts or practices which have previously been declared, by Ohio court decisions, to be a violation of Section 1345.02(A) of the Ohio Revised Code, and filed in the Public Inspection File of the Ohio Attorney General.

33. Defendant ***knew*** it was sending unsolicited fax advertisements, and thus the defendant ***knowingly*** committed an act or practice that violated Section 1345.02(A) of the Ohio Revised Code, and therefore the defendant is liable for plaintiffs' attorneys fees, pursuant to Section 1345.09(F) of the Ohio Revised Code, for all time expended in connection with this matter.

34. Plaintiff is entitled, under Section 1345.09(B) of the Ohio Revised Code, to bring

an action in this court to enjoin further violations, and to receive **Two Hundred Dollars ($200)** damages for Defendant's above-described violation, as well as attorneys fees.

THIRD CLAIM

35. Plaintiff re-alleges paragraphs One (1) through Thirty-Four (34) of this Complaint, as if fully rewritten herein.

36. Plaintiff herein sues individually, and also as a member and representative of a class, pursuant to Ohio Civil Rule 23.

37. The aforesaid class is hereby defined as:

All persons and entities, within the 216, 440 and 330 telephone area codes, to whom Defendant transmitted one or more advertisements by fax, at any time during the years 2002 through 2004, without obtaining prior express permission or invitation to do so.

38. The aforesaid class includes at least fifty (50) or more persons and entities to whom Defendant transmitted advertisements by fax, without obtaining the prior express invitation or permission of the recipients.

39. The class is so numerous that joinder of all members is impracticable.

40. Questions of law and fact are common to the class.

41. The claims of the representative plaintiff are typical of the claims of the class.

42. Plaintiff will fairly and adequately protect the interests of the class.

43. This claim is filed, in this court, pursuant to Section 227(b)(3), United States Code, Title 47, to enjoin violations of the federal Telephone Consumer Protection Act

(Section 227, United States Code, Title 47), and also for the plaintiffs to be awarded **Five Hundred Dollars ($500)** for each separate violation, or **Triple Damages ($1,500)** if the defendant unsolicited fax advertisement was sent willfully.

44. Defendant **knew** that it was sending, or causing to be sent, unsolicited advertisements by fax.

45. The defendant, **Custom Tool & Gage, Inc.**, acted voluntarily, and under its own free will, and therefore ***willfully*** sent, or caused to be sent, unsolicited advertisements by fax.

46. Defendant is therefore liable for the sum of **$1,700** in damages, for each separate unsolicited fax advertisement, pursuant to Section 227(b)(3)(B), United States Code, Title 47

DEMAND FOR JUDGMENT

WHEREFORE, plaintiff prays for judgment of this Court against Defendant, for all damages allowed by law, for himself, and for the Class plaintiff.

The plaintiff further prays for an award of reasonable Attorneys Fees, and costs of this action, along with an Order enjoining Defendant from transmitting any further unsolicited advertisements by fax to Plaintiff or to anyone else, without obtaining prior express invitation or permission to do so, and keeping written records of such consent.

Respectfully submitted,

JOSEPH R. COMPOLI, JR.
(Reg. No. 0031193)
612 East 185th Street
Cleveland, OH 44119
Phone: (216)481-6700
Fax: (216)481-1047
Attorney for Plaintiff

DEMAND FOR TRIAL BY JURY

Plaintiff hereby demands trial by the maximum number of jurors allowed by law, on all issues raised by the Plaintiff's pleadings, pursuant to Ohio Civil Rule 38.

JOSEPH R. COMPOLI, JR.
Attorney for Plaintiff

47 U.S.C. 227
Chapter 5

227. Restrictions on the use of telephone equipment

a) Definitions

As used in this section-

(1) The term "automatic telephone dialing system" means equipment which has the capacity-

(A) to store or produce telephone numbers to be called, using a random of sequential number generator; and

(B) to dial such numbers.

(2) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over regular telephone line onto paper.

(3) The term "telephone solicitation" means the initiation of a telephone call or message of the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(4) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

(b) Restrictions on the use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States--

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions
The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission--

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;
(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subsection, subject to such conditions as the Commission may prescribe--
(i) calls that are not made for a commercial purpose; and
(ii) such classes or categories of calls made for commercial purposes as the Commission determines--
(I) will not adversely affect the privacy rights that this section is intended to protect; and
(II) do not include the transmission of any unsolicited advertisement; and
(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect.

(3) Private right of action
A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State-

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount under subparagraph (B) of this paragraph.

OHIO REVISED CODE.

SECTION 1345.01 Definitions

As used in sections 1345.01 to 1345.13 of the Revised Code:

(A) "Consumer transaction" means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things.

SECTION 1345. 02 (A) Unfair or deceptive consumer sales practices prohibited

(A) No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.

SECTION 1345.09 Private remedies

For a violation of Chapter 1345. Of the Revised Code, a consumer has a cause of action and is entitled to relief as follows:

(A) Where the violation was an act prohibited by section 1345.02 or 1345.03 of the Revised Code, the consumer may, in an individual action, rescind the transaction or recover his damages.

(B) Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02 or 1345.03 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code, the consumer may rescind the transaction or recover, but not in a class action, three times the amount of this actual damages or two hundred dollars, whichever is greater, or recover damages or other appropriate relief in a class action under Civil Rule 23, as a mended.

(C) In any action for rescission, revocation of the consumer transaction must occur within a reasonable time after the consumer discovers or should have discovered the ground for it and before any substantial change in condition of the subject of the consumer transaction.

(D) Any consumer may seek a declaratory judgment, an injunction, or other appropriate relief against an act or practice that violates this chapter.

(E) When a consumer commences an individual action for a declaratory judgment or an injunction or a class action under this section, the clerk or court shall immediately mail a copy of the complaint to the attorney general. Upon timely application, the attorney general may be permitted to intervene in a private action or appeal pending under this section. When a judgment under this section becomes final, the clerk of court shall mail a copy of attorney general for inclusion in the public file maintained under division (A)(3) of section 1345.05 of the Revised Code.

(F) The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if either of the following apply:

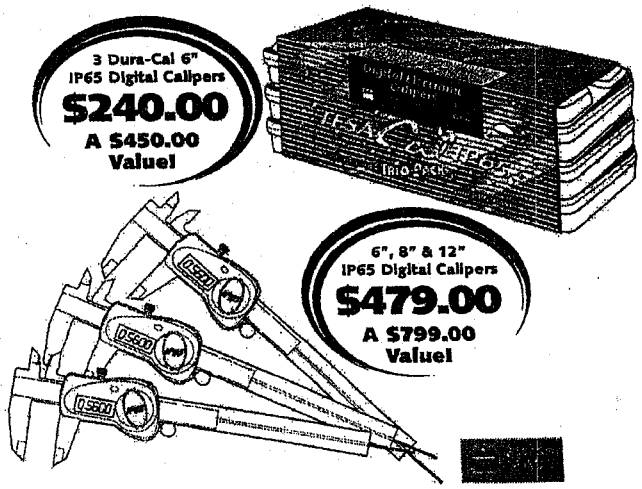
(1) The consumer complaining of the act or practice that violated this chapter has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith:

(2) The supplier has knowingly committed an act or practice that violates this chapter.

HISTORY: 134 v H 103 (Eff 7-14-72); 137 v H 681. Eff 8-11-78.

Attention: Quality Control Manager **From:** CustomTool&Gage

Pick Up an IP65 Trio-Pack Today and Save Over 45%!



For a limited time Brown & Sharpe IP65 digital calipers are available at a special savings when purchased as a Trio-Pack.

brown & sharpe TESA TECHNOLOGY

CUSTOM TOOL & GAGE INC

5765 CANAL RD. CLEVELAND OH 44125-3498
fax: 216.447.0381 email: ToolnGage@aol.com
800.354.3543 216.447.0860

Kohrman Jackson & Krantz PLL
ATTORNEYS AT LAW

March 16, 2004

Joseph R. Compoli, Jr.
Attorney at Law
612 East 185th Street
Cleveland, OH 44119

Re: Your Client: James Brown
My Client: Custom Tool & Gage, Inc.

Dear Mr. Compoli:

I have received copies of your letter and enclosures of March 11, 2004, addressed to my client. I understand that you have filed numerous claims under the TCPA and Ohio Revised Code Chapter 1345. Please be advised that I am quite familiar with the law and the cases decided in Ohio. I have reviewed the facts with my client and let me provide you with some information that you may wish to consider before you file a lawsuit.

Custom Tool & Gage, Inc. is a reputable company which sells precision materials to manufacturers of products which must meet exacting tolerances. The company has been in business for thirty years. The company does not send advertising by facsimile to businesses who are not frequent purchasers of its materials.

My client is confused by the allegations of your draft pleading. It clearly sent the fax attached to your draft pleading, but the document was faxed to Miller Bearing Co. Inc., which its records indicate is located at 420 Portage Blvd., Kent, Ohio 44240, the same address as the putative plaintiff. My client was not aware that Mr. Brown was authorized to review advertising materials for the company. We understand that he is a truck driver. My client deals with Sonny Bosley, who is the buyer. Since January of 2003, Miller Bearing has place 12 orders with my client for materials, including 5 orders in 2004. The fax number known for Miller Bearing is 330-678-1765. This is the number which my client entered when the advertisement was sent. The fax was clearly not intended for Mr. Brown. How he came to possess the fax is only known to him and possibly to you.

V 216-736-7239
F 216-621-6536
E kwk@kjk.com

One Cleveland Center
20th Floor
1375 East Ninth Street
Cleveland, OH 44114-1793
216-696-8700
www.kjk.com

Kohrman Jackson & Krantz PLL
ATTORNEYS AT LAW

Joseph R. Compoli, Jr.
March 16, 2004

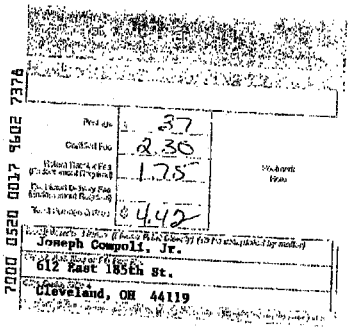
In August of 2003 the FCC issued its Order on Reconsideration (CG Docket No. 02-278), which provides that until January 1, 2005 a business may send unsolicited facsimile ads to those persons with whom it has established business relationships, without obtaining express written permission.

I am particularly concerned about your statements to my client regarding the law as it applies to this case, given the fact that my client was clearly acting in a lawful manner. You may be assured that the case, if you choose to file, will be defended vigorously and that the court will be made aware of all of the facts and circumstances of this matter.

Very truly yours,

Kenneth W. Kleinman
Of Counsel

cc: Custom Tool & Gage, Inc.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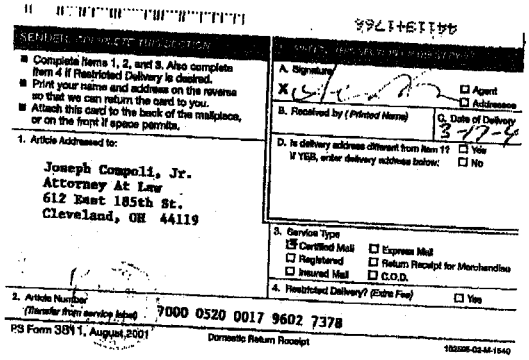
1.75
4.42
Joseph Compoli, Jr.
612 East 185th St.
Cleveland, OH 44119


SENDER: COMPLETE THIS SECTION
Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
Print your name and address on the reverse so that we can return the card to you.
Attach this card to the back of the mailpiece, or on the front if space permits.
1. Article Addressed to:
Joseph Compoli, Jr.
Attorney At Law
612 East 185th St.
Cleveland, OH 44119
A. Signature
Agent
Addressee
B. Received by (Printed Name)
C. Date of Delivery
D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No
3. Service Type
Certified Mail
Express Mail
Registered
Return Receipt for Merchandise
Insured Mail
C.O.D.
4. Restricted Delivery? (Extra Fee) Yes
2. Article Number (Transfer from service label) 7000 0520 0017 9602 7378
PS Form 3811, August 2001
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Joseph R. Compoli, Jr.
Attorney At Law

Telephone: 216-481-6700
Facsimile: 216-481-1047

612 East 185th Street
Cleveland, OH 44119

March 18, 2004

Custom Tool & Gage, Inc.
Attn: President or CEO
5765 Canal Rd.
Cleveland, Oh 44125

Re: James Brown - File No. 03-0912-01

Dear Sir/Madame:

This letter is written to request that you please disregard the letter from my office addressed to your client dated March 11, 2004. I represent James Brown for claims under the TCPA for unsolicited fax advertisements that he receives. Mr. Brown receives hundreds of these faxes a year.

Your fax was inadvertently given to my office as part of Mr. Brown's group of unsolicited faxes. Mr. Brown has advised me that he conducts business with Custom Tool & Gage and that he does not wish to pursue any claims against you. He also advised me that he would like to continue doing business with you and that he would like to continue receiving faxes from Custom Tool & Gage.

I sincerely apologize on behalf of James Brown and my office for any inconvenience that this may have caused. Please advise your client not to hesitate to contact Mr. Brown in the future.

Sincerely,

JOSEPH R. COMPOLI, JR.

JRC/ag

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Chase Industries Falls Prey to Frivolous Lawsuit in Ohio
Wednesday, March 03, 2004

Joseph Compoli, Jr., LPA, of Cuyahoga County, OH, has filed complaints against multiple businesses using the do not fax portion of the TCPA Act of 1991- also known as the "Do Not Call" Act. The act sets a $500 fine for each unsolicited fax and allows for tripling of the fine for "willful violation". This portion of the act was intended to protect consumers from "Blast Fax" marketing companies that use "War Dialers" to send millions of faxes per day...as many as 800 to a single fax number, thus wasting resources.

Some lawyers have used this legislation to file suit against businesses who have sent as few as 1 or 2 faxes. In some cases, this even includes faxes sent to another individual and mistakenly received by the fax machine named in the suit. One contact at the FCC, the government entity which oversees and enforces the TCPA, said that though they had heard of Attorneys "ambulance chasing" by searching for unsolicited faxes, the act was intended to protect consumers from real damage in the form of lost time and resources. And also that a simple telephone call, rather than a court case, is often the place to start.

Compoli sends small businesses a very threatening letter which quotes select portions of the TCPA and cites huge fines (in the millions of dollars) levied by the FCC against Mega-Corporate violators. He then offers to settle for the maximum damage amount allowed. His next step is sending 30 or so pages of intimidating questions to be answered for the class action suit he is filing against the business. A small business is forced to settle or hire a lawyer to defend itself. In one recent case, Compoli sought $70,000 in attorneys' fees, a request that the court did not find him entitled to.

Gary Saulter, president of Chase Industries, Inc., one of the small

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businesses being taken to court by Compoli, said "I am amazed that this kind of thing is allowed to happen in our justice system. We make every attempt to conform to the law in all aspects of our business, and face the possibility of severe financial penalties for unintentionally causing miniscule damage-about $0.03 in resources. I'm sure the people of Cuyahoga County want their courts to have time to concentrate on important problems....not to have them used to line lawyer's pockets".

Chase Industries is a leasing company headquartered in Grand Rapids, MI, which specializes in medical equipment leasing.

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*269 **FEDERALISM** AND **FEDERAL LIABILITY REFORM:** THE UNITED STATES CONSTITUTION SUPPORTS REFORM

Victor E. Schwartz [FNa1]
Mark A. Behrens [FNaa1]
Leavy Mathews III [FNaaa1]

Three recent Supreme Court decisions have bolstered the arguments and efforts of opponents of federal tort reform initiatives. This Article contends that these decisions do not stand in the way of liability reform at the federal level. The authors maintain that courts in the modern era have reviewed economic legislation with great deference and should continue to do so. Accordingly, neither the Commerce Clause nor the Tenth Amendment impose limitations on Congress's ability to enact tort reform measures.

