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Tort Reform [1]

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THE WHITE HOUSE
WASHINGTON

September 3, 1992

To: Steve Provost
Richard Porter

From: Andrew
Carpendale

There's some good
speech material
here

MEMORANDUM FOR ANDREW CARPENDALE

FROM: ROBERT B. CHARLES ^{RBC.}
SUBJECT: Tort Reform/ Anecdotal Material

Attached are several highlighted articles offering persuasive anecdotal evidence of the need for tort reform (e.g. playgrounds).

Speechwriters
Tort Reform
File

Note: This comparison chart (p.2) is generated by Wisconsin's
Institute for Legal Studies.

Extrapolations from Chart

- US has more lawyers than [the former West] Germany, Canada, England, Wales, Japan, Switzerland and France combined -- and -- multiplied by two! [780K > 776.5K]
- US has more than 3 times as many lawyers per capita as Japan. [312 > 101.6 x 3]
- US has more than 6 times as many lawyers per capita as France. [312 > 49.1 x 6]

Goal Housekeeping, September 1990



WHEN YOU CAN BE SUED FOR INJURIES

Your baby-sitter gets hurt in your home...a visiting friend slips on your wet sidewalk...your neighbor's child sneaks into your pool and accidentally drowns. In each of these cases you could be liable, and if you are, will your homeowner's insurance cover you?

Maybe not. Many homeowner's policies typically have only \$100,000 in liability coverage. Yet, it is not uncommon nowadays for a court award to exceed \$500,000, even run into millions of dollars. And if you don't have the money, you may be forced to declare bankruptcy and hand over future earnings to pay the settlement. Here, a few cases of potential liability and how to protect yourself.

Employee accident

When the Conways' full-time baby-sitter tripped on a toy, fell down their stairs, and fractured her leg, she collected for medical expenses under the Conways' insurance policy. But since she would be out of work for six months, she also sued her employers for "lost wages" and "pain and suffering." She was awarded \$50,000.

The Conways didn't know that their state required them to carry workers' compensation coverage for household help who work full-time. (This would have cost them about \$120 per year.) Presently, nearly half of the states have this law, and a few states say that even part-time workers must be covered. For example, in Connecticut, any domestic worker em-

ployed more than 26 hours per week is eligible. However, this coverage is usually not needed for occasional, temporary, or one-time workers—a teenager who mows your lawn, a woodworker installing cabinets, or a caterer.

Make sure anyone you hire carries his or her own liability and workers' compensation insurance (ask to see the actual insurance certificate). Workers with their own insurance are less likely to sue you.

Visitor mishap

Janet stopped by the Hansons' home while they were at work to drop off a book she had borrowed. She slipped on some wet leaves on their front walk, hurt her back, and sued her friends for negligence. They were not found liable.

The Hansons were not found negligent because they were at work and therefore did not have the opportunity to sweep away the wet leaves. However, some state and local laws set a time limit, such as 24 hours, in which a homeowner must clear his or her sidewalk of snow, ice, and other "natural hazards." And the walks must be cleared thoroughly; otherwise, a homeowner can be found liable for failing to remove all of the hazard.

Trespasser tragedy

Paul, age 5, climbed over the Grants' fence so he could sneak into their pool. Jumping off the diving board, he broke his neck and died. Though Paul had been trespassing, his parents were awarded \$3 million in their child's

"wrongful death." This forced the Grants into bankruptcy.

Although Paul had not been invited onto the Grants' property, the court ruled that the pool was an "attractive nuisance," inviting enough itself to beckon the curious child.

In the same way, anyone who comes into your home uninvited—even the friend your guest brings over without asking you first—can sue you for negligence if injured on your property. The best prevention: If you have or add any permanent fixture to your property, such as a pool or

play set, or just in case your property has a hazard you are unaware of, consider increasing your liability insurance or look into an "umbrella" policy. This type of policy substantially increases your personal liability protection to at least one million dollars for your home and auto (and your boat, if you have one). Depending on the amount of liability protection, coverage may cost you an additional \$100 to \$400 a year. —S.N.

Note: For advice on liability coverage specific to your needs, consult your insurance agent.

CONSUMER COSTS: THE UPS & DOWNS

Does everything cost more than it used to? No! Some products and services cost nearly the same today as they did 10 years ago—and a few prices actually fell! Below, the percentage of change in price of some products and services from Dec. 1979 to Dec. 1989.

These went up a lot...

Hospital rooms	+181.9%
Tobacco, smoking products	+152.1
Prescription drugs	+151.1
College tuition	+149
Airline fares	+130
Auto insurance	+119.9
Physician's services	+114.4

These hardly went up at all...

Coffee (beans and ground)	+2.1%
Women's suits	+2.5
Gasoline	+3.5
Women's coats and jackets	+6.5

And these actually came down in price!

Television sets	-27 %
Long-distance telephone calls (interstate)	-14.7
Sound equipment (stereo system, radio, VCR, compact-disc player, records, tapes)	-2.5

Sources: Division of Consumer Prices and Price Indexes, Bureau of Labor Statistics, U.S. Department of Labor

Law's empire

country	lawyers*	lawyers* per 100,000 population
Pakistan	46,000	508.4
Singapore	990	396.0
United States	780,000	312.0
Belgium	21,104	214.0
Finland	9,314	191.6
Western Germany	115,900	190.1
Israel	7,500	182.5
Argentina	50,000	169.4
Canada	42,710	168.5
Venezuela	31,400	159.1
Australia	23,000	145.7
New Zealand	4,700	144.6
England & Wales	68,067	134.0
Scotland	6,350	124.5
Chile	12,300	104.9
Japan	124,000	101.6
Spain	32,540	84.6
Italy	46,401	81.2
Costa Rica	1,959	80.3
Ireland	2,500	71.4
Brazil	85,716	69.1
Norway	4,412	68.7
Egypt	30,000	68.2
Nepal	1,000	63.2
Denmark	3,000	58.7
Switzerland	3,300	51.4
France	27,700	49.1
Panama	900	43.1
Turkey	22,395	42.1
Former Soviet Union	100,000	35.3
Holland	5,124	35.2
India	247,373	34.4
Others	66,399	-
World total	2,024,054	-

Source: Institute for Legal Studies, University of Wisconsin
* For latest available years



In the past such derision was tempered by a certain awe for lawyers and the law, nurtured by the mystery that surrounded them. No longer. The media report on trials as contests and lawyers as tacticians manoeuvring for any advantage. Once there was Atticus Finch in "To Kill a Mockingbird"; now there is Arnie Becker in "LA Law". A British former judge, James Pickles, appeared in tabloid photos with topless models. With these and countless other indignities, the law has been demystified.

As it has happened, the suspicions that lie be-

him to a business meeting would be considered an act of hostility.

Some differences are too great to take account of: between criminal-justice systems, between the view from behind a steel desk rather than a mahogany one. So this survey will mention criminal and government lawyers only in passing.

Among the lawyers that remain—commercial and civil attorneys of all stripes—there are still differences. Yet it is the similarities that ring out. Start with a long history of public resentment. Advocates in ancient Greece, such as the sophists ridiculed by Aristophanes, were often considered shyshes. During the French revolution, *avocats* were condemned as part of the *ancien régime*. In colonial America, lawyerly contentiousness and price-gouging sparked public rioting. Lawyers, said a North Carolina regulator, were "cursed hungry caterpillars" who would "eat out the very bowels of our Commonwealth."

It has only got worse, especially in America. There Dan Quayle, himself a lawyer, loudly echoes the caterpillar complaint. In California, T-shirts read: "What do you call 1,000 lawyers at the bottom of the ocean? A start." But it is not only an American revulsion. Newly unshackled judges in Eastern Europe are being accused of corruption and incompetence. A Japanese lawyer explains that when he tried recently to find office-space for his firm, several prospective landlords refused when they discovered what he does.

neath popular resentment for lawyers have begun to bubble up in parliaments and boardrooms: that lawyers have a stake in making transactions complicated and prolonging disputes, and in shielding themselves from competition; and that by pursuing their self-interest they inflict huge costs. Carl Sandburg captured the point elegantly: "When the lawyers are through, what is there left? Can a mouse nibble at it and find enough to fasten a tooth in?"

Tipping the scales

Change is upon them. To reduce the costs of America's alleged "litigation explosion", Mr Quayle proposes to re-regulate the most free-market legal system in the world. To cut the costs of legal services to consumers, Britain's Lord Chancellor wages a campaign to introduce competition and improve access to a legal system that excludes all but the richest and poorest. Protectionist barriers erected by local lawyers in France and elsewhere to keep out foreign ones are under fire. And in Japan, a quiet movement is afoot to prise open a classic cartel: high barriers to entry, restrictive practices, monopoly pricing. Some Japanese suspect the cost of their happily non-litigious system is a deficiency of justice.

Reformers everywhere refer to how much better things are in other countries. Usually they have little idea what they are talking about. Before charging ahead with ideas borrowed from abroad, they should take a closer look. This is not because (say) Germany has nothing to learn from (say) Canada. Quite the contrary. But regulating lawyers is a tricky task. The law may be a business, but the legal profession is not, as Harvard's Pound put it, "the same sort of thing as a retail grocers' association." Lawyers are most people's only way to use the civil-justice system. With the power to compel costly proceedings, lawyers can besmirch reputations and disrupt social harmony. They can also provide valuable business advice, help vindicate rights, and get compensation for those wrongly harmed. "Lawyers are like doctors," says Charles Sifton, a federal judge in New York. "They have people by the throats. Sometimes they save you. Sometimes they choke you."

Unsurprisingly it is America, where lawyers are most free to ply their trade, which sees the most choking and the most saving. In Japan, where lawyers are most restricted and ostensibly professional (or at least high-minded), there is little of either. Ideally, societies want lawyers to strike the right balance between being businessmen and being professionals. Wherever that "right" balance is, lawyers have too often failed to find it on their own—especially where great wads of cash are there to be made. Luckily, they are starting to get some help.

The client is sometimes right

Being in a service business means knowing who is supposed to serve whom

FOR a clue as to how wrenching it has been for lawyers to become businessmen, listen to the legal profession's elite at big law firms react defensively to the suggestion that the change is only recent. "Any lawyer who hasn't always known that he was working in a service industry", says James

Hurloch, managing partner at White & Case, a New York firm, "has really missed the boat."

Maybe. But until two years ago, the law was an unreal sort of industry: one virtually unaffected by economic cycles, in which growth seemed limitless and big firms rarely failed. Inevitably, these traits

Extrapolations from Attached Charts

- In 1988, the US graduated more lawyers (JD degrees) [36,172] than it graduated doctors (MD degrees) [15,091], engineers (PhDs) [4,191], and computer services personnel (MDs and PhDs combined) [9,166 + 428]. (i.e. $36,172 > 28,872$).
- In 1989-90, the US admitted more than 47,000 lawyers to practice law in the US. In 1963-64, the US was admitting less than one-fourth that number annually.

