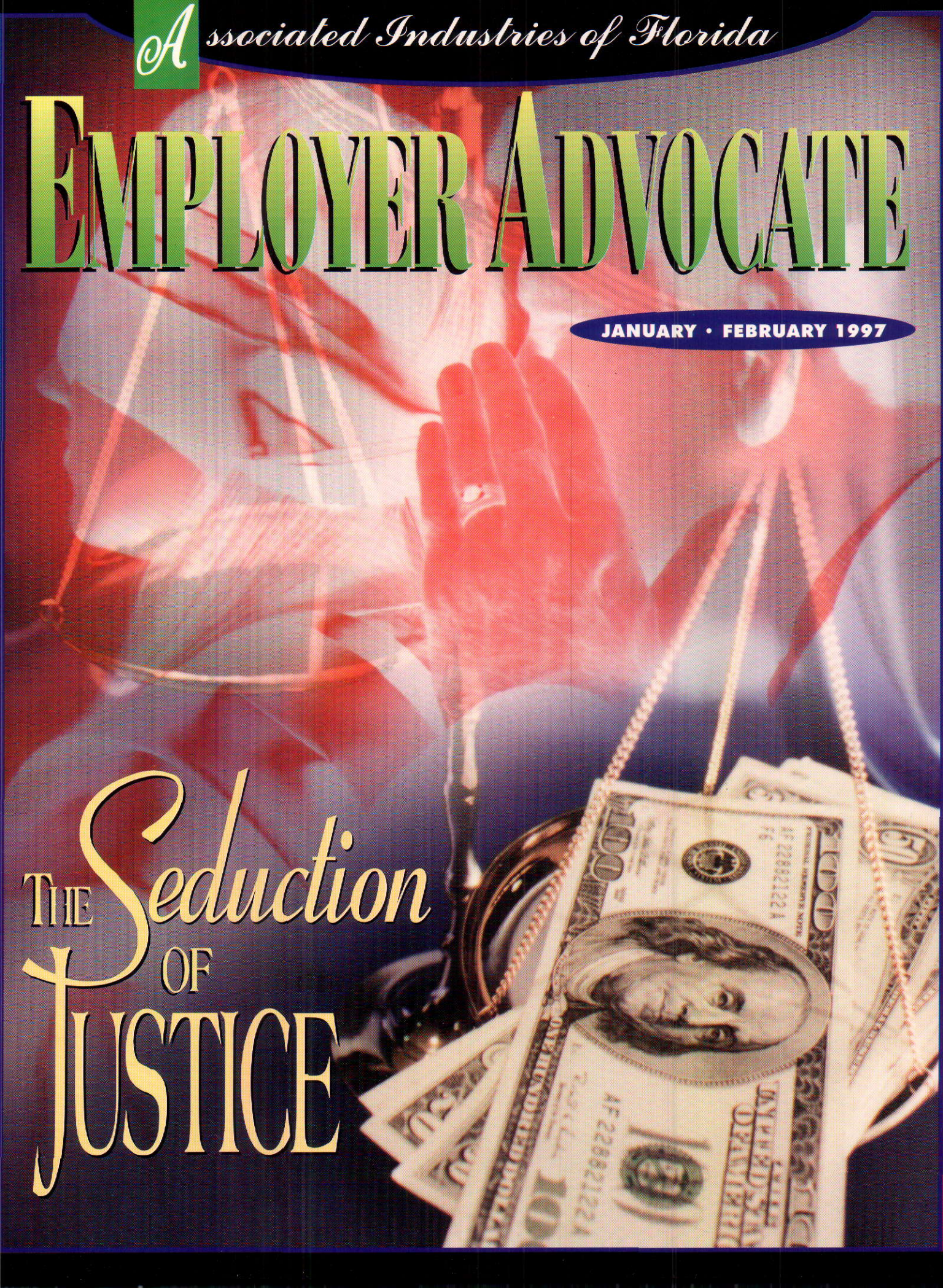
Associated Industries of Florida

EMPLOYER ADVOCATE

JANUARY • FEBRUARY 1997



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Jon L. Shebel
PRESIDENT AND CEO

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Associated Industries of Florida

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EMPLOYER ADVOCATE

JANUARY • FEBRUARY 1997

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Civility and Justice

by Jon L. Shebel,

President & CEO

Generosity is admirable — except when it is practiced under misguided assumptions with someone else's money.

As an employer, you are the primary funder of the multitudinous charitable projects conducted under the auspices of government. Paradoxically, many of these "charities" perform poorly at inordinate cost and with pernicious effect.

One of the most pernicious of all government charities is our modern civil justice system. According to some estimates, the tort system costs every American about $1,200 a year.

We pay for this system in more currencies than mere money. The civil justice system has evolved into a form of legal extortion where fear of the high costs of self-defense leads many a company to pay off potential plaintiffs and their lawyers.

The randomness of the system means that sometimes those who are injured go uncompensated, those who are not injured hit the jackpot, and the innocent are found guilty and penalized for mistakes they did not commit.

Consumers pay more for necessary products and services, ranging from child care to football helmets. Often, we lose access to products and services altogether, including life-saving medical devices.

The modern tort system combines injustice with inefficiency, two qualities that we should not tolerate in public policy. For that reason, we are devoting this edition of *Employer Advocate* to the issue of tort reform.

When the legislative session begins in a couple of months, AIF and other organizations will ask lawmakers to enact reforms that will increase the measure of justice and efficiency in the tort system.

Lovers of lawsuits will fight this effort with every weapon in their arsenal. The spoutings of overblown rhetoric have already begun. According to the head of the Academy of Florida Trial Lawyers, tort reform is the pet project of "big businesses" who don't want to pay when they kill someone.

That depiction is melodramatic nonsense and must not be allowed to kill efforts to reform the legal travesties perpetrated in our state.

Indeed, big business is harmed by frivolous lawsuits. But so are small and medium-sized business, governments, private charities, schools, nurses, hospitals, doctors, and normal, every-day people.

Supporters of the current system say it is necessary to correct defects in the free-market system. In this case, however, the cure is worst than the disease.

Consumer groups should decry this system that drives up costs and reduces access to products.

Civil libertarians should find disagreeable the provisions of a system that encourages outrageous violations of privacy.

Advocates for the poor should oppose the regressive nature of the tort tax, which imposes a higher burden on those with little money to waste.

And all who cherish the ideal of justice should object to the current state of affairs that demeans the ideal in practice and in theory.

Tort reform advocates do not want to abolish trial by jury in civil cases. They do not want to inflict harm on the innocent while allowing the guilty to revel in their wealth. They are not the overfed and overpaid titans of multinational corporations.

Rather, supporters of the reform effort hope to recapture the dignity of the courtroom and the legal profession by returning civility and justice to civil justice.

In this edition, we will explain what is wrong with the current system and what can be done to fix it.

I urge you to monitor the reform effort and ask your representative and senator to support reform legislation. Even if you've never been sued, you, your business, your employees, and your family can no longer afford to pay the tort tax. ■

What if you were able to offer your employees

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a benefit that costs your company ***nothing***?

a benefit that saves **your employees money?**

a benefit that saves your company ***money***?

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A DIVISION OF
Associated Industries of Florida
Service Corporation

A TRUE Coalition

by Jodi L. Chase, Executive Vice President & General Counsel

The civil justice system touches the lives of all citizens. The fear of liability may keep many a small business owner from expanding. It drives up costs for consumers. It harms the health of a patient who can't obtain a life-saving medical device. An injured plaintiff waits years for a settlement or a verdict to bring the monetary relief he needs right now.

In fact, the system serves no one but the few elite lawyers who are able to slow the system down and take a huge percentage of awards. Sensible reform of the system will benefit all Floridians.

Meaningful reform of any institution in American society can only be achieved with the support of citizens. It takes many voices to convince policy makers that change is necessary. The desire to make the system work for everyone gave rise to the spontaneous formation of the Tort Reform United Effort, or TRUE.

TRUE is a coalition of Floridians concerned about the civil justice system. It's goal is to enact sensible, real reform of Florida's civil justice system.

TRUE members come from all walks of life. They are employers and employees, retirees and homemakers. They are doctors, nurses, service providers, product manufacturers, and retailers.

Membership is open to anyone. When you become a member of TRUE, you are committing yourself to bringing about change. Your membership is a concrete sign that you will use your voice to help achieve reform.

TRUE is a professionally managed coalition. It is headed by a steering committee that acts as the board of directors. Policy decisions are democratically made by a policy board. Suggestions for reform come from members, the steering committee, and the policy board.

Members will be asked to contact their legislators and the coalition office will assist in that effort. Members are also asked to publicly list their name or the name of their company as a TRUE member.

Battling trial lawyers is an enormous task. They have tremendous power in the halls of the Capitol. They call themselves consumer advocates and will depict the TRUE coalition as big business against the consumer. They have already made statements to the effect that what civil justice reform advocates really want is the freedom to injure people and walk away without even saying "sorry." No AIF member — or business person for that matter — wants to harm others. Defendants are people as well. All a defendant wants is fairness. It takes a TRUE collective effort for you to gain fair treatment. ■

Editor's note: If you have stories of frivolous lawsuits you'd like to share with us, please contact Jodi Chase at (904) 224-7173, or e-mail her at jchase@aif.com.

TRUE

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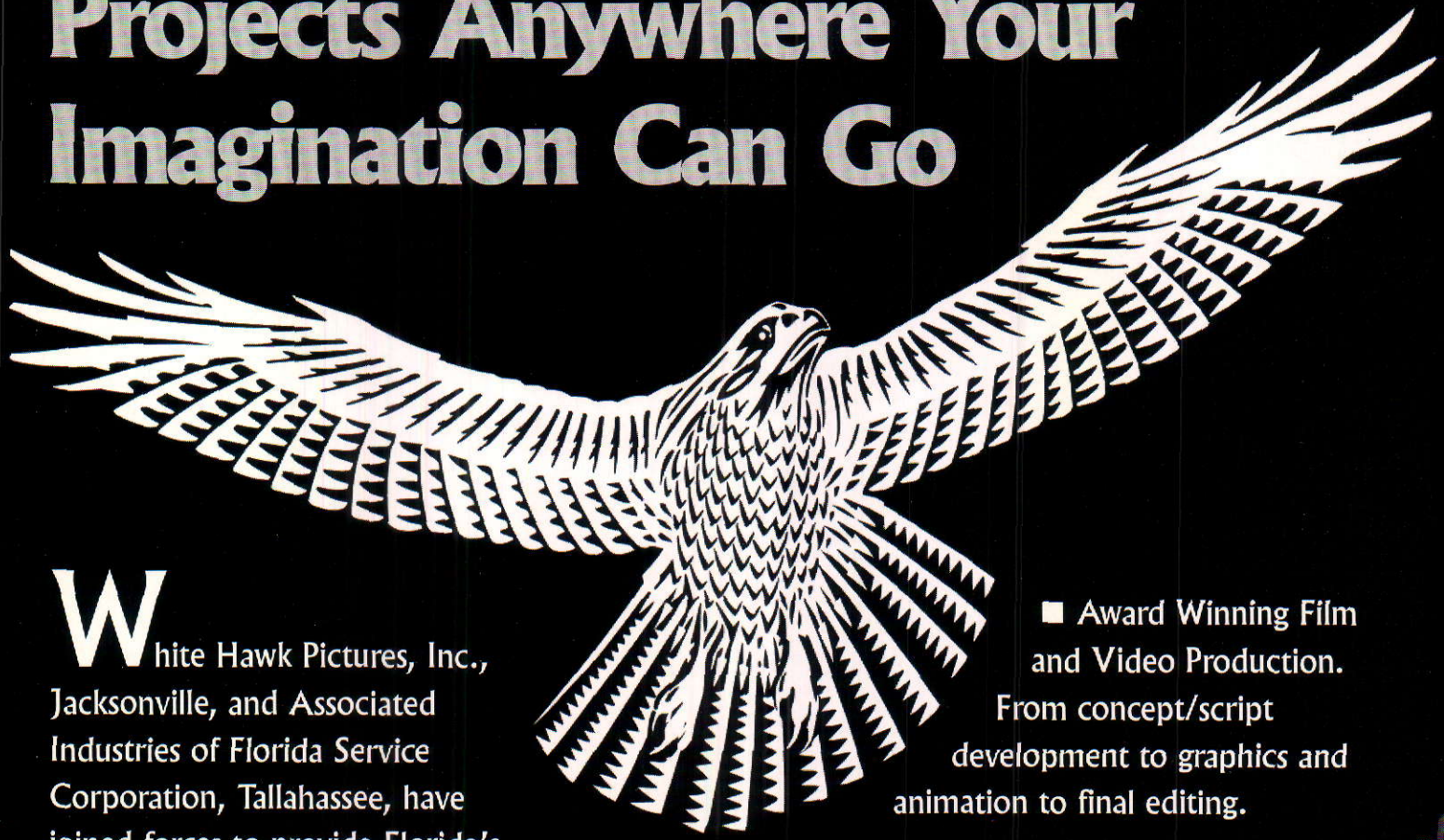