Virtually every American has heard the conservative call to protect "states' rights." It is a political staple of conservative causes. [FN1] Ironically, however, in recent debates about federal tort reform legislation, the call to respect states' rights has been trumpeted by some very unlikely sources-- liberal members of Congress [FN2] and consumer advocates who have traditionally supported *270 federal regulation of everything from food package labeling [FN3] to local activities like used car sales [FN4] and funeral home practices. [FN5] Both Presidents Ronald Reagan and George Bush, on the other hand, supported federal product liability reform legislation, notwithstanding their ideological preference for an expanded role for state governments. [FN6]

Civil justice reform has turned the world of states' rights upside down. A basic explanation for this phenomenon is political. Opponents of federal liability reform legislation enjoy pointing out an apparent inconsistency in conservative philosophy. [FN7] They can show that the ascent to power of the Republican-controlled Congress early in 1995 was based, in part, on a pledge that members would reduce the role of the federal government and give more policymaking authority to the states. [FN8] Various federal initiatives sought to "devolve power to the states in areas such as welfare, school lunch programs, legal services for the poor, speed limits on interstate highways, and other spheres in which the federal government had played a dominant role for decades." [FN9] Federal civil justice reform was and continues to be an exception to this pattern.

*271 Another explanation for the prominence of federalism in arguments against federal liability reform is more pragmatic. Opponents of reform know that if their political arguments fail to carry the day and such legislation is enacted, the U.S. Constitution may provide the only mechanism to nullify the law. Our experience in working on tort reform at the state level has taught us that, once legislation is enacted, it is likely to be challenged on constitutional grounds by the Association of Trial Lawyers of America ("ATLA") and the political allies of the organized plaintiffs' bar. [FN10]

We believe that there are certain rational goals of civil justice reform that, as a practical matter, can only be accomplished at the federal level. [FN11] The fact that tort law has long been the province of the states does not mean that it should be off-limits to any reform at the federal level. Federal legislation can provide an effective means of addressing liability problems that are rooted in interstate commerce and national in scope.

For example, Congress is uniquely suited to enact a national solution to provide predictability in the product liability system. [FN12] Predictability reduces unnecessary legal costs and allows consumers to know their rights; it also allows manufacturers to understand their obligations. State product liability legislation, as a practical matter, cannot achieve this goal on a national level. [FN13] For that reason, the National Governors' Association ("NGA") has adopted resolutions on several different occasions calling for Congress to enact federal product liability legislation. ***272** [FN14] The American Legislative Exchange Council, a bipartisan organization of more than 3000 state legislators from all fifty states formed in principal part to protect states' rights, also supports the enactment of federal product liability reform legislation. [FN15]

Further, as we argue in this Article, federal liability reform has ample basis for support in the Constitution. We address arguments to the contrary [FN16] based on three recent decisions by the Supreme Court--New York v. United States, [FN17] United States v. Lopez, [FN18] and Printz v. United States. [FN19] While these decisions provide limits on the federal government's power over the states, they do not preclude the enactment of civil justice reform at the federal level.

This Article does not advocate any particular bill in the matrix of federal tort reform legislation. Rather, it responds to questions that may be raised in general about whether civil justice reform is constitutional and comports with basic principles of federalism. By focusing on such general principles, this Article is intended to have a long "shelf life" that can contribute to constitutional debates and legal challenges in the courts for many years to come.

Part I of this Article argues that Congress has the power under the Commerce Clause of the Constitution to enact federal liability reform legislation and that state courts are bound to enforce ***273** that law under the Supremacy Clause. Part II shows that, for almost a century, Congress has enacted legislation altering state tort law, and that these laws have been held constitutional time after time. Finally, Part III maintains that state court enforcement of federal liability reform legislation would not encroach upon any powers specifically reserved for the States and, therefore, is not inconsistent with the Tenth Amendment.

I. THE COMMERCE CLAUSE EMPOWERS CONGRESS TO ENACT FEDERAL LIABILITY REFORM LEGISLATION

A. The Commerce Clause

The Commerce Clause of the Constitution gives Congress the power to regulate commerce. [FN20] As the Supreme Court has said, "This power, like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." [FN21]

The Supreme Court has identified "three broad categories of activity" [FN22] that Congress may regulate pursuant to its Commerce Clause authority: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce or persons or things in interstate commerce; and (3) activities having a substantial relation to interstate commerce, regardless of whether the activity is local or extends across state boundaries. [FN23]

The Supreme Court has ruled that, while local activity may not have a substantial effect on interstate commerce when considered in isolation, it may have a substantial effect on interstate commerce when considered in the aggregate. In Wickard v. Filburn, [FN24] for example, the Court upheld Congress's regulation of ***274** the consumption of homegrown wheat because of its aggregate economic effect on the interstate wheat market. The Court explained that, "even if |the| activity |is| local and though it may not be regarded as commerce, it may still ... be reached by Congress if it exerts a substantial economic effect on interstate commerce." [FN25] The Court also concluded that Congress may regulate activity "irrespective of whether [the] effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" [FN26]

B. Federal Tort Laws

Consistent with its power to regulate comm o the Commerce Clause, Congress has enacted a number of laws that preempt state tort law. [FN27]

ly Laws

As far back as 1908, Congress enacted a "tort substitute" for workers' compensation in the railroad field. The Federal Employers' Liability Act ("FELA"), [FN28] a misleadingly named federal statute that defines rights and duties in personal injury cases brought by railroad workers against their employers, was upheld by the Supreme Court as a constitutional exercise of congressional power. [FN29]

Similarly, in 1927, Congress enacted the Longshore and Harbor Workers' Compensation Act ("LHWCA"), [FN30] a FELA-like statute that provides fixed awards to employees or their dependents in cases of employment-related injuries or deaths occurring upon the navigable waters of the United States. [FN31] Congress enacted LHWCA both to provide injured employees with more ***275** immediate and less expensive relief than that available in a common law tort action [FN32] and to provide employers with liability that was "limited and determinative." [FN33] Again, the Supreme Court held that Congress had the constitutional power to enact this piece of federal tort legislation. [FN34] These are just two examples among many that illustrate Congress's active, longstanding participation in setting national tort liability rules. [FN35]

2. Recent Laws Setting National Tort Policy Rules: 1993-1998

Almost nine decades after the enactment FELA, the 103d Congress enacted the General Aviation Revitalization Act of 1994 ("GARA"), [FN36] which established an eighteen-year statute of repose, or outer time limit on bringing litigation, for accidents involving general aviation aircraft. [FN37] GARA was predicated on Congress's power to regulate interstate commerce. Enough time has passed to conclude that GARA has been successful in its goal of revitalizing the light aircraft industry, which could not have been accomplished by state action alone.

A March 1997 hearing of the Consumer Affairs Subcommittee of the Senate Commerce Committee explored GARA's effects. [FN38] John Moore, senior vice president of Human Resources for Cessna Aircraft Company, testified that Cessna withdrew from the single engine aircraft market in 1986, but as a result of ***276** GARA, is now back in the single engine aircraft business. [FN39] At the time of the subcommittee's hearing, Cessna's small aircraft division had more than 650 employees and had plans to double employment in 1998. [FN40] John Peterson of the Montgomery County Action Council of Coffeyville, Kansas-- the home of Cessna's new small aircraft plant--testified that, prior to 1995, Montgomery County ranked ninety-eighth out of 105 Kansas counties in economic indicators. [FN41] The county's population was dropping, employment was on the decline, per capita income was down, and property values were depressed. [FN42] After GARA, new housing starts were up 260%, the value of new homes doubled, retail sales were up five percent, per capita income nearly doubled, and nearly 500 people per year were moving into the county. [FN43]

Similarly, Paul Newman, Chief Financial Officer of the New Piper Aircraft Corporation, testified that GARA permitted New Piper to emerge from a Chapter 11 bankruptcy that had idled 1000 workers. [FN44] Likewise, John S. Yodice, General Counsel of the Aircraft Owners and Pilots Association ("AOPA"), testified that his members supported GARA, even though it limited their right to sue. [FN45] AOPA members realized that they were paying an extraordinary amount for new aircraft due to manufacturers' "long tail" liability exposure for very old planes--aircraft that had flown safely for more than two decades. [FN46]

The 104th Congress enacted a number of other tort and civil justice reform measures:

The Small Business Job Protection Act of 1996 [FN47] included a provision that: (1) holds punitive damages received in personal injury suits subject to federal income tax by eliminating the possibility for an exclusion from taxable gross income; (2) eliminates the possibility of an exclusion for personal injury damages in cases that do not involve physical injury or illness; and (3) provides that emotional distress is not by itself a physical injury or

sickness;

***277** The Federally Supported Health Centers Assistance Act of 1995 [FN48] extended Federal Tort Claims Act coverage to community, migrant, and homeless health centers;

The Aviation Disaster Family Assistance Act of 1996 [FN49] limited unsolicited contacts from lawyers and insurance company representatives with airline crash victims or their families;

The Bill Emerson Good Samaritan Food Donation Act of 1996 [FN50] provided limited tort immunity to encourage the donation of food and grocery products to nonprofit organizations for distribution to needy individuals; and

The Private Securities Litigation Reform Act of 1995 [FN51] placed limits on the conduct of private lawsuits under the Securities Act of 1933 and the Securities Exchange Act of 1934. [FN52]

The 105th Congress continued the trend toward greater federal involvement in deciding liability rules by enacting several other tort reform laws:

The Volunteer Protection Act of 1997 [FN53] provided limited immunity for volunteers acting on behalf of a nonprofit organization, creating a national standard of punitive damages liability for volunteers, and abolishing joint liability for noneconomic damages in tort actions involving volunteers;

The Amtrak Reform and Accountability Act of 1997 [FN54] created a federal standard for punitive damages awards in tort cases brought against Amtrak by its passengers and capped Amtrak's tort liability at $200 million for each rail accident;

***278** The Biomaterials Access Assurance Act of 1998 [FN55] provided suppliers of the raw materials and component parts used to make implantable medical devices with a mechanism to obtain dismissal, without extensive discovery or other legal costs, in certain tort suits in which plaintiffs allege harm from a finished medical implant;

The Year 2000 Information and Readiness Disclosure Act [FN56] banned, with a few exceptions, the use of "Year 2000 readiness disclosure" statements by plaintiffs as evidence in court to prove the truth or accuracy of a company's assertions about dealing with the Year 2000 computer problem and protects companies from liability for Year 2000 statements they made that are alleged to be false, inaccurate, or misleading unless it is proven that the company knew the statement was false, inaccurate, or misleading and made it with an intent to deceive or mislead; and

The Securities Litigation Uniform Standards Act of 1998 [FN57] made federal courts the sole venue for most securities class action fraud lawsuits involving fifty or more parties. The law was enacted to close a loophole in the Private Securities Litigation Reform Act of 1995. [FN58] That law raised the standard for filing such suits in federal courts, but was undermined when lawyers shifted their filings to state courts. [FN59]

C. The Lopez Decision Does Not Undermine the Authority of Congress to Enact Liability Reform Legislation

Despite the long history of congressional involvement in matters having an effect on interstate commerce, opponents of federal liability reform have questioned whether Congress has the authority to enact liability reform legislation in light of the holding of United States v. Lopez. [FN60]

In Lopez, the Court considered whether Congress's enactment of the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to ***279** believe, is a school zone," [FN61] was a proper exercise of Congress's Commerce Clause power. The Court held that it was not, because "[t]he Act neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce." [FN62]

Conceptually, Lopez was not a Commerce Clause case. Congress was not regulating the firearms market or any other economic activity. As the Court explained, the Gun-Free School Zones Act was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." [FN63] Moreover, "respondent was a local student at a local school; there [was] no indication that he had recently moved in interstate commerce, and there [was] no requirement that his possession of the firearm ha[d] any concrete tie to interstate commerce." [FN64]

The Lopez decision is distinguishable both legally and factually from those cases upholding regulation of activities that arise out of or are connected with commercial transactions, which viewed in the aggregate, substantially effect

interstate commerce. These cases directly support Congress's Commerce Clause authority over liability law. [FN65] In fact, rather than limiting Congress's Commerce Clause authority, the Lopez decision can be read to support legislation that would regulate the firearms industry in a manner more explicitly connected with interstate commerce, such as a limit on the liability of gun manufacturers in order to promote the development of the firearms industry or ***280** an imposition of requirements on gun manufacturers to promote firearms safety. [FN66]

II. FEDERAL TORT LAWS HAVE BEEN AND SHOULD BE DECLARED CONSTITUTIONAL

A. Courts Have Respected the Role of Congress in the Development Of Tort Law

For almost a century, the Supreme Court and the lower courts have upheld numerous federal tort law statutes against constitutional challenges. The courts have uniformly held that such economic legislation comes clothed with a presumption of constitutionality that is subject to a highly deferential rational basis standard of review. In every modern case, the legislation has been found to pass constitutional muster.

1. Limitation of Shipowners' Liability Act

The Limitation of Vessel Shipowners' Liability Act and the Harter Act (collectively "the LSLA") [FN67] were the first major federal tort policy statutes to be challenged in the Supreme Court. The LSLA, enacted to promote commercial shipping, exempted ship owners from liability for any loss or damage to goods on board ship resulting from fire, unless the fire was caused by the design or neglect of the ship owner. [FN68] In addition, the LSLA limited ship owners' liability for any loss or destruction of goods aboard their ships. [FN69]

The Supreme Court upheld the constitutionality of the LSLA in Providence & New York Steamship Co. v. Hill Manufacturing Co. [FN70] The case arose when the Providence Company, a defendant in state tort suits filed by the Hill Company to recover damages ***281** arising from a fire aboard one of Providence's ships, sought to limit its liability and suspend the state suits in accordance with the LSLA. [FN71]

The Supreme Court held that there was "no doubt that Congress had [the] power to pass the [LSLA]." [FN72] Quoting from an earlier decision, The Lottawana, [FN73] the Court reaffirmed Congress's "authority under the commercial power ... to introduce such changes [in maritime law] as are likely to be needed," [FN74] and indicated that it "perceive[d] no reason for entertaining any serious doubt" that Congress's power under the Commerce Clause "may be extended to the securing and protection of the rights and title of all persons dealing [in shipping]." [FN75] The Court added that because Congress acted within its lawful authority to regulate interstate commerce, the LSLA was "binding on all courts and jurisdictions throughout the United States." [FN76] The Court went on to hold that the purpose of the LSLA would be frustrated unless the institution of proceedings in a federal district court superseded the prosecution of claims for the same losses and injuries in other courts. [FN77]

2. Federal Employers' Liability Act of 1908

In Mondou v. New York, New Haven & Hartford Railroad Co., [FN78] the Supreme Court upheld the constitutionality of the Federal Employers' Liability Act of 1908 ("FELA"), [FN79] which established rules governing personal injury and wrongful death actions brought by railroad workers and their families against railroads engaged in interstate commerce. [FN80] Federal and state courts were given concurrent jurisdiction to decide FELA cases. [FN81]

***282** In Mondou, railroads unsuccessfully challenged the constitutionality of the legislation on several grounds. The Court in Mondou held that Congress had not exceeded its Commerce Clause authority by enacting tort rules which deviated from the common law. In an oft-quoted passage, the Court held that:

> A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will ... of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy

defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. [FN82]

The Court also noted that despite the fact that employer liability had traditionally been a matter of state law, Congress had a legitimate interest in replacing the patchwork of state laws with uniform, national legislation "to promote the safety of the [railroad] employees and to advance the commerce in which they are engaged." [FN83]