Education

Degrees Conferred

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No. 284. Earned Degrees Conferred, by Field of Study and Level of Degree:
1971 to 1988

LEVEL AND FIELD OF STUDY	1971	1980	1984	1985	1986	1987	1988	PERCENT FEMALE	
								1971	1988
Bachelor's, total	839,730	929,417	974,309	979,477	987,823	991,339	993,362	43.4	52.0
Agriculture and natural resources	12,672	22,802	19,317	18,107	16,823	14,991	14,222	4.2	31.5
Architecture and environmental design	5,570	9,132	9,186	9,325	9,119	8,922	8,606	11.9	38.7
Area and ethnic studies	2,582	2,840	2,879	2,867	3,060	3,340	3,463	52.4	59.8
Business and management	114,865	185,361	230,031	233,351	238,160	241,156	243,344	9.1	46.7
Communications	10,802	28,616	40,165	42,083	43,091	45,408	46,705	35.3	60.2
Computer and information sciences	2,388	11,154	32,172	38,878	41,889	39,664	34,548	13.6	32.4
Education	176,614	118,169	92,382	88,161	87,221	87,115	91,013	74.5	76.9
Engineering	50,046	68,893	94,444	96,105	95,953	93,074	88,791	0.8	13.7
Foreign languages	19,945	11,133	9,479	9,554	10,102	10,184	10,028	74.8	72.9
Health sciences	25,190	63,607	64,338	64,513	64,535	63,206	60,095	77.1	85.4
Home economics	11,167	18,411	16,316	15,555	15,288	14,942	14,825	97.3	91.7
Law	545	683	1,272	1,157	1,197	1,178	1,303	5.0	68.3
Letters	64,933	33,497	33,739	34,091	35,434	37,133	39,503	65.5	66.7
Liberal/general studies	5,461	20,069	18,815	19,191	19,248	21,365	21,796	29.0	56.4
Library and archival sciences	1,013	398	255	202	157	139	123	92.0	86.2
Life sciences	35,743	48,370	38,640	38,445	38,524	38,114	36,761	29.1	50.3
Mathematics	24,801	11,378	13,211	15,146	16,306	16,489	15,888	38.0	46.4
Military sciences	357	251	195	299	256	383	349	0.3	5.2
Multi/interdisciplinary studies	8,306	14,404	16,734	15,727	15,700	16,402	17,366	28.4	52.8
Parks and recreation	1,621	5,753	4,752	4,593	4,433	4,107	4,081	34.7	58.8
Philosophy, religion, and theology	11,890	13,276	12,349	12,439	11,841	11,686	11,543	25.5	30.3
Physical sciences	21,412	23,410	23,671	23,732	21,731	19,974	17,776	13.8	30.4
Psychology	37,880	41,962	39,872	39,811	40,521	42,868	44,961	44.5	70.0
Protective services	2,045	15,015	12,654	12,510	12,704	13,369	13,369	9.2	37.5
Public affairs	6,252	18,422	14,396	13,838	13,878	14,161	14,232	60.2	68.1
Social sciences	155,236	103,519	93,212	91,461	93,703	96,185	100,270	36.8	43.9
Visual and performing arts	30,394	40,892	39,833	37,936	36,948	36,223	36,600	59.7	61.5
Unclassified							1,801	(X)	2.0
Master's, total	230,590	298,081	284,263	286,251	288,567	289,557	298,733	40.1	51.5
Agriculture and natural resources	2,457	3,976	4,178	3,928	3,801	3,523	3,479	5.9	30.2
Architecture and environmental design	1,705	3,139	3,223	3,275	3,260	3,142	3,159	13.8	35.4
Area and ethnic studies	1,032	852	888	879	927	851	905	38.3	45.3
Business and management	26,481	55,006	66,653	67,527	67,137	67,496	69,630	3.9	33.5
Communications	1,856	3,082	3,656	3,669	3,823	3,937	3,932	34.6	60.0
Computer and information sciences	1,588	3,647	6,190	7,101	8,070	8,491	9,166	10.3	26.9
Education	88,952	103,951	77,187	76,137	76,353	75,501	77,704	56.2	75.1
Engineering	16,443	16,243	20,661	21,557	21,661	22,693	23,426	1.1	12.5
Foreign languages	4,755	2,236	1,773	1,724	1,721	1,746	1,847	65.5	68.1
Health sciences	5,445	15,068	17,443	17,383	18,624	18,426	18,523	55.9	78.3
Home economics	1,452	2,690	2,422	2,383	2,298	2,070	2,059	93.9	88.1
Law	955	1,817	1,802	1,796	1,924	1,943	1,880	4.8	26.3
Letters	11,148	6,807	5,818	5,934	6,291	6,123	6,171	60.2	65.8
Liberal/general studies	549	1,373	1,173	1,180	1,154	1,126	1,342	44.3	61.9
Library and archival sciences	7,001	5,374	3,805	3,893	3,626	3,815	3,713	81.3	78.7
Life sciences	5,728	6,510	5,406	5,059	5,013	4,954	4,769	33.6	49.3
Mathematics	5,191	2,860	2,741	2,882	3,159	3,321	3,423	29.2	40.1
Military sciences	2	46	127	83	83	49	49	2.0	2.0
Multi/interdisciplinary studies	1,157	3,579	3,148	3,184	3,104	3,041	3,097	10.9	41.9
Parks and recreation	218	647	555	544	495	476	461	29.8	55.5
Philosophy, religion, and theology	4,036	5,126	6,259	5,519	5,630	5,989	5,873	27.1	34.7
Physical sciences	6,367	5,219	5,576	5,796	5,902	5,652	5,727	13.3	24.7
Psychology	4,431	7,806	8,002	8,408	8,293	8,204	7,862	37.2	67.1
Protective services	194	1,805	1,219	1,235	1,074	1,019	1,024	10.3	29.0
Public affairs	8,215	18,413	15,373	16,045	16,300	17,032	17,150	49.2	63.1
Social sciences	16,476	12,101	10,465	10,380	10,428	10,397	10,293	28.5	39.4
Visual and performing arts	6,675	8,708	8,520	8,714	8,416	8,506	7,925	47.4	56.6
Unclassified							4,144	(X)	54.8
Doctorate's, total	32,107	32,615	33,209	32,943	33,653	34,120	34,839	14.3	35.2
Agriculture and natural resources	1,086	991	1,172	1,213	1,158	1,049	1,142	2.9	18.9
Architecture and environmental design	36	79	84	89	73	92	98	8.3	32.7
Area and ethnic studies	144	151	139	137	157	132	142	16.7	50.0
Business and management	807	792	977	866	969	1,098	1,109	2.9	23.1
Communications	145	193	219	234	223	275	236	13.1	45.8
Computer and information sciences	128	248	251	248	344	374	428	16.4	11.2
Education	7,403	7,941	7,473	7,151	7,110	6,909	6,544	21.2	55.0
Engineering	3,638	2,507	2,981	3,230	3,410	3,820	4,191	0.6	7.0
Foreign languages	6,801	549	462	437	448	441	411	38.0	56.2
Health sciences	459	771	1,163	1,199	1,241	1,213	1,247	16.3	56.7
Home economics	123	192	279	276	311	297	309	61.0	73.5
Law	20	40	121	105	54	120	89	9.0	25.8
Letters	1,857	1,500	1,215	1,239	1,215	1,181	1,180	28.0	54.9
Life sciences	3,645	3,636	3,437	3,432	3,358	3,423	3,598	16.3	35.2
Mathematics	1,199	724	695	699	742	725	752	7.8	16.8
Multi/interdisciplinary studies	80	295	378	285	319	276	281	13.8	36.0
Philosophy, religion, and theology	866	1,693	1,644	1,608	1,680	1,658	1,612	5.8	14.0
Physical sciences	4,390	3,089	3,306	3,403	3,551	3,672	3,804	5.6	18.0
Psychology	1,782	2,768	2,973	2,908	3,088	3,123	2,988	24.0	54.3
Public affairs	185	372	421	431	385	398	474	28.8	49.4
Social sciences	3,659	3,219	2,911	2,851	2,955	2,916	2,783	13.9	33.5
Visual and performing arts	621	655	728	693	722	792	728	22.2	41.3
Other and unclassified	53	218	180	209	160	136	177	28.3	42.0

No. 285. Degrees Conferred in Selected Professions: 1960 to 1988

[First professional degrees. See Appendix III]

TYPE OF DEGREE AND SEX OF RECIPIENT	1960	1970	1975	1980	1982	1983	1984	1985	1986	1987	1988 ¹
Medicine (M.D.):											
Institutions conferring degrees	79	86	104	112	119	118	119	120	120	122	120
Degrees conferred, total	7,032	8,314	12,447	14,902	15,814	15,814	15,814	16,041	15,938	15,620	15,091
Men	6,645	7,615	10,818	11,416	11,867	11,350	11,359	11,167	11,022	10,566	10,107
Women	387	699	1,629	3,486	3,947	4,134	4,454	4,874	4,916	5,054	4,984
Percent of total	5.5	8.4	13.1	23.4	25.0	26.7	28.2	30.4	30.8	32.4	33.0
Dentistry (D.D.S. or D.M.D.):											
Institutions conferring degrees	45	48	52	58	58	59	60	59	59	58	55
Degrees conferred, total	3,247	3,718	4,773	5,258	5,282	5,585	5,353	5,339	5,046	4,741	4,351
Men	3,221	3,684	4,627	4,558	4,467	4,631	4,302	4,233	3,907	3,603	3,216
Women	26	34	146	700	815	954	1,051	1,106	1,139	1,138	1,135
Percent of total	0.8	0.9	3.1	13.3	15.4	17.1	19.6	20.7	22.6	24.0	26.1
Law (LL.B. or J.D.):											
Institutions conferring degrees	134	145	154	179	180	177	179	181	181	180	180
Degrees conferred, total	9,240	14,916	29,296	35,647	35,991	36,853	37,012	37,491	35,844	36,172	35,469
Men	9,010	14,115	24,881	24,893	23,965	23,550	23,382	23,070	21,874	21,643	21,124
Women	230	801	4,415	10,754	12,026	13,303	13,630	14,421	13,970	14,529	14,345
Percent of total	2.5	5.4	15.1	30.2	33.4	36.1	36.8	38.5	39.0	40.2	40.4
Theological (B.D., M.Div., M.H.L.):											
Institutions conferring degrees	(NA)	(NA)	(NA)	(NA)	(NA)	(NA)	(NA)	(NA)	(NA)	(NA)	(NA)
Degrees conferred, total	(NA)	5,296	5,095	7,115	6,901	6,494	6,878	7,221	7,283	7,181	6,474
Men	(NA)	5,175	4,748	6,133	5,817	5,395	5,673	5,886	5,865	5,794	5,088
Women	(NA)	123	347	982	1,084	1,099	1,205	1,335	1,418	1,387	1,386
Percent of total	(NA)	2.3	6.8	13.8	15.7	16.9	17.5	18.5	19.5	19.3	21.4

NA Not available. ¹ Preliminary.

Source: U.S. National Center for Education Statistics, *Digest of Education Statistics*, annual.