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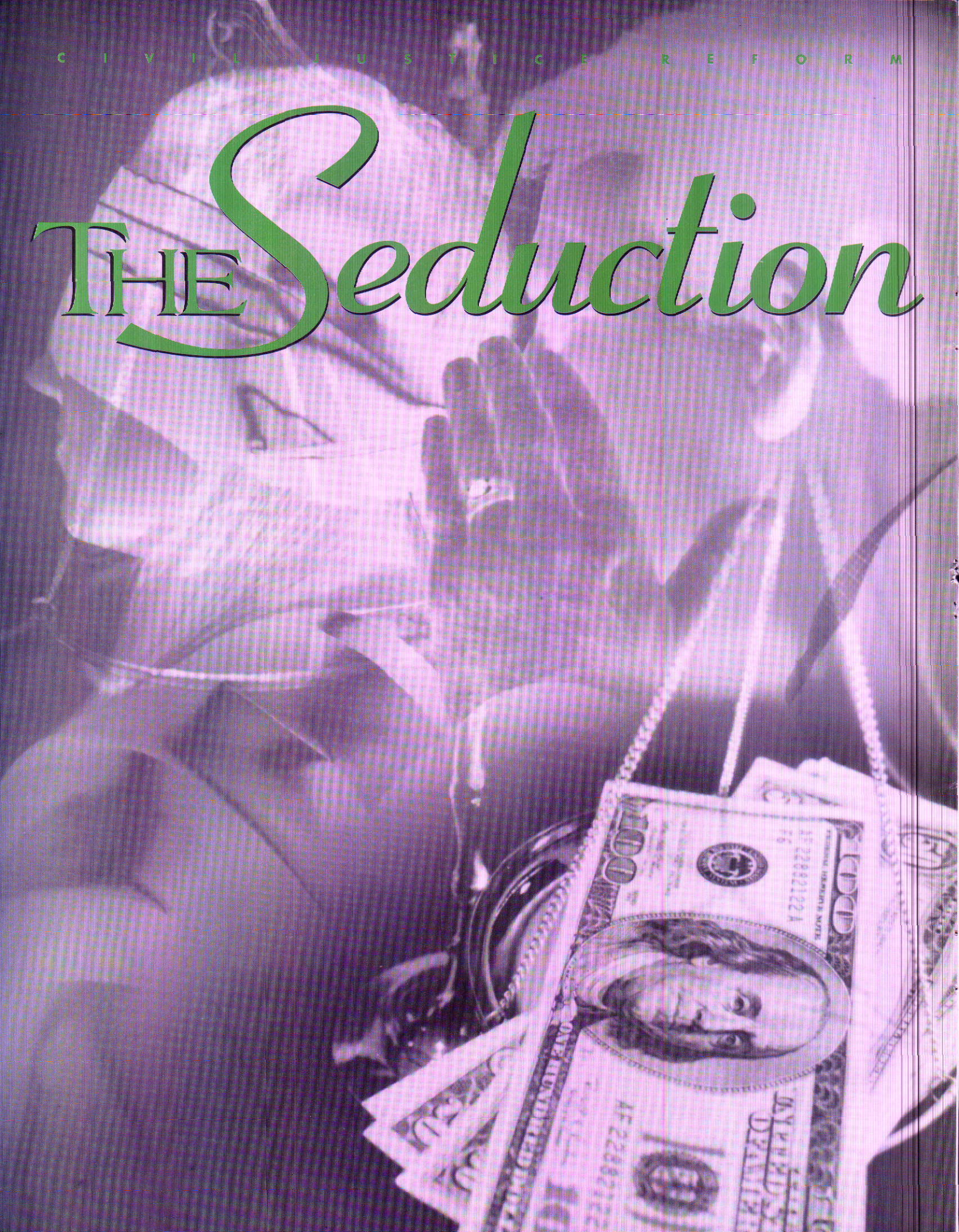


OF JUSTICE

by Jacquelyn Horkan, Employer Advocate *Editor*

In1945, Ira Arnstein, a songwriter of lasting obscurity, sued Cole Porter for plagiarism. Arnstein had previously lost five similar cases against other leading songwriters of the day. He could offer no evidence that Porter had ever seen his musical scribblings or suffered through a performance of them. He just claimed that Porter "had stooges follow me, watch me, and live in the same apartment with me."

Only the most gullible could believe Arnstein's allegations. Rather, make that the most gullible *and* the judges of a New York federal court who subscribed to the notion that any lawsuit is a good lawsuit and, therefore, allowed Arnstein's to go forward. Arnstein lost, but only after forcing Porter to go through the expensive motions of defending himself against a silly man making delusional accusations.

When Cole Porter produced his musical, *Anything Goes*, in 1934, little did he imagine that he was penning the philosophy for a revolution in the American civil justice system that would in a few short years ensnare him. With his usual brevity and wit, however, he analyzed the situation succinctly in the lyrics to the title song, "The world has gone mad today/ and good's bad today."

Through the centuries, legal tradition had come to view litigation as a necessary evil, something to be avoided if at all possible. The reasons were simple. It was expensive, acrimonious, and placed great demands on time and energy that could be spent in more constructive endeavors.

"Discourage litigation," said Abraham Lincoln, a talented trial lawyer himself. "Persuade your neighbors to compromise wherever you can. As a peacemaker, the lawyer has a superior opportunity of being a good man."

In this century, however, a new breed of jurists came into their own, and they preached the benefits of litigation over comity, echoing Cole Porter's lyrics, "good's bad today."

Lawsuits became an instrument of enforcement, "compelling" manufacturers to produce safe products and softening the social costs of caring for those who are injured in accidents.

In fact, some courts actually awarded legal fees to *losing* plaintiffs, in the belief that, successful or not, any person who brought a lawsuit was performing a public service. In 1983, the U.S. Supreme Court put an end to that ridiculous practice.

Nonetheless, the readiness to embark on a courtroom battle — to make someone pay — now seems ingrained in the popular consciousness.

Not only has the number of lawsuits risen; the size of awards has also increased. The National Center for State Courts surveyed jury awards in two periods, from 1965 to 1969 and from 1980 to 1984. Between those two periods, average jury awards, after adjusting for inflation, grew by a whopping 1,595 percent.

Tort lawsuits involve civil wrongs or injuries and they encompass just one part of the civil justice system. In the last two decades, tort litigation has become the poster child of what is wrong with the overall civil justice system.

No one really knows how much the tort system costs, but the most frequently cited numbers come from the research of Tillinghast, an insurance consulting firm. According to Tillinghast, the costs of the tort system grew from $22 billion in 1975 to $152 billion in 1994. That translates to a yearly tort tax of $2,160 on each U.S. family.

Furthermore, Tillinghast estimates that only 43 percent of the money spent on compensating injured claimants actually makes it into the claimants' pockets. The rest is spent on attorneys' fees and administration of the system.

Are all these lawsuits really worth it? Personal injury lawyers argue yes, that their gallant efforts in the courtroom have made the world safer and eased the suffering of the tired, the poor, the huddled masses.

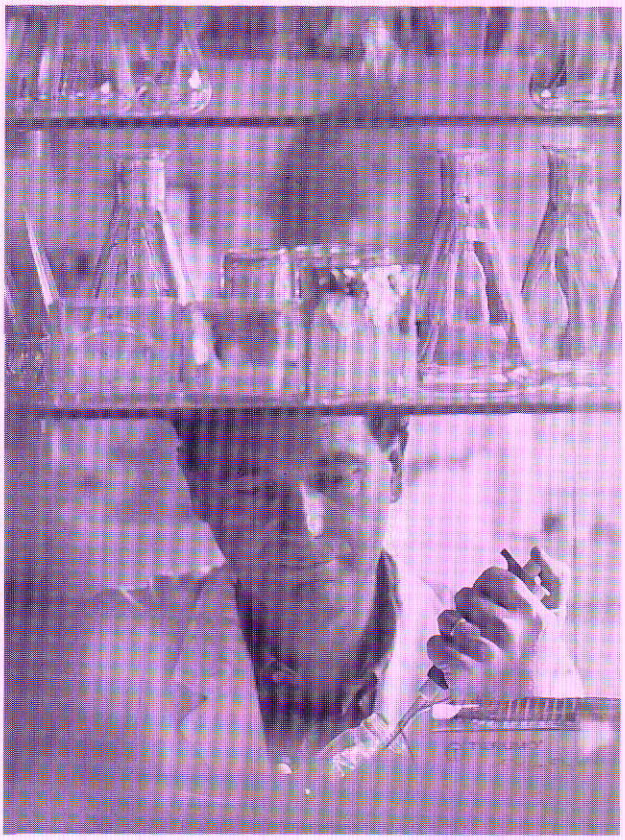
In practice, the current civil justice system often does not secure justice for defendants, plaintiffs, or consumers, who never enter the courtroom but bear the expense of its verdicts every day.

The world of liability serves most consistently the trial attorneys who wade into its high-stakes lottery and wade out

with most of the jackpot. And it serves most fully those who lack the ethical restraints to treat justice as anything more than a painted lady of non-existent virtue.

"Friends, I believe you can see the great mission that rests upon you today — redistribute this wealth, get it back into the hands of the masses and the multitudes."

Fuller Warren, Governor of the State of Florida (1949 to 1953) in remarks at Trial and Tort Trends — the 1959 Melvin Belli Seminar



Today's tort system did not evolve naturally. Rather, it was a dramatic departure from a system of civil law based on centuries of experience in trying to control the cost and ferocity of legal combat.

The new rules were written to fulfill a perceived need to deter accidents and compensate victims. The legal scholars who developed these new rules believed the consumer was a hapless dupe of wealthy corporations. They were convinced that free enterprise included no incentive to manufacture safe products and consumers were incapable of demanding quality on their own.

The new goal of the tort system was to get money to injured victims in any way possible. That meant stretching the net of liability to its farthest limits so that it could capture, not just those who were to blame, but those who could pay.

To accomplish that objective, old legal doctrines, such as assumption of risk, had to be eradicated; a defendant could no longer argue that the plaintiff knowingly undertook a risky activity. Courts had to create the doctrine of joint and several liability so that the plaintiff was assured of full recovery of damages from at least one defendant no matter what that defendant's level of liability was.

In the courtroom, cases are argued based on their individual merits, not on their impact on overall public policy. One generous verdict in a case where misfortune rather than negligence caused an accident seemed a small price to pay for compassion. Judges and lawyers did not have to look at the cumulative effect of millions of those verdicts. They did not have to weigh the merits of such generosity against the expense.

The job of balancing costs against benefits falls to legislatures which did not play a role in the genesis of the new tort theories. Few lawmakers are willing to enact a social program where 57 percent of the total cost of the program is administrative, as it is in civil justice.

But there was no debate over cost versus benefit in this situation. Costs and unintended consequences of the tort revolution were matters of no concern to the Utopians who set it into motion.

"But litigation is like the neighborhood grouch: It knows how to shoo but not how to beckon."

Peter W. Huber, *Liability: The Legal Revolution and Its Consequences*

In the mid-1980s, police officers in West Orange, New Jersey, refused to answer any calls but those involving emergencies. The citizens lived with minimal service because their police department could not afford liability insurance.

The tort revolution spawned new theories of liability, which gave birth to meritless claims and exaggerated recoveries of damages. At the beginning, the "good work" of personal injury attorneys may have been aimed at large, wealthy corporations, but municipalities, charities, and small businesses were soon caught in the crossfire.

The someone-must-pay rule of the new tort system underwent a natural expansion into the nether regions of coherence. Everyone has heard the stories. A contestant enters a refrigerator-carrying race, injures his back, and recovers damages. A man sues a ladder manufacturer after he undergoes hypnosis and "recovers" his memory of falling off the ladder. A drunk driver smashes into a delivery truck and his passenger sues the company that owns the delivery truck.

These are just a few of the anecdotes illustrating the absurdity of the current system. Plaintiff lawyers would argue that a few absurd results are a small price to pay for a system that makes America safer. If only it did.

In many cases, the tort system rewards dangerous behavior. In other cases, it actually penalizes safe behavior.

According to the U.S. Office of Technology Assessment, fear of litigation has hampered the development of a vaccine to prevent the spread of AIDS. How?

Trial lawyers have made millions suing vaccine manufacturers. Inoculations do entail some risk since they involve the injection of a weakened strain of the actual disease into a person's system. There is simply no way to eliminate the chance of a rare harmful side effect without reducing the life-saving potential of the vaccination.

Personal injury lawyers do not even need an actual side effect to attack a beneficial product. Lawsuits over the whooping cough vaccine alleged that the vaccine caused brain cancer. When plaintiff lawyers created a worldwide panic with this claim, vaccination rates in Japan and parts of Europe dropped and children began dying of this disease when a simple shot in the leg could have saved their lives. Deepening the tragedy was the absence of any link between brain cancer and the vaccine. It was the selfish invention of a small group of trial lawyers.

The tort system simply cannot distinguish between a good risk and a bad risk and the public health suffers. Between 1960 and 1985, the number of U.S. vaccine manufacturers shrank by more than half. In 1986, there was only one U.S. maker of the polio vaccine. Where there were eight U.S. makers of the whooping cough vaccine in 1960, there were only two in 1986.

Today, pregnant women in America have no access to Bendectin, the only approved drug that helps prevent morning sickness. The Food and Drug Administration says Bendectin is "safe and effective." Reputable scientists agree. Trial lawyers, however, claim that the drug causes birth defects.

Despite scientific evidence, regulatory approval, and the merits of the drug, the pressures of litigation forced the manufacturer to withdraw the product from the market in 1985. Within four years, hospitalization for excessive vomiting during pregnancy increased almost 50 percent in the United States. These unnecessary hospitalizations cost $73 million.

The tort system simply cannot distinguish between a good risk and a bad risk and the public health suffers.

Bendectin is still available in other countries. It still carries the FDA seal of approval and the backing of the scientific community. But no one will sell it in the United States because of the lawsuit industry.

Americans lose more than their health through the tort system; they lose jobs. The Health Industry Manufacturing Association estimates that the pressures of litigation and regulation will force makers of medical devices to ship 40,000 to 50,000 jobs overseas in the next five years.

The U.S. Department of Commerce estimates that U.S. companies pay 20 to 50 times more for product liability insurance than their foreign competitors do.

According to a 1988 Conference Board study, 47 percent of U.S. companies had withdrawn products from the marketplace because of the uncertain legal climate. Another 39 percent had decided not to introduce a new product line.

As the designers intended, the new tort system does indeed act as a deterrent. Unfortunately, what it often deters is necessary, valuable, productive activities.

"If I rob a bank, the penalty is spelled out beforehand. If someone slips on my sidewalk, it could cost me a few thousand dollars or my entire net worth."

Bob Eaton, Chairman and CEO of Chrysler Corp., *Newsweek*, Sept. 23, 1996

There were 15,965 employment discrimination suits filed in 1994, nearly twice as many as were filed four years earlier before Congress enacted the 1991 Civil Rights Act.

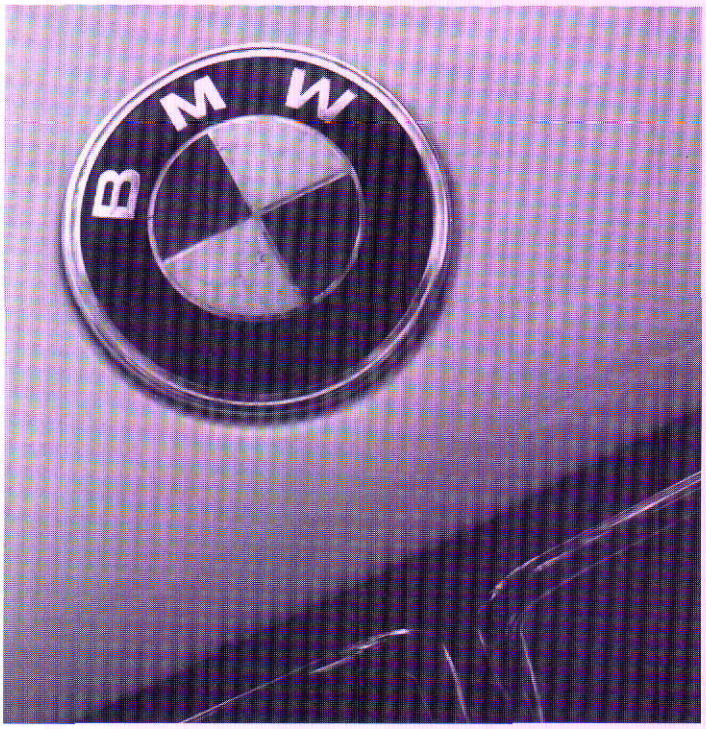
Has there been an increase in employment discrimination over that time? Did the new law give workers protection they lacked before? Who knows. One thing we can be sure of: The 1991 Civil Rights Act made employment discrimination suits eminently more attractive to plaintiffs' lawyers.