Furthermore, the Court held that the "classification" created by FELA (i.e., the distinction it makes between interstate railroad carriers, which are subject to liability, and all other parties, which are not) did not doom the statute under the Due Process Clause of the Fifth Amendment, [FN84] even though it could "occasion some inequalities." [FN85] The Court held that tort law classifications are constitutionally permissible under the Fifth Amendment as long as the classification has a rational basis. [FN86] Tested by that standard, the Court held, FELA was "not objectionable." [FN87] The Court pointed out that it had repeatedly sustained "[l]ike classifications of railroad carriers and employees for like purposes" ***283** under the Equal Protection Clause of the Fourteenth Amendment. [FN88]

After resolving FELA's constitutionality, the Court moved to settle FELA's preemptive effect over state laws covering railroad employer liability. The Court explained that although Congress had chosen not to regulate the field of railroad carrier liability in the past, and although the subject fell within the police power of the states in the absence of congressional action, Congress was not therefore precluded from acting. [FN89] To the contrary, once Congress acted, "the laws of the states, in so far as they cover the same field, [were] superseded, for necessarily that which is not supreme must yield to that which is." [FN90]

The Court went on to explain that FELA did not present federalism problems because Congress was not setting state policy. Rather, Congress was establishing federal policy to be implemented by the states in accordance with the Supremacy Clause. The Court held:

> [W]e deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure. [FN91]

The Court added that it did not perceive that FELA would cause any appreciable inconvenience or confusion for state courts, and that in any case, such inconvenience or confusion would not change its holding:

> We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules ***284** of law to different situations and subjects, even although possessing some elements of similarity, as where the liability of a public carrier for personal injuries turns upon whether the injured person was a passenger, an employee, or a stranger. [FN92]

3. The Longshore and Harbor Workers' Compensation Act

In Crowell v. Benson, [FN93] the Supreme Court was asked to decide the constitutionality of the Longshore and Harbor Workers' Compensation Act ("LHWCA"). [FN94] The LHWCA created a nofault compensation scheme that provided fixed awards to employees injured upon the navigable waters of the United States. [FN95]

The Court began by holding that the federal power to alter, amend, or revise the maritime law gave Congress the authority to define the substantive rights of employees under the LHWCA (in this case, by providing for recovery in the absence of fault, establishing classifications based on type of injury, fixing the range of compensation for disability or death, and designating the classes of beneficiaries). [FN96]

Next, the Court addressed whether the substantive rights created by the LHWCA violated the Due Process Clause of the Fifth Amendment. [FN97] The Court, applying a deferential rational basis test, held that neither the classifications created by the statute nor the extent of compensation provided were unreasonable. [FN98] In light of

the difficulties associated with determining actual damages in maritime cases, the Court held, Congress was justified in providing for the payment of damages in amounts that would reasonably approximate a claimant's probable damages. [FN99] The Court also noted that the plaintiff's Fifth Amendment objections were substantially similar to those which the Court had rejected in challenges to state workers' compensation laws under the Due Process Clause of the Fourteenth Amendment. [FN100]

***285** After upholding the constitutionality of the LHWCA's substantive provisions, the Court turned to the LHWCA's procedural requirements. The plaintiff's procedural objections to the LHWCA focused on the administrative authority conferred by the Act. [FN101] The Court held that the use of the administrative method to assess the cause, character, and effect of claimants' injuries fell "easily within the principle of the decisions sustaining similar procedure against objections under the due process clauses of the Fifth and Fourteenth Amendments," [FN102] and did not constitute an unconstitutional invasion of judicial power. [FN103]

4. The Drivers Act

In 1961, Congress enacted the Drivers Act [FN104] to relieve government drivers from the burden of personal liability for claims arising from vehicular accidents occurring in the course of their employment. Unlike many employers, the United States neither maintained liability insurance to protect its employees nor assisted them in paying for their own insurance against on-the-job accidents. [FN105] "[M]oved by the fact that automobile accident insurance placed such a heavy financial burden on government drivers that it was adversely affecting morale and making it difficult for the government to attract competent drivers into its employ," [FN106] Congress decided to forbid suits against federal drivers, but to permit suits against the United States for tort liability arising out of accidents caused by a driver's negligence. [FN107]

a. Private citizen and federal driver. The Drivers Act was challenged on constitutional grounds in Nistendirk v. McGee, [FN108] a personal injury action arising out of an automobile accident between a private citizen and a federal employee (in this instance, a rural mail carrier). The plaintiff initially brought a negligence action against the mail carrier in Missouri state court. The ***286** United States removed the case to federal court and was substituted as the defendant pursuant to the Drivers Act. [FN109] The plaintiff, seeking to obtain full damages and wanting to avoid trying the case under the Federal Tort Claims Act, moved to remand the case to state court on the ground that the Drivers Act violated the Fourteenth Amendment of the United States Constitution. [FN110]

The court rejected plaintiff's argument that the Drivers Act violated the Fourteenth Amendment by replacing a common law remedy with a statutory one. [FN111] The court noted that, in Silver v. Silver, [FN112] the Supreme Court, in sustaining the abolition of a nonpaying passenger's right to sue his host for negligence, had held that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." [FN113] The court concluded that because Congress had a legitimate interest in insulating federal drivers from liability, the Drivers Act constituted a valid exercise of legislative power under the Necessary and Proper Clause of Article I. [FN114]

b. Federal employee and federal driver cases. Most of the litigation involving the Drivers Act has involved claims by federal employees injured by government drivers, since prior to passage of the Act, civilian government workers injured in the course of employment as a result of the negligence of a fellow-employee were not limited to claims against the United States under the Federal Employees' Compensation Act ("FECA"). [FN115] They also had the right to bring a common law tort action ***287** against the negligent co-worker. [FN116] Congress, however, did not "specifically consider whether or not this cause of action against a fellow government employee should survive" passage of the Drivers Act. [FN117] That issue was addressed by a number of courts, which uniformly held that the Drivers Act abrogated the traditional common law rule. [FN118] Those decisions, in turn, produced litigation challenging Congress's authority to do so.

The Fourth Circuit addressed the constitutionality of the Drivers Act in Carr v. United States. [FN119] The plaintiff, a government employee injured by a federal driver, argued that the abrogation of a government employee's common law action against a fellow employee for negligence violated the Due Process Clause of the Fifth Amendment, because the Drivers Act did not create a new benefit as a quid pro quo. [FN120] Furthermore, the plaintiff argued, the Drivers Act violated the Equal Protection Clause of the Fifth Amendment, because it created an

impermissible distinction between federal employees injured in vehicular accidents caused by fellow employees and federal workers injured in other job-related activities. Only Drivers Act plaintiffs were specifically barred from bringing tort actions against negligent co-employees. [FN121]

The Fourth Circuit rejected the plaintiff's due process argument, noting that it had already been rejected by the Supreme Court. [FN122] Moreover, even though a common law action could no longer be brought against the United States, the Fourth Circuit said, the Drivers Act itself provided an adequate quid pro quo, because it provided plaintiff with "valuable protection against personal liability for on-the-job automobile accidents for which he might have been responsible." [FN123]

The court rejected the plaintiff's equal protection challenge on the ground that the classification created by the Drivers Act did not penalize the exercise of any constitutional right. [FN124] Therefore, ***288** the court held, the statutory classification did not have to be justified by a compelling governmental interest. Rather, it came "clothed with a presumption of constitutionality" and would be upheld as long as Congress had a rational basis for enacting the legislation. [FN125] The court concluded that "the magnitude of the automobile insurance problem justified Congress's separate treatment of this specific problem." [FN126]

The Third Circuit reached a similar conclusion in Thomason v. Sanchez. [FN127] The plaintiff, a serviceman, was injured when he was struck by an automobile operated by another serviceman. He had no remedy at all against the United States, because of the so-called "Feres doctrine," [FN128] and thus presented a highly compelling appeal. [FN129] The plaintiff in Thomason argued that he should be allowed to proceed against the defendant and the defendant's automobile insurer. [FN130]

The Third Circuit, however, rejected the plaintiff's argument that common law tort actions against fellow government employees had survived passage of the Drivers Act. [FN131] The Third Circuit also rejected the plaintiff's argument that the Drivers Act, as applied to him, deprived him of all remedies at law and, therefore, constituted a denial of due process under the Fifth Amendment. [FN132] Adopting the reasoning of the Fourth Circuit in Carr, [FN133] the Third Circuit held that Congress was justified in passing the Drivers Act to relieve the heavy automobile insurance burden on federal drivers. [FN134]

5. Black Lung Benefits Act of 1972

In Usery v. Turner Elkhorn Mining Co., [FN135] the Supreme Court upheld the constitutionality of Title IV of the Federal Coal Mine ***289** Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972. [FN136] The black lung benefits provisions established a compensation scheme for coal miners allegedly suffering from "black lung disease" (pneumoconiosis) and the survivors of miners who died from or were "totally disabled" by the disease. [FN137] Coal mine operators challenged a number of the black lung benefit provisions as unconstitutional.

First, the operators contended that the Black Lung Benefits Act violated the Fifth Amendment Due Process Clause by requiring them to compensate former miners who terminated their work in the industry before the Act passed. The operators argued that "the Act spreads costs in an arbitrary manner by basing liability upon past employment relationships, rather than taxing all coal mine operators presently in business." [FN138]

The Court made it clear that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality." [FN139] It then held that Congress was justified in its decision to provide for the retroactive application of liability under the Black Lung Benefits Act. [FN140] The Court stated that, whether it would have been wiser for Congress to have chosen a cost-spreading scheme that was broader or more practical under the circumstances was "not a question of constitutional dimension." [FN141]

Second, the coal mine operators challenged the two alternative methods set forth by Congress for proving "total disability" due to black lung disease, a prerequisite for compensation under the Act. [FN142] The Court held, however, that the standards adopted by Congress could not be deemed to be "purely arbitrary" and, thus, were constitutionally valid. [FN143]

Third, the operators argued that a provision of the Act which provided that no claim for benefits could be defeated based solely on the results of a chest x-ray violated due process. The operators argued that x-ray evidence was frequently the only ***290** evidence that they could put forth to rebut a black lung claim. [FN144] The Court noted, however, that Congress was presented with "significant evidence" that x-ray testing was not an accurate indicator of the absence of disease. [FN145] Thus, "Congress was faced with the problem of determining which side should bear the burden of the unreliability." [FN146] The Court held that the fact that "Congress ultimately determined 'to resolve doubts in favor of the disabled miner' [did] not render the enactment arbitrary under the standard of rationality appropriate to th[e] legislation." [FN147]

6. The Price-Anderson Act

The Price-Anderson Act, [FN148] as amended in 1975, limited the aggregate liability for a single nuclear incident to $560 million to be paid from contributions from nuclear power plant operators, private insurance, and the federal government. In addition, the amended Act required operators to waive certain legal defenses in the event of an extraordinary nuclear incident. [FN149]

The Price-Anderson Act was critical to the development of the private nuclear power industry in the United States. [FN150] Congress appreciated that, even though the risk of a major nuclear accident was extremely remote, "the potential liability dwarfed the ability of the nuclear power industry and private insurance companies to absorb the risk." [FN151] Without reasonable and defined limits on liability, there might not be a nuclear power industry as we know it today.

In Duke Power Co. v. Carolina Environmental Study Group, Inc., [FN152] individuals who lived close to proposed nuclear power plants and two organizations sought to prevent construction of the planned facilities by obtaining a declaration that the Price-***291** Anderson Act was unconstitutional. [FN153] After deciding that plaintiffs had standing to challenge the Act, [FN154] the Supreme Court addressed plaintiffs' argument that the Act violated the Due Process Clause, because of the alleged arbitrariness of the $560 million statutory ceiling on liability. [FN155]

The Court rejected plaintiffs' contention that the Act should be subjected to an intermediate standard of review, holding that the Price-Anderson Act was a "classic example of an economic regulation" that could only be overcome by a showing that Congress acted in an "arbitrary and irrational way." [FN156] In light of this standard, the Court held that the Act passed constitutional muster because the liability cap bore a rational relationship to Congress's desire to stimulate the private sector's involvement in nuclear power. [FN157] Importantly, the Court stated that, while any cap could be characterized as arbitrary in some sense, the decision to fix a $560 million ceiling was not the "kind of arbitrariness" that would flaw an otherwise constitutional law. [FN158]

Plaintiffs' remaining due process objection was that the liability limitation failed to provide a satisfactory quid pro quo for the common law rights of recovery that the Act abrogated. The Court, however, expressed doubt whether the Due Process Clause requires that a statutory compensation scheme either duplicate the recovery available at common law or provide a reasonable substitute. [FN159] The Court cited earlier decisions which "clearly established" that "[a] person has ... no vested interest in any rule of the common law." [FN160] It also cited an earlier decision that held that the "Constitution does not forbid the ... abolition of old [rights] recognized by the common law, to attain a permissible legislative object." [FN161] The Court went on to hold that, even if there were a quid pro quo requirement, the assurance of a ***292** $560 million fund provided a "just substitute" for the common law rights replaced by the Act. [FN162]

Finally, the Court held that the Price-Anderson Act did not violate the Equal Protection Clause because the "general rationality" of the Act's liability ceiling provided "ample justification for the difference in treatment between those injured in nuclear incidents and those whose injuries are derived from other causes." [FN163]

7. Swine Flu Act

The National Swine Flu Immunization Program of 1976 ("Swine Flu Act") [FN164] was enacted to deal with the collapse of the commercial liability insurance market for vaccine manufacturers and distributors following judicial

decisions holding polio vaccine manufacturers strictly liable for vaccine-related injuries. [FN165] In addition, Congress was concerned about the devastating economic impact that would occur due to lost wages if the population were not inoculated before the start of the flu season. [FN166] Modeled after the Drivers Act, the Swine Flu Act barred common law tort actions against swine flu vaccine manufacturers and providers and created a Federal Tort Claims Act remedy against the United States as the exclusive means of recovery for swine flu-related injuries. [FN167]

The constitutionality of the Swine Flu Act was first addressed in Sparks v. Wyeth Laboratories, Inc. [FN168] Plaintiff, who had suffered serious injuries following a swine flu immunization, alleged that the Act violated the Due Process Clause of the Fifth Amendment, because it abrogated common law causes of action against program participants. [FN169] The court held, however, that plaintiff had "no vested interest in any rule of the common ***293** law." [FN170] Moreover, while a replacement or substitution of remedies was "perhaps not technically necessary for due process," Congress did provide "an alternative, efficacious remedy against the United States." [FN171] The court noted that federal statutes similar to the Swine Flu Act had "always been found to be constitutional when challenged," including the Drivers Act upon which the Swine Flu Act was modeled. [FN172]

Plaintiff also alleged an equal protection violation. [FN173] The court noted, however, that "such routine equal protection considerations as 'compelling governmental interest' or 'suspect' classifications or 'fundamental' interests [were] simply not involved" in challenges to economic legislation. [FN174] Thus, the court dismissed plaintiff's challenge. [FN175]

Finally, the court addressed plaintiff's argument that the Swine Flu Act violated the Tenth Amendment. [FN176] The court pointed out that plaintiff's argument rested "mainly upon cases declaring early pieces of New Deal legislation to be unconstitutional ... [and that] the spirit if not the letter of those cases ha[d] been overruled in subsequent decisions." [FN177] The court stated that the Swine Flu Act simply allowed the federal government to work with the states and imposed no coercion on them. [FN178]