No. 286. Graduate Student Enrollment and Degrees Conferred in Selected Fields, by Race/Ethnicity: 1987

ITEM	NUMBER				PERCENT DISTRIBUTION			
	Total	Minority ¹	White ²	Non-resident alien ³	Total	Minority ¹	White ²	Non-resident alien ³
Graduate enrollment (1,000).	1,432	166	1,130	136	100.0	11.6	78.9	9.5
Degrees conferred: ⁴								
Masters	289,341	30,573	228,870	29,898	100.0	10.6	79.1	10.3
Doctorates	34,033	3,011	24,435	6,587	100.0	8.8	71.8	19.4
SELECTED FIELD								
Agriculture and natural resources:								
Masters	3,521	187	2,536	798	100.0	5.3	72.0	22.7
Doctorates	1,048	87	650	331	100.0	6.4	62.0	31.6
Business and management:								
Masters	67,504	6,721	53,582	7,201	100.0	10.0	79.4	10.7
Doctorates	1,094	91	688	315	100.0	8.3	62.9	28.8
Computer and info. systems:								
Masters	8,481	1,211	5,053	2,217	100.0	14.3	59.6	26.1
Doctorates	374	29	219	126	100.0	7.8	58.6	33.7
Engineering:								
Masters	22,046	2,694	13,343	6,009	100.0	12.2	60.5	27.3
Doctorates	3,807	358	1,672	1,777	100.0	9.4	43.9	46.7
Mathematics:								
Masters	3,319	327	2,113	879	100.0	9.9	63.7	26.5
Doctorates	723	56	349	318	100.0	7.7	48.3	44.0
Physical sciences:								
Masters	5,630	450	4,062	1,118	100.0	8.0	72.1	19.9
Doctorates	3,671	255	2,441	975	100.0	6.9	66.5	26.6
Social sciences:								
Masters	10,395	934	7,441	2,020	100.0	9.0	71.6	19.4
Doctorates	2,915	244	2,051	620	100.0	8.4	70.4	21.3

NUMBERS OF TEACHERS IN APPROVED LAW SCHOOLS, 1989

	Total	Women	Minorities
Full-Time	5,202	1,237	451
Part-Time	3,422	807	275
Deans & Administrators	1,229	609	137
Librarians	1,117	732	111

LEGAL EDUCATION AND BAR ADMISSION STATISTICS 1963-1989

Academic Year	Number of Schools	First Year Enrollment	First Year Women Enrollment	Total J.D. Enrollment	Total J.D. Women Enrollment	Total Overall* Enrollment	LSAT Administrations	J.D. or LL.B. Awarded	Admissions to the Bar
1963-64	135	20,776	877	46,666	1,739	49,552	30,528	9,638	10,788
1964-65	135**	22,753	986	51,079	2,056	54,265	37,598	10,491	12,023
1965-66	136	24,167	1,064	56,510	2,374	59,744	39,406	11,507	13,109
1966-67	135	24,077	1,059	59,236	2,520	62,556	44,905	13,115	14,644
1967-68	136	24,267	1,179	61,084	2,769	64,406	47,110	14,738	16,007
1968-69	138	23,652	1,742	59,498	3,554	62,779	49,756	16,077	17,764
1969-70	144	29,128	2,103	64,416	4,485	68,386	59,050	16,733	19,123
1970-71	146	34,289	3,542	78,018	6,682	82,041	74,092	17,183	17,922
1971-72	147	36,171	4,326	91,225	8,567	94,468	107,479	17,006	20,485
1972-73	149	35,131	5,508	98,042	11,878	101,707	119,694	22,342	25,086
1973-74	151	37,018	7,464	101,675	16,303	106,102	121,262	27,756	30,879
1974-75	157	38,074	9,006	105,708	21,283	110,713	135,397	28,729	30,707
1975-76	163	39,038	10,472	111,047	26,020	116,991	133,546	29,961	34,930
1976-77	163	39,996	11,354	112,401	29,343	117,451	133,320	32,597	35,741
1977-78	163	39,676	11,928	113,080	31,650	118,557	128,135	33,640	37,302
1978-79	167	40,479	13,324	116,150	35,775	121,606	125,757	33,317	39,086
1979-80	169	40,717	13,490	117,297	37,534	122,860	111,235	34,590	42,756
1980-81	171	42,296	15,272	119,501	40,834	125,397	112,750	35,059	41,997
1981-82	172	42,521	15,811	120,879	43,245	127,312	111,373	35,598	42,382
1982-83	172	42,034	16,136	121,791	45,539	127,828	118,565***	34,846	42,905
1983-84	173	41,159	16,049	121,201	46,361	127,195	111,620***	36,389	41,684
1984-85	174	40,747	16,236	119,847	46,897	125,698	104,621	36,687	42,630
1985-86	175	40,796	16,510	118,700	47,486	124,092	95,129	36,829	42,450
1986-87	175†	40,195	16,491	117,813	47,920	123,277	91,921	36,121	40,247††
1987-88	175†	41,055	17,506	117,997	48,920	123,198	100,751	35,478	39,918††
1988-89	174	42,860	18,395	120,694	50,932	125,870	115,407	35,701	46,528
1989-90	175	43,826	18,722	124,471	53,113	129,698	136,367	35,520	47,147†††

NOTES: Enrollment is that in American Bar Association-approved schools as of October 1. The LSAT test taker volume is given for the test year ending in the first year stated. Thus, 136,367 administrations occurred in the test year June, 1988, through February, 1989. J.D. or LL.B. degrees are those awarded by approved schools for the academic year ending in the first year stated. Thus, 35,520 degrees were awarded in the year beginning with the fall, 1988, term and ending with the summer, 1989, term.

Total new admissions to the bar are for the 1989 calendar year and include those admitted by office study, diploma privilege, and examination and study at an unapproved law school. The great bulk of those admitted were graduated from approved schools.

*Total overall enrollment includes post-J.D. and other.

**Stanford enrollment not included.

***These are updated figures for 1982-83 and 1983-84.

†This number includes Oral Roberts University, Coburn School of Law, which terminated its program effective June 1, 1986. However, the Council advised it to retain degree-granting authority for those former students who completed satisfactorily 30 additional hours in ABA-approved law schools by Sept. 1, 1988.

††No data was available from New York state in this year, thus figure is lower than prior years'.

†††Includes 439 admitted by diploma privilege. It does not include admissions on motion by a jurisdiction of attorneys from other jurisdictions, which totaled 6,142.

***A Review of
Legal Education
in the United States
Fall, 1989
Law Schools and
Bar Admission
Requirements***

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12TH STORY of Level 1 printed in FULL format.

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August 19, 1992, Wednesday, Late Edition - Final

SECTION: Section D; Page 20; Column 1; National Desk

LENGTH: 923 words

HEADLINE: Fullback Sues School Over Her Injury

BYLINE: By FELICITY BARRINGER, Special to The New York Times

DATELINE: WASHINGTON, Aug. 18

BODY:

Tawana Hammond, her lawyer says, was just entering her senior year and was the fastest runner at Francis Scott Key High School, on the northwestern fringe of Baltimore's suburbs, when she tried out for the football team.

Three years later, she is missing half her pancreas, has amassed what her mother says are medical bills exceeding \$200,000. And she is suing the Carroll County Board of Education because, she contends, no one told her "of the potential risks of serious and disabling injury inherent in the sport," according to a lawsuit filed in the county's Circuit Court last week.

The legal theory at the heart of her case, "failure to warn," is a staple of product-liability law that has migrated over the years to other arenas, including high school sports, coaches and lawyers say. One result is the warning labels now attached to the helmets used by the nation's 950,000 high school football players, labels that warn of death and paralysis as potential consequences of participation.

But while the basic premise of the case may not win the support of the state's appellate judges, its mere existence is a new marker in the continuing debate being played out in the nation's courts and legislatures over who should assume responsibility for life's risks, and who gets stuck with the bills and the blame when things go wrong.

Miss Hammond's case, reported in The Baltimore Sun today, is noteworthy largely because of its eye-catching assertion that neither she nor her mother were aware of the risks inherent in one of the country's most popular, televised, talked-about -- and violent -- sports.

How could the Hammonds have missed the violence in the sport they saw on television?

"They don't tell the stories on TV," said Peggy Hammond, Tawana's mother, in a brief telephone interview today from her daughter's Baltimore home. "You hear about a football player getting a knee injury. They don't tell you about nearly dying."

Mrs. Hammond said her daughter, playing fullback, was expected to carry the ball and get tackled. Peggy Hammond confirmed The Sun's account of her daughter's injury. It said that when Tawana was tackled in a pre-season

scrimmage, she fell on the knees or feet of another player.

Miss Hammond, her mother said, needed 22 units of blood during her 10-week stay in the intensive care unit. "She was in shock trauma on the critical list for two and a half months," Mrs. Hammond said. Citing lawyers' advice, Mrs. Hammond declined to have her daughter comment on the case.

Daniel H. Green, one of the family's lawyers, said that Tawana Hammond had hoped to join the military and study oceanography, but that her injuries prevented this. She is now a security guard in Washington.

A spokesman for the Carroll County Board of Education refused to comment on the case today, beyond confirming that Tawana Hammond had graduated from Francis Scott Key High School in 1991.

Ned Sparks, the executive secretary of the Maryland Public Secondary Schools Athletic Association, said state rules require a parent's permission and a doctor's examination before a child may play sports, and require all coaches to be trained in the care and prevention of injuries.

"To do anything there's risk," Mr. Sparks said. "If you put on your sneakers and jog in Central Park, you are at risk. You could turn your ankle. Should your sneakers have labels on them? Should your car have a label on it? Anything we use is deadly. We might as well just carpet the world with labels."

The suit asks for damages because of the "failure to warn" and because, it asserts, the school football coach wrongfully assured Mrs. Hammond that her daughter had insurance coverage for the Aug. 25, 1989, pre-season scrimmage, even though Mrs. Hammond had not yet paid the required premium for the "accidental injury" coverage.

'Double Bind' — excellent point! (and quite accurate)

"It sounds ludicrous to us," Bob Ottewill, Commissioner of Colorado's High School Activities Association, said of the suit. He and others associated with high school sports said a case like Miss Hammond's put them in a double bind because she was a woman playing a predominantly male sport. Public-school officials are bound by the rules of Title IX, the Federal law that forbids discrimination against female athletes.

Bill Young, executive director of the High School Activities Association in Idaho, where in 1990 there were 23 female high school football players, said: "What is amazing is that, if you say, 'No, she can't play,' you're sued for discrimination. If you say, 'She can play,' you can be sued for this.'"

But Mr. Green, the Hammond lawyer, said, "Gender has nothing to do with this" and the same rules would apply if his client were male.

Dick Schindler, a spokesman for the National Federation of State High School Associations, the umbrella group for public high school sports, said even states had girls playing football at the high school level during the 1990 season: California with 39, Colorado with 58, Idaho with 23, Georgia with 11, Arizona with 2, and Indiana and Wyoming with one each.

— Note: States.