The act increased the array of damages that lawyers could demand for their clients, including future pay, emotional distress, and punitive damages. Perhaps the increase in employment discrimination lawsuits is nothing more than a case of trial lawyers following the scent of money.

Personal injury lawyers scoff at the notion of a supposed litigation explosion and recent numbers seem to back them up. In the 1990s, the number of lawsuits filed every year has held steady, although it is on a slight uptick since 1994.

Furthermore, only about 3 percent of the lawsuits filed go to trial; once there, the plaintiff only wins about half of the time.

The number of suits and plaintiff victories is not the whole story, however. The size of recoveries is booming, which has a



The failure to inform a buyer of a minor touch-up of the car's paint, costing a few hundred dollars, is not a reprehensible action.

ripple effect throughout the system. The potential for an enormous reward leads to inflated settlements both before and after a suit is filed. Most employers simply cannot wager their company's future in a game of lawsuit roulette. Smaller companies with fewer resources may not be able to pay for self-defense in the courtroom. The pressure is on them to settle frivolous claims for inflated amounts just to escape the nuisance and potential catastrophe of a lawsuit.

The indeterminacy of the system is what allows plaintiffs' lawyers to thrive. A few losses here and there are but the price to pay for hitting it big. And one victory can lead to others.

Almost everyone has heard about the BMW case that led to a jury award of $4 million in punitive damages. The Alabama Supreme Court reduced the award to $2 million. The U.S. Supreme Court called the award an unconstitutional violation of BMW's right to due process and sent the case back to Alabama for a determination of a fair level of punitive damages.

That any award for punitive damages was made in this case is ridiculous. The failure to inform a buyer of a minor touch-up of the car's paint, costing a few hundred dollars, is not a reprehensible action. Nevertheless BMW had to pay lawyers to defend itself through the trial and the appeals. And there's more to come. According to Citizens for a Sound Economy, the same lawyers in that first case have now filed 24 more actions against BMW.

BMW is not the only car manufacturer to encounter Alabama jurors' tolerance for nonsensical theories of damages. A few years ago, a bankrupt Ford dealer sued the auto manufacturer, blaming it for his business failure. Ford hadn't warned him that "minority" dealerships fail more frequently than other dealers. The jury awarded him $2.5 million for mental anguish and $6 million in punitive damages. In June of 1995, another jury upped the stakes by awarding another failed "minority" dealer $5 million for emotional distress and $20 million for punitive damages.

Punitive damages are supposed to punish intentional misconduct; now they are being applied to situations where a jury just doesn't like the outcomes of the real world. The frequency and size of these awards sends shock waves through the system as they become one more immeasurable threat to potential defendants.

One commonly discussed tort reform measure is the capping of punitive damages and non-economic damages (such as mental anguish) at triple the amount of economic damages. Personal injury lawyers say this will rob the poor of their keys to the courtroom.

The keys-to-the-courtroom argument tarnishes the plaintiff lawyers' depiction of themselves as the faithful advocates of the poor. They seem to be saying that they will not help the poor unless the money is *really* good.

Assertions of plaintiff lawyer altruism are mostly fictional. More and more, the interest of the client is secondary to the greater purpose of collecting contingency fees. In some cases, a client and his interests aren't calculated into the winning formula at all.

"Members of the legal profession started their assault immediately after the crash."

Richard P. Kessler, Jr., Statement before the U.S. House Subcommittee on Aviation, June 19, 1996

On May 12, 1996, ValuJet Flight 592 crashed into the Everglades, killing all on board. Families of the victims, suffering horror and sorrow, were further traumatized by the sickening attentions of personal injury lawyers. Richard P. Kessler, Jr., the husband of one of the victims, told a congressional panel that the families were "directly solicited by mail, by telephone, and in person."

Digging for business in the wake of a tragedy is nothing new to the legal profession. After an August 1987 plane crash in Detroit, the representative of a Florida attorney dressed as a priest. "Father" John Irish prayed with families of the victims, consoled them, gave them the business card of his employer, and then disappeared from the scene.

These tactics may not be the norm of the legal profession, but they are signs of the powerful and degrading incentive for

attorneys to defy the boundaries of decent behavior in the pursuit of contingency fees.

Contingency fees are peculiar to the American legal system. They are supposed to provide access to legal services for those who cannot otherwise afford the assistance. If the lawyer wins the case, he takes part of the award; if he loses, he gets nothing.

For personal injury attorneys, contingency fees have virtually become the only acceptable form of payment. According to a report of the Federal Trade Commission, 97 percent of the lawyers who handle injury cases refuse to consider hourly rates, no matter how generous the rate or how wealthy the client.

Many lawyers will not take a case, no matter how meritorious, unless the prospective damages exceed $20,000, $30,000, even $100,000. *Trial*, the magazine of the Association of Trial Lawyers of America, includes advertisements from legal consultants who evaluate the profitability of prospective cases. One of these warns, "85 percent of all cases aren't worth taking. (Do you know which ones?)"

Most fee arrangements promise the lawyer one-third of the settlement, but the percentage can go higher or lower, depending on what the lawyer thinks the client will accept. In yet another airplane crash, the widow of one of the victims was approached by a lawyer who produced a 40-percent retainer agreement. When she refused to sign it, the lawyer presented one document after another, each with a lower percentage. When she still refused to sign, the lawyer rebuked her for wasting his time.

In this case, the widow was an experienced business woman who knew better than to buckle under the pressure. Not all are so fortunate. The rate of the contingency often bears no relation to the risk or the effort involved in pursuing a case.

Over the last 30 years, changes in the tort system have increased plaintiffs' chances of victory. As the job of plaintiff attorneys has become easier — more efficient, you might say — the cost of producing plaintiff victories — contingency rates — should have dropped. They have not. Thirty percent remains the standard.

In addition to the contingency, plaintiff lawyers generally deduct from the award expenses such as travel, expert witness fees, photocopying, court reporters, and copies of transcripts. Unwary consumers will often agree to arrangements whereby the lawyer takes his fee off the top, then deducts his expenses. This means he also earns a percentage on his expenses, further reducing his client's percentage of the recovery.

The newest trend in contingency fee arrangements is in lawsuits, such as those against tobacco companies, to recover the costs of treating Medicaid patients. Governments are hardly needy citizens who can't afford lawyers, but the contingency fee arrangements are essential for two reasons. First, the personal injury lawyers want them. Second, to hire the lawyers on retainer would require an appropriation from the state legislature. That would force a debate on the public policy merits of these lawsuits, something the personal injury lawyers desperately want to avoid.

By far, the most egregious abuses of legal fees for plaintiff lawyers occur in class-action suits. These suits are rooted in English common law, but their occurrence has exploded in the last 20 years with the advent of looser judicial standards governing the approval of class actions.

In these suits, a group of people with similar complaints join together to recover damages. The damages are usually small and therefore are not pursued on a case-by-case basis. Today, many relatively large claims are grouped in class actions for the ease of the plaintiffs' lawyers and the defendants. Resolving many claims at once means less work for the plaintiffs' attorneys and less risk for the defendants. Often, the only loser in the settlement is the actual injured party.

With increasing regularity, the interests of injured citizens play no role whatsoever in the decision to file a class action. The plaintiff lawyer is no longer the advocate of the client; he is the dealmaker.

Unwary consumers will often agree to arrangements whereby the lawyer takes his fee off the top, then deducts his expenses. This means he also earns a percentage on his expenses, further reducing his client's percentage of the recovery.

Some experts estimate that 80 percent of the administrative costs of the tort system are incurred during discovery, when lawyers engage in legalized harassment by demanding depositions and documents.

One of the biggest consumer class actions in history involved a $950 million settlement against a Tennessee company that made flexible plastic plumbing for homes. According to plaintiffs' lawyers, the pipes were defective. For their efforts on behalf of the class, the lawyers received $83.4 million in legal fees. The homeowners received an 8-percent rebate on new piping — if they could produce evidence of leaks.

Even more unbelievable is the plight of consumers in a class action against the Bank of Boston Corporation. Lawyers charged the bank with maintaining excessive balances in mortgage escrow accounts. According to the settlement negotiated by the plaintiffs' lawyers, the bank would make a deposit in each customer's account as reimbursement for the overcharging — and then would deduct an amount to cover its legal expenses. When all was said and done, all of the plaintiffs' lawyers made money and many of their clients lost money.

Proponents of the current system support it with two contradictory arguments. First, they say that it has forced corporate America to stop wantonly harming consumers — claiming great effects from the efforts of trial lawyers. Then, they deny that the litigation explosion has increased the cost of insurance and products — claiming that it has had no effect.

They remain silent on the paradoxical effects of class-action suits where lawyers prosper while plaintiffs are fortunate if they receive any benefit at all.

"The reigning view of lawyers' ethical responsibility is all gas pedal and no brake."

Walter Olson, *The Litigation Explosion*

Opponents of tort reform inevitably rationalize away the abuses of contingency fee arrangements with the key-to-the-courthouse-door argument. The rest of us cannot ignore the abuses or the ethical implications of this system.

In many respects, lawyers are much like other professionals, such as accountants, doctors, tax collectors, and soldiers. Each profession is empowered with specialized knowledge that is supposed to work for the benefit of others. Consumers are often helpless in their hands because we don't have their specialized knowledge; we must trust them to act in our own best interests.

Of these distinguished vocations, only lawyers collect contingency fees. To understand the temptation for unethical behavior, one only has to draw a parallel to another profession.

If doctors were paid on a contingency — reimbursement contingent on the patient's recovery — the natural progression is easily imagined. No sensible doctor would choose to treat a terminally ill patient. People with serious illnesses would find medical treatment hard to obtain; a truly serious illness would reduce the likelihood of recovery — both for the patient and the doctor.

Some doctors might be tempted to exaggerate the severity of a minor medical condition in order to inflate the fees they would collect when the patient recovered. After all, they wouldn't get paid for every client, so they'd have to make up their losses where they could.

This is not to suggest the abolition of legal contingency fees, but merely to illustrate their problematic nature. Doctors and other professionals shun contingency fees to avoid conflicts between their financial interests and the interests of the client or patient.

Rules that once enforced a distaste for "Ramboism" among personal injury lawyers have been obliterated. Nothing exists in the system as a counterweight to the lure of bloated legal fees. The vast potential for abusing the tort system is undeniable. It attracts the unscrupulous to the legal profession and sings a siren's song to those of ordinary character.

Lawyers are commonly referred to "officers of the court," denoting their quasi-governmental power to help enforce the law. It is a privilege and a burden that traditionally requires a sense of restraint and a duty to something more than the demands of the client and the lawyer's pocketbook; that other obligation is to law and justice. The ethical rules to enforce that duty among personal injury lawyers has become attenuated to the point that it might be considered nonexistent.

Today's vision of a lawyer's obligation to his client almost demands extremism in advocacy. This includes inflating damages beyond reason, inventing speculative legal theories about liability, pandering to the emotions and prejudices of jury members, and employing scorched-earth tactics in the courtroom. It also includes invasions of privacy and personal attacks that border on assault with deadly words.

Dickens referred to the paperwork of the legal system as "mountains of costly nonsense." Comparing the old tort system to the new, the old mountains were gentle slopes while the new are replicas of Mount Everest.

Under the old rules, if you wanted to sue someone, you had to make a specific complaint. Now, a lawyer shoots first and asks questions later. The questioning comes during what is called discovery as the lawyer tries to figure out just what he's going to accuse the defendant of doing.

Some experts estimate that 80 percent of the administrative costs of the tort system are incurred during discovery, when lawyers engage in legalized harassment by demanding depositions and documents. One enlightening example of the nuisance value of discovery occurred during the 1980s when IBM was under investigation for alleged antitrust violations.

During the first five years of the investigation, 64 million pages of documents were obtained. IBM employees were also subjected to endless rounds of depositions. Nicholas Katzenbach was IBM's in-house counsel during much of this. According to Katzenbach, the company's CEO endured a total of 45 days of deposition by changing bands of private and government lawyers.

Eleven years into the case and some years after the government rested, the chairman went through his last deposition. During this final round, he was asked how long he had been chairman, where the corporate offices of IBM were located, and what the square footage of the corporate offices was.

Obviously, the last group of attorneys had never read the earlier depositions. In fact, many attorneys admit that they don't read depositions. Often, the only value of grilling the opponent is the imposing of nuisance and intimidation.

When trial lawyers instigated lawsuits against manufacturers of breast implants, they did so despite the absence of proof linking the devices to the alleged illnesses. Then the *New England Journal of Medicine* published a study calling into question the validity of the allegations. The trial lawyers responded with subpoenas demanding that the journal's editor and the article's authors produce a laundry list of documents, most of which did not even exist.

Again, opponents of tort reform argue that these tactics are only employed against big businesses and are essential to the quest of protecting consumers. Whether the end justifies the means offers plenty of grounds for disagreement, but there is no question that the tactics are used against every party remotely connected to a tort case — large or small, for profit or not-for-profit, private or corporate.

These methods also spill over into every other civil trial, including divorce proceedings, patent fights, and will contests. Custody battles have become especially nasty as one parent requests custody of the children, not because he wants them, but because his lawyer says it will help him reduce his future financial obligation to his former spouse.

Tactical innovations in tort law become standard practice in other areas of the law and we all suffer a loss of civility and courtesy.

The someone-must-pay rule of the new tort system underwent a natural expansion into the nether regions of coherence.

"All this wasteful wanton chess-playing *is* very strange."
Charles Dickens, *Bleak House*

The liability revolution may have been based on pro-plaintiff principles, but in practice it is merely pro-litigation. Will we choose to continue sustaining an unsustainable system for the benefit of a few citizens who happen to practice personal injury law? That is a public policy question AIF intends to ask the Florida Legislature to answer in the upcoming session.