Sparks was influential in leading other courts to reject similar constitutional challenges to the Swine Flu Act. In Wolfe v. Merrill National Laboratories, Inc., [FN179] plaintiff's "unarticulated major premise" was that the Swine Flu Act unconstitutionally compelled her participation in the program, causing her to suffer serious injury. [FN180] The court easily dismissed plaintiff's claim, ***294** noting that she voluntarily chose to accept the benefit of the federally administered vaccine. [FN181] The court also discussed plaintiff's allegation that the Swine Flu Act violated the Tenth Amendment. [FN182] The court stated that, as a grant program, the Swine Flu Act fell within the power of Congress to spend funds for the "general welfare." [FN183] Accordingly, "Congress acted within its constitutionally ordained powers in passing the Act." [FN184]

8. Atomic Weapons Testing Liability Act

In Hammond v. United States, [FN185] the First Circuit upheld the constitutionality of the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985 ("Atomic Weapons Testing Liability Act") [FN186] against a challenge brought by a widow for the death of her husband, a civilian employee of the Department of Defense and observer at several atomic weapons tests, from radiation poisoning. The Atomic Weapons Testing Liability Act created a cause of action against the United States for radiation injuries arising from federal atomic weapons testing programs, retroactively abolished private tort actions against government contractors for such injuries, and made the Federal Tort Claims Act the sole remedy for those injuries. [FN187]

The First Circuit noted that Congress had previously passed laws (the Drivers Act and the Swine Flu Act) that substituted the federal government as the defendant for particular types of tort suits and required plaintiffs to seek relief through the Federal Tort Claims Act. [FN188] The court also noted that when those statutes had been challenged for alleged due process violations, they were consistently evaluated under the rational basis test and declared constitutional. [FN189] The court then evaluated the Atomic Weapons Testing Liability Act under a rational basis standard and concluded that Congress's desire to shield government contractors ***295** from public embarrassment arising from litigation was rationally related to its decision to abolish common law tort claims against the contractors. [FN190] In addition, the court reasoned that, since the government was required to pay the

judgments obtained against the contractors, it was neither irrational nor arbitrary for Congress to subject all potential plaintiffs uniformly to Federal Tort Claims Act limitations. [FN191] Accordingly, the court held that the Atomic Weapons Testing Liability Act did not violate the Due Process Clause. [FN192]

The court also rejected plaintiff's Tenth Amendment challenge to the Act. [FN193] Plaintiff relied on National League of Cities v. Usery [FN194] to argue that, by abolishing the state common law actions against government contractors, Congress "invaded rights reserved to the states." [FN195] The court, however, determined that plaintiff's argument was without merit, because National League of Cities had been overruled. [FN196]

The Ninth Circuit Court of Appeals dismissed additional constitutional challenges to the Atomic Weapons Testing Liability Act in In re Consolidated United States Atmospheric Testing Litigation. [FN197] Plaintiffs, military and civilian participants in the United States atmospheric nuclear weapons testing program and their families, alleged that the Act constituted a "taking" for purposes of the Fifth Amendment, because it substituted a remedy against the government under the Federal Tort Claims Act for state tort law causes of action against government contractors who participated in the federal weapons testing program. [FN198] In addition, plaintiffs alleged that the Act violated the Due Process ***296** Clause of the Fifth Amendment and the separation of powers doctrine. [FN199]

The court began its takings analysis by noting that courts had found it "well settled" that a "plaintiff has no vested right in any tort claim for damages under state law." [FN200] Accordingly, denial of plaintiffs' state tort law cause of action did "not translate into a cognizable taking claim." [FN201] The court also pointed out that the Act did not abrogate claims arising from atomic weapons tests, but instead subjected claimants to a statutory procedure that plaintiffs could reasonably expect to apply to them. [FN202]

Next, the court held that, because Congress had acted within its war powers and Commerce Clause authority, and no fundamental right or suspect classification was involved, the rational basis standard of due process review applied to plaintiffs' due process claim. Under that standard, the court held, plaintiffs had not met their burden of proving that the Act was "wholly arbitrary and irrational in purpose and effect, i.e., not reasonably related to a legitimate congressional purpose." [FN203] According to the court, the weapons testing program had been a crucial government function from its inception, and Congress reasonably believed that relieving contractors of liability would encourage their participation in the program. [FN204]

Finally, the court rejected plaintiffs' separation of powers claim. The court said that legislation does not run afoul of the separation of powers doctrine unless Congress "presumes to dictate 'how the Court should decide an issue of fact (under threat of loss of jurisdiction)' and purports to 'bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds." [FN205] Those limitations did not exist with respect to the Atomic Weapons Testing Liability Act, because Congress did not direct courts to make certain findings or fact or require them to apply an unconstitutional law. [FN206]

***297** 9. National Childhood Vaccine Injury Act of 1986

The National Childhood Vaccine Injury Act of 1986 [FN207] was enacted to address manufacturers' liability concerns relating to the distribution of vaccines and to minimize the public health dangers posed by low vaccine supplies. [FN208] The Act created a no-fault compensation program for childhood vaccine-injury victims to be funded by an excise tax on each dose of vaccine. As a predicate to receiving compensation under the Act, injured persons are required to file a petition in the United States Court of Federal Claims demonstrating, among other things, harm including "unreimbursable expenses ... in an amount greater than $1,000." [FN209]

In Black v. Secretary of Health and Human Services, [FN210] plaintiffs challenged the constitutionality of the $1,000 threshold requirement on Fifth Amendment equal protection grounds. They argued that by making eligibility for the program turn on incurring $1,000 of unreimbursable expenses, Congress made it more difficult for indigent persons to qualify for compensation, because indigents often have their medical expenses defrayed by government programs such as Medicaid. [FN211] The court held, however, that the Act's eligibility requirement "was not designed to disadvantage poor persons, and the fact that it may dispropor-tionately disqualify certain groups, including indigents and persons who enjoy the benefits of other medical programs, d[id] not give rise to an equal protection violation." [FN212]

The court explained that drawing lines to create distinctions for eligibility in social programs was "peculiarly a legislative task" that "may be rational even if it does not do a perfect job of selecting those cases that appear to be appropriate subjects of congressional concern." [FN213] The court then held that "it was rational for Congress to conclude, that as a general matter, those ***298** who incur only modest expenses or whose expenses are reimbursed from other sources present less compelling cases for compensation than those who incur large, unreimbursed expenses." [FN214] Thus, there was no constitutional flaw in the $1,000 threshold requirement, "particularly in light of the 'strong presumption of constitutionality' that attaches to legislation conferring monetary benefits." [FN215]

10. Price-Anderson Act Amendments of 1988

The 1988 Amendments to the Price-Anderson Act ("1988 Amendments") [FN216] created a federal cause of action for nuclear accident claims and provided that public liability actions filed in state courts were retroactively subject to removal. [FN217] After the 1979 Three Mile Island incident near Harrisburg, Pennsylvania, plaintiffs who wished to have their tort claims remain in state court challenged the jurisdictional and removal provisions of the 1988 Amendments in In re TMI Litigation Cases Consolidated II. [FN218] They argued that the legislation violated Article III of the Constitution [FN219] because the public liability actions subject to the Act did not "arise under" the laws of the United States. [FN220]

The Third Circuit began its analysis with a close examination of the scope of Congress's power to authorize federal courts to decide nondiversity cases turning on state law rules of decision. The court noted that the Supreme Court had distinguished between "pure jurisdictional statutes" and those mixing elements of federal and state law. [FN221] The central teaching of those cases, the Third Circuit said, was that a nondiversity case "cannot be said to arise under a federal statute where that statute is nothing more than a jurisdictional grant." [FN222] On the other hand, courts evaluating mixed federal and state schemes have focused upon ***299** congressional intent and have formulated their decisions with flexibility "in order to honor the presumption in favor of a statute's constitutionality." [FN223]

Turning to the 1988 Amendments at issue, the Third Circuit examined the legislative history and held that Congress had clearly expressed its intention that state law provide the content of and operate as federal law governing public liability cases resulting from nuclear incidents. [FN224] By federalizing state substantive law, Congress established the constitutional foundation for the Act's jurisdictional and removal provisions. The court then said that it would have reached the same conclusion even if state law itself, rather than state law operating as federal law, formed the basis for decision, because the level of federal involvement in the field of nuclear energy and the need for "uniformity, equity, and efficiency in the disposition of public liability claims" provided sufficient "federal elements" to support the legislation. [FN225]

The Third Circuit then turned to plaintiffs' collateral constitutional arguments that the retroactive application of the 1988 Amendments to cases already pending in state court violated principles of "federalism, state sovereignty, due process, and equal protection." [FN226] The Third Circuit's survey of relevant law led it to conclude that the legislation survived each of these challenges, because the provision for retroactivity was rationally related to Congress's desire to avoid inefficiencies and inconsistent outcomes in claims resulting from a single nuclear incident. [FN227]

11. Federal Employees Liability Reform and Tort Compensation Act

The Federal Employees Liability Reform and Tort Compensation Act of 1988 ("the Westfall Act") [FN228] amended the Federal Tort Claims Act to provide for the substitution of the United States as ***300** a defendant in any action where one of its employees is sued for damages as a result of an alleged common law tort committed by the employee within the scope of his or her employment. Congress enacted the Westfall Act to respond to the United States Supreme Court's decision in Westfall v. Erwin, [FN229] which limited a federal official's absolute immunity from tort claims to situations where the official's actions were "within the outer perimeter of an official's duties and discretionary in nature." [FN230] Congress saw the Westfall decision as an erosion of the common law tort immunity formerly available to federal employees. [FN231]

The Westfall Act was challenged in Sowell v. American Cyanamid Co., [FN232] involving a government employee who was seriously injured at work and sought to bring a negligence action against his co-employees. The Eleventh Circuit held that "the great weight of authority" supported the constitutionality of the statute. [FN233] The court also held that the statute's retroactive application did not render it unconstitutional, because "a legal claim affords no definite enforceable property right until reduced to a final judgment." [FN234] The court concluded that Congress's desire to preserve employee morale, maintain federal agencies' ability to carry out their missions, and sustain the vitality of the Federal Tort Claims Act provided a rational basis for the Westfall Act. [FN235]

12. General Aviation Revitalization Act of 1994

The General Aviation Revitalization Act of 1994 ("GARA"), [FN236] which created an eighteen-year statute of repose for general aviation aircraft, is the most recent congressional tort policy statute to withstand constitutional scrutiny. At least three courts have declared GARA to be constitutional "economic legislation." [FN237]

***301** B. Federal Tort Laws Should Be Upheld: The Mistake of Lochner Should Not Be Repeated

It is important for courts to follow the significant body of case law discussed above supporting the authority of Congress to enact laws setting national tort policy objectives. Any new decision overturning federal liability legislation would create a precedent that courts in the future could utilize to nullify a wide array of federal legislation, even outside the context of tort reform.

It may be unnecessary to raise this point in light of the very strong record of success that federal liability statutes have had against constitutional challenges. Lest anyone forget, however, it is worth reflecting on a highly discredited period in the Supreme Court's history that began around the turn of the century and ended in the mid-1930s. During this period, known as the "Lochner era" (after the unsound constitutional law decision, Lochner v. New York [FN238]), the Court nullified state and federal legislation that it disagreed with as a matter of public policy, using the Constitution as a cloak to cover its highly personalized decisions. [FN239]

Just as plaintiffs during the Lochner era implored the Supreme Court to utilize an expansive view of the Constitution to override legislation, claimants in the future may seek to convince courts to utilize an expansive view of the Constitution to impose their economic policy views upon the nation. Courts should reject this invitation, as they have done for almost a century in the field of federal tort law.

***302** The need for courts to respect Congress's authority to enact legislation setting tort policy rules is reinforced by the doctrine of stare decisis, and by the importance of the statutes themselves. For example, because of the National Childhood Vaccine Injury Act, diseases which once threatened to end the lives of American infants prematurely are now prevented with a routine series of childhood vaccinations. [FN240] Without the Price-Anderson Act, the private nuclear power industry in the United States might not have developed. [FN241] The General Aviation Revitalization Act of 1994 breathed life back into an important American industry. Instead of continuing on the path toward extinction, the general aviation industry is now booming. [FN242] The Biomaterials Access Assurance Act of 1998 will help ensure the availability of lifesaving and life-enhancing implantable medical devices, such as pacemakers, heart valves, artificial blood vessels, and hip and knee joints, that are needed by millions of people each year. [FN243]

C. The Supremacy Clause Requires States to Enforce Federal Liability Reform Legislation

Once Congress enacts legislation pursuant to the Constitution, the Supremacy Clause [FN244] prohibits the states from enforcing any local laws that conflict with the statute. To the extent the various states have liability laws that interfere with, or are contrary to, federal laws enacted by Congress, the state laws are preempted. [FN245] As Chief Justice Marshall explained:

[T]o such acts of the State Legislatures as do not transcend their powers, but ... interfere with, or are contrary to

the law of Congress, made in pursuance of the Constitution, ... ***303** [i]n every such case, the act of Congress ... is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it. [FN246]

The Supremacy Clause also requires state courts to enforce federal laws, even though that requirement is in a sense a federal command requiring state court action. [FN247] In Testa v. Katt, [FN248] the Supreme Court addressed the Rhode Island Supreme Court's refusal to enforce the federal Emergency Price Control Act of 1942. [FN249] The Act provided a treble-damages remedy for persons who bought goods for more than the amount of the federal ceiling price and gave jurisdiction over claims under the Act to state as well as federal courts. The Supreme Court upheld the federal program, stating that the position of the Rhode Island Supreme Court "fl[ew] in the face of the fact that the States of the Union constitute a nation" and "disregard[ed] the purpose and effect" of the Supremacy Clause. [FN250] State courts were directed to heed the federal Act as "the prevailing policy in every state." [FN251] More specifically, the Court explained:

[T]his Court took occasion in 1876 to review the phase of the controversy concerning the relationship of state courts to the Federal Government. Claflin v. Houseman, 93 U.S. 130. The opinion of a unanimous court in that case was strongly buttressed by historic references and persuasive reasoning. It repudiated the assumption that federal laws can be considered by the States as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon States, courts, and the people, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." It asserted that the obligation of States to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide.... [FN252]

***304** III. RECENT TENTH AMENDMENT DECISIONS DO NOT UNDERMINE CONGRESSIONAL AUTHORITY TO ENACT TORT POLICY LEGISLATION

The United States Constitution grants certain powers to the Federal Government. Where federal legislation is authorized by one of those powers, "Congress may impose its will on the States." [FN253] All other powers are reserved for the States under the Tenth Amendment, which provides that:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. [FN254]

A. The Traditional View: Judicial Deference to Congressional Authority

Historically, the Supreme Court has recognized Congress's "extraordinary power" to enact legislation and has been reluctant to invoke the Tenth Amendment to limit that authority. [FN255] Maryland v. Wirtz [FN256] is the archetypal case adopting the traditional view that courts should not apply substantive limits on federal authority under the Tenth Amendment if Congress is exercising one of its enumerated powers and has a rational basis to do so. In Wirtz, the Court upheld the constitutionality of amendments to the Fair Labor Standards Act ("FLSA") [FN257] that required the states to adopt federal minimum wage and overtime standards for state employees of hospitals, institutions, and schools. [FN258] The Court refused to distinguish economic activity engaged in by ***305** private persons from that engaged in by states, [FN259] and declared that courts should not use the Tenth Amendment to "carve up the commerce power to protect enterprises ... simply because those enterprises happen to be run by the States." [FN260]