Mr. Schindler had no separate listing of serious injuries by sex, but said that 61 players had died as a result of contact in a football game in the 12 seasons from 1980 through 1991. This average of about five a year is less than a quarter of the fatality rate in the late 1960's.

Mr. Young said most girls involved in high-school football play in ninth grade. "There are very few girls on varsities, and they are usually kickers," he said.

SUBJECT: FOOTBALL; INTERSCHOLASTIC ATHLETICS; ACCIDENTS AND SAFETY; SUITS AND LITIGATION; WOMEN

ORGANIZATION: FRANCIS SCOTT KEY HIGH SCHOOL (MD)

NAME: HAMMOND, TAWANA; BARRINGER, FELICITY

GEOGRAPHIC: CARROLL COUNTY (MD)

LEVEL 1 - 64 OF 249 STORIES

Copyright 1992 The Atlanta Constitution
The Atlanta Journal and Constitution

March 24, 1992

SECTION: EDITORIAL; Section A; Page 11

LENGTH: 610 words

HEADLINE: Kids learn about civil suits before civil behavior

BYLINE: By Debbie M. Price

KEYWORD: sex; violations; abuse; lawsuits; children; teenagers; families; courts; ruling; legislation; opinion

BODY:

FORT WORTH, Texas - It looks like we have a new epidemic on our hands.

Sexual harassment, The New York Times reports, has spread into the high schools. Girls who have been sexually harassed by boys are taking the schools to court.

In Minnesota, one girl settled with her high school last summer for \$ 15,000 after she filed a complaint with the state's department of human relations. The Times characterized the money as payment for "mental anguish. The school admitted no fault, nor was it cited by the human relations agency. The girl had complained about vulgar graffiti in a boy's restroom. The school removed the anonymous graffiti, but the slurs kept coming back.

In another Minnesota case, which is still pending after almost two years, a female student alleges sexual harassment because her name appeared with 25 others on a list of allegedly promiscuous girls.

A federal appellate court recently ruled in favor of a Pennsylvania student who claimed sexual harassment and the U.S. Supreme Court decided to allow monetary damages for sexual discrimination in schools. And that, the Times concludes, constitutes a trend.

If this is so, we're in worse shape than I thought. We are already the most litigious society in the world. You slip on your neighbor's sidewalk, you sue. Someone backs into your car, you sue. Boy Scout leaders, Little League coaches, they're all taking out liability insurance just in case your kid cuts his finger or gets beamed by a baseball.

On the sex front, it's no secret that relations between men and women are troubled these days. Everyone in the media is telling us this. The autumn of Anita Hill segued into the winter of Patricia Bowman and Desiree Washington. Sexual harassment (sometimes twinned with the Epidemic of Low Self-Esteem) has become to news magazines what the Disease of the Week is to TV melodrama.

This isn't to say that sexual harassment isn't real and isn't wrong. And this isn't to say that lawsuits aren't sometimes warranted. But when a high-school sophomore sues for harassment over restroom graffiti, you have to ask yourself where things went so wrong.

LEVEL 1 - 93 OF 249 STORIES

Copyright 1992 The Houston Chronicle Publishing Company
The Houston Chronicle

February 8, 1992, Saturday, 2 STAR Edition

SECTION: BUSINESS; Pg. 1

LENGTH: 727 words

HEADLINE: That's a wrap, Houston;
Final frame nears as last drive-in in area gives way to retail center

BYLINE: RALPH BIVINS, DAVID IVANOVICH; Staff

KEYWORD: Houston

BODY:

Houston's last drive-in movie theater is closing, ending an era of entertainment born when John Wayne was young and Elvis Presley lived.

The I-45 Drive-In, a six-screen theater at the North Freeway and West Road, will be torn down to make way for a shopping center.

"It's terrible, isn't it? It's like a funeral," said the drive-in's operator, Cotton Griffith, who has been a part of Houston's drive-in movie business since 1950.

The I-45 Drive-In opened seven years ago. "It was one of the last ones built and the last one to go," Griffith said.

The theater site had been up for sale for some time. But Griffith, 69, had held out hope that a sale would not occur.

Three days ago, he was told the theater would die. Griffith, who once owned a share of four Houston drive-ins, said he is saddened by the extinction of drive-ins.

Janice Phipps, manager of the drive-in, said, "It's sad. It's the only one left. I hate to see it go. It's been like a second home. Everybody's like family. . . . It's just fading away like everything else." The I-45 Drive-In, which is near Greenspoint Mall, was owned by the estate of Gordon McLendon. In addition to owning drive-in movies, McLendon was a broadcaster who pioneered Top 40 radio, popularizing pop hits and early rock 'n roll music.

A long-term lease for the 46-acre theater site has been obtained by Weber & Co., a Dallas development group.

In March, Weber will start to build a 355,000-square-foot retail center with Kmart, Builders Square and a Pace Membership Warehouse, said John Weber, head of the company. In a couple of years, a 200,000-square-foot second phase of the center will be built.

The capacity of the I-45 Drive-In was 3,500 cars, but it was rarely full. And it certainly wasn't a big money-maker.

LEVEL 1 - 31 OF 249 STORIES

Copyright 1992 The Times Mirror Company
Los Angeles Times

July 5, 1992, Sunday, Home Edition

SECTION: Long Beach; Part J; Page 2; Column 2

LENGTH: 606 words

HEADLINE: BEST BET: SOUTHLAND TITLES ARE UP FOR GRABS IN LONG BEACH SOAP BOX DERBY RACES

BYLINE: By SUSAN PATERNO

BODY:

When 11-year-old Mark Sanders Jr. rolls off the starting line in his prefabricated racer at the Southern California Championship Soap Box Derby race this weekend in Long Beach, he hopes to carry a family tradition to the finish line.

Mark's dad still has the yellowed newspaper clipping showing him racing in a soapbox derby when he was Mark's age. The recent rejuvenation of the sport is allowing the younger Sanders to dream about doing something his father did. He even dreams of becoming a champion.

"Everyone tells me my chances aren't real good," said Mark, who just finished fifth grade at the Monroe School in Lakewood. "But I think they are. I think I can do it if I try hard enough."

The Long Beach race is the first soapbox derby in Los Angeles and Orange counties in a decade, said John Taylor, who is promoting the Southern California championship. Not too long ago, derby racing was as declassé as bell-bottom pants, but a rekindled interest has led to a resurgence of local races, Taylor said.

Soapbox derby racing began in 1933 in Dayton, Ohio, when 12-year-old Bob Gravett won the first race in Ol' No. 7, made from an ironing board, a clothesline, tricycle wheels, a screen door, springs and a trash can. The sport reached its zenith in the late 1960s, when U.S. automobile manufacturers spent more than \$1 million annually promoting it. The companies withdrew their support because they were reluctant to pay for liability insurance, and local events dwindled, Taylor said.

Today, parents are pushing the sport back into prominence. "Parents are looking for something for their kids to do besides Little League," said Mark's mother, Candy.

Friday, Saturday and Sunday ore than 60 racers -- about 40% of them girls -- will compete in three divisions for ages 9 through 16. Winners will race in Akron, Ohio, in August at the Soap Box Derby National Championship.

The Long Beach race is "as fair as it can be," Taylor said. "Nobody is given an edge." Many competitors purchase stock-car kits for \$215 from derby national headquarters in Ohio. Every racer is weighed and the cars outfitted with ballast to make sure each is evenly matched. Competitors roll down a quarter-mile hill

Los Angeles Times, July 5, 1992

for about a minute, traveling at speeds up to 40 m.p.h. Roughly 60% of the races are decided within three-tenths of a second, Taylor said.

"Any kid can win," he said. "It comes down to how they steer the car."

Mark Sanders Jr. constructed his fiberglass car from a kit. With help from his dad and grandfather, and thanks to his own experience building skateboard ramps, Mark finished the racer in eight hours. It took considerably less time than Mark's dad remembers spending on his racer in the late 1950s.

"It was a lot different back then. We had to make the floorboard out of wood, make a brake assembly, build the whole thing by hand," the father said. "It took three months."

On Saturday, race registration will begin at 8 a.m. with the first heat for the Mayor's Cup beginning at 10. The races are expected to last all day. On Sunday, the event will start at 9 a.m. with 1991 champion Danny Garland doing the first run down the hill. Competition will begin at 10 a.m. and last until 5 p.m.

Vendors will sell food both days at the race site, 2100 Obispo Ave., Long Beach, between 20th and Hill streets. Parking is ample and free in two adjacent lots. Spectators will be admitted free. Racers pay a \$25 entry fee.

Ol' No. 7, now insured for more than \$1 million, will be on view during both days of the race.

For more information on the race or on ordering a kit, call (800) 350-1933.
SUSAN PATERNO

GRAPHIC: Photo, Mark Sanders Jr. watches his father, Mark Sr., and grandfather, Doug, remove car from garage. RICK CORRALES / Los Angeles Times; Photo, Mark Sanders Jr., 11, of Lakewood, flanked above by his father and grandfather with race promoter John Taylor at left

TYPE: Column

No Holds Barred

Judicial Restraint? The Rule of Law?
In Today's Lawsuits, Anything Goes.

By John G. Kester



When the American frontier began around Hagerstown, a popular amusement of settlers was the "rough-and-tumble fight." What made such contests unique was a total absence of rules. Kicking, clawing, gouging, and biting were not only acceptable but expected. Travelers wishing to avoid these spectacles were advised that one way to identify a respectable inn was to count whether the landlord still possessed two ears.

Rough-and-tumble fighting was brought to this country by settlers from

England. Another favorite activity of English origin was lawsuits and prosecutions. Our forebears often took each other to court over petty quarrels. As with the no-holds-barred fights, the public once again found the kind of entertainment that filled idle time and stirred the blood.

Two hundred years later, the predilection for lawsuits has not diminished, but their quantity and scale have expanded beyond imagination. This legal hypertrophy has begun to be noticed, although most Americans still are not aware that the US legal system now is different from the one under which their parents lived. The multiplication of lawsuits and

lawyers would be enough by itself to alter both society and law. For quantity, as the systems analysts like to say, has a quality all its own.