THE INJURED CONSUMERS' *Bill of Legal Rights*

HALT is a Washington D.C.-based consumer organization that advocates legal reform. One measure it seeks is the enactment of a bill of rights for consumers of legal services.

- **THE RIGHT** to be left free from unsolicited contact by plaintiffs' or defendants' attorneys, or defendants' insurers, or any of their representatives, for 45 days after an event resulting in personal injury or death.

- **THE RIGHT** to a written fee agreement with a plaintiffs' lawyer and to be informed of each of the following before the agreement is signed, which shall be incorporated in the agreement.
  - The probability of a successful outcome.
  - The amount of recovery reasonably expected in that outcome.
  - The number of hours of legal services that are likely to be required to secure that outcome.
  - The amount of any costs or expenses that the client must bear.
  - All fee agreements to be made concerning the case, including the amount to be paid to any co-counsel associated with the case and/or to refer the client to another attorney in exchange for a referral fee.
  - The availability and cost of alternative fee arrangements.

- **THE RIGHT** to have the lawyer keep accurate records of the time spent on a case and to have periodic reports from the lawyer on time spent and progress in the case.

- **THE RIGHT** to have an objective review of a contingent fee by a court or a bar association committee to assure that it is reasonable and fair in the circumstances. Judges should be mandated to review and approve contingent fees, and given guidelines for doing so, including such factors as to whether liability was contested, whether the amount of damages was clear, and how much actual time a lawyer reasonably spent on the case.

- **THE RIGHT** to decide whether to "opt in" to a potential class action before being included in such a case, rather than having to affirmatively "opt out" in order to pursue an individual remedy.

In the next edition of *Employer Advocate,* we will outline the details of the reform legislation that AIF will put before the Legislature this year. AIF lobbyists are currently working with other interest groups to create a seamless, workable package of lasting reform. It's a difficult task.

The old framework of law that discouraged wasteful litigation has been destroyed. Erecting a new framework to reduce the stresses built into the current system will take some ingenuity. The old system took centuries to build and three decades to dismantle. Putting something new in its place will probably take more than a year to accomplish.

Despite the popular misconception, the reforms will not include the abolition of jury trials in civil cases. Any problems with the jury system are the result of the haphazard and incomplete guidelines jurors are given in civil trials.

Under the current system, jurors are forced to act as legal and economic experts without the benefit of experience, education, or training. They must listen to a bewildering array of testimony, much of which is so speculative that it has no place in the courtroom. They are asked to award damages with few standards to use in determining dollar amounts.

Juries are not to blame for the excesses of the current system; the culprits are the creators of it, who sowed fertile ground for the excesses, and the lawyers, who reap the harvest.

Despite accusations to the contrary, support of tort reform does not necessarily entail a hatred of lawsuits or of lawyers; it merely encompasses disgust for the waste and intrigue that are currently allowed to flourish.

In fact, one overlooked casualty of the tort machinations is the reputation of the legal profession. Lawyers have never been revered and literature abounds with portrayals of shady shysters and slippery pettifoggers. Nevertheless, respect for the profession may never have sunk so low as it has today.

There are some who delight in reciting Shakespeare's exhortation to kill all the lawyers. Put in its context, however, the words reveal the debt we all owe to lawyers.

The line is spoken by the unsavory Dick Butcher, a cynical lackey of the treacherous Jack Cade. Cade promotes rebellion, furthering his quest for power by seducing his listeners with vague, wonderful, and impossible-to-fulfill promises. The first step in his journey is the elimination of all lawyers.

The creation of a formal and systematic body of law has been called the greatest achievement of mankind. In America, the law was made the bulwark of liberty for all, promising every citizen equal protection against the caprice and tyranny of his sovereign and his enemies.

For all their faults, lawyers stand as our surest safeguard against a heavy and uneven hand of justice. That the hand of civil justice has grown uneven and heavy through the power of a few lawyers is argument enough for reform. ■

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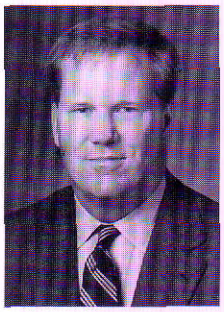
Science And The Law



by Sherman Joyce, President, American Tort Reform Association

Jurors assess the "facts" in litigation. This includes when and how events in a dispute took place. Often, litigation involves highly technical issues involving complex medical, engineering, or scientific theories.

In many cases, however, science and other technical disciplines have little or nothing to do with facts. When "experts" with little or no training offer testimony with no basis in accepted scientific theory, the result can be a miscarriage of justice.

Rather than seeking to ascertain the truth, the rule of law has been jeopardized by questionable evidence as a result of junk science. Lawyers in search of jackpot verdicts are using junk science to link products and medical treatments to ailments when no link exists.

Improbable as it may seem, the issue of junk science is not new. It has developed over time into a serious problem for the civil justice system. It began 25 years ago when obstetricians were sued for causing cerebral palsy in newborns. Cerebral palsy, it was alleged, was caused when obstetricians used excessive force, including the use of forceps, to deliver babies. While this hypothesis may seem absurd today, it was not until after a decade of losing cases, many with large damage awards, that studies emerged showing no scientific link between forceps and the incidence of cerebral palsy.

Even though this litigation ended, it gave rise to a myriad of lawsuits based upon nonexistent or unproven scientific theories. During the past decade, we have witnessed two additional aspects of these phenomenal cases.

First, even if there is scientific evidence proving a product or medical procedure does not cause harm, it is not enough to stop frivolous lawsuits. Second, lawyers are no longer the only ones who can profit from junk science.

In order to get past the generally accepted conclusions of the scientific and medical communities, lawyers will hire "experts" to testify in court and introduce either scientific evidence that is not accepted by the scientific community, or theories that have no grounding in sound scientific research. In addition, these witnesses frequently speculate about theories unrelated to their field of expertise — often citing a cause and effect without any evidence at all. Some expert witnesses earn as much as $5,000 for one day of testimony, or even a percentage of a verdict.

Lawsuits that rely on junk science must be won on emotion, not the merits. A recent *Frontline* report featured an interview with former jurors who said they decided to award a plaintiff millions of dollars even though they knew the product involved did not cause her injury — they simply felt sorry for the woman.

Lawsuits involving the drug Bendectin are the epitome of non-meritorious litigation. Bendectin, the only medication approved by the Food and Drug Administration (FDA) for the treatment of nausea and vomiting during pregnancy, became a target of litigation when plaintiffs' attorneys alleged that Bendectin caused birth defects. After years of litigation, manufacturers of Bendectin prevailed. While they may have won that important legal battle, consumers lost the war. The combination of skyrocketing insurance rates and the prohibitive cost of defending claims in court forced Bendectin off the market. Currently, there are no products on the market to help pregnant women suffering from severe morning sickness.

Litigation involving multiple chemical sensitivity (MCS) is another example of how the civil justice system can be manipulated by junk science.

MCS has no characteristic features or unique symptoms. Plaintiffs' lawyers argue, therefore, that a wide range of men-

(continued on page 18)

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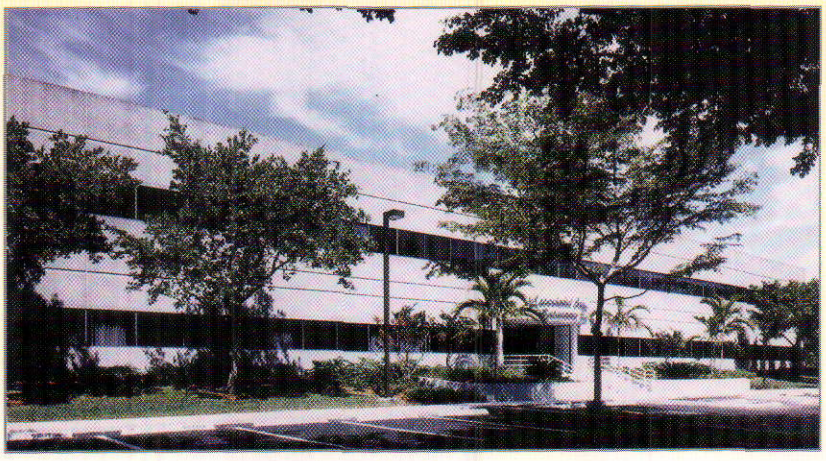

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Lawyers in search of jackpot verdicts are using junk science to link products and medical treatments to ailments when no link exists.

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tal, emotional, and physical disorders are caused by environmental chemical agents. Despite lack of proof of causation between the symptoms and the products, juries have awarded millions of dollars in damages.

In a Missouri case (*Elam v. Alcolac, Inc., 1988*), residents living near a chemical plant alleged that they were suffering numerous health problems due to the plant's activity. Even though the toxicologists and physicians who examined the plaintiffs found nothing unusual about their health, plaintiffs' expert witnesses persuaded the jury to disregard the factual evidence and to award $43 million in damages against the chemical plant — even though there was no scientific evidence to substantiate the plaintiffs' claim.

Bendectin and multiple chemical sensitivity are just two examples of the recent trend in mass tort litigation or serial tort cases; other examples include Norplant, electromagnetic fields, breast implants, and the list goes on. Each case follows the same pattern from beginning to end.

First, a lawsuit based on junk science is filed, sparking media attention. Inevitably, the media hype publicizes the plaintiff's claim regardless of its merit, and the public begins to be swayed by sensational reports.

Before we know it, a lawyer's theory, which is not accepted by the scientific or medical communities, causes the public to believe there is a problem. As the public notices, so do other attorneys, and they jump on the bandwagon and file cases. Meanwhile, defendants are forced to defend themselves, incurring enormous costs.

Eventually, peer-reviewed research emerges proving the safety of the product or procedure, and vindicating the defendant. And just as the litigation begins to fade away, another product or procedure becomes the target of junk science litigation.

The pattern of junk science litigation reflects the reality that American courts can be turned into chaos when unproven or discredited scientific evidence determines crucial issues in litigation. It is imperative that in cases in which liability depends on scientific, medical or other highly technical theories, that only *legitimate* evidence be allowed into our courtrooms. ■

Punitive Damages

in Labor and Employment Law Cases

Steven Padilla was 40 years old when he filed an age discrimination in employment case against the Metro-North Commuter Railroad in the New York-Connecticut area. Padilla had been a witness in another age discrimination case filed by a 60-year old employee of the railroad who claimed that he had been discriminated against on the basis of his age. Padilla supported that claim by testifying that he had overheard comments made by supervisory employees that the other employee was too old.

Padilla was subsequently suspended for improper administrative practices. He immediately filed a charge with the Equal Employment Opportunity Commission claiming his suspension was in retaliation for him participating in the age discrimination suit. During the case, the railroad decided to demote Padilla from his position and place him in a job earning $25,000 less per year.

The court awarded 25 years of front pay to Mr. Padilla, noting that he had a high school education and his very specialized railroad skills left him unlikely to find a job in any industry or in the railroad profession that would pay him his pre-demotion salary of $65,000 a year. Reinstating him to his old job was not an option, the court ruled, since the relationship between Padilla and the railroad had been irreparably damaged by animosity associated with the litigation. Padilla's award of 25 years of front pay was the largest such award ever issued in any labor and employment law case.

As this case demonstrates, courts continue to fashion remedies for employees alleging discrimination in the workplace. At the same time, state legislatures and Congress pass laws that provide for more and more damages in employment lawsuits. Not only does the aggrieved employee receive back pay and loss of benefits, but also punitive damages, attorney's fees and costs, and now, according to the aforementioned case, front pay as well.

In 1991, the Civil Rights Act was amended to allow for jury trials for the first time in employment litigation (except for age discrimination, which had always permitted jury trials). That act also imposed punitive damages of up to $300,000, depending on the size of the employer. Additional damages can also be obtained for compensatory losses, pain and suffering, defamation, humiliation, tortious interference, etc.

In addition to such extra damages, of course, the employer has to pay its own attorney's fees and costs coupled with the loss of productivity and management time spent in defending or responding to an allegation of discrimination in employment. As a result, employers increasingly are reluctant to discharge, demote, or discipline a problem employee for fear of having to defend their actions in an employment discrimination suit.

Even if the employer prevails, there is still the expense associated with defending the suit or responding to a charge filed with either the Florida Commission on Human Relations or the Equal Employment Opportunity Commission. Many times, it is easier to keep the employee and ignore the problem than it is to pay to respond to a charge or a lawsuit.

Even if the employee quits, he may still sue, claiming he was "constructively discharged," i.e. that he had no choice but to quit since the discrimination was so prevalent that any employee would have quit under like circumstances rather than put up with the continuing discrimination.

The most productive employees, the good workers, tend to leave rather than work in an environment in which less productive employees are permitted to remain on the payroll, but do not pull their weight or carry their fair share. In fact, one source reports that almost half of the employees who took part in work-

(continued on page 22)

by William E. Curphey, Stiles, Taylor & Metzler, P.A.

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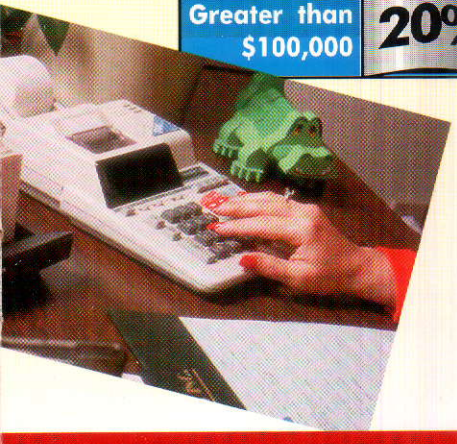
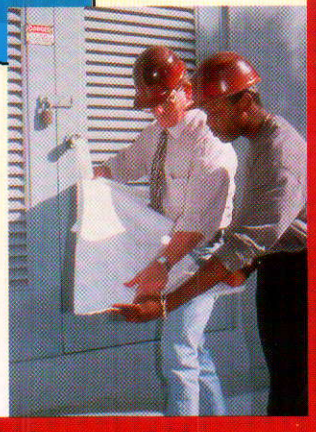
Return Premium Table

Premium Range	Incurred Loss Ratio: Less Than 10%	10% to 19%	20% to 29%	30% to 39%	40% to 49%	50%+
	Percentage of Return Premium					
Less than $5,000	5%	3%	3%			
$5,000 to $10,000	6%	5%	3%	3%		
$10,000 to $20,000	8%	6%	5%	3%		
$20,000 to $30,000	10%	8%	6%	5%	3%	
$30,000 to $50,000	12%	9%	7%	5%	3%	
$50,000 to $75,000	15%	12%	9%	6%	3%	
$75,000 to $100,000	17%	13%	10%	6%	3%	
Greater than $100,000	20%	15%	10%	6%	3%	

Our safety team is "on the road" showing employers how to keep their businesses safe.