In 1976, the Court departed briefly from its longstanding reluctance to invoke the Tenth Amendment and attempted to devise affirmative limits on Congress's Article I powers. In National League of Cities v. Usery, [FN261] the Court declared that the Tenth Amendment prohibited Congress from interfering with the core sovereign functions of the states, even where those functions affected interstate commerce. [FN262] That case challenged the validity of the 1974 amendments to the FLSA. The Court held that, insofar as the amendments operated directly to displace the states' ability to structure "integral operations" in areas of "traditional government functions" (i.e., employee-employer relationships in areas such as fire prevention, police protection, sanitation, public health, and parks and recreation), they were not within Congress's Article I authority. [FN263]

Nine years later, however, the Court overruled the National League of Cities case in Garcia v. San Antonio

Metropolitan Transit Authority. [FN264] The Garcia case and a 1988 case, South Carolina v. Baker, [FN265] showed the Court's return to its previous position on the Tenth Amendment. [FN266]

1. Garcia v. San Antonio Metropolitan Transit Authority

In Garcia v. San Antonio Metropolitan Transit Authority, [FN267] the Court revisited the question of whether the Commerce Clause empowered Congress to enforce the federal wage and overtime ***306** requirements in the 1974 amendments to the FLSA against the states in areas of "traditional governmental functions." [FN268] The San Antonio Metropolitan Transit Authority ("SAMTA") challenged the Act's validity after "the Department of Labor formally amended its [FLSA] interpretive regulations to provide that publicly-owned mass-transit systems were not entitled to immunity under National League of Cities." [FN269]

The Court began its analysis by restating the well-settled principle that Congress's Commerce Clause authority extends to intrastate economic activities that affect interstate commerce. [FN270] The Court noted that, were SAMTA privately owned, it would unquestionably be obligated to follow FLSA's requirements. [FN271] Therefore, any constitutional exemption SAMTA could obtain from FLSA's requirements had to rest on its status as a governmental entity rather than on the nature of its operations. [FN272]

The Court went on to outline the prerequisites for governmental immunity set forth in National League of Cities, focusing in particular on the exception for "traditional governmental functions." [FN273] The Court said that its own attempts to articulate affirmative limits on congressional authority had failed to establish a workable standard for defining "traditional governmental functions." [FN274] Moreover, attempts by federal and state courts to distinguish "traditional" functions from "nontraditional" functions had proven to be "impracticable and doctrinally barren." [FN275] The Court also expressed skepticism that a case-by-case approach would eventually establish a workable standard, citing its own poor experience in the related field of state immunity from federal taxation. [FN276]

Next, the Court explored alternative ways to define state immunity, but rejected those as unmanageable as well. It conceded that making immunity turn on a "traditional" standard would prevent courts from accommodating changes in the historical functions of states. [FN277] In addition, the Court said that it had previously ***307** rejected the idea of determining a nonhistorical standard for immunity based on the identification of "uniquely" governmental functions. [FN278]

The Court also expressed concern that any rule that would establish judicially imposed definitions of "traditional," "integral," or "necessary" state governmental functions would "inevitably invite[] an unelected federal judiciary to make decisions about which state policy it favors and which ones it dislikes." [FN279] Accordingly, the Court held:

> We, therefore now reject, as unsound in principle and unworkable in practice, a rule for state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles because it is divorced from those principles. [FN280]

The Court then turned to the underlying issue that confronted it in National League of Cities--the manner in which the Constitution insulates states from the reach of Congress's power under the Commerce Clause. The Court said that it had "no license to employ freestanding conceptions of state sovereignty" [FN281] in deciding when the Constitution protects "the States as States," [FN282] because the Framers had chosen to ensure a role for the states in the federal system through the structure of the federal government itself. [FN283] The Court stated:

> [W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the political process ***308** rather than to dictate a "sacred province of state autonomy." [FN284]

The Court reinforced its conclusion that the federal political process effectively preserves the interests of the states by pointing out the high level of funding that states receive from the federal government in the form of general and program specific grants in aid. [FN285]

The Court then held that the federal wage and overtime requirements in the FLSA, as applied to SAMTA, were not "destructive of state sovereignty or violative of any constitutional provision." [FN286] SAMTA was simply being placed in the same position as other employers. The Court also pointed out that, while the FLSA would raise costs for mass-transit systems, Congress had provided countervailing financial assistance--thus reinforcing the Court's "conviction that the national political process systematically protects States from the risk of having their functions in [the area of mass-transit] handicapped by Commerce Clause regulation." [FN287]

2. South Carolina v. Baker

In South Carolina v. Baker, [FN288] the Court was asked to decide the constitutionality of the Tax Equity and Fiscal Responsibility Act of 1982 ("Tax Act"). [FN289] The Tax Act removed the federal income tax exemption for interest earned on publicly offered long-term bonds issued by state and local governments unless those bonds were issued in registered form. [FN290] Congress believed that ***309** the registration requirement would prevent tax evasion that was being facilitated through the exchange of unregistered bearer bonds. [FN291] South Carolina, joined by the National Governors' Association as intervenor, challenged the Tax Act, contending that it violated the Tenth Amendment because it compelled States to issue bonds in registered form. [FN292]

The Court began its analysis by restating its holding in Garcia that the Tenth Amendment provides structural rather than substantive limits on Congress's legislative authority--i.e., that states must find their protection from overreaching congressional acts through elected Members of Congress. [FN293] The Court acknowledged that Garcia left open the possibility that the Tenth Amendment could be invoked to invalidate congressional regulation of state activities where there were "extraordinary defects in the national political process," but held that those defects did not exist with respect to the Tax Act. [FN294] South Carolina, the Court said, did not "even allege[] that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." [FN295]

The Court then addressed the states' contention that the Tax Act coerced them into enacting legislation permitting bond registration and into administering the registration scheme. [FN296] In support of their contention, the states cited FERC v. Mississippi, [FN297] which left open the possibility that the Tenth Amendment might limit Congress's power to compel states to regulate on behalf of federal interests. [FN298]

In FERC, the Court had upheld a federal statute requiring state utility commissions to: (1) adjudicate and enforce federal standards; (2) either consider adopting certain federal standards or cease regulating public utilities; and (3) follow certain federally ***310** mandated procedures. [FN299] The Court had concluded that, whatever constitutional limitations might exist on the federal power to compel state regulatory activity, Congress had the power to require state utility regulatory commissions to adjudicate federal issues and to require that states regulating in a field open to preemption consider suggested federal standards and follow federally mandated procedures. [FN300]

The Court in Baker did not accept South Carolina's invitation to define whether the Tenth Amendment claim left open in FERC survived Garcia or posed constitutional limitations independent of those discussed in Garcia. It was able to avoid the issue by finding that the Tax Act presented the same type of legislation that was upheld in FERC: both statutes regulated state activities, neither sought to control or influence the manner in which states regulated private parties. [FN301]

The Baker Court concluded its Tenth Amendment analysis by rejecting the states' contention that the Tax Act impermissibly commandeered the state legislative and administrative process by requiring many state legislatures to amend their statutes in order to issue registered bonds, and state officials to devote substantial effort to determine how best to implement a registered bond system. The Court observed that being compelled to take administrative and legislative actions to comply with federal law was a common and often inevitable consequence faced by states wishing to engage in activities subject to federal regulation. [FN302] Furthermore, the Court bluntly pointed out that the states' theory of commandeering would "not only render Garcia a nullity, but would also restrict congressional regulation of state activities even more tightly than it was restricted under the now overruled National League of Cities line of cases." [FN303]

B. Judicially Imposed Limitations on Congressional Authority

The Supreme Court has signaled in two recent cases that the Tenth Amendment may once again return from its basic dormancy. ***311** In those decisions-- New York v. United States [FN304] and Printz v. United States [FN305]--the Court addressed the federal government's ability to force states to implement or administer federal regulatory schemes.

1. New York v. United States

New York v. United States [FN306] involved a challenge to the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("Waste Policy Act"). [FN307] That Act sought to address a looming national shortage of disposal sites for low-level radioactive waste by directing each state to assume responsibility "for providing, either by itself or in cooperation with other States, for the disposal of ... low-level radioactive waste generated within the State" within seven years. [FN308] The State of New York and two counties in which disposal facilities were planned in the state sought a declaratory judgment that the Waste Policy Act was inconsistent with the Tenth Amendment. [FN309]

Petitioners' challenge focused on three sets of "incentives" that Congress included in the Act to encourage states to comply with their statutory obligation to attain local or regional self-sufficiency in the disposal of low-level radioactive waste. [FN310] Monetary incentives allowed states with disposal sites to impose a surcharge on radioactive waste received from other states. The Waste Policy Act also established an escrow account from which the Secretary of Energy allocated a portion of the monies generated by this surcharge to states that complied with the federal timetable. [FN311] Next, access incentives allowed states with disposal sites to increase the cost of access to the sites substantially, and then to deny access altogether, to radioactive waste generated in states that failed to meet the federal timetable. [FN312] Finally, the most severe incentive, the "take title" provision, required states ***312** that failed to make arrangements for radioactive waste disposal to take title and possession of waste generated within their borders and to accept liability for all damages directly or indirectly incurred by waste generators as a consequence of the state's failure to make arrangements by the federal deadline. [FN313]

The Court began its discussion by noting that the powers conferred in the Constitution "were phrased in language broad enough to allow for the expansion of the Federal Government's role," [FN314] and that allows for enormous changes in the "scope of the federal government's authority with respect to the States." [FN315] The Court cited its "broad construction" of the Commerce and Spending Clauses, along with the Necessary and Proper Clause and the Supremacy Clause, as particularly important. [FN316] Nevertheless, the Court held, Congress is subject to the limitations contained in the Constitution. Those limitations, the Court explained, are "not derived from the text of the Tenth Amendment itself," but are found elsewhere in the Constitution (i.e., in Article I). [FN317]

The Court then distinguished the Waste Policy Act from statutes at issue in recently decided cases that involved the authority of Congress to subject state governments to generally applicable laws (e.g., Garcia). [FN318] Unlike the statutes at issue in those cases, the Court held, the Waste Policy Act did not seek to subject a state to the same legislation applicable to private parties, but instead attempted to "direct or otherwise motivate the States to regulate in a particular field or a particular way." [FN319]

The Court observed that, while it had "never sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations," [FN320] the "question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers." [FN321] The Court noted that the Constitutional Convention was convened, in part, because the Articles of Confederation did not give Congress the authority in most respects to govern the ***313** people directly. [FN322] The Convention generated many proposals for the structure of the new government, "but two quickly took center stage." [FN323] One plan, the "Virginia Plan," allowed Congress to regulate individuals "without employing the States as intermediaries." [FN324] The "New Jersey Plan," on the other hand, continued to require Congress to obtain the approval of the states to legislate, as had the Articles of Confederation. [FN325] This plan was criticized, however, because it "might require the Federal Government to coerce the States into implementing legislation." [FN326] Ultimately, the Framers opted to provide for a central government in which Congress "would exercise its legislative authority directly over individuals rather than over States." [FN327] The Court concluded, therefore, that "where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to

compel the States to require or prohibit those acts." [FN328]

On the other hand, the Court explained that, while Congress cannot compel state regulation, it is not prohibited from encouraging a state to regulate in a particular way or attempting to influence a state's policy choices through noncoercive incentives. [FN329] The Court identified two tangible methods by which Congress "may urge a State to adopt a legislative program consistent with federal interests." [FN330] First, under its spending power, Congress can attach conditions on the receipt of federal funds as a means of influencing a state's policy. [FN331] Second, Congress can establish a "program of cooperative federalism" in which states may choose to regulate an activity according to federal standards or to have state law preempted by federal regulation. [FN332]

Under these noncoercive approaches to achieving state regulation, the Court pointed out, state governments can remain responsive to the local electorate's policy preferences and accountable to the people. [FN333] In contrast, if the federal government ***314** were able to compel states to regulate, political accountability would be diminished. For instance, if members of Congress could impose unpopular policy decisions on state legislators, the state officials would "bear the brunt of public disapproval," while the federal officials who devised the program would "remain insulated from the electoral ramifications of their decision." [FN334]

The Court then proceeded to determine whether the Waste Policy Act's monetary, access, and take-title incentives impermissibly commandeered the states' legislative processes. The Court held that the monetary incentives included in the Act, in which Congress conditioned grants to the states upon the states' attainment of certain milestones, fell "well within the authority of Congress under the Commerce and Spending Clauses." [FN335] The Court also held that the access incentives in the Act, which ultimately authorized states to deny access to low-level radioactive waste generated in other states, represented a permissible exercise of Congress's commerce power. [FN336] Because both sets of incentives were supported by affirmative constitutional grants of power to Congress, neither was inconsistent with the Tenth Amendment. [FN337]

The Court found the Waste Policy Act's "take title" provision to be of a "different character" than the monetary and access incentives. [FN338] The "take title" provision offered states a "choice" of either regulating according to Congress's instructions or accepting ownership of waste and becoming liable for all damages waste generators suffered as a result of failure to meet the federal timetable. [FN339] The Court characterized the forced transfer component, standing alone, as no different than a congressionally compelled subsidy from state governments to radioactive waste producers. [FN340] Likewise, the requirement that states assume the liabilities of waste generators within their borders unconstitutionally directed the states to assume the liabilities of certain state residents. [FN341] Both types of federal actions commandeered the states for federal regulatory purposes and were inconsistent ***315** with the Constitution's division of authority between federal and state governments. [FN342]

Significantly, the Court drew a sharp distinction between permissible federal legislation that directs state courts to enforce federal laws and unconstitutional legislation, such as the Waste Policy Act, that directs state officials to create and enforce a congressionally mandated regulatory scheme. [FN343] The Court wrote:

> Some of [the cases cited by the United States in favor of the Waste Policy Act] discuss the well established power of Congress to pass laws enforceable in state courts. See Testa v. Katt, 330 U.S. 386 (1947); Palmore v. United States, 411 U.S. 389, 402 (1973); see also Second Employer's Liability Cases, 223 U.S. 1, 57 (1912); Claflin v. Houseman, 93 U.S. 130, 136-37 (1876). These cases involve no more than an application of the Supremacy Clause's provision that federal law "shall be the Supreme Law of the Land," enforceable in every State. More to the point, all involve congressional regulation of individuals, not congressional requirements that States regulate. Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal "direction" of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to legislate. [FN344]

The Court's clarification is particularly relevant to the constitutionality of federal liability reform legislation, because these reform proposals have frequently called upon state courts to enforce federal law. Recently, some opponents of federal tort reform legislation have expansively interpreted the Court's general holding in New York that Congress cannot compel state legislation to suggest that Congress may lack the power to direct state judges to enforce federal liability reform legislation. [FN345] As the Court's opinion in New York demonstrates, however, federal liability reform legislation that compels state court enforcement of federal law is not in violation of the Tenth Amendment. It is ***316** constitutionally permissible. This is how FELA has worked for almost a hundred years.

Congress's power to act in this regard is still intact.

The concerns the Court had with the Waste Policy Act's "take title" provision in New York simply do not exist with respect to federal liability reform legislation. Most importantly, federal liability reform efforts seek to "exercise ... legislative authority directly over individuals rather than over States." [FN346] Like the legislation upheld in Garcia, and unlike the Waste Policy Act's take title provision that was struck down in New York, federal liability reform bills have been "generally applicable laws." [FN347] They have never compelled state legislation or required state legislatures to enact legislation limiting tort liability.

In addition, when Congress enacts federal tort policy legislation, there is no potential for a breakdown in the national political process due to a lack of accountability. Clearly, if Congress enacts tort reform legislation, "it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." [FN348] This fact strongly supports the constitutionality of federal liability reform legislation.