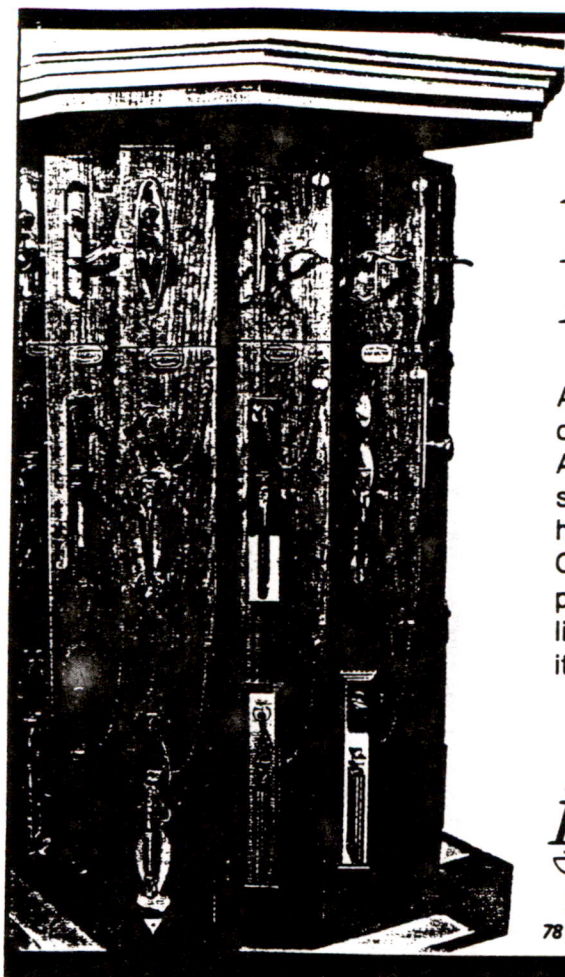
But the change is not just in volume. In his new book, *The Litigation Explosion*, Walter K. Olson of the Manhattan Institute, a New York City think tank, shows that, more as cause than as effect, the law itself has changed. His focus is not the big Supreme Court cases. Rather, he looks at the real law that steers people's daily activities—the first-year-law-school curriculum of torts, contracts, and civil procedure.

Olson demonstrates that the common law is not the only bit of Anglo-Saxon DNA in our legal genes. From his colorful and accurate book, one is forced to conclude that the American legal system of 1991 now also resembles that other cultural antecedent, the fight with no rules.

Partly, the crowding of court dockets reflects a changed notion of what is respectable behavior. More cases are in court because more people are suing. No law has forced them to do so, although some modern statutes make it almost risk-free, and *LA Law* implies that to do so can be chic. Provocateurs of litigation, who used to be denounced in judicial opinions as "officious intermeddlers," now are more likely to be praised in heroic terms, as "private attorneys general" or "whistleblowers." Our culture was always more litigious than most, but at least dignified people used to feel embarrassed if they took others to court. The stigma is gone.

Beyond the greater social toleration for litigation, there are more substantial causes hidden within contemporary law itself. None is labeled "new legal doctrine that will stir up more litigation." But that is exactly what the changes Olson identifies have done. They have altered the incentives for suing, so that rational people more often can expect a payoff for doing so. Olson tells how, in the past fifty years—with a crescendo in the most recent twenty—"America changed the rules in its courtrooms to encourage its citizens to sue each other."

His book's title, *The Litigation Explosion*, is apt, because an explosion describes not just a billowing expansion of hot gases but also a powerful destructive force. The legal disaster today involves not only numbers, but deterioration of the law itself. Olson's contribution, and the unifying theme of his



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child's parents for his own alleged loss of her "consortium"—affection, assistance, and other intimate pleasures.

Jurisdiction. First-year law students are routinely taught to scoff at the old days when a person could not be forced to defend a lawsuit except in the court where he lived or, if he crossed a state line, where the sheriff could tag him with a summons. For half a century, and partly for such good reasons as catching reckless out-of-state drivers, the geographical restrictions on what is called "personal jurisdiction" have been methodically knocked down until almost none are left. Now it is not unusual for anyone to be sued anyplace, including places he has never seen, as long as any trivial connection can be dreamed up—a long-distance telephone call, say. The Supreme Court didn't create this mess, but seldom has interfered. Congress, which has ample power to correct it, has no inclination to do so. The result is more suits, and more suits in places that plaintiffs like.

Modern rules also allow "class actions" that encourage suits in the name of a group whose members otherwise wouldn't bother to sue. In class actions the big winner, if anyone, is the lawyer; when plaintiffs come in bunches, the lawyer, not the client, runs the show.

Trial by expert. Once upon a time the witnesses in a lawsuit all were people who took the stand and said things like, "Yes, I saw him pull the trigger," or, "The light was red when the car drove through it." Now, in most of the big-money litigation, and even auto-accident cases, the key testimony often comes from "experts" for hire. Some advertise in legal journals in what Olson accurately calls "a vast bazaar of testimony that can be had for a price."

With great authority these savants tell juries what in theory no ordinary person could possibly figure out, often based on such mushy "sciences" as accident reconstruction or "clinical ecology." Years ago, many such gurus would have been bounced down the courthouse steps. Now many judges welcome such testimony to instruct juries "for what it's worth," even though most real scientists regard it as totally bogus. If the testimony is allowed, the plaintiff has evidence; if there is evidence, the case gets to the jury; if the case gets to the jury, a pathetic plaintiff is not likely to go uncompensated whether or not the defendant was really at fault or really caused the injury.

Pleading. In older days, suit papers had to be worded clearly and meticulously, to tell the defendant exactly what he was being sued for; even slight omissions could land a plaintiff out of court. In 1938 new federal rules, which by now have influenced most of the states,

switched to a view that the initial complaint needed only to give a sort of general notice that a dispute existed and a lawsuit had begun. Uncertainty about details would presumably disappear after the parties went through each other's files and answered hundreds of questions from each other's lawyers. Such "pretrial discovery" has come to consume many hours of lawyers' time and to generate many billable hours.

In words that belong in all civil-procedure texts, Olson explains that, "Nowadays it is routine for the 'pleadings' with which a lawsuit begins to be maximally alarming but minimally informative. They are at most a kind of air-raid siren, warning that the enemy is about to attack but not from which direction or how."

In California, whose busy courts have been at the forefront of untraditional litigation, if a plaintiff fails to satisfy even the current relaxed standard, it is routine to keep the lawsuit going and allow a faulty complaint to be amended over and over until the lawyer gets it right. Throwing any complaint out of court is regarded as dreadfully harsh.

Law that is less precise is less difficult for plaintiffs. Tolerating vague claims makes it possible for some attorneys to practice law who would be casualties under a more demanding system. Allowing claims to be framed based on only

the most general legal theories encourages more lawsuits to flourish, or at least to linger.

Because procedure has become so permissive, and legal rules so unpredictable, the lawyer today finds that the hardest professional job is to advise a client ahead of time as to whether a proposed activity is legal. The answer

There can be no equal protection of the laws if there are no clear laws to consult.

most often sounds like the weather report: 20 percent chance clear, 50 percent partly cloudy, 30 percent thunderstorms. Whatever happens, we called it. Conducting a lawsuit afterwards is much easier.

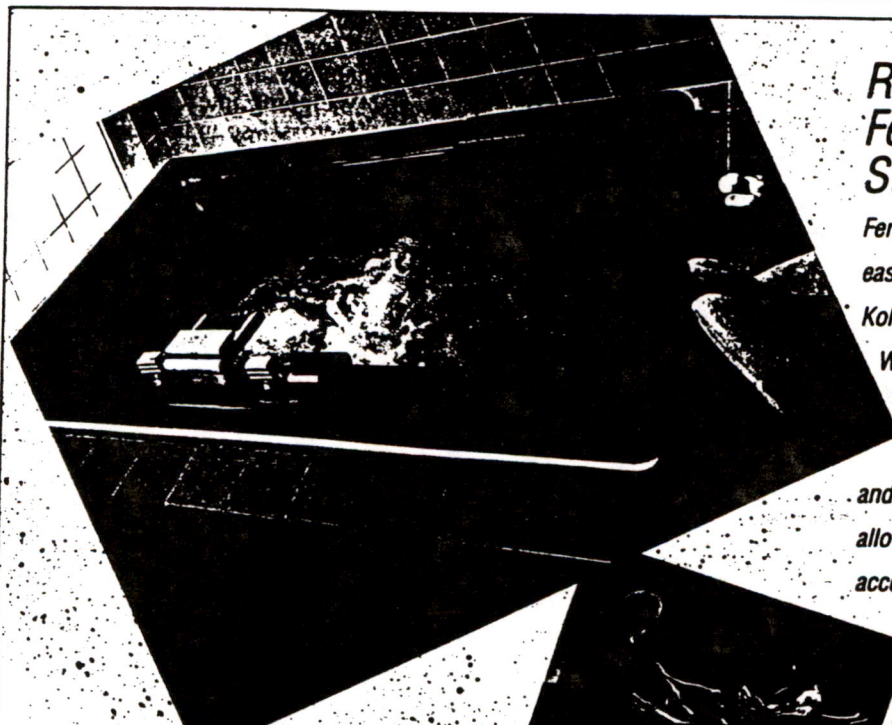
Other costs of the legal revolution add up both in dollars and in oppressiveness.

When individuals and companies cannot confidently plan by contracts that they know will be enforced, they either must bear greater risks and anxieties or simply scrap their plans.

Evenhandedness diminishes. With fewer preset rules, the decisions of judges and juries are more likely to be scattered all over the lot, depending on which judges and jurors one draws. The optimist will say that justice has been very finely tuned to fit the particular case. The skeptic will see an end to equal protection of the laws. There can be no equal protection if there are no clear laws to consult.

The obverse of the shiny coin of new rights is a whole set of new duties, often vague but nearly always enforceable by lawsuits. Society takes on a heavier, moralistic tone, with more and more obligations imposed not by parties on themselves but by the state through its judges or legislature.

The costs of this legal revolution are enormous. The inability of business people or ordinary citizens to have any confidence that by contracts they can arrange their own affairs is a significant loss of freedom in itself. But the threat of tort liability lurking in almost any human activity, and most commercial activities, adds a cost that, because it is impossible to predict or quantify, is also impossible to insure against at reasonable rates. Some businesses simply close up and their products no longer are available. Others, if they can, raise prices: One-third of the cost of a prescription reflects



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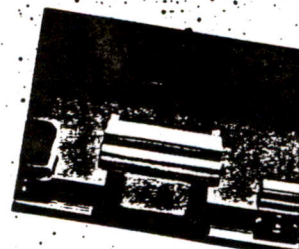
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hedging against litigation; \$300 of the obstetrician's bill covers malpractice insurance, and fewer physicians want to become obstetricians. Foreign producers roll their eyes in disbelief at the lottery-justice liability system that has become the custom here. Peter W. Huber, a colleague of Olson's at the Manhattan Institute, in his excellent 1988 book, *Liability*, estimated the cost of the tort system at \$80 to \$300 billion per year. And legal institutions have no way of measuring the enormous "transaction costs" of litigation itself.

The contemporary dismantling of law started in the 1930s when some progressive professors and judges concluded that legal habits should loosen up and reject "rigid formalism." They succeeded. The results took a while to work through a generation or two of law students and into hundreds of volumes of court decisions.

Law now has been shorn of most "mechanical rules" and therefore of much certainty. This leaves leeway for judges to decide one way or the other on the law in any particular case and plenty of opportunity to buck all difficult issues to juries under vague instructions that amount to "do what you think best." Passing issues to juries guarantees that similar cases sometimes will not come out the same way.

The purpose of a "rigid" or "mechanical" or "formal" rule was to force different judges to decide cases the same way. "Weighing interests" and "balancing factors" sounds judicious, but more often it is the antithesis of law. A rule—as in "rule of law"—means that like cases will be decided with like results, no matter who is the judge, who the jury, and who the parties. But variable results, unpredictable in advance, encourage more plaintiffs to try for a win.