The retro return percentage shown in the table are for premium sizes and loss ratios at the mid-point of the range. Actual retro returns will be calculated by interpolation using both actual premium and loss as weights. The Jumbo Retro Plan provides a policyholder with an opportunity to earn a return premium based upon its loss experience developed during the policy period.



nsurance Company, Inc.

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Employers need to weed out problems when they arise rather than allowing a problem employee to remain and potentially damage the morale of the entire workforce.

place surveys complained that it takes too long to get rid of problem employees.

Leaving a problem employee in the workplace, therefore, causes problems throughout. It is like a virus that begins to infect the entire workforce, resulting in either the best leaving or not putting out their best any more since doing so does not result in anyone getting ahead. Employees quickly learn that they can just "get by" without being afraid of being discharged or disciplined.

Certainly, discrimination in employment continues to exist in certain situations and every reasonable effort must be made to eradicate it. All should be provided an opportunity to advance based on their skills, education, experience, background, etc., and without regard to race, color, sex, religion, age, national origin, or disability.

With the passage of the Americans with Disabilities Act and the Family Medical Leave Act, however, everyone now falls within some protected class of "victims" and every employee is therefore covered under some federal and state law in the employment setting.

Employers need to treat problem employees the same in all circumstances. If objective criteria have been firmly established and communicated to employees and the employees know what is expected in terms of production or output, any employee failing to meet those standards must be dealt with on a consistent basis, either through a disciplinary process or through discharge, if appropriate.

Legislatively created remedies for employees are new. Previously, under the common law and under the law of most of the states, until recently, employment was considered "at will." Florida is an employment-at-will state, which means the employee works at the will of the employer and can be terminated for any reason — good, bad, or indifferent — provided it is not otherwise discriminatory.

As the Legislature continues to fashion new remedies and cover new employment situations, such as the Family Medical Leave Act, we are fast approaching a situation where a job is considered to be a right of the employee that needs protecting.

For approximately 10 years now, the drafters of uniform laws have studied the issue of enacting a uniform employee termination act. Other uniform laws exist in the United States, including the Uniform Commercial Code and Uniform Banking Laws. Since many employees now are multi-state, the uniform drafters are looking at the creation of a uniform termination law that would provide employees with the right to a hearing prior to a termination, very similar to an unemployment compensation hearing, in which a state hearing examiner would take evidence on whether or not an employer had justifiable reason for termination of an employee.

The law has little likelihood of passage in the current political environment, but it has only been a little over 60 years since we even had any federal or state laws governing the workplace. The first laws were passed during Franklin D. Roosevelt's New Deal during the Great Depression. At that time, the U.S. Department of Labor was created and the National Labor Relations Act, Child Labor Act, Portal to Portal Act, and Fair Labor Standards Act were all passed, affording for the federally protected rights for employees in the workplace.

Since the passage of those landmark acts, employee rights have continued to expand and seemingly will continue to expand in the future until the "right" to a job is considered paramount. This will happen as more and more remedies are given to employees and less and less discretion to the employer in controlling the actions and production of an employee.

There clearly needs to be a balance to keep the United States competitive and to allow employers to hire, promote, and retain the most qualified workers. Employers need to weed out problems when they arise rather than allowing a problem employee to remain and potentially damage the morale of the entire workforce.

Legislation giving more remedies and damages to employees only encourages rather than solves problems in the workplace. ■

Three Steps to Putting the Justice Back in Civil Justice

by Jodi L. Chase, Executive Vice President & General Counsel

As a business person, you know firsthand the meaning of the expression, "The buck stops here." You often have to make decisions alone and take full responsibility for them.

That is never the case in the legislative process. Any legislative solution must satisfy at least 61 representatives and 21 senators who each come to the Legislature from different backgrounds and carry different points of view.

That need to reach consensus among many is a pillar of democracy. When the system works, the end product is usually not a radical departure from the status quo. When the system is abused, such as in the case of the secret passage of the 1994 amendments to the Medicaid third-party liability statute, the result is invariably poor public policy.

In the upcoming session, Floridians face a titanic battle over the issue of civil justice reform. The effort to make the necessary changes face two obstacles: the objections of the trial lawyers and their legislative backers; and the desire to avoid controversy by those legislators who will offer, at most, lukewarm support to the effort.

In order to make those changes, AIF is preparing a modest but important package of legislation. The reforms must make the system better for all participants, plaintiffs and defendants alike. At the same time, they must result in real changes that make the system more fair and efficient.

The ultimate objective is something most members of the Legislature can agree on. But when the trial lawyers start to lobby, they will try to convert the end result into something very different from the original idea.

The civil justice crisis can be solved if the Legislature will address the roots of the problem. AIF has identified three basic weaknesses in the system. Exactly how to repair these weaknesses will be the subject of debate.

First, the economic incentives for litigation are askew. The economics of a lawsuit or claim for damages are controlled by the interests of the trial lawyer, not the client. Today, a trial lawyer pockets up to 50 percent of an award.

The trial lawyer takes home more money if the case is allowed to go to trial. That makes it difficult for the parties to settle because the plaintiff's lawyer's fee is negatively impacted. On the other hand, the easy money is in settlement, especially when the plaintiff's case is shaky.

In many cases, obtaining a settlement is as easy as printing a computerized form letter and mailing it to an insurance company. This jackpot litigation encourages frivolous lawsuits. If you have the chance to take home $30,000 just from writing a single letter demanding $100,000, why not roll the dice? Thus, the economic incentives must be realigned.

Economics also plays a role in the quality of life of the injured plaintiff. Trial lawyers have to keep their clients unhealthy for as long as possible in order to inflate damages. The higher the damages, the higher the lawyer's fee.

For example, a plaintiff can be paid lost wages by a defendant who caused an injury that kept the plaintiff from returning to work. The lawyer receives half of that money. So the lawyer counsels his client not to go back to work even if the client is able. This is wrong! The system

(continued on page 25)

THE VOICE OF FLORIDA BUSINESS

Since 1920, Associated Industries of Florida (AIF) has stood firm on the side of prosperity and free enterprise. With headquarters standing on the road that connects the Capitol to the Governor's Mansion, AIF represents the link between responsible public policy and a thriving economy. AIF offers the business community a gathering place to meet with government leaders to preserve and defend Florida's prosperity.

Dedicated to and owned by the members of Associated Industries, the building is a tribute to the efforts of employers — the men and women who provide jobs, manufacture goods, and supply services to the citizens of Florida.

When your business brings you to Tallahassee, we invite you to set up shop at Florida's corporate headquarters. ■

Associated Industries of Florida

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(continued from page 23)

should be mindful of the quality of life of the plaintiff.

If work is available and possible, plaintiffs should be allowed to put their lives back together, but the trial-lawyer-driven economics of the system won't allow that. Perhaps a trial lawyer should not be allowed fees on the lost wages part of damages. This way, the plaintiff really takes home the pay the jury decides he is entitled to.

The same applies to future medical expenses. The trial lawyer gets a cut of the medical expenses and the defendant may misspend or lose track of the money in the years following the award. Perhaps damages for future medical payments should be exempt from fees as well. Perhaps they should be deposited in a special medical trust.

Next, the civil justice system is no longer civil. Defendants are harassed and plaintiffs are harangued. Once a lawyer is involved, the disputing parties are not even allowed to talk to one another. Once litigation begins, the parties have no opportunity to talk face to face in an effort to settle the dispute quickly and fairly. Perhaps combating parties should be given the option of talking to one another as rational adults to settle their differences. After all, the purpose of the civil justice system is to obtain justice and justice is not restricted to the courtroom.

Today, only the plaintiff can decide if he wants a jury trial or some other form of dispute resolution. The jury system must remain an option, but perhaps alternative dispute resolution should be another option. Perhaps the defendant should be allowed some say in making that choice. In fact, the results of a negotiated settlement may suit the claimant better than the specter of waiting years to get half the money in a judgment.

The next systemic infirmity is caused by years of court-made law. Our civil law is made case by case. When the facts present a unique situation, a decision is rendered to fit those facts, but the law created to fit those facts must be applied to all other like cases. Over the years, decisional law begins to pile up, tilting the scales of justice.

Today, our scales of justice are not balanced. Every once in a while, the Legislature should examine the direction civil law has taken and realign those aspects that are out of balance.

We grow up believing Lady Justice is blind. We grow up believing in fairness and a chance to defend yourself. Today's reality is that neither of these is the case. We live in a state where our highest court declares it permissible for the Legislature to take away a defendant's right to defend himself. In effect, we live in a state where it is morally and legally permissible to bully a defenseless defendant in the courtroom. In the upcoming session, we must demand that the Legislature reshape the tort laws to reflect our ideal of justice. ■

CREATING A DANGEROUS PRECEDENT FOR TRIAL LAWYERS

by Glenn G. Lammi, Chief Counsel, Legal Studies Division, Washington Legal Foundation

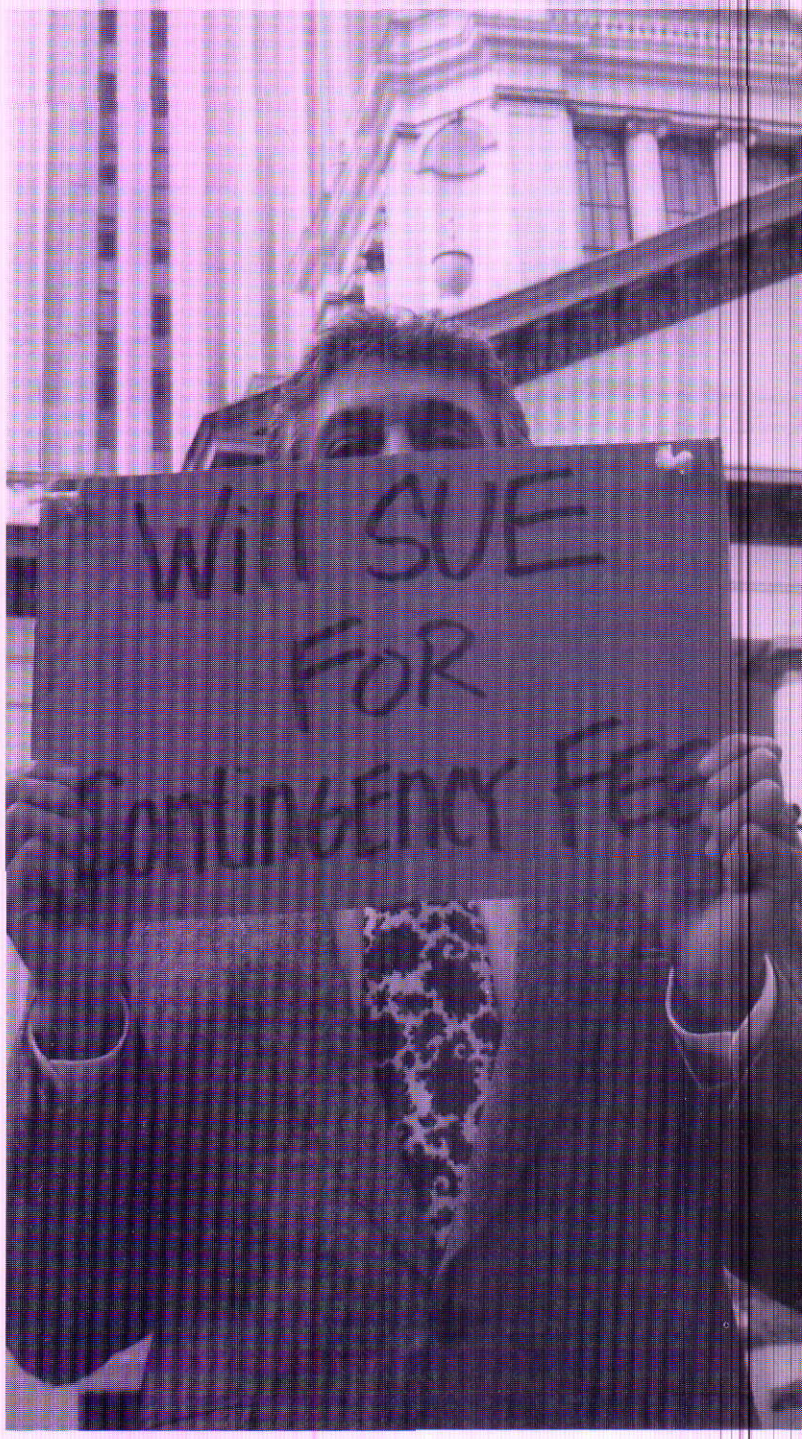
Editor's Note: The following is excerpted from a Working Paper *published by the Washington Legal Foundation. The paper explores the public policy implications of hiring private trial lawyers on a contingency fee basis to pursue suits such as the one currently in litigation under Florida's Medicaid Third-Party Liability Law.*

The states' use of private trial lawyers (typically those with experience in smoking or asbestos litigation) to prosecute the cases is unprecedented. If the suits are as successful as the states assert, these lawyers will receive a huge contingent fee award, most likely as high as one-third of the total judgment. Indeed, since the state is obligated to reimburse the federal government for the latter's contribution to those medical payments made under the Medicaid program, the private lawyers may well end up recovering more money than the state.

The state suits are precisely the vehicle that frustrated trial lawyers have been seeking. In fact, the Florida statute appears to have been the brainchild of these lawyers. It was reported that the idea of the Florida statute was first raised at a meeting of the "Inner Circle," an exclusive association of 100 trial lawyers, a fact touted in the press by a Pensacola plaintiff's attorney who helped draft the law. If the suits simply were the result of state initiative, the states could have attempted similar suits years ago under the Medicaid statute.

To protect against another string of defeats, the states (and their attorneys) have stacked the deck in their own favor. For example, the Florida statute directs that the "evidence code shall be liberally construed regarding the issue of causation and damages ... and [such issues] may be proven by the use of statistical analysis." This provision essentially requires the courts to resolve evidentiary disputes in favor of the state and against the defendant. It also allows the state to recover damages against a defendant without having to show that the product allegedly causing the injury was actually produced by the particular defendant involved.

In Mississippi, the attorney general filed suit not in the state capital, where enforcement actions typically are prosecuted, but in a Gulf Coast county that has long been a favorite among plaintiff's lawyers for mass-tort cases such as asbestos and



environmental toxic torts. The case also was filed in Chancery (i.e., equity) court, where there is no right to a jury, so that the state need only convince one person in order to devastate an entire industry.