2. Printz v. United States

Printz v. United States [FN349] involved a challenge to the 1993 Brady Handgun Violence Prevention Act amendments to the Gun Control Act of 1968 ("Brady Act"). [FN350] The Brady Act required the Attorney General to establish a national system for instant background checks on prospective handgun purchasers and commanded the "chief law enforcement officer" ("CLEO") of each local jurisdiction to conduct the background checks and perform related tasks until the national system became operative. [FN351] The CLEOs for counties in Arizona and Montana objected to being "pressed into federal service" and contended that ***317** the Act impermissibly compelled them to execute a federal law. [FN352]

The Court opened its opinion by noting that no constitutional text directly addressed the extent to which Congress may force state officials to execute a federal law. [FN353] Accordingly, the Court concluded that the answer to the CLEOs' challenge would have to come from historical understanding and practice, the structure of the Constitution, and the Court's jurisprudence. [FN354]

In support of the Brady Act's validity, the Government cited acts of Congress which required state courts to record applications for citizenship, transmit naturalization records, order deportations, and perform other miscellaneous duties. [FN355] The Court held that Congress's power to compel enforcement of federal law by state judges was well settled, but only "establish[ed] ... that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." [FN356] The Court explained:

> It is understandable why courts should be viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time.... The Constitution itself, in the Full Faith and Credit Clause, Art. IV, § 1, generally required such enforcement with respect to obligations arising in other States. [FN357]

The Court then said that its acceptance of statutes imposing obligations on state courts did not imply that Congress could impose obligations on state executives. [FN358] Moreover, the Court observed that the "utter lack of statutes" imposing obligations on state executives suggested that Congress assumed it did not have the authority to compel state executive officers to carry out federal laws. [FN359] To complete the historical record, the Court acknowledged that "a number of federal statutes enacted within the past few decades [require] the participation of state and local officials," but that the persuasive force of these recent statutes ***318** was far outweighed by the almost 200 years of congressional avoidance of the practice. [FN360]

Next, the Court turned to the structure of the Constitution. Pointing to its detailed discussion of the Constitutional Convention in New York, [FN361] the Court reinforced its earlier conclusion that, "[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." [FN362] The Printz Court further concluded that, with respect to the Brady Act, the "power of the Federal Government would be augmented immeasurably if it were able to impress into its service--and at no cost to itself--the police officers of the 50 States." [FN363]

The Court also evaluated whether the Brady Act violated the separation of powers doctrine. [FN364] The Court noted that, under Article II, Section 3, the responsibility for administering federal laws rests with the Executive Branch of the federal government. [FN365] The Court declared that the Brady Act effectively transferred this function to thousands of state CLEOs by requiring them to administer the federally mandated background checks "without meaningful Presidential control." [FN366] The Court viewed Congress's transfer of the federal executive power to state officials as a constitutionally impermissible reduction of the Executive Branch's power by another co-equal branch of the federal government. [FN367] The Court indicated that allowing such a transfer would shatter the unity of the federal executive envisioned by the Framers, because "Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws." [FN368]

Finally, the Court turned to its prior decisions on the ability of the Federal Government to commandeer state governments to administer federal laws. In Hodel v. Virginia Surface Mining & Reclamation Association, Inc. [FN369] and FERC v. Mississippi, [FN370] the ***319** Court held, it sustained statutes against constitutional challenge only after establishing that they did not require the states to enforce federal law. Accordingly, the Court held, its decision in New York [FN371] striking down a provision of the Waste Policy Act that "unambiguously required the States to enact or administer a federal regulatory program ... should have come as no surprise." [FN372] After rejecting the Government's attempts to distinguish the New York decision, the Court wrote:

> We held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty. [FN373]

The Printz decision does not provide a constitutional basis to nullify federal liability reform legislation. The decision makes clear that Congress cannot compel state legislatures or executives to participate in a federal regulatory or administrative scheme, [FN374] but it suggests no constitutional prohibition against legislation that asks state courts to enforce a federal liability law. [FN375] To the contrary, state courts have always been and continue to be obligated to honor such legislation. That role is entirely consistent with the Tenth Amendment and the constitutional mandate found in the Supremacy Clause.

***320** 3. Driver's Privacy Protection Act Cases

Recent federal appellate and district court decisions striking down a federal law regulating the disclosure of information contained in motor vehicle registration records have been heavily influenced by the Printz and New York decisions.

In Condon v. Reno, [FN376] the Fourth Circuit permanently enjoined federal enforcement of the Driver's Privacy Protection Act of 1994 ("DPPA"). [FN377] The DPPA restricted the states' dissemination and use of personal information contained in state motor vehicle records and imposed criminal and civil liability on state officials who failed to comply with the federal restrictions. [FN378] The court concluded that the DPPA exclusively regulated the disclosure of information contained in state motor vehicle records, and therefore could not be categorized as a law of general applicability permissible under Garcia. [FN379] Instead, the DPPA violated the Supreme Court's holding in New York that the federal government cannot compel state executives to administer a federal regulatory program. [FN380]

Similarly, in Oklahoma v. United States, [FN381] the court enjoined federal enforcement of the DPPA on Tenth Amendment grounds. Contrary to the provisions of the federal DPPA, Oklahoma law made motor vehicle records a matter of public record. [FN382] Relying primarily on New York and Printz, the court held that the DPPA impermissibly sought to "treat the Oklahoma Department of Public Safety as a subdivision of the United States" by requiring the Department to "create and maintain systems" to enforce the DPPA's provisions. [FN383]

***321** Like the New York and Printz cases, the reach of the DPPA cases is limited to situations where state executives (as opposed to state courts) are forced to implement federal policy or where Congress escapes political accountability by forcing state legislators to enact a regulatory scheme. They have no bearing, directly or indirectly,

on congressional enactment of a tort law that would be applicable in both federal and state court proceedings.

CONCLUSION

For almost a century, Congress has enacted legislation setting national tort policy rules, and these laws have been declared constitutional time and time again as legitimate exercises of Congress's Commerce Clause authority. Future challenges to federal tort legislation are bound to fail as well, unless courts unwisely choose to abandon that substantial body of well-reasoned precedent. The United States Supreme Court's decisions in New York, Lopez, and Printz do not change this conclusion.

The Lopez opinion discussed the Commerce Clause, but it is not truly a Commerce Clause case. As the Court explained, the Gun-Free School Zones Act at issue was a criminal statute that regulated handgun possession. "[B]y its terms," the statute "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however, broadly one might define those terms." [FN384] The Lopez decision is distinguishable both legally and factually from those cases upholding regulation of activities that arise out of or are connected with commercial transactions, which viewed in the aggregate, substantially effect interstate commerce--cases that directly support Congress's Commerce Clause authority over liability law.

The New York and Printz decisions provide limits on the federal government's power over the states, but they do not preclude the enactment of civil justice reform at the federal level. In fact, the opinions make clear that state court enforcement of federal liability reform legislation would not encroach upon any powers specifically reserved for the states. They expressly distinguish state court enforcement of federal laws from federal laws commanding state legislatures to legislate or requiring state ***322** executive officials to administer a federal regulatory scheme. While the former is clearly constitutional and, indeed, mandated by the Supremacy Clause, the latter are not.

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[FN1]. See Erwin Chemerinsky, The Values of Federalism, 47 FLA. L. REV. 499 (1995).

[FN2]. See h.R. Rep. No. 105-702, at 25-28 (1998) (minority views in House Judiciary Committee Report on Class Action Jurisdiction Act of 1998); s. Rep. No. 105-32, at 64, 78-80 (1997) (minority views in Senate Commerce Committee Report on Product Liability Reform Act of 1997); s. Rep. No. 104-69, at 64-66 (1995) (minority views in Senate Commerce Committee Report on Product Liability Fairness Act); h.R. Rep. No. 104-63, at 27 (1995) (minority views in House Commerce Committee Report on Common Sense Product Liability Reform Act); h.R. Rep. No. 104-64, at 35-36, 40-41 (1995) (minority views in House Judiciary Committee Report on Common Sense Legal Standards Reform Act of 1995).

[FN3]. See 21 C.F.R. § 101 (1995) (requiring uniform labeling of all packaged food products with ingredients and specific nutritional information).

[FN4]. See Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. § 455 (1995) (prohibiting misrepresentation of the mechanical condition of a used vehicle and requiring used car salesmen to disclose warranty information to consumers prior to sale); Odometer Disclosure Requirement, 49 C.F.R. § 580 (1995) (requiring transferor of motor vehicle to provide a written disclosure of odometer mileage and its accuracy to protect purchasers who rely on odometer readings in selecting used cars).

[FN5]. See Funeral Industries Practice Rule, 16 C.F.R. § 453 (1995).

[FN6]. See C. Boyden Gray, Regulation and Federalism, 1 YALE J. ON REG. 93, 96-98 (1983) (explaining the Reagan administration's reasons for supporting national product liability legislation); Joe Davidson, Bill to Limit Product Liability Lawsuits by Consumers Fails in Senate, But Barely, WALL ST. J., Sept. 11, 1992, at C13 (stating that "President Bush strongly supported [federal product liability reform legislation] and made it a hot campaign topic with a comment at the Republican convention").

[FN7]. See supra note 2 and accompanying text. Conservatives also enjoy pointing out an apparent inconsistency in liberal philosophy. The same members who have expressed a resounding "no" to federal civil justice and liability reform legislation strongly support the Consumer Products Safety Commission, in part because products flow in interstate commerce. See Victor E. Schwartz & Mark A. Behrens, Federal Product Liability Reform in 1997: History And Public Policy Support Its Enactment Now, 64 TENN. L. REV. 595, 605-06 (1997).

[FN8]. See H.R. Rep. No. 104-63, at 27 (1995) (minority views in House Commerce Committee Report on Common Sense Product Liability Reform Act).

[FN9]. Robert M. Ackerman, Tort Law and Federalism: Whatever Happened to Devolution?, 14 YALE J. REG. 429, 329 (1996) (describing the public policy and constitutional bases for federal involvement in tort law). See also Thomas A. Eaton & Susette M. Talarico, Testing Two Assumptions About Federalism and Tort Reform, 14 YALE J. REG. 371 (1996) (characterizing Republican support for federal tort reform as an exception to the desire to shift policymaking authority from the federal government to the states); Robert L. Rabin, Federalism And The Tort System, 50 RUTGERS L. REV. 1 (1997) (characterizing 1996 federal product liability reform legislation as part of a recent series of efforts to achieve liability reform at the federal level); Nim M. Razook, Jr., Legal And Extralegal Barriers To Federal Product Liability Reform, 32 AM. BUS. L.J. 541 (1995) (suggesting federal liabilty reform is inconsistent with states' rights).

[FN10]. See Victor E. Schwartz, Mark A. Behrens, & Mark D. Taylor, Stamping Out Tort Reform: State Courts Lack Proper Respect for Legislative Judgments, LEGAL TIMES, Feb. 10, 1997, at S34 (discussing judicial nullification of state tort statutes); Victor E. Schwartz, Mark A. Behrens, & Mark D. Taylor, Who Should Make America's Tort Law: Courts or Legislators? (Wash. Legal Found. Feb. 1997) (asserting that legislatures and courts share a role in deciding tort law rules).

[FN11]. See Schwartz & Behrens, supra note 7.

[FN12]. See Victor E. Schwartz & Mark A. Behrens, The Road To Federal Product Liability Reform, 55 MD. L. REV. 1363 (1996); Sherman Joyce, Product Liability Law In The Federal Arena, 19 SEATTLE U. L. REV. 421 (1996).

[FN13]. See U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS COMMODITY TRANSPORTATION SURVEY 1-7, tbl. 1 (1977) (indicating that, on average, over 70% of goods manufactured in the United States are shipped out of state and sold).

[FN14]. The NGA's most recent resolution stated in part:

The National Governors' Association recognizes that the current patchwork of U.S. product liability laws is too costly, time-consuming, unpredictable, and counterproductive, resulting in a severely adverse effect on American consumers, workers, competitiveness, innovation and commerce.... Clearly, a national product liability code would greatly enhance the effectiveness of interstate commerce. The Governors urge Congress to adopt a federal uniform product liability code.

S. Rep. No. 105-32, at 14 (1997) (quoting NGA policy statement).

[FN15]. See id. at 15.

[FN16]. See Jeffrey White, Does Products Bill Collide with Tenth Amendment?, TRIAL, Nov. 1997, at 30; Cynthia C. Lebow, Federalism And Federal Product Liability Reform: A Warning Not Heeded, 64 TENN. L. REV. 665 (1997); Jerry J. Phillips, Hoist by One's Own Petard: When a Conservative Commerce Clause Interpretation Meets Conservative Tort Reform, 64 TENN. L. REV. 647 (1997); Andrew F. Popper, A Federal Tort Law Is Still a Bad Idea: A Comment on Senate Bill 687, 16 J. PRODS. & TOXICS LIAB. 105 (1994); Beth Rogers, Note, Legal Reform--At the Expense of Federalism? House Bill 956, Common Sense Civil Justice Reform Act and Senate Bill 565, Product Liability Reform Act, 21 U. DAYTON L. REV. 513 (1996).

[FN17]. 505 U.S. 144 (1992) (discussing the Low-Level Radioactive Waste Policy Amendments Act).

[FN18]. 514 U.S. 549 (1995) (discussing the Gun Free Zones Act).

[FN19]. 521 U.S. 898 (1997) (discussing the Brady Handgun Violence Prevention Act).

[FN20]. See U.S. Const. art. 1, § 8, cl. 3.

[FN21]. United States v. Lopez, 514 U.S. 549, 553 (1995) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824)) (reaffirming that, although the Commerce Clause represents a broad grant of federal authority, that authority is not plenary, but subject to outer limits).

[FN22]. Lopez, 514 U.S. at 558.

[FN23]. See id. at 558-59. See also United States v. Darby, 312 U.S. 100, 118 (1941) ("The power of Congress over interstate commerce ... extends to those activities intrastate which so affect interstate commerce ... as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.").

[FN24]. 317 U.S. 111 (1942).

[FN25]. Id. at 125.

[FN26]. Id. See also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 277 (1981) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States ....").

[FN27]. Maritime law, though beyond the scope of this Article, is another field in which Congress has been active in setting tort policy rules. See generally GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY ch. VI (2d ed. 1975).

[FN28]. Federal Employers' Liability Act, ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. § § 51-60 (1994)).

[FN29]. See infra notes 78-82 and accompanying text.

[FN30]. 33 U.S.C. § § 901-944 (1994).

[FN31]. See generally Kane v. United States, 43 F.3d 1446, 1449 (Fed. Cir. 1994) (describing workers' compensation acts).

[FN32]. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046, 1051 (5th Cir. 1983) (holding that, although the LHWCA was enacted to help injured employees, the Act was not intended to provide compensation to injured employees for expenses that are the direct result of the employee's own post-injury misconduct).

[FN33]. Smither & Co., Inc. v. Coles, 242 F.2d 220, 222 (D.C. Cir. 1957) (citing Bradford Electric Co. v. Clapper, 286 U.S. 145, 159 (1932)) (describing the compromises made by both employees and employers through the enactment of statutes like the LHWCA).

[FN34]. See infra notes 93-103 and accompanying text.

[FN35]. Numerous other congressional tort policy enactments that have been declared constitutional are described later in this Article. See discussion infra Part II.

[FN36]. Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101). See generally David Moffitt, Note, The Implications of Tort Reform For General Aviation: The General Aviation Revitalization Act of 1994, 1 SYRACUSE J. LEGIS. & POL'Y 215 (1995).

[FN37]. GARA did not provide any new basis for federal court jurisdiction; cases that would have been decided by a state court before GARA became effective on August 17, 1994, remain in state court today, subject to the application of the federal "ceiling" on tort liability. GARA also did not preempt shorter state statutes of repose that may apply to bar a tort claim.