A legal swamp called "conflict of laws" was where the heresy first appeared. Conflict of laws is a legal topic concerned with what state's law applies when events involve more than one state. The courts by the 1920s, applauded by a now-despised law professor named Beale, had developed a short series of rules that could be applied by any quick fourth-grader. For torts, for example—if you shot someone across the state line, the law of the place the bullet strikes would govern. They even put it into Latin—*lex loci delicti*—to sound eternal. For contracts—unless the parties provided otherwise—the law of the place of signing controlled. And so on and so on—until just before World War II, when some law school professors found the "rigid formalism" of the rules too "mechanical," and so did a few judges,

whom the professors then praised as "creative" and "innovative" jurists.

Would it not be more modern, they said, to "weigh" in each case the "interests" of each state and decide according to the law of the state with the heavier interests—or, as some later took it further, the state with the "better" law, usually meaning by that the one that would pay off for the plaintiff (or, as it is more delicately put, "provide relief").

By the 1960s, those of us then in law school had caught on that conflict of laws was three easy credits that did not require study or class attendance. For the final exam, the answer to any question always was "weigh the interests," and the more imaginative interests you could concoct, the higher your grade.

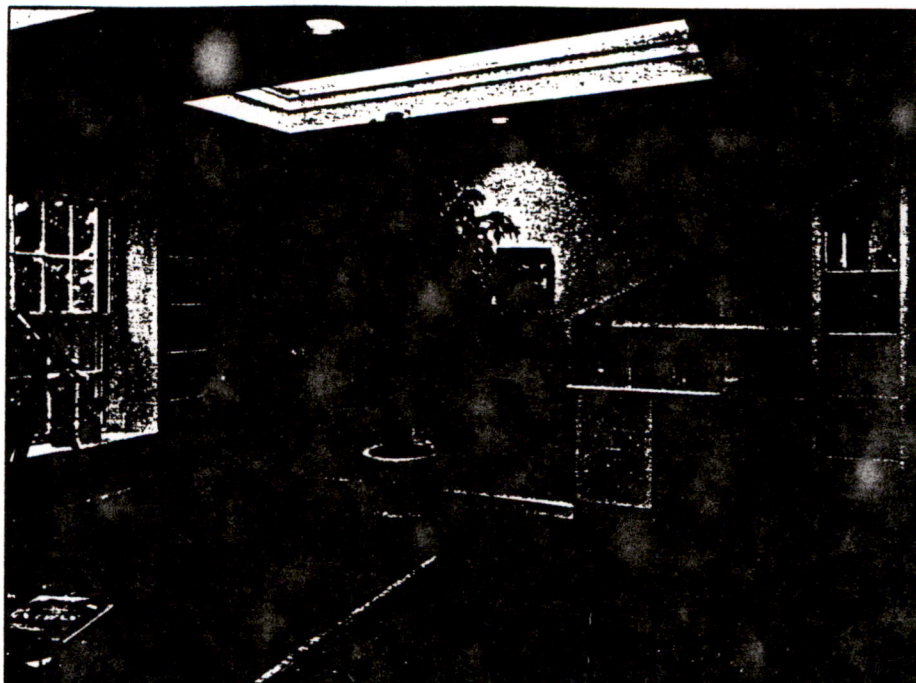
Few students today even bother to study conflict of laws. But nowadays the same answer applies to large chunks of virtually every course in the curriculum and—because, as they say, teachers affect eternity—now to hundreds of court decisions on everything from property rights to constitutional law as well. The trouble is, weighing the interests in each particular case is not law. The disappearance of comprehensible and dependable doctrine leaves the legal horizon featureless. And if there is no certainty what will happen, why not take your chances and sue?

A leitmotif sounded intermittently in Olson's book is the baleful role of the law schools in destroying the law. He has a point. Moreover, they have walked away from the mess.

In Washington earlier this year, Judge Richard A. Posner of the federal appeals court in Chicago chided a meeting of legal academics for their "complete neglect of what is after all the great story of American law of the modern era, and that is the extraordinary growth in the size of the profession since 1960, accompanied by an extraordinary increase in the volume of litigation and other legal activities."

The neglect is indeed striking. But it is perhaps not surprising, because law schools focus intensely on arranging outcomes in individual cases—where often there is a strong emotional tug to pay an injured plaintiff money—but only vaguely on what the theories they invent do to the economy and social fabric of the United States. Most law professors, nearly all of whom are ordinary lawyers with no advanced degrees, would not have the training to make the inquiry. Studying, as opposed to guessing at, the real-world results of legal doctrine is not something that law schools are set up to do.

The incentive structure for law professors does not direct them toward



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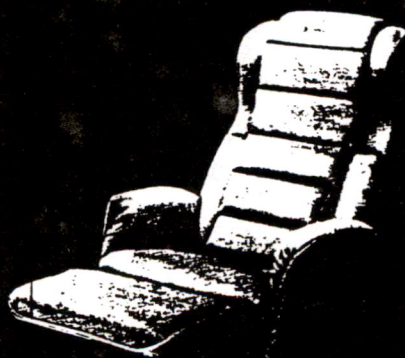


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maintaining a static and settled system. They are as a group extremely intelligent, not inclined to self-doubt, and Robin-Hood-oriented in political predilections. They think about cases. They are not well tuned in to consequences.

Law professors understandably find intellectual satisfaction in dreaming up new theories and arguments and approaches. A settled jurisprudence is far less stimulating. To come up with a creative idea for some new way to hold a manufacturer liable may result in a published law-review article and a sense of professional fulfillment. It surely beats pounding into the heads of students, year in and year out, that an offer is not effective until received, but an acceptance is irrevocable as soon as it hits the mailbox. (Or is it the other way around?) It is hardly the professors' fault if some judges take their theories seriously or if their students lap it up and then go out and sell it to judges, either as law clerks whispering behind the bench or lawyers arguing in front of it.

To find concern about the problem Olson discusses, do not travel to the great law schools of this country. Their faculties still are barely aware that the system is sick, and to the extent they sense any change, many tend to shrug or even to believe it an improvement.

One professorial faction, the "critical legal studies" crowd, has perceived some of modern law's formlessness, but drawn all the wrong conclusions. The "crits" celebrate the demolition of legal rules, which they say were just a fig leaf to conceal arbitrary domination of the weak by the strong. Their program is not to make law more predictable, but to grab political power.

Most law professors probably would say that our law is more interesting than it was a generation ago. They helped to make it so. Perhaps it is, in the same sense that a painting by Titian is more interesting than an anatomy book. But for your appendectomy, which would you prefer to have your surgeon consult?

If not in academia, there is sporadic concern among practicing attorneys about what has occurred, coming mainly from defense lawyers who begin after a while to vibrate sympathetically with their quivering clients' frustration—even in spite of their own profitable role in the system—and a little bit from some younger attorneys who have the uneasy sense that they have signed onto a professional chain letter that cannot continue indefinitely to make all the players rich. The American Bar Association is not complaining, although it wants still more judges. Because lawyers tend not to think about public policy much, and most non-lawyers are unable to question what all the jargon means, there is almost no sophisticated discus-

sion of what has happened to legal doctrine and not enough on what the intellectual collapse of the legal system is doing to our country.

Olson's presentation has a few flaws but not of the kind that undermine his thesis.

First of all, he never mentions the obvious: that lawyers, including the plaintiffs' bar, can and do accomplish a great deal of good for society as well as for their clients. Ordinary people too often have difficulty getting anyone other than lawyers to pay attention to their problems. As the state has grown in power, more lawyers are needed to offset it.

Occasionally Olson mistakenly points to the criminal-justice system as superior to the civil. No doubt this is because he has never been a criminal and hasn't thought about the criminal-justice system as much. An indicted criminal defendant—and, as the prosecutors never tire of bragging, they can get a grand jury to indict a ham sandwich—may enjoy a presumption of innocence, but jurors may also figure he did something bad or he wouldn't be in the dock. Although criminal law has some important procedural protections, it lacks others. Unlike a civil defendant, a criminal accused has no right to take pretrial depositions of witnesses (as the government does) or to obtain a summary judgment—a pretrial ruling from the court that there is insufficient evidence to support the charge.

In its substance, criminal law has become hopelessly vague. People risk being prosecuted criminally now for virtually any intentional activity that in hindsight causes loss; if you are among an elite few, you may even get a special prosecutor, who will spend full time doing nothing but finding ways to prosecute you. Olson acknowledges that almost anything can be turned into a crime, as the federal mail fraud and odd conflict-of-interests provisions demonstrate. Given the choice, you would rather be a defendant on the civil side of the docket.

One of Olson's big targets is contingent fees—the common arrangement by which, instead of billing by the hour, the lawyer takes a share of whatever the plaintiff recovers, usually about one-third. But his case against the contingent fee is unconvincing. He argues that after buying a share of the case in this way, the lawyer's zeal and greed become uncontrolled, and questionable cases are pushed to court and to the limit.

But contingent fees do help plaintiffs who cannot pay hourly charges in advance to get legal help so they do not have to deal with insurance companies



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all alone. And by the time the hours are finally totaled, the fee often is quite reasonable.

The contingent fee stimulates less unruly litigation than the class action—another innovation justly criticized—which allows lawyers to corral large numbers of people with tiny individual claims and then collect a fee based on the total.

The real argument against contingent fees is quite different from Olson's nightmare. It is not that specialists look for the marginal cases but that they want only the sure things—the soda-pop bottle that blows up in the grocery customer's hand, the construction site that caves in, the airplane crash. Such claims are money in the bank. The lawyer's incentive often is not to take them to court but to settle quickly. If the recovery is large, the client probably is being overcharged for the amount of work it took. Lawyers should not charge as if they were being asked to play roulette when they are simply shooting fish in a barrel.

If, as Olson calls it, the "unleashed lawsuit" is a problem, what is the solution?

He has a few ideas. His big one, which no organized group of lawyers in this country dignifies by mentioning but which has been the law in Britain and many other countries for generations, is to make the loser of a lawsuit pay the winner's legal fees. With few lawyers billing at less than \$100 per hour and many three times that, the "transaction costs" of litigation are high. Currently, having to pay a great deal of money no matter what in order to defend puts an immediate pressure on a defendant to pay for a quick settlement.

The risk of having to pay the bills of the defendant's team of lawyers would surely focus the mind of the plaintiff who simply hoped to score a lucky win. It would vastly increase the pressure to settle at reasonable amounts. It also would scare off a few people with legitimate claims, but most would still find lawyers, as they do in Britain. Any system has its downsides, and the present arrangement, as our current legal mess demonstrates, has too many on one side of the ledger.

At the very least, Congress needs to get out of the habit it began in civil-rights cases of stimulating lawsuits by requiring losing defendants to pay plaintiffs' lawyers but not vice versa. That may make sense for reasons of fundamental national policy in the limited range of cases for which it was originally intended, but now such provisions are becoming frequent adornments of new federal laws on many subjects. Olson suggests we have reached a time when "people

who press their legal rights to the limit should be discouraged from imagining that they are somehow performing a public service."