State Suits Threaten To Undermine Traditional Tort Law

The state attorney general suits differ radically from ordinary tort suits and, unless rejected by the courts, threaten to undermine traditional tort concepts. The seriousness of this threat can be demonstrated by examining the suits in light of traditional tort principles.

American product liability law has changed considerably over the past century. A system once characterized by *caveat emptor* (let the buyer beware) has become dramatically more pro-plaintiff. Thus, common law doctrines that formerly frustrated most plaintiffs' ability to recover damages, (e.g., the *restrictive rule of privity of contract* and the ability to disclaim implied warranties) have been eliminated. The modern concept of design defect, which holds manufacturers liable for product imperfections that may be present in every sample of the product (as compared with individual manufacturing defects), and defect by failure to provide an adequate warning, have vastly expanded the scope of tort liability. Negligence and implied warranty have, to a significant degree, been replaced by "strict liability" in tort, which holds the manufacturer or seller liable for a defective product even if he acted with the utmost care.

The transformation has been so complete that plaintiffs can now in some circumstances bring lawsuits even before they suffer an actual injury, simply by alleging that they fear some future injury or have been exposed to a product that will increase their risk of future illness. The dramatic change in the law also has been accompanied by explosive growth in the number of mass latent injury and toxic tort cases, so that "tort reform" (implying some form of cutback on plaintiffs' ability to sue or recover in certain types of suits) is now a frequent topic of political debate.

Despite the dramatic pro-plaintiff shift in tort law, plaintiffs do not always win tort suits; indeed, in some areas, tort plaintiffs have had little success. This phenomenon can be explained in part by the fact that, while tort law has indeed changed substantially, certain fundamental principles have been preserved largely intact in the modern era. Three of these principles, in particular, are jeopardized by the state attorney general suits: the requirement of individualized proof of causation; the right of the defendant to assert serious affirmative defenses; and the rule that the defendant pays only for the injury that it causes.

Individualized Causation

Traditional tort law requires individualized proof of causation. The plaintiff must show by a preponderance of the evidence that the particular defendant in the case actually caused him (or his property) specific harm.

This principle has remained a central feature of tort law because, absent proof of individual causation, a defendant could be unfairly held liable without any proof that it was the cause of the alleged injury. This principle is applied even in class action suits, where multiple plaintiffs are allowed to aggregate their claims in a single case. Thus, even in a class action, if the "named" or "representative" plaintiffs are able to establish liability and obtain a favorable ruling on common classwide issues, the other class members typically cannot recover unless they establish their own damages. Indeed, if the causation issues for the individual class members are too numerous or complicated, courts will refuse even to allow the case to proceed on a class basis.

In a dramatic departure from these salutary principles, the state attorneys general seek to recover for health expenditures without such individualized proof of causation. The states simply allege that they have spent a certain amount of money to treat smoking-related diseases and are entitled to reimbursement; they do not attempt to show that any individual citizen's illness was caused by any particular defendant or by cigarette smoking at all. Indeed, the suits do not even purport to be brought as class actions. The individuals who received medical assistance are completely irrelevant; all the state has to show under its theory is that, as a *statistical* matter, smoking is likely to have caused a certain percentage of the injuries for which the state paid medical benefits.

The Florida statute, for example, explicitly provides that causation and damages can be proven by use of statistical analysis. Thus, the state may be permitted to prove causation and damages in the aggregate. The parties would not have to litigate, on an individual-by-individual basis, whether a particular Medicaid recipient's illness was caused by something other than smoking. A defendant therefore may be held liable for health effects that may have been caused by genetic factors, products that were not manufactured by the defendant, environmental toxins, workplace exposures, or some other cause having nothing to do with the defendant.

Use of similar statistics could support lawsuits against product manufacturers for the health costs of treating victims of drunk driving and alcohol-related disease, persons injured by guns and motor vehicles (diesel fumes, for example, are a known carcinogen), and those who suffer heart disease, which is statistically related to excess cholesterol.

These lawsuits have the potential to impose enormous costs on states' already weak economies. As liability is expanded to more industries, more jobs could be lost and more investment will be chilled.

Courts previously have condemned efforts by trial lawyers to eliminate the need to prove individual causation. For example, in 1990 a group of trial lawyers in an asbestos case persuaded a trial court to permit approximately 3,000 claims to be tried at once by actually trying only a small number of them and then extrapolating the results to the remainder by statistical evidence and expert testimony. The court of appeals reversed because the "procedure [did] not allow proof that a particular defendant's asbestos 'really' caused a particular plaintiff's disease." The state attorney general suits are an even more flagrant attempt to hold defendants liable absent proof of causation.

Affirmative Defenses

A second fundamental tort principle is that the plaintiff cannot fully recover for injuries partly caused by his own wrongdoing. Under this principle, if the defendant is able to prove an applicable "affirmative defense," such proof will defeat some or all of the plaintiff's claims. For example, if a plaintiff knowingly encounters a known risk, such as deliberately touching a hot waffle iron, then he is precluded from recovering. Likewise, if a plaintiff does not sue within the applicable statute of limitations, he will be barred from recovering.

Even the generally pro-plaintiff doctrine of "comparative negligence" (which, unlike the traditional rule of "contributory negligence," does not totally bar the claims of plaintiffs who were only slightly responsible for their own injuries) requires that a plaintiff's recovery will be reduced according to the percentage by which he contributed to his own injury. This requirement is based on the sound principle that if a plaintiff knowingly or carelessly contributes to his own injury, recovery should be limited or barred.

The state tobacco suits seek to eliminate traditional tort law defenses. Some of the suits do so implicitly by alleging causes of action (such as unjust enrichment) that, according to the states, could require them to show only that they expended funds for the health consequences of smoking. In the states' view, the tobacco defendants could not win even by showing that individual recipients of medical benefits deliberately chose to smoke despite awareness of the health risks. Indeed, the Florida statute explicitly abolishes the defendants' right to assert affirmative defenses:

> [C]omparative negligence, assumption of the risk, and all other affirmative defenses normally available to a liable third party are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources.

This result is both morally and legally indefensible. Elimination of any requirement that the plaintiff be free of fault implies a system in which consumers have no responsibility for their own life choices. The states' position makes product manufacturers the absolute insurers of injuries related to their products, a degree of liability that American product liability law traditionally has rejected.

The skewing of the litigation process in favor of the state could readily be applied to virtually any product that has public health consequences.

Defendant Pays Only For What It Causes

A third — and related — principle of tort law is that the defendant is required to pay compensatory damages only for the injuries that it actually caused. This rule recognizes that it would be unfair to require a defendant to pay for an injury that, in fact, was caused by someone else. For example, in the context of pharmaceuticals, the plaintiff must show that it was the defendant's drug that caused his injury, as opposed to a genetic problem, some other company's drug, or the plaintiff's own conduct.

Although contemporary tort law has expanded the range of potential defendants that can be held liable for a given injury, there still must be a causal connection between each defendant and the injury. For example, the principle of "joint and several" liability permits the plaintiff, in a case where two or more defendants are liable for the injury, to collect the entire amount of the judgment from any one of the defendants. But each of the defendants can be said to have caused the injury.

The requirement of a causal connection between the defen-

dant and the injury (and the accompanying limitation of the defendant's liability to the harm it caused) persists under even the most extreme theories of tort liability. Thus, the controversial "market share" theory of liability, adopted in only a few jurisdictions and in very limited contexts, permits the court to assess liability against defendants in proportion to their market share of a standardized product where the plaintiff cannot identify which brand of the same product caused the injury. Nonetheless, while market share theory may in some cases require a defendant to pay for damages caused by another manufacturer in the same industry, there is still no doubt (1) that the product caused the injury, and (2) that the defendant's overall level of liability cannot exceed its market share.

The state suits, by contrast, may require a defendant to pay far more than its share of damages. For example, the Florida statute authorizes the state "to proceed under a market share theory" to establish a causal connection between a specific manufacturer's product and the injury, but it also requires joint and several liability. These rules are simply incompatible with one another. Joint and several liability is designed for the situation where more than one party contributes to a single plaintiff's injury. Under a market share theory, by contrast, it is not established that all defendants actually contributed to the plaintiff's injury; instead, it is held that as a matter of justice each defendant should pay proportionately for the amount of harm that it can be said to cause in the market at large. By combining these concepts, however, the state could impose liability on any defendant for the harm caused by the entire industry, simply because the defendant has some presence in the market. This result would be unprecedented, unfair, and potentially an unconstitutional "taking" of property without due process.

Unprecedented Theories

Beyond their departure from traditional principles of tort law, the state lawsuits attempt to create entirely new and radical theories of tort liability. For example, the state suits ignore the subrogation theory of recovery in the federal Medicaid statute. Under Medicaid subrogation, the state may seek recovery for medical costs inflicted by a third party because the individual victim/Medicaid recipient has turned his rights over to the state. The defendant's legal duty, however, is owed to the victim, not to the state.

The state suits, however, assert that the state has an independent right of recovery outside of the Medicaid statute for whatever the state has spent in medical costs. The state need not show that it has been given rights by individual victims and it need not prove that the defendant caused any individual victim's injury. Put differently, the states implicitly claim that product manufacturers owe legal (non-criminal) *duties directly to the state* for injuries caused by their products. This type of claim is unprecedented and conflicts with the traditional rule that third-party Good Samaritans (as the states claim to be here) have no independent right to recover against tortfeasors.

A second illustration of the states' radical theory is the unprecedented paternalism that is inherent in their lawsuits. Current law embodies the idea that at some point, consumers must accept personal responsibility and cannot reasonably expect to be protected or compensated for their own choices. Under the state suits, however, liability will result from individual consumer decisions regardless of public knowledge and regardless of consumer negligence or misuse.

In sum, the attorney general suits are deliberately seeking to manipulate basic tort rules. Given this frontal assault on tort law, these suits should be subjected to the most exacting scrutiny by judges and other legal policy makers.

Conclusion

The temptation for judges and other policy makers to embrace the expansive new theories the state attorney general lawsuits and the Florida law promote is significant. These efforts may represent to some an ideal quick fix to alleviate rising health care costs in the states, while at the same time forcing changes that will make the populace, from their subjective viewpoint, "healthier." The notion of litigation as a quick, painless fix, however, is illusory.

These lawsuits seek nothing less than a fundamental, permanent change in the way courts interpret and apply the common law of tort to personal and mass injury actions. The direct beneficiaries of such change will not be the states who seek reimbursement for health costs or the patients allegedly injured by the products. The trial lawyers and their health activist allies will be the ones to benefit. The public and its policy makers must examine the history of the litigation explosion and appreciate the likelihood that the activist state attorneys general and the trial lawyers will not stop at tobacco. Once that source of awards and attorneys' fees is no longer available, the legal changes will be used to pursue auto-makers, fast food proprietors, meat and dairy producers, and alcohol distributors, just to name a few targets.

These lawsuits have the potential to impose enormous costs on states' already weak economies. As liability is expanded to more industries, more jobs could be lost and more investment will be chilled. The heaviest burdens will be imposed on the court system, which is already weighed down with overcrowded dockets. An expansion of liability will certainly exacerbate this situation. Judges presiding over these cases, and policy makers examining these issues, would do well to seriously consider ignoring the temptation of the quick fix. ■

by Jerry Jasinowski, President, National Association of Manufacturers

Product Liability Reform in Congress

In 1996, product liability reform legislation made it to the president's desk — for the first time ever. It's unfortunate that President Bill Clinton chose to pay back his largest campaign contributors — trial lawyers — by vetoing H.R. 956, the Common Sense Product Liability Legal Reform Act.

But the president may have an opportunity to redeem himself. The business community is making plans now to advance the issue early in 1997. Thanks to lobbying by member companies of the NAM and AIF, most lawmakers realize our legal system is out of control. U.S. liability suits are 14 times more frequent and eight times more costly than in other nations. Bogus liability claims often prompt companies to remove products from the market; lay off workers; and, in almost all cases, forfeit large sums of money to a system that pays $2 in legal fees for every $1 received by plaintiffs.

The Case For Reform

The inconsistent patchwork of 51 state product liability laws (including Washington, D.C.) — combined with an increase in litigation, higher awards, and more settlements — has spawned unaffordable insurance premiums; a shortage of insurance in some industries; and widespread uncertainty for consumers, manufacturers and retailers. Many states have reformed their liability systems without regard to state-by-state consistency. Meanwhile, trial attorneys have mastered the art of forum shopping (filing suits in states where laws are most sympathetic to their clients).

This is why the National Governors Association, a group normally reluctant to cede authority to the federal government, supports reform at the federal level. Ironically, it was former Gov. Bill Clinton who played a leading role in persuading the governors to adopt the proposal.

The Association of Trial Lawyers of America (ATLA) has skillfully played both sides of the issue. At the state level, the association has testified that product liability is a national, not a state or local issue. Before Congress, ATLA says a federal solution is not needed and that the issue should be left for states to decide.

Most manufacturers believe in taking responsibility for their mistakes. If something they make causes harm, they should pay. At the same time, common-sense rules are needed. Recovery should be denied, for instance, to "victims" whose intoxication or drug abuse is primarily responsible for their injuries. And when a company is only 10 percent responsible for an injury, it should pay no more than 10 percent of the damages.

Congressional Action

Allies of ATLA in Congress blocked consideration of fair and reasonable reform bills throughout the 1980s and early 1990s. But the dynamics were reversed in 1995 when Republicans captured the House and Senate.

The House approved a broad legal-reform measure early in 1995, with 45 Democrats joining 220 Republicans in support of the bill. Unlike previous measures that focused solely on product liability lawsuits, H.R. 956 as passed by the House would have capped punitive damages and limited joint and several liability in *all* civil cases.

Senate attempts to enact a similar bill were filibustered. On three occasions, industry was unable to muster the 60 votes needed to defeat the filibuster. Working closely with the NAM, Sens. Slade Gorton (R-Wash.) and Jay Rockefeller (D-W.Va.) proposed passing a more narrow, "products-only" version of H.R. 956. Their strategy worked; the narrow version of the bill was approved 61-37.

Congress, working closely with administration officials in trying to reconcile the House and Senate versions of H.R. 956,

carefully crafted a proposal aimed at receiving favorable White House consideration. (Throughout the debate, the White House indicated the president would sign a bill limited to coverage of product liability suits.)

The trial attorneys' lobby — joined by self-proclaimed consumer lobbyist Ralph Nader — applied a full-court press to prevent a vote on the conference report. When their strategy failed, they appealed to the White House. On March 16, 1996 — just days before the conference report was scheduled to reach the Senate floor — President Clinton announced he would veto the bill.