[FN38]. See S. Rep. No. 105-32, at 41-42 (1997) (Senate Commerce Committee Report on Product Liability Reform Act of 1997). See generally Geoffrey A. Campbell, Study: Business Booms After Tort Reform Enacted, A.B.A. J., at 28 (Jan. 1996) ("The light aircraft industry is taking off as reduced liability encourages technological innovation.").

[FN39]. See S. Rep. No. 105-32, at 41.

[FN40]. See id.

[FN41]. See id.

[FN42]. See id.

[FN43]. See id. at 42.

[FN44]. See id.

[FN45]. See id.

[FN46]. See id.

[FN47]. 26 U.S.C. § 104 (Supp. II 1996).

[FN48]. 42 U.S.C. § § 201, 233 (Supp. II 1996).

[FN49]. 49 U.S.C. § 1136 (Supp. II 1996).

[FN50]. 42 U.S.C. § 1791 (Supp. II 1996).

[FN51]. 15 U.S.C. § 77 (Supp. II 1996) (enacted over the veto of President Clinton).

[FN52]. A product liability reform bill cleared both the House and Senate in the 104th Congress, but was vetoed by President Clinton. That legislation, among other reforms, capped punitive damage awards at the greater of two times the plaintiff's compensatory damages award or $250,000; abolished joint liability for noneconomic damages; limited the liability of product sellers to their own negligence or failure to comply with an express warranty; established a complete defense to liability if the principal cause of an accident was the claimant's abuse of alcohol or illicit drugs; reduced a defendant's liability to the extent the plaintiff's harm was due to the misuse or alteration of a product; and set a 15-year statute of repose on litigation involving workplace durable goods (e.g., machine tools). See H.R. Conf. Rep. No. 104-481 (1996). President Clinton vetoed the bill on May 2, 1996. See John F. Harris, Clinton Vetoes Product Liability Measure, wash. Post, May 3, 1996, at A14.

[FN53]. 42 U.S.C.S. § 14503 (Law. Co-op. 1998).

[FN54]. 49 U.S.C.S. § 28103 (Law. Co-op. 1998).

[FN55]. 21 U.S.C.S. § 1605 (Law. Co-op. 1998).

[FN56]. Pub. L. No. 105-271, 112 Stat. 2386, 2389 (1998) (to be codified at 15 U.S.C. § 78a).

[FN57]. 15 U.S.C.S. § § 77-78 (Law. Co-op. 1998).

[FN58]. See supra text accompanying note 51.

[FN59]. See s. Rep. No. 105-182, at 3 (1998); h.R. Rep. No. 105-640, at 8 (1998); h.R. Rep. No. 105-803, at 13 (1998).

[FN60]. 514 U.S. 549 (1995). See, e.g., Phillips, supra note 16.

[FN61]. Pub. L. No. 101-647, § 1702(b), 104 Stat. 4789, 4844 (1990) (current version at 18 U.S.C. § 922(q)(2)(A) (1998)).

[FN62]. Lopez, 514 U.S. at 551. See also Brzonkala v. Virginia Polytechnic Inst. and State Univ., 1999 WL 111891, at *10 (4th Cir. Mar. 5, 1999) (holding that the Violence Against Women Act, which created a civil cause of action against private parties who commit acts of gender-motivated violence, exceeded Congress's Commerce Clause authority because the activity Congress sought to regulate--violent crime motivated by gender animus--was "not itself even arguably commercial or economic," and it "lack[ed] a meaningful connection with any particular, identifiable economic enterprise or transaction"). See generally Herbert Hovenkamp, Judicial Restraint And Constitutional Federalism: The Supreme Court's Lopez And Seminole Tribe Decisions, 96 COLUM. L. REV. 2213 (1996); Symposium, The New Federalism After United States v. Lopez, 46 CASE W. RES. L. REV. 633 (1996); Symposium, Reflections on United States v. Lopez, 94 MICH. L. REV. 533 (1995).

[FN63]. Lopez, 514 U.S. at 561.

[FN64]. Id. at 567.

[FN65]. See supra notes 22-26 and accompanying text. See also Patrick Hoopes, Tort Reform In the Wake of United States v. Lopez, 24 HASTINGS CONST. L.Q. 785 (1997) (discussing how the Lopez decision represented a retreat from the Supreme Court's traditionally expansive interpretation of Congress's authority under the Commerce Clause).

[FN66]. See Lopez, 514 U.S. at 563 (indicating that Congress has the power to enact legislation regulating firearms possession explicitly connected with or having an effect on interstate commerce). See also Scott M. Richmond, Note, Printz v. United States: If Congress Cannot Force State Legislatures to Implement Federal Policy, Why Should It Be Able to Force State Executives?, 7 WIDENER J. PUB. L. 325, 371 (1998) ("Congress has the power,

under the Commerce Clause, to regulate handgun sales involved in interstate commerce.").

[FN67]. 46 U.S.C.A. § § 181-196 (1994).

[FN68]. 46 U.S.C.A. § 182.

[FN69]. 46 U.S.C.A. § 183.

[FN70]. 109 U.S. 578 (1883).

[FN71]. See id. at 579-80.

[FN72]. Id. at 589.

[FN73]. 88 U.S. (21 Wall.) 558 (1874) (addressing Congress's power to make changes to maritime law).

[FN74]. Providence, 109 U.S. at 589 (quoting The Lottawana, 88 U.S. at 577).

[FN75]. Id. at 590 (quoting The Lottawana, 88 U.S. at 577).

[FN76]. Id.

[FN77]. See id. at 587.

[FN78]. 223 U.S. 1 (1912).

[FN79]. 45 U.S.C. § § 51-60 (1994).

[FN80]. See supra note 28 and accompanying text. In Howard v. Illinois Central Railroad Co. (the Employers' Liability Cases), 207 U.S. 463, 496-97 (1908), the Court struck down a 1906 version of FELA, finding that the 1906 Act exceeded Congress's Commerce Clause authority because it "embrace[d] ... matters and things domestic [or intrastate] in their character."

[FN81]. See 45 U.S.C. § 56. The Jones Act, 46 U.S.C.A. § 688 (1994), a FELA-like statute that permits seamen injured in the course of employment to maintain an action for damages at law, also has been interpreted to provide federal and state courts with concurrent jurisdiction to decide Jones Act cases. See Engel v. Davenport, 271 U.S. 33 (1926).

[FN82]. Mondou, 223 U.S. at 50 (emphasis added) (quoting Munn v. Illinois, 94 U.S. 113, 134 (1876)).

[FN83]. Id. at 51.

[FN84]. The Court assumed the clause to be the equivalent of the Equal Protection Clause of the Fourteenth Amendment. See id. at 53.

[FN85]. Id.

[FN86]. See Mondou, 223 U.S. at 53.

[FN87]. Id.

[FN88]. Id.

[FN89]. See id. at 54-55.

[FN90]. Id. at 55.

[FN91]. Id. at 56-57.

[FN92]. Id. at 58-59.

[FN93]. 285 U.S. 22 (1932).

[FN94]. 33 U.S.C. § § 901-950 (1994) (originally entitled "Longshoremen's and Harbor Worker's Act").

[FN95]. See supra notes 30-33 and accompanying text.

[FN96]. See Crowell, 285 U.S. at 39.

[FN97]. See id. at 41.

[FN98]. See id.

[FN99]. See id.

[FN100]. See id. at 42.

[FN101]. See id. at 42-45 (detailing the significant amount of discretion granted to a single deputy commissioner under the Act).

[FN102]. Id. at 47.

[FN103]. See id. at 54 (holding that the LHWCA's reservation of the judiciary's power to deal with matters of law appropriately preserved the exercise of the judicial function).

[FN104]. 28 U.S.C. § 2679(b)-(e) (1994).

[FN105]. See Carr v. United States, 422 F.2d 1007, 1009 (4th Cir. 1970).

[FN106]. Id. at 1012.

[FN107]. See 28 U.S.C. § 2679(b), (d) (1994).

[FN108]. 225 F. Supp. 881 (W.D. Mo. 1963).

[FN109]. See id. at 881.

[FN110]. See id. at 882. Plaintiffs also argued that the Act violated the Seventh Amendment and the jury trial provision of the Missouri Constitution. See id. The court quickly disposed of plaintiff's Seventh Amendment challenge, holding that "the guarantees of the Seventh Amendment do not apply" to statutory causes of action against the federal government. See id. See also Gustafson v. Peck, 216 F. Supp. 370, 371 (N.D. Iowa 1963) (holding that the Seventh Amendment does not guarantee a right to a trial by jury in a state court); Adams v. Jackel, 220 F. Supp. 764, 765 (E.D.N.Y. 1963) (Seventh Amendment does not guarantee a right to a trial by jury in a claim for restitution against a collector of internal revenue). The court dismissed the plaintiff's argument that the Drivers Act violated the Missouri Constitution's jury trial guarantee, noting that the argument was without merit in light of the Supremacy Clause of the United States Constitution. See Nistendirk, 225 F. Supp. at 882.

[FN111]. See Nistendirk, 225 F. Supp. at 882.

[FN112]. 280 U.S. 117 (1929).

[FN113]. Nistendirk, 225 F. Supp. at 882 (quoting Silver, 280 U.S. at 122).

[FN114]. See id.

[FN115]. 5 U.S.C. § § 8101-8193 (1994).

[FN116]. See Noga v. United States, 411 F.2d 943, 944 (9th Cir. 1969).

[FN117]. Carr, 422 F.2d at 1010.

[FN118]. See Vantrease v. United States, 400 F.2d 853 (6th Cir. 1968); Noga, 411 F.2d at 943; Van Houten v. Ralls, 411 F.2d 940 (9th Cir.); Beechwood v. United States, 264 F. Supp. 926 (D. Mont. 1967).

[FN119]. 422 F.2d 1007 (4th Cir. 1970).

[FN120]. See id. at 1010.

[FN121]. See id. at 1011.

[FN122]. See id. at 1010 (noting the Court's rejection of the argument's premise in Silver).

[FN123]. Carr, 422 F.2d at 1011.

[FN124]. See id.

[FN125]. Id. at 1012.

[FN126]. Id.

[FN127]. 539 F.2d 955 (3d Cir. 1976).

[FN128]. In Feres v. United States, 340 U.S. 135 (1950), the Supreme Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. at 146.

[FN129]. See Thomason, 539 F.2d at 956.

[FN130]. Id. at 957.

[FN131]. See id. at 958.

[FN132]. See id. at 959-60.

[FN133]. See supra notes 123-126 and accompanying text.

[FN134]. See Thomason, 539 F.2d at 959-60.

[FN135]. 428 U.S. 1 (1976).

[FN136]. 30 U.S.C. § § 901-962 (1994). See generally Allen R. Prunty & Mark E. Solomons, The Federal Black Lung Benefits Program: Its Evolution and Current Issues, 91 W. VA. L. REV. 665 (1989).

[FN137]. See 30 U.S.C. § 901 (1994).

[FN138]. Usery, 428 U.S. at 18.

[FN139]. Id. at 15.

[FN140]. See id at 16.

[FN141]. Id. at 19.

[FN142]. See id. at 20.

[FN143]. Id. at 29.

[FN144]. See id. at 31.

[FN145]. Id. at 31-32.

[FN146]. Id. at 32.

[FN147]. Id. at 34 (quoting s. Rep. No. 92-743, at 11 (1972), reprinted in 1972 U.S.C.C.A.N. 2305, 2315).

[FN148]. 42 U.S.C. § 2210 (1994).

[FN149]. See Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 65 n.5 (1978). "The defenses of negligence, contributory negligence, charitable or governmental immunity and assumption of the risk are all waived in the event of an extraordinary nuclear occurrence." Id.

[FN150]. See id. at 64.

[FN151]. Id.

[FN152]. 438 U.S. 59 (1978).

[FN153]. See id. at 67.

[FN154]. See id. at 81.

[FN155]. See id. at 84.

[FN156]. Id. at 83.

[FN157]. See id. at 84. Cf. Indemnity Ins. Co. of N. Am. v. Pan Am. Airways, 58 F. Supp. 338, 340 (S.D.N.Y. 1944) (upholding against a due process attack the Warsaw Convention, a treaty which limited the liability of airlines for injuries or deaths to aircraft passengers).

[FN158]. Duke Power, 438 U.S. at 86.

[FN159]. See id. at 88.

[FN160]. Id. at 88 n.32 (quoting Mondou, 223 U.S. at 50 (quoting Munn, 94 U.S. at 134)).

[FN161]. Id. (quoting Silver, 280 U.S. at 122).

[FN162]. Id. at 93.

[FN163]. Id. at 93-94.

[FN164]. Act of Aug. 12, 1976, 90 Stat. 1113 (repealed 1978). See generally Colleen Courtade, et al., 57A Am. Jur. 2d Negligence § 540 (1989).

[FN165]. See Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968) (holding a polio vaccine manufacturer strictly liable for failure to warn individuals receiving the vaccine); Reyes v. Wyeth Laboratories, Inc., 498 F.2d 1264 (5th Cir.) (same).

[FN166]. See Sparks v. Wyeth Laboratories, Inc., 431 F. Supp. 411, 415 (W.D. Okla. 1977) (detailing the Swine Flu Act's legislative history to explain why it was enacted in haste).

[FN167]. See Act of Aug. 12, 1976, 90 Stat. 1113, 1114 (repealed 1978).

[FN168]. 431 F. Supp. 411 (W.D. Okla. 1977).

[FN169]. See id. at 416.

[FN170]. Id.

[FN171]. Id.

[FN172]. Id.

[FN173]. See id. at 417.

[FN174]. Id. at 418.

[FN175]. See id. See also DiPappa v. United States, 687 F.2d 14 (3d Cir. 1982) (holding that Swine Flu Act did not violate the Due Process Clause of the Fifth Amendment). The court also rejected a Seventh Amendment challenge raised by plaintiff, stating that the right to jury trial guarantee is inapplicable where a sovereign waives its immunity and noting that the Seventh Amendment had never been held to apply against the States under the Fourteenth Amendment. See Sparks, 431 F. Supp. at 418-19. See also Ducharme v. Merrill-Nat'l Laboratories, 574 F.2d 1307 (5th Cir. 1978) (holding that Swine Flu Act did not violate Seventh Amendment).

[FN176]. See Sparks, 431 F. Supp. at 418.

[FN177]. Id.

[FN178]. See id. at 420.

[FN179]. 433 F. Supp. 231, 236 (M.D. Tenn. 1977).

[FN180]. Id. at 237.

[FN181]. See id. at 238.

[FN182]. See id.

[FN183]. Id.

[FN184]. Id.

[FN185]. 786 F.2d 8 (1st Cir. 1986).

[FN186]. 42 U.S.C. § 2212 (1988) (repealed 1990).

[FN187]. See id.; Hammond, 786 F.2d at 9.

[FN188]. See Hammond, 786 F.2d at 12-13.

[FN189]. See id. at 13.

[FN190]. See id. at 13-14.

[FN191]. See id.

[FN192]. See id. The court also held that the Atomic Weapons Testing Liability Act did not violate equal protection for the same reasons. See id. at 15.

[FN193]. For further discussion of Tenth Amendment challenges to federal tort reform legislation, see infra notes 253-382 and accompanying text.

[FN194]. 426 U.S. 833 (1976), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). See infra notes 267-287 and accompanying text.

[FN195]. Hammond, 786 F.2d at 15.

[FN196]. See id. at 15 (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)). The court also rejected a claim that the Act violated the prohibition against ex post facto laws, noting that the prohibition applies only to criminal or penal statutes. The court also held that the Act was not punitive, so it did not constitute a bill of attainder. Finally, the court refused to apply the Contracts Clause to the federal government. See id. at 16.

[FN197]. 820 F.2d 982 (9th Cir. 1987).

[FN198]. See id. at 988.