Olson also wants to cut back on lawyer advertising, which the Supreme Court let out of the cage a few years ago. Not a bad idea, you will say, if you have seen some of the current TV ads. But because the Supreme Court invoked the First Amendment, only a few modest limitations seem likely.

Olson points out, though not at length, the folly of "punitive damages." Until recently a bit-player legal doctrine, punitive damages has become the star attraction. A civil lawsuit is supposed to compensate a winning plaintiff for his damage; if he was injured and suffered pain, money is included in the compensatory damages for that as well.

Punitive damages are not damages. They were invented for another purpose entirely: to give a monetary cuff on the cheek to a defendant who did something really rotten and knew it. Usually they were confined to intentional wrongs that could have been prosecuted as crimes, like assault and battery. Punitive damages were extracted from the defendant as punishment, over and above all the compensation he had to pay. The purpose was to teach the bully a lesson and

make an example to deter others from such antisocial behavior. The topic was scarcely mentioned in law school a generation ago.

Now punitive-damage demands, based on easy-to-allege claims that defendants acted recklessly or maliciously, are routinely passed along to juries for decision and setting a number. The \$3-billion punitive-damage award a

Until recently a bit-player legal doctrine, punitive damages has now become the star attraction.

Texas jury gave Pennzoil against Texaco in 1985 was only a notorious instance of what now goes on at slightly smaller figures in lawsuits all the time. This year two homeowners, already awarded \$189,000 from an insurance company that had not promptly reimbursed them for damage to their house, were handed an additional \$5 million by a jury as punitives. Lockheed Corporation recently was ordered to pay three former employees \$400,000 in damages, plus \$45 million as punishment.

It is pure insanity. A business must worry not only that it will have to pay for any damages it causes—which seems fair enough and can be insured against—but that it may be bankrupted as well if its actions strike a jury as wicked or if a plaintiff stirs up great sympathy. A newspaper that makes a slip may be hit not only for a big compensatory libel judgment—in which hurting someone's feelings often scores greater compensation than cutting off a leg—but also by a punitive judgment from a jury offended by the kind of news that paper prints. An ordinary person has cause to worry, too. Unlike the public schools, it is not possible to opt out of the legal system.

So far the Supreme Court has found no constitutional barrier to states hitting defendants with punitive damages, partly because the doctrine, although almost never used until recently and not nearly so promiscuously, is very old. The Court this March, in spite of Justice Sandra Day O'Connor's protest that punitive damages are "the antithesis of due process," backed away, explaining that "we cannot draw a mathematically bright line" between what is legal and what is not.

But simple justice demands that if defendants are going to be civilly punished and fined in this way, they ought at least to have the special protections of people



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punished through the criminal law—presumption of innocence, proof beyond a reasonable doubt, and standards announced in advance. Any state legislature could eliminate punitive damages, or require more proof, or set reasonable ceilings. But they show little interest in doing so.

Olson doesn't want more "deregulation" of lawyers. He attacks the permissive Supreme Court decisions allowing lawyer advertising. He complains that old offenses that used to be taken seriously—stirring up or subsidizing litigation—now are consigned to learned humor. He thinks that lawyers should be held more responsible personally for the damage their maneuvers cause to ordinary people, and reined in from gross forms of competition and stirring up lawsuits.

But deregulation at some other points might be a good idea. For example, law school should be cut back from three years to two. There never was a good reason for that length; it began years ago when Harvard Law School wanted to be seen as no less exalted than Harvard Medical School. The schools got the state legislatures to put it into law. A law student learns 75 percent of what is to be learned in law school in the first year, 15 percent to 20 percent in the second year, and in the last year a bunch of specialized data or skills that could as easily be picked up on the job. Third-year law students are mostly bored and counting the hours and learning very little.

Ending the misery sooner would also save a load of student debt. As Judge Laurence A. Silberman of the US Court of Appeals here observed, that debt load drives many new lawyers into firm practice and litigation when they might rather do something else. A shrinkage of the law schools, which have expanded hugely in recent years, might also concentrate them more on what they do best, which is school in technique, and less on what they do poorly, which is to study or provide insight into larger social issues.

It would also make more obvious the limited scope of the academic activity that transpires in law schools. In that connection, the pretentious "JD" (juris doctor) diploma most law schools have switched to in recent years should be done away with. Law graduates are not doctors. They are not original researchers at the frontiers of knowledge, and although they hash over court decisions, they seldom perform truly scholarly work. They are taught some useful and challenging ways of reasoning, some rhetorical skills, and incidentally how to look up things in books, but they do not belong grouped with Ph.Ds.

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law school is so popular with college seniors who are not inclined to become scholars and who don't have a marketable skill. The old practice of giving law graduates a second bachelor's degree more clearly reflected reality.

Finally, here are two other modest proposals that Olson might have recommended but didn't:

- Because much legal uncertainty and expense comes from leaving far too much to juries, trial judges should be prodded to block civil cases from trial when there are no serious factual disputes as to what happened. The process is called summary judgment. It is available virtually everywhere, but state judges in particular hate to use it. As elected officials, they would rather blame the jury for any result; just as important, judges cannot get reversed for failing to grant a summary judgment but can be and often are reversed for sticking their necks out and granting one. The Supreme Court five years ago began pushing federal judges to grant summary judgment more often when a plaintiff supports his claim with only a few bits of barely plausible evidence. Federal district judges began to respond, but many federal appeals court judges still haven't gotten the message and keep on reversing. The state courts, where most of the litigation goes on, remain a disaster area. In most of them, if a lawyer mentions summary judgment, he gets a funny look. Summary judgment, its opponents argue, threatens the right to trial by jury. Certainly it sets a boundary. But civil juries were traditionally intended to decide issues of fact, and not to operate with the almost limitless scope that some judges now give them.

- Some poor law is the product of poor judges, particularly—and with notable exceptions—in the state appeals and



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supreme courts. There is not much that can be done to control the whims of voters in the states, or even to prevent senators from foisting their former law partners or campaign managers on the president for federal nomination. But the jobs could be made less attractive to dilettantes by depriving them of large personal staffs to do their work for them. Judges in many courts are too abundantly served by law clerks who can write opinions to come out however the judge wants to decide, making the law more of a mess than it is. If appellate judges had fewer helpers and had to do more on their own (as the best ones do), interest in judicial positions might shift further to persons more learned in the law and more respectful of it.

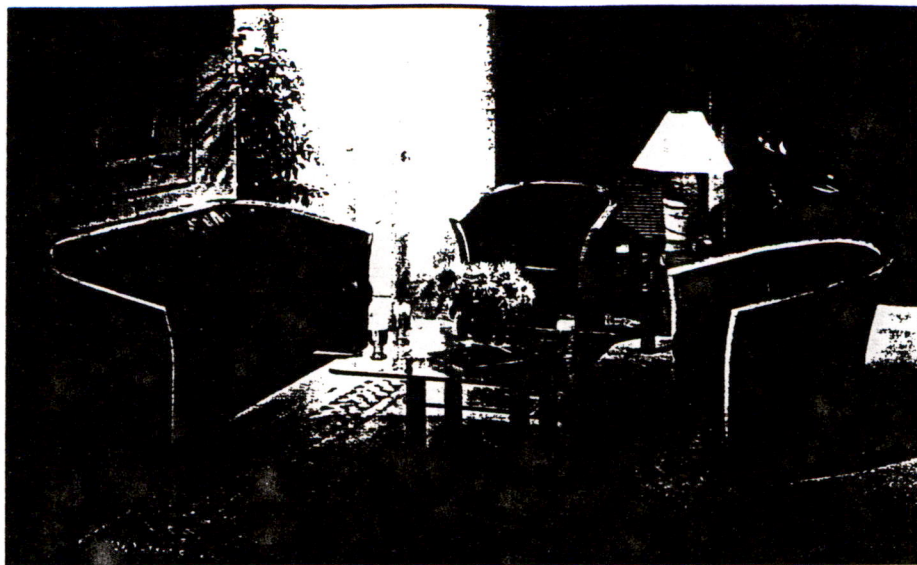
None of these changes nor those Olson proposes would alone vastly alter the litigation explosion, but collectively they might start to slow the trend and help bring some direction to what is now an uncontrolled disintegration.

But is that what Americans want? Suing is and always has been something we do well—much better than we make cars, for instance. In fact, we now are mediocre at manufacturing exactly because we use laws to tie up commerce, and we pay many of our brightest children to practice law instead of pursue careers that produce something.

It is not at all clear that the average person is disturbed by big recoveries by plaintiffs, especially from rich defendants—rich, that is, until they go bankrupt, like the asbestos companies. It is apparent that the interest groups that so dominate political funding, and legislators' votes, will never have so many rights that they will stop pushing for more. Using law to redistribute the wealth will always be attractive to most people, who assume they would get more. That much of the cost of all this ultimately gets shifted to everybody and makes the country far less productive than it otherwise would be is a fact less easy to measure than it is certain.

It is difficult, unless by precise legislation, to bring back clear rules once courts have destroyed them or fuzzed them up. It is the legal application of the second law of thermodynamics—the irreversible movement from organization to undifferentiated mush.

The people in charge of the law and lawsuits—the judges—can certainly do better than they have in recognizing what Justice Scalia called “the rule of law as a law of rules.” If the law becomes more predictable, boring, and cut-and-dried, there will be fewer lawsuits, and this country will more resemble a civilized polity and less a free-for-all.



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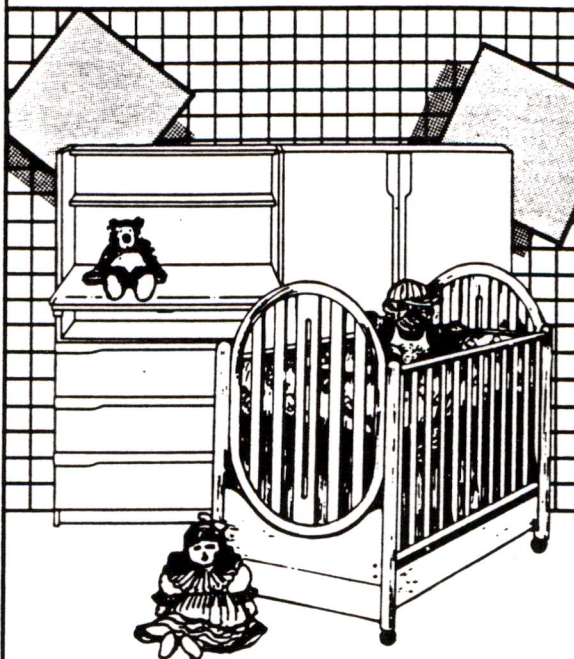
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The Clintons and the Lawyers ^{2/13}

President Bush claimed last week that Bill Clinton "is being backed by practically every trial lawyer who ever wore a tasseled loafer." But don't take his word for it. Listen to the trial lawyers who know Mr. Clinton best.