The veto threat did not dissuade lawmakers. A bipartisan majority in both chambers approved the conference report. Nevertheless, President Clinton vetoed H.R. 956 on April 30, 1996. One week later, the House fell 23 votes short of the two-thirds majority necessary to override the president's veto.

Contrary to the president's assertions, the final version of H.R. 956 was a modest bill that included sensible limits on punitive damage awards, a reasonable statute of repose, and an end to joint and several liability for non-economic damages. In addition to criticism from some of his closest Democratic allies in the Senate, the president was chided by *The Washington Post*, which called his "decision to capitulate to [trial lawyers'] pressure ... transparent, shortsighted and wrong."

Outlook

Looking to 1997, we believe the issue is more alive than ever. While the business community supported broad efforts to reform the nation's legal system in 1995, manufacturers are seeking a sensible product-liability bill that can clear both chambers and be signed into law early in 1997.

In the Senate, the NAM is urging Majority Leader Trent Lott (R-Miss.) and new Commerce Committee Chairman John McCain (R-Ariz.) to move reform legislation quickly. Fifteen new senators will need to be educated on the issue. (Florida Sen. Connie Mack (R) is a longtime supporter of reform; Sen. Bob Graham (D) is an opponent.)

In the House, reform supporters continued to outnumber opponents. The NAM is asking House leaders not to broaden the bill, which would only lead to defeat in the Senate.

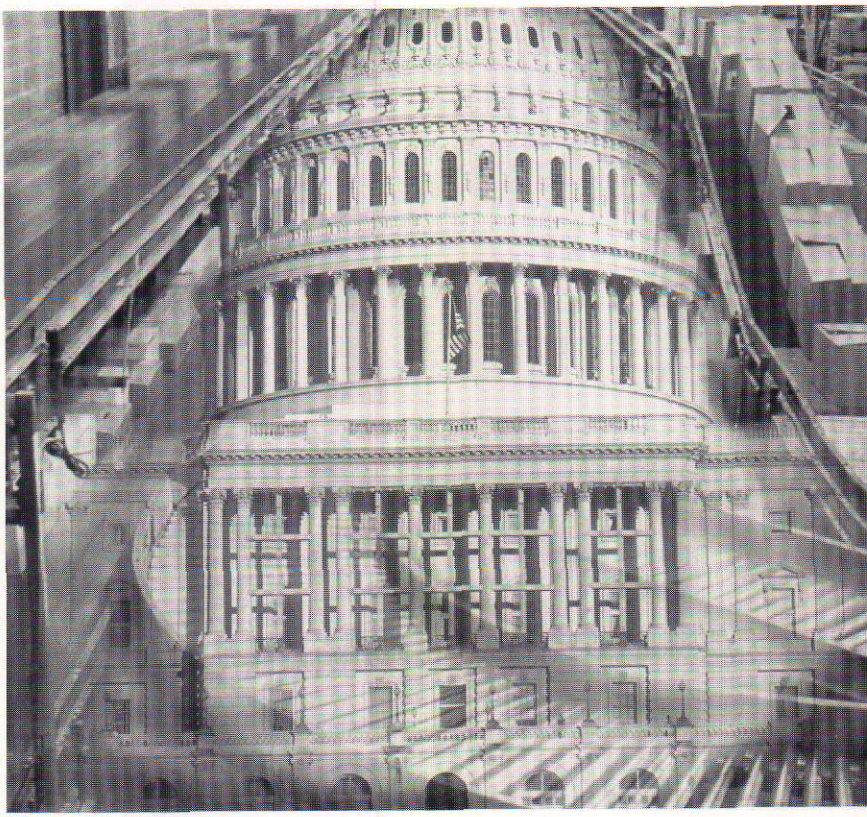
Some supporters on Capitol Hill believe recent changes in White House staff — who may focus more on policy than politics — could help persuade the president to sign a reform bill. Key officials at the Justice Department helped negotiate this year's bill and appear to support some sensible reforms.

What Can You Do

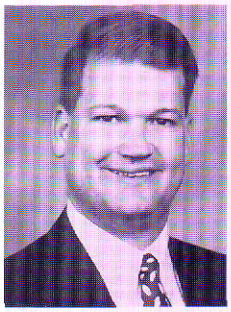
Contact your lawmakers now. Tell them about the unconscionable costs of defending against frivolous liability suits, where even a successful defense entails a large economic loss. More importantly, new members of Congress — including Florida Reps. Allen Boyd (D-2), Jim Davis (D-11), and Robert Wexler (D-19) — need to hear about the research that is never conducted, the products that are withdrawn or never developed, and the jobs that are lost or never created — solely from fear of liability repercussions.

With your help, we can create a reasonable product liability law that protects injured victims without wasting money and stifling innovation. ■

Bogus liability claims often prompt companies to remove products from the market; lay off workers; and, in almost all cases, forfeit large sums of money.



Efforts to End Lawsuit Abuse Successful in Ohio



by Roger R. Geiger,
President, Ohio Alliance
for Civil Justice

After more than 20 months of hard work and dedication by members of the Ohio Alliance for Civil Justice, the Ohio House of Representatives and the Ohio Senate approved measures in House Bill 350 intended to make beneficial reforms to the state's civil justice system. The legislation was signed into law by Ohio Gov. George V. Voinovich on Oct. 28, 1996.

The alliance is an unprecedented coalition of major employers, small business owners, medical providers, farmers, trade and professional associations, political subdivisions, and nonprofit organizations who joined forces to help end lawsuit abuse in Ohio. The leadership of the alliance spent more than 13,000 hours working on the tort reform campaign.

In early September, the Ohio Senate voted 20-13 to approve a joint House-Senate conference committee report on House Bill 350. On the same day, the Ohio House of Representatives also considered the measure. When the House's first concurrence vote was called, the bill was defeated 47-48. However, due to a lack of affirmative votes, a parliamentary procedure was used to allow the House to consider the legislation when 50 favorable representatives were in attendance. In late September, the Ohio House reconvened to approve the motion to reconsider, and then concurred with the conference committee report by a vote of 53-41.

The new tort reform law contains meaningful and common sense provisions that will help put an end to the pervasiveness of frivolous lawsuits in Ohio. With one new lawsuit being filed in Ohio every 17 minutes and each Ohio resident spending $1,200 annually in a hidden tort tax, civil justice reform was long overdue.

Members of the alliance all agreed that in order to attain meaningful reform, the following five key measures needed to be enacted.

- **Modification of Joint and Several Liability:** Abolishes joint and several liability in tort actions and replaces it with proportional liability, except for defendants who are more than 50 percent at fault. Defendants more than 50 percent at fault will be liable for the plaintiff's economic damages only.
- **Non-Economic Damage Limits:** Limits non-economic damages (pain and suffering, mental anguish, etc.) to the greater of $250,000 or three times the plaintiff's economic damages, up to a maximum of $300,000 in all cases, except for those that are particularly severe. In severe cases, non-economic damages are limited to the greater of $1 million or $35,000 multiplied by the number of years remaining in the plaintiff's life. There are no limits on a plaintiff's actual economic loss (lost wages, medical bills, etc.).
- **Punitive Damage Limits:** There are several provisions in the new law related to the awarding of punitive damages, including:
  - Limits to the amount of punitive damages recoverable for all parties, except large employers, to the lesser of three times the amount of compensatory damages (economic and non-economic) or $100,000;
  - Limits the amount of punitive damages recoverable from employers with more than 25 full-time, permanent employees to the greater of three times compensatory damages or $250,000.
- **Comparative Fault:** Allows juries to consider the fault of non-parties, including those who have settled and those who were

never made parties to the action, in apportioning liability. The bill also permits application of comparative fault to product liability actions.

- **Statutes of Repose:** Provides a 15-year statute of repose for product liability claims, six years for medical malpractice claims, and 15 years for improvements to real property. Except for cases involving fraud, claims for products sold and services rendered after 15 and six years would not be subject to lawsuits.

Not only were these major provisions a part of the final legislation; more than 40 other civil justice reform measures were enacted. Ohio was one of the first states to take a comprehensive approach to tort reform by addressing many major tort reform issues in a single piece of legislation.

Although the Ohio Legislature's action represents great strides toward ending lawsuit abuse, additional activity by opponents of tort reform is still anticipated. Legislation challenging key portions of House Bill 350 could be introduced as early as 1997. Legal challenges in the Ohio Supreme Court are also anticipated.

The grassroots assistance from thousands of individuals was critical in the overall effort to enact House Bill 350, and cannot be left unacknowledged. More than 1,600 small business owners, corporate CEOs, doctors, farmers, accountants, county commissioners, and many others from across the state participated in meetings with legislators, provided testimony before committees in the Legislature, wrote letters, spoke to the media, made phone calls and/or simply added their names to the overwhelming list of businesses and consumers supporting civil justice reform.

In analyzing Ohio's success, there are four major reasons that meaningful tort reform legislation was enacted. The four critical elements to the alliance's success were:

- the breath and depth of the coalition's membership;
- the ability to maintain a focus on the five major reforms and the coalition remaining united around those issues;
- retaining knowledgeable and professional legal, public relations, and grassroots help; and
- strong legislative leadership that started with the speaker of the Ohio House.

These four elements clearly enabled the alliance to overcome the strong opposition of the Ohio trial bar, several so-called consumer groups, and organized labor.

While each state is different, the ability to create some form of the four key elements will likely lead to success stories in other states. Wherever the tort reform debate begins, the message for ending lawsuit abuse must simply be that citizens want it, consumers need it, and common sense demands it. ■

The Anti-Consumer Crusaders

by Jacquelyn Horkan, Employer Advocate *Editor*

They are the modern day pioneers of moral economy, measuring goodness and virtue in terms of wealth or lack thereof.

Consumer advocates earnestly endorse Balzac's nostrum that behind every great fortune lies a great crime. In fact, their almost paranoiac distrust of free enterprise and large corporations means they often act less like friends of consumers and more like enemies of business.

For instance most consumer groups favor protectionism — a stance that benefits a few employers and employees instead of the consumer who enjoys lower prices when trading borders are opened.

Consumer advocates lobby for everything from increased welfare spending to stronger environmental regulation to socialized medicine. Despite their decidedly leftist orientation, consumer advocates are widely regarded as untainted by bias and motivated by the purest of intentions. That makes them one of the most potent allies of trial lawyers.

Both trial lawyers and consumer advocates favor the Leninesque stipulation of "From each according to his ability to pay; to each according to the skill of his lawyer."

The consumer movement and the current tort system were born of the belief that free enterprise offers producers no incentive to consider the safety of their customers when designing their products. Furthermore, consumers are depicted as hapless creatures, unable to collect the facts they need to make wise, reasonable choices in the marketplace.

The patriarch of the consumer movement is Ralph Nader, nicknamed Saint Ralph and deified for his simple and ascetic lifestyle. According to a 1990 article on Nader in *Forbes* magazine, the crusader exercises varying degrees of control over 29 organizations with combined revenues of $75 million and assets of at least $23 million.

Plaintiffs' lawyers interviewed for that article proudly spoke of their support of Nader. Nader vehemently denies any connection between them and him. According to the magazine, Nader's sensitivity touched off a minor altercation at a press conference when he was asked about plaintiff lawyer funding of his organizations. Nader stalked off the stage and one of his supporters punched the questioner in the eye.

Nevertheless, trial lawyers must contribute something to the Nader conglomerate if only because several of his organizations sell litigation kits. The kits are packets of material gathered through Freedom of Information requests and discovery proceedings and are used to help lawyers prepare their lawsuits.

The closeness of the bond is simply unavoidable. For instance, Nader and an associate donated their cooking skills to an Association of Trial Lawyers of America fund-raising auction. The highest bidder would receive a gourmet meal catered by the two consumer crusaders.

The winner was one Lanny Vines, an Alabama personal injury lawyer. One notable Vines's victory was a $312,000 settlement for injuries caused by an allegedly defective door latch. The latch was on a 10-year-old car; the injuries were sustained in a high-speed wreck.

There is a certain irony in this anecdote. From the start, lawsuits and automobiles have financed Nader's movement. In 1970, he won a $425,000 settlement of his invasion of privacy suit against General Motors. The money was used to create Nader's flagship, Public Citizen. At his client's request, Nader's lawyer chipped in $10,000 of his $150,000 fee from the case.

That lawsuit arose out of the automaker's response to Nader's book *Unsafe at Any Speed*, which alleged that GM's Corvair was inherently dangerous due to design defects. The book and subsequent auto safety legislation have given rise to the myth that Nader single-handedly made

American highways safer. In fact, driving in the United States has grown progressively safer throughout the history of the automobile.

In 1921, there were 24 traffic fatalities for every 100 million miles traveled. By 1965, the year of publication of *Unsafe at Any Speed,* that number had dropped to 5.3 and has continued dropping. Then and now, the U.S. traffic rate was among the lowest in the world. Increased safety arose from the supposedly defective free market system that, in truth, values product improvements with or without the meddling of the Ralph Naders of the world.

Nevertheless, the myth has proven lucrative for Nader and other consumer advocates and, you might say, they've driven it to the bank over and over again.

Consumer organizations are prime R&D facilities for lawsuits. For example, in 1988, *Consumer Reports* announced that the Suzuki Samurai exhibited a dangerous tendency to roll over. Within weeks, hundreds of lawsuits had been filed. Suzuki won about three out of every four cases that went to trial.

Nevertheless, the carmaker settled many of the suits, buying off the plaintiffs to protect itself from the expensively random nature of the U.S. legal system.

Now, the Samurai lawsuits seem little more than extortion, instigated by *Consumer Reports* and collected by trial lawyers. According to the National Highway Safety Administration, *Consumer Reports's* tests of the Samurai "do not have a scientific basis and cannot be linked to real-world crashes, avoidance needs, or actual crash data." Numerous government agencies across the globe reached the same conclusions.

More recently, the magazine condemned two other sport utility vehicles (the Isuzu Trooper and the Acura SLX) as unstable in sharp turns. Once again, publication of the report was swiftly followed by lawsuits.

The attack on sport utility vehicles, pursued for different ends, is an excellent example of the symbiotic relationship between consumer groups and plaintiffs' lawyers. The lawsuits mean more opportunities for lawyers to collect fees. Sport utility vehicles offend the consumer movement's environmental objective of greater fuel economy.

There's a paradox here, however. The environmental objective clashes with the consumer safety objective. Smaller cars use less gas; larger, heavier cars are safer. Rather than advocating safer cars, consumer groups want to put all of us in small, fuel-efficient, less powerful, more vulnerable vehicles. Or maybe not.