[FN199]. See id. at 989-92.

[FN200]. Id. At 988.

[FN201]. Id.

[FN202]. See id.

[FN203]. Id. at 990 (quoting Hammond, 786 F.2d at 8).

[FN204]. See id. at 991.

[FN205]. Id. at 992 (citations omitted).

[FN206]. See id. The court also held that the Act did not violate the Seventh Amendment, because "[t]here is no right to jury trial against the sovereign." Id.

[FN207]. 42 U.S.C. § § 300aa-1 to 300aa-34 (1994).

[FN208]. See generally Victor E. Schwartz & Liberty Mahshigian, National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future, 48 OHIO ST. L.J. 387 (1987); Daniel A. Cantor, Note, Striking A Balance Between Product Availability and Product Safety: Lessons from the Vaccine Act, 44 AM. U. L. REV. 1853 (1995).

[FN209]. 42 U.S.C. § 300aa-11(c)(1)(D)(i).

[FN210]. 93 F.3d 781 (Fed. Cir. 1996).

[FN211]. See id. at 787.

[FN212]. Id.

[FN213]. Id. at 788.

[FN214]. Id.

[FN215]. Id. (quoting Mathews v. De Castro, 429 U.S. 181, 185 (1976)).

[FN216]. 42 U.S.C. § § 2014, 2210 (1994).

[FN217]. See id.

[FN218]. 940 F.2d 832 (3d Cir. 1991).

[FN219]. See U.S. Const., Art. III, § 2, cl. 2 ("The judicial Power shall extend to all Cases, in Law and Equity,

arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.").

[FN220]. See In re TMI Litig., 940 F.2d at 835.

[FN221]. See id. at 849-51 (discussing Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983); and Mesa v. California, 489 U.S. 121 (1989)).

[FN222]. Id. at 849.

[FN223]. Id. at 855.

[FN224]. See id. at 855-56.

[FN225]. See id. at 856-57.

[FN226]. Id. at 860.

[FN227]. See id. at 861. See also In re TMI, 89 F.3d 1106 (3d Cir. 1996) (holding that retroactive application of the 1988 Amendments did not violate due process); O'Connor v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994) (upholding constitutionality of the 1988 amendments against an Article III challenge).

[FN228]. 28 U.S.C. § 2679 (1994).

[FN229]. 484 U.S. 292 (1988).

[FN230]. Id. at 300.

[FN231]. See generally Daniel A. Morris, Federal Employees' Liability Since The Federal Employees Liability Reform & Tort Compensation Act of 1988 (The Westfall Act), 25 CREIGHTON L. REV. 73 (1991).

[FN232]. 888 F.2d 802 (11th Cir. 1989).

[FN233]. Id. at 805. See also Connell v. United States, 737 F. Supp. 61 (S.D. Iowa 1990) (holding that retroactive application of the Westfall Act was not unconstitutional).

[FN234]. Sowell, 888 F.2d at 805.

[FN235]. See id. See also Salmon v. Schwarz, 948 F.2d 1131 (10th Cir. 1991) (holding that the Westfall Act did not violate the Seventh Amendment).

[FN236]. Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101) (1994).

[FN237]. See Rixon v. Smith, No. 96-714 (W.D. Pa. Jan. 6, 1997) (holding that GARA can be constitutionally applied retroactively); Pollack v. Agusta, S.P.A., Nos. 94-7769, 94-7770 (C.D. Cal. Dec. 6., 1995) (GARA did not violate due process or deprive plaintiffs of a property right); Schneider v. Cessna Aircraft Co., No. 542343 (Super. Ct. Sacramento Cty., Cal. July 29, 1996) (GARA does not violate due process).

[FN238]. 198 U.S. 45 (1905). In Lochner, the Court invalidated a New York law that limited the number of hours bakers could work. Justice Holmes argued in his dissent that courts should respect economic legislation that is rationally related to a legitimate policy goal. He wrote:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law.

Id. at 75 (emphasis added).

[FN239]. See LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-2 to 8-7 (2d. ed. 1988).

[FN240]. See Denis J. Hauptley & Mary Mason, The National Childhood Vaccine Injury Act, 37 FED. B. NEWS & J. 452 (1990) (stating that the Act effectively controlled liability costs for vaccine manufacturers, prevented the withdrawal of crucial vaccines from the market, and averted epidemics of certain childhood illnesses in the United States.)

[FN241]. See Duke Power, 438 U.S. at 64 (discussing congressional passage of the Price-Anderson Act in response to concerns that the private sector would be forced to withdraw from nuclear power production).

[FN242]. See supra notes 38-43 and accompanying text.

[FN243]. See H.R. Rep. No. 105-549, pts. 1 and 2 (1998) (reports from the House Committee on the Judiciary and the Committee on Commerce regarding the Biomaterials Act).

[FN244]. U.S. Const. art. VI, § 2.

[FN245]. See, e.g., Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding California's Franchise Investment Law unconstitutional because it directly conflicted with federal legislation).

[FN246]. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824).

[FN247]. See New York, 505 U.S. at 178-79 (noting that the Supremacy Clause directs state courts to take action to enforce federal law, but that no comparable constitutional provision allows Congress to force state legislators to act); Mondou, 223 U.S. at 57-58 (1912) (stating that, in some instances, action must be taken by state courts to enforce a federally established penalty).

[FN248]. 330 U.S. 386 (1947).

[FN249]. Ch. 26, 56 Stat. 23 (codified at 50 U.S.C. app. § 107 (1976)) (repealed 1947).

[FN250]. Testa, 330 U.S. at 389.

[FN251]. Id. at 393.

[FN252]. Id. at 390-91 (emphasis added).

[FN253]. Gregory v. Ashcroft, 501 U.S. 452, 460 (1990) (discussing how the Supremacy Clause is the textual authority granting the federal government power over the states in the U.S. system of federalism).

[FN254]. U.S. Const. amend. X. See also The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution ... are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

[FN255]. See Gregory, 501 U.S. at 460 ("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly."). See also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § § 5-20 (2d. ed. 1988).

[FN256]. 392 U.S. 183 (1968).

[FN257]. 29 U.S.C. § § 203-218 (1994).

[FN258]. See 29 U.S.C. § 203(d).

[FN259]. See Wirtz, 392 U.S. at 197.

[FN260]. Id. at 198-99.

[FN261]. 426 U.S. 833 (1976), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[FN262]. See National League of Cities, 426 U.S. at 840-52.

[FN263]. Id. at 852.

[FN264]. 469 U.S. 528 (1985). See generally Martha A. Field, Comment, Garcia v. San Antonio Metropolitan

Transit Authority: The Demise of a Misguided Doctrine, 99 Harv. L. Rev. 84 (1985) (arguing against the concept of the Supreme Court granting the states constitutional immunities as a constraint on Congress's use of its delegated powers).

[FN265]. 485 U.S. 505 (1988).

[FN266]. See also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 289-90 (1981) (holding that the Tenth Amendment does not prohibit Congress from passing laws that preempt state regulations); FERC v. Mississippi, 456 U.S. 742, 764 (1982) (same).

[FN267]. 469 U.S. 528 (1985).

[FN268]. Id. at 530.

[FN269]. Id. at 534-35.

[FN270]. See id. at 537.

[FN271]. See id.

[FN272]. See id.

[FN273]. See id. at 537-38.

[FN274]. See id. at 539.

[FN275]. Id. at 557.

[FN276]. See id. at 540.

[FN277]. See id. at 543.

[FN278]. See Garcia, 469 U.S. at 545.

[FN279]. Id. at 546.

[FN280]. Id. at 547.

[FN281]. Id. at 550.

[FN282]. Id. at 554.

[FN283]. The Court pointed out that "the composition of the Federal Government was designed in large part to protect States from overreaching by Congress." Id. at 550-51. The Framers thus gave the states a role in selecting the executive and legislative branches, provided for the equal representation of states in the Senate, and prohibited any constitutional amendment divesting a state of equal representation in the Senate without the state's consent. See id. at 551.

[FN284]. Id. at 554 (quoting EEOC v. Wyoming, 460 U.S. 226, 236 (1983)). See also Thomas H. Odom, The Tenth Amendment After Garcia: Process-Based Procedural Protections, 135 U. PA. L. REV. 1657, 1666 (1987) (indicating that Garcia is significant because it "calls for the development of new theories of federalism-based limitations on the commerce power").

[FN285]. Garcia, 469 U.S. at 552-553. See also John E. DuMont, Comment, State Immunity From Federal Regulation--Before and After Garcia: How Accurate Was the Supreme Court's Prediction in Garcia v. SAMTA that the Political Process Inherent in Our System of Federalism Was Capable of Protecting the States Against Unduly Burdensome Federal Regulation?, 31 DUQ. L. REV. 391 (1993) (arguing that the political process has protected the states against unduly burdensome federal regulation).

[FN286]. Garcia, 469 U.S. at 554.

[FN287]. Id. at 555. See also William A. Isaacson, Garcia v. San Antonio Metropolitan Transit Authority: Antifederalism Revisited, 21 U. TOL. L. REV. 147 (1989) (providing historical account of the Constitutional Convention and arguing in support of the holding in Garcia).

[FN288]. 485 U.S. 505 (1988).

[FN289]. 26 U.S.C. § 103(j)(1) (1982).

[FN290]. See id.

[FN291]. Ownership of a registered bond is recorded on a central list, and a transfer of record ownership requires entering the change on that list. Bearer bonds, on the other hand, leave no paper trail. Congress believed that bearer bonds facilitated tax evasion, because they could be used to avoid estate and gift taxes and as a medium of exchange in the illegal sector. See Baker, 485 U.S. at 508-509.

[FN292]. The Court treated the Tax Act as banning the issuance of bearer bonds, because it would force States to increase the interest paid on bearer bonds to exceptionally high rates. Moreover, since the Act became effective, no State had issued a bearer bond. See id. at 511.

[FN293]. See id. at 512.

[FN294]. Id. at 512-13.

[FN295]. Id.

[FN296]. See id at 513.

[FN297]. 465 U.S. 742 (1982).

[FN298]. See id. at 761-64.

[FN299]. See Public Utility Regulatory Policies Act of 1978, 15 U.S.C. § 3201, 16 U.S.C. § 2611 (1994).

[FN300]. See FERC, 456 U.S. a 759-67.

[FN301]. See Baker, 485 U.S. at 514.

[FN302]. See id. at 514-15.

[FN303]. Id. at 515.

[FN304]. 505 U.S. 144 (1991).

[FN305]. 521 U.S. 898 (1997).

[FN306]. 505 U.S. 144 (1991).

[FN307]. 42 U.S.C. § 2021b-j (1994).

[FN308]. 42 U.S.C. § 2021c(a)(1)(A) (1994).

[FN309]. See New York, 505 U.S. at 154. Petitioners also charged that the Act violated the Guarantee Clause of the Constitution, which directs the United States to "guarantee to every State in this Union a Republican Form of Government." U.S. Const. art. IV., § 4. The Court easily dismissed this claim. See id. at 183-86.

[FN310]. See New York, 505 U.S. at 152-54.

[FN311]. See id. at 152-53.

[FN312]. See id. at 153.

[FN313]. New York, 505 U.S. at 153-54.

[FN314]. Id. at 157.

[FN315]. Id. at 159.

[FN316]. Id. at 158.

[FN317]. Id. at 156.

[FN318]. See id. at 160-61.

[FN319]. Id. at 161.

[FN320]. Id. (quoting FERC, 456 U.S. at 761-62).

[FN321]. Id. at 163.

[FN322]. See New York, 505 U.S. at 163.

[FN323]. Id. at 164.

[FN324]. Id.

[FN325]. See id.

[FN326]. Id.

[FN327]. Id. at 165.

[FN328]. Id. at 166.

[FN329]. See id.

[FN330]. Id. at 166.

[FN331]. See id. at 167.

[FN332]. Id.

[FN333]. See id. at 168.

[FN334]. New York, 505 U.S. at 169.

[FN335]. Id. at 173.

[FN336]. See id.

[FN337]. See id. at 173-74.

[FN338]. Id. at 174.

[FN339]. See id. 174-75.

[FN340]. See id. at 175.

[FN341]. See id.

[FN342]. See id. at 177. See generally Evan H. Caminker, State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?, 95 COLUM. L. REV. 1001 (1995); H. Jefferson Powell, The Oldest Question of Constitutional Law, 79 VA. L. REV. 633 (1993); Saikrishna B. Prakash, Field Office Federalism, 79 VA. L. REV. 1957 (1993); Martin H. Redish, Doing It with Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation, 21 HASTINGS CONST. L.Q. 593 (1994).

[FN343]. See New York, 505 U.S. at 178-79.

[FN344]. Id. (emphasis added).

[FN345]. See White, supra note 16, at 34; Lebow, supra note 16, at 690.

[FN346]. New York, 505 U.S. at 165.

[FN347]. Id. at 177.

[FN348]. Id. at 168.

[FN349]. 521 U.S. 898 (1997).

[FN350]. 18 U.S.C. § § 921-925A (1994).

[FN351]. See id.

[FN352]. See Printz, 521 U.S. at 904-05.

[FN353]. See id. at 905.

[FN354]. See id.

[FN355]. See id. at 905-10 (citations omitted).

[FN356]. Id. at 907 (emphasis in original).

[FN357]. Id. (citations omitted).

[FN358]. See id.

[FN359]. Id. at 907-08.

[FN360]. Id. at 917-18.

[FN361]. 505 U.S. 144 (1991).

[FN362]. New York, 505 U.S. at 166.

[FN363]. Printz, 521 U.S. at 922.

[FN364]. See id.

[FN365]. See id.

[FN366]. Id.

[FN367]. See id.

[FN368]. Id. at 923.

[FN369]. 452 U.S. 264 (1981).

[FN370]. 456 U.S. 742 (1982).

[FN371]. 505 U.S. 144 (1991).

[FN372]. Printz, 521 U.S. at 926.

[FN373]. Id. at 935.

[FN374]. See Shawn E. Tuma, Note, Preserving Liberty: United States v. Printz and the Vigilant Defense of Federalism, 10 REGENT U. L. REV. 193 (1998) (discussing the federalism doctrine as a safeguard of individual liberties).

[FN375]. See Vicki C. Jackson, Federalism and the Uses and Limits of Law: Printz and Principle? 111 HARV. L. REV. 2180, 2185-86 (1998) (indicating that the Printz and New York decisions set forth a "clear-cut rule against federal 'commandeering' of state legislative or executive officials," but do not alter the responsibility of state courts to enforce federal laws).

[FN376]. 155 F.3d 453 (4th Cir. 1998). See also Travis v. Reno, 12 F. Supp. 2d 921 (W.D. Wis. 1998), rev'd, 163 F.3d 1000 (7th Cir. 1998) (holding that the Driver's Privacy Protection Act violated the Tenth Amendment because it forced state officials and state employees to administer and enforce a federal regulatory scheme). But see Pryor v. Reno, 998 F. Supp. 1317 (M.D. Ala. 1998) (ruling that the Driver's Privacy Protection Act was authorized pursuant to Congress' Commerce Clause authority and did not violate the Tenth Amendment because, rather than requiring the state to enforce a federal regulatory scheme preventing the disclosure of driver records, the Act merely prohibited the state from releasing such records for impermissible purposes).

[FN377]. 18 U.S.C. § § 2721-2725 (1994).

[FN378]. See id.

[FN379]. See Condon, 155 F.3d at 463.

[FN380]. See id. at 459.

[FN381]. 994 F. Supp. 1358 (W.D. Okla. 1997).

[FN382]. See id. at 1360.

[FN383]. Id. at 1363.

[FN384]. Lopez, 514 U.S. at 561.

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