Without sport utility vehicles, there would be fewer lawsuits and consumer advocates would lose an important source of funding.

In the last few years, consumer groups have locked onto a new method for profiting from lawsuits. In some class actions, the portion of each individual award is so small that many in the class don't bother collecting their share. Under the rather obscure legal doctrine of *cy pres*, consumer groups have begun to ask for and receive permission to take the undistributed portions of the awards.

The alliance has undoubtedly been lucrative for both sides. Consumer advocates add a certain degree of moral legitimacy to opposition of tort reform. They conduct questionable tests on products, the results of which trial lawyers use to file lawsuits. They collect and sell documents that make the job of suing a little easier. And trial lawyers repay the help with generous contributions and donations.

When it comes to litigation, the very people consumers are told to think of as friends are, in fact, sleeping with the enemy. ■

When it comes to litigation, the very people consumers are told to think of as friends are, in fact, sleeping with the enemy.

Comrades in Alms

by Jacquelyn Horkan, Employer Advocate *Editor*

Three days before Christmas 1995, the Republican Congress enacted a law making it harder for plaintiffs' lawyers to bring securities class-action suits in federal court. President Bill Clinton had expressed his support for the measure. One battle on the tort reform front seemed headed for certain victory.

Then William Lerach came to dinner. Within days of Lerach's meal at the White House, the president reneged on his promise and vetoed the legislation.

While Congress subsequently overrode the veto, this story is an important lesson in a little known fact of American politics. Plaintiffs' lawyers may just be the most powerful faction at every level of our nation's government.

Tort reform advocates have many issues on their agenda. Trial lawyers have one issue: promoting litigation.

Lerach is a California plaintiff's attorney who specializes in filing class-action suits on the behalf of shareholders whenever a company's stock suddenly drops. It's a growing and highly lucrative specialty in which Lerach rules as king.

As another aspect of his assumed royalty, Lerach practices a form of *noblesse oblige* by dispensing millions of dollars in contributions to political candidates.

His generosity came to light in a report released last year by the non-profit group Contributions Watch.

The organization matched campaign contribution reports in 11 states against a list of elite plaintiff attorneys and their relatives. The results are staggering.

Between January 1990 and December 1995, this select group of litigators contributed a total of $100.4 million to candidates in local, state and federal races. Just a small percentage of the money came from political action committees, most flowing from the pockets of the litigators and their family members.

Half of the individual contributions came from a small core of 150 attorneys. One of them, the aforementioned Lerach, doled out $1.5 million all by himself.

Keep in mind that the $100.4 million included only those contributions in a mere 11 states that could be traced to a small portion of the lawyers who represent plaintiffs. The number only gives a partial picture of the political generosity of the lawsuit industry.

The number by itself, however, doesn't mean much without a comparison to other interests. Since there is no central repository for information on who gave what to which candidate, the Contribution Watch statistics aren't useful in a comparison. Nevertheless, there are ways to compare the political charity of the litigators to others.

When it comes to "soft" money and political action committee spending at the federal level, trial lawyers outspend tobacco companies, the Big Three automakers, and oil companies *combined*. Over a four-and-a-half-year period, a small cadre of litigators contributed more to races in three states than each of the two major political parties spent in all 50 states.

There's little doubt that total spending by all of the opponents of trial lawyers — business, health care professionals, insurance companies — outweighs that of the lawyers, but there's an important distinction to be made.

Tort reform advocates have many issues on their agenda, including taxes, property rights, the environment, insurance, health care, employment law, and regulatory reform. Trial lawyers have one issue: promoting litigation.

With one issue, they get the biggest bang for their bucks. With one vote against a pro-litigation issue, a politician can be pretty well-assured that plaintiff lawyer dollars won't be flowing into future campaign coffers. Business contributors can't make such a resolute differentiation; today's opponent may be tomorrow's ally.

But why do trial lawyers spend so much money on their one issue? Litigators have an enormous financial interest in

killing efforts to reform the tort system. According to Professor Lester Brickman of Cardozo Law School, contingency fees now run at about $15 billion a year.

This doesn't mean that all politicians who get money from trial lawyers are witless pawns or craven lackeys. The corrupting influence of money in politics is overblown by the media. Citizens give money to politicians with similar ideals and philosophies. Any lawmaker who tried to vote strictly according to the different agenda of his contributors would quickly find himself frozen in confusion.

In most cases, the very level of contributions and the noncompromising nature of trial lawyer approval just renders a lawmaker unwilling to listen to the other side of the argument. The only way to counteract that influence is to take action based on knowledge of it.

That appears to have happened in the 1996 elections. Across the country, trial lawyer candidates and issues fell to defeat. In Alabama, there was the race for the seat of retiring Democratic Sen. Howell Heflin, a long-time member of the Senate and opponent of tort reform. Voters rejected the trial lawyer candidate and elected a reformer, Republican Jefferson Sessions.

Also in Alabama, and in Texas — two states where state Supreme Court justices are elected in partisan races — voters endorsed the candidates who supported tort reform.

Several pro-plaintiff-lawyers' propositions in California fell to defeat, including one designed to protect the kinds of securities class actions filed by William Lerach. His firm chipped in $4 million to promote the initiative; 74 percent of the voters voted against it.

President Clinton, the primary recipient of trial lawyer money, would have gained an easy victory with or without their cash. Of greater import to tort reform advocates was the president's wooing of Silicon Valley execs, who despise Lerach and were furious with Clinton for vetoing the securities legislation. They even convinced him to denounce Lerach's initiative.

Clinton's wavering winds of political sympathies make predictions about his behavior difficult. For the time being, however, he seems to be leaning toward industry and away from lawyers.

In Florida, trial lawyer candidates lost in several key races. Furthermore, with a Republican majority in the House and Senate, proponents of reform have taken the reins of leadership in both chambers.

On both the federal and the state level, the prospects for tort reform appear brighter than ever, although victory is not a foregone conclusion.

Perhaps the most important lesson of the last election year is that citizens are quite capable of judging the candidates on their own merits, thank you, regardless of where the money comes from. ■

Total "Soft Money" and Political Action Committee Contributions at the Federal Level in 1995

Big Three Automakers	$842,000
Oil and Gas Companies	$2,800,000
Tobacco Companies	$3,200,000
Trial Lawyers	$8,100,000

Contributions To Candidates for State Office Jan. 1990 to June 1994

Republican National Party (all 50 states)	$10,800,000
Democratic National Party (all 50 states)	$12,400,000
Trial Lawyers (3 states)	$17,300,000

Legal Tips for You

The legal profession may be the least regulated of all professions and little is done for consumers who suffer at the hands of their lawyers.

San Diego County Citizens Against Lawsuit Abuse has put together an excellent consumers' guide to hiring a personal injury lawyer. We urge you to share this information with family, friends, and employees so that more consumers can protect themselves against the unscrupulous members of the legal community.

Tip #1

Talk to more than one lawyer. Interview three lawyers before selecting one. Lawyers have different levels of ability and different ways of working with clients. It is important that you find someone who has the skills you need, will be honest with you, and will work hard on your behalf.

Be prepared when you meet with a lawyer. Don't get intimidated. Make a list of written questions so you get the information you need. Most lawyers will only allow 30 minutes for a free consultation, so focus on what you want to know, including:

- references;
- information on recent cases they've handled;
- whether or not they have tried cases in court;
- if they will have a less experienced lawyer working on your case instead of handling it themselves; and
- if they will refer you to a different lawyer if it looks like you will be going to court.

Some tactics to watch for:

- The lawyer insists you sign a contract today and not talk to anyone else. Never sign anything until you have time to review it and consider other offers, and certainly do not sign anything you do not fully understand.
- The lawyer refuses to talk to you if you are merely interviewing him. If he doesn't make time for you now, he may not make time for you later — when you really need it.
- The lawyer talks in too much "legalese." If the lawyer is unable to communicate effectively with you about how he would handle your case, he most likely won't be able to communicate effectively with a jury of your peers.

Tip #2

Check out your lawyer's record with other legal consumers. Ask the state bar association if your lawyer has ever been the subject of an ethical complaint or inquiry. Knowing if your lawyer has a pattern of questionable conduct could alert you to potential problems and save you time and money.

Tip #3

Don't believe everything you see in an advertisement. Advertising is often designed to entice you to purchase products or services you don't really need. If it sounds too good to be true, it probably is.

Tip #4

Contingency fees work in dozens of ways — make sure you understand what you're paying for and what you aren't. No two contingency fee arrangements are alike. Find out if your lawyer will take his fee "off the top" or only after all the expenses are counted up. Some consumers report that their 60 percent settlement got whittled down to less than 45 percent after all expenses were taken out. Insist on getting the information in writing and in clear, direct language you are comfortable with. Typical expenses include court costs (fees for filing a lawsuit), court reporter and copies of transcripts, expert witness fees, private investigator, postage, courier, photocopying, telephone costs, computerized legal research, and travel expenses, including transportation, hotels, and meals.

Tip #5

Don't hire a lawyer who calls you on the phone or visits you in person. If, without your permission, a lawyer or someone acting on his behalf tries to contact

you asking you to hire him in connection with your accident, this is "barratry," commonly referred to as "ambulance chasing." It's against the law in Florida. When a lawyer will break the law and code of ethics to get your business, he's probably not the kind of lawyer you want representing you.

Tip #6

Know how you can fire a lawyer. Consumers often report that firing a lawyer is next to impossible. Some contracts specify that even if you fire a lawyer, he still gets a large percentage of any future award or settlement you may receive on the case. Make sure you know how to fire your lawyer — before you hire him.

Tip #7

Make sure your lawyer gives you all of your options and advises you on the potential disadvantages of bringing a lawsuit. Lawyers don't just sue. In fact, suing can be one of the more expensive ways for you to get compensated. Make sure your lawyer has an open mind about alternative means to resolve your problem, such as mediation or arbitration. Satisfaction rates for mediation or arbitration run as high as 90 percent. Also you should be aware that lawsuits sometimes have unintended, but very serious consequences. For example, recent reports show that construction defect lawsuits may lower property values and make it difficult to refinance or sell your home.

Litigation is time consuming. Depositions and court appearances can interfere with your employment or family activities. Weigh the potential disadvantages before you bring a lawsuit.

Tip #8

Know who you are suing. You may be suing someone and not even know it. Lawyers can claim to represent you and not even have your permission. Abuses are on the rise in class-action lawsuits where lawyers find one or two people to file a claim, then purport to represent everyone (including you) who might have a similar claim.

If you are notified about being part of a class action, read the notice carefully. Keep in mind that when all is said and done, you may end up with pennies or coupons, while you pay "your" lawyer over $2,000 an hour. Most of these legal costs will end up being passed on to you and other consumers in the long run.

Tip #9

Don't let your lawyer pick your doctor. No law school has a program for teaching would-be lawyers about medical problems, yet many consumers report being told by their lawyer what kind of injury they have.

Some things to be aware of when consulting a lawyer:

- The lawyer suggests you go to "his" doctor. You may be setting yourself up to be diagnosed for an injury the lawyer believes will be most useful for his case. While it may profit the lawyer, that arrangement could be very dangerous to your health.
- The lawyer says he will pay for your doctor's visit — but only if you use "his" doctor. In most cases, all your medical costs will eventually be taken out of your settlement.
- The lawyer says he will pay for a doctor's visit to "his" doctor, but won't consider paying for a second opinion. When you are injured, most doctors strongly recommend a second opinion and will even provide to you a list of specialists to consider. This is a safety precaution you should insist on.

Tip #10

Use your good judgment. You can help stop lawsuit abuse. If you decide to go forward with a lawsuit, don't use the courts as a way to seek revenge or try to "hit the legal lottery." Conflicts are inevitable in our society, but a lawsuit should be the last resort, not the first choice. Many disputes can be resolved informally, through phone calls, letters, or personal meetings. Make sure you have exhausted all other means before bringing a costly and disruptive lawsuit. The civil justice system is designed to provide compensation for real injuries, and the more the system is abused, the less it's able to help those who need it most. ■

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AIF Mourns Passing of Friend

On Nov. 27, 1996, Donald H. Reed, Jr., passed away while visiting family in Oklahoma City.

Mr. Reed was a veteran of more than 30 years in state politics, serving as a member of the Florida House of Representatives from 1963 to 1972. During that time, he was the Republican leader of the House for eight years, the longest term in that office ever served by a GOP member of the Legislature. He also served on two constitution revision commissions and was preparing to contribute to his third at the time of his death.

"A man who never seeks accolades for himself is usually the one who gets them all. And that was Don Reed."

Donald H. Reed, Jr.
1933-1996

Among his legislative accomplishments, Mr. Reed included the creation of the office of the auditor general and streamlining of government.

After leaving the Legislature, Mr. Reed returned to his Boca Raton law practice, but maintained his connection to Tallahassee where he lobbied for the Florida Telecommunications Association, the City of Boca Raton, and Associated Industries.

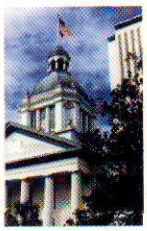
Jon Shebel, AIF president and CEO, served as an aide to Mr. Reed in the Republican minority office and the two maintained a close friendship over the years. Shebel remembers Mr. Reed as everyone's friend.

"A man who never seeks accolades for himself," said Shebel, " is usually the one who gets them all. And that was Don Reed."

Although he suffered a stroke several years ago and underwent a heart transplant in 1995, Mr. Reed continued to approach life with enthusiasm and humor.

The week before his death, Mr. Reed celebrated the birth of twins to his son and daughter-in-law, then flew to Oklahoma to spend Thanksgiving with family there. Earlier in the month, he was on hand to watch the first GOP speaker in more than century take the gavel, a special pleasure for a man who spent 10 years serving his constituents at a time when Republicans were rarities in the Capitol.

Don Reed is survived by his wife Carole and his four children, Donald, David, Douglas, and Pam.



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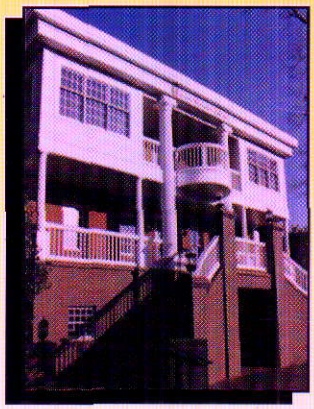

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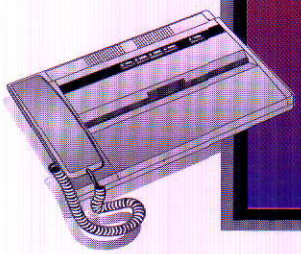

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