"I can never remember an occasion," writes David H. Williams, when Mr. Clinton "failed to do the right thing where we trial lawyers were concerned." Mr. Williams should know. As president of the Arkansas Trial Lawyers Association, he's been sending out fund-raising pleas for Governor Clinton to his fellow plaintiff's attorneys around the country.

"Can I recommend that your folks put their money behind Bill Clinton for president? Not just yes, but hell yes," Mr. Williams wrote on July 10 to the head of the Houston trial lawyers' group. "Dig down deep and give."

Some of our best friends are lawyers, but their solicitude as a class for Mr. Clinton deserves more exposure than it's so far received. The decline of the U.S. justice system is one of the major political issues of the 1990s. A nation that has 70% of the world's lawyers, and its most backlogged courts, is in danger of becoming less a nation of laws than a nation of lawyers and lawsuits.

Studies out of Brookings and elsewhere have estimated the burden of lawsuits on the economy from \$120 billion to as much as \$300 billion a year. But the social cost may be even higher. The threat of lawsuits has stopped the development of birth-control devices and made delivering babies a high-risk profession. A family is now suing in Maryland because of injuries its daughter sustained playing high school football. Her enterprising attorney claims the board of education failed to warn her of football's risks, a sport whose violence is on TV every autumn weekend. Had she been barred from playing, of course, the school could have been sued for Title IX sex discrimination. Now the costs of her playing will be borne by the school district's taxpayers — not to mention that some judge may well force them to drop football.

This social impact, by the way, is why Hillary Clinton's legal ideas are a legitimate issue, contrary to the view that every criticism of her intellect is somehow unfair. Pat Buchanan and other Republicans strain credibility when they say she equates "marriage" with "slavery." It's her advocacy of "children's rights" that is fair game. Mrs. Clinton has said that children should be "competent persons"

under the law with standing to sue.

The law already allows for this in cases of abuse, as it should, but Mrs. Clinton wants to go much further. "Decisions about motherhood and abortion, schooling, cosmetic surgery, treatment of venereal disease, or employment, and others where the decision or lack of one will significantly affect the child's future should not be made unilaterally by parents," she wrote in 1979. This is the sort of litigation liberalism that uses "rights" as a cudgel against the common sense decisions of communities. (In a letter nearby, the Children's Defense Fund denies that it's litigious.)

This world view is also why the plaintiff's bar so loves Clinton & Clinton. In Mr. Williams's fund-raising letter, he explains how legal reform was stopped dead in Arkansas in 1987. "We immediately got on the horn to the Governor about this and the tort reform part of the legislative package was pulled," Mr. Williams boasts. "It has never come back up."

He can barely contain himself. "During another session, I remember a bill that had whistled through the Arkansas House and Senate that would have given immunity from liability to 'good Samaritan' doctors who provided medical care to indigent patients," the trial lawyer writes. "Once again we got on the horn" to Governor Clinton, who vetoed the bill. This is the same candidate who claims to be outraged by the lack of health insurance for the poor.

It's not surprising that \$2.6 million, or more than 20%, of Mr. Clinton's contributions through May came from lawyers and lobbyists (who are usually lawyers), according to the nonpartisan National Library on Money and Politics. Even that understates things. The Association of Trial Lawyers of America has about 60,000 members, and their individual donations are hard to trace in federal campaign records. The Clinton campaign won't release its records, but a prominent plaintiff's lawyer, Robert Fogel of Chicago, sits on its national finance committee.

Mr. Clinton has artfully positioned himself as a new sort of Democrat who isn't beholden to traditional interest groups. But the tort bar, which has imposed a huge burden on the American system of government and commerce, is a stealthy interest group that has eclipsed unions in its financial support for Democrats. No wonder Mr. Clinton wants it all to remain a stealth issue.

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Forbes magazine
February 18, 1991

good
stats
@ last page



Having driven most of our asbestos companies into bankruptcies, litigators are going after any business that has had anything to do with asbestos.

IN DES MOINES, IOWA Judge James Brown recently upheld a \$506,000 asbestos injury award for Joseph Beeman. Beeman wasn't in court to hear the good news: He was too busy working as a plumber to attend more than two days of the three-week trial.

Nor did it matter that Beeman, who had fitted asbestos insulated pipes, suffered no clear ill effects from asbestos. His attorneys sought compensation for his "mental anguish and fear

**By Suzanne L.
Oliver and
Leslie Spencer**

concerning his increased risk of cancer." Fellow plumber James Eaton made the same claim in Judge Brown's court. Happily retired and wintering in Arizona, he sued 42 manufacturers, including Armstrong World Industries, Combustion Engineering and Union Carbide. Eaton lost his case before the jury. Even so, he collected an estimated \$20,000 from defendants who settled with Eaton before the trial.

If that seems stretching the law, consider this:

Asbestos suits

In Los Angeles last December, a jury awarded retired tire worker Simon Redditt \$155,000. This 75-year-old lifetime smoker walks 5 miles a day. He claimed past asbestos exposure caused him, among other things, shortness of breath.

These cases and 90,000 more like them go far beyond the 25,000 cases pending against asbestos manufacturers such as Johns-Manville and Raymark Industries by plaintiffs with asbestos-related lung cancers and asbestosis. Our populist-leaning courts are turning the asbestos issue into a giant lottery in which almost anyone can win and the consumers of America must ultimately pay.

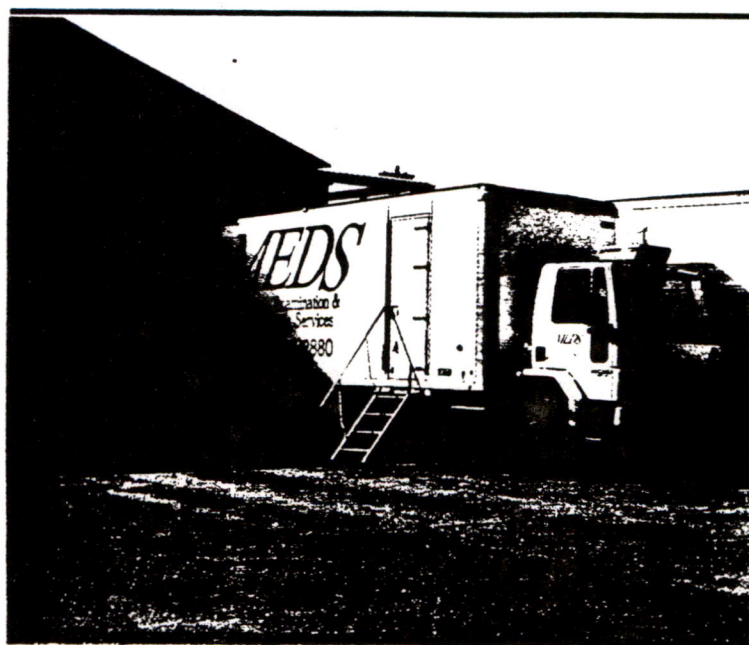
Who's caught in this morass? The list is long (see p. 77). Armstrong World Industries has 60,000 claims pending against it alleging asbestos-related disease from exposure to its asbestos-containing felts, adhesives and floor tile. The cost of settling those could reach \$400 million. Armstrong had less than a 5% share of the asbestos product market.

B.F. Goodrich is also on the hook for floor tile that plaintiffs allege released dangerous amounts of asbestos when it was cut for installation or removal. There are 16,000 suits against A.P. Green Industries for refractory products that usually contained just 1% asbestos—an immaterial amount, unless you're a personal injury lawyer. Foster Wheeler, too, is a defendant in 14,000 asbestos-related suits claiming injury from cements and block insulation that contained just 3% asbestos.

Right now there are 115,000 claimants in asbestos cases working their way through U.S. courts. Just 5,000—a bit over 4%—suffer from mesothelioma, the deadly cancer almost always caused by asbestos. Many of these unfortunate victims die before they collect their awards because the courts are so clogged with meritless claims.

Dr. Irving J. Selikoff's seminal 1965 study of asbestos insulation workers established a firm link between asbestos exposure and lung disease. Further investigation has established definitively that asbestos fibers can cause mesothelioma, the rare and fatal cancer that attacks the pleura, or membrane encasing the lungs. The fiber can also cause asbestosis, a buildup of scar tissue inside the lung that impedes lung function. The lung scarring typical of asbestosis has 100 other causes, including many viruses.

Asbestos may also cause scarring on the pleura either in diffuse thickening or in spots, called pleural plaques. Mainstream science has established that this scarring does not affect lung function, nor does it develop into lung cancer. Federal district judge Spencer Williams calls pleural plaques "freckles on the lungs." The case against asbestos is weakened by the fact that it is not the only cause of pleural scarring. Other



Just checking
In a process duplicated across the country, trial attorneys and unions have hired vans like this one, equipped with X-ray and breathing test machinery, to screen factory workers for traces of asbestos-related disease.

causes include tuberculosis and broken ribs.

Nor, of course, is asbestos the only or even the main cause of lung cancer. A nonsmoking asbestos worker is 7 times more likely to develop lung cancer than is the general population, while a smoker not exposed to asbestos is 11 times more likely. Together, smoking and asbestos exposure are lethal. The risk of dying of lung cancer increases by a factor of 61 when the two are combined.

Research has also demonstrated that not all asbestos fibers are equally dangerous. The most deadly is amphibole asbestos, used primarily in Navy ships in World War II. Chrysotile asbestos, used in 95% of U.S. asbestos products, is relatively benign (FORBES, Jan. 8, 1990).

Astonishingly, between 65% and 80% of the claimants in asbestos suits currently pending in the legal system have symptomless pleural scarring, pulmonary maladies unrelated to asbestos or no lung disease whatsoever. Many of their claims have been prompted by lawyers' ads like the one on page 78. It is trial lawyers, their paid medical experts and sympathetic judges and juries who have turned asbestos litigation into a giant grab bag.

Consider the National Tire Workers Litigation Project. In 1986 two Los Angeles-based personal injury attorneys, Gordon Stemple and Richard Gerry, founded the organization. It was an interesting device for stimulating business for the lawyers.

Why tire workers? Stemple and Gerry learned that tire workers were sometimes exposed to asbestos in the talc used on tire molds. To build a large base of claims, the Tire Workers Project hired two former United Rubber Workers union presidents and paid them to persuade

Guilt by association

Hundreds of asbestos defendants, including GE, GTE and Eaton, made relatively harmless products, such as gaskets and brake linings. Others, including Crown Cork & Seal and McDermott International, never made an asbestos product but bought assets from a corporation that did. Today they are spending millions defending 115,000 pending asbestos personal injury claims. Already 15 companies have been bankrupted. The companies in the chart are some of the defendants left picking up the tab. For some, an average case cost of \$5,000 would do serious damage to their net worth.

Company	Net worth (\$bil)	Offending products include	Estimated cases pending
Allied Signal	\$3.4	brake linings	15,000
Armstrong World Industries	1.0	cements, sealers, floor tile	60,000
Crown Cork & Seal	0.8	insulation	2,000
Dana Corp	1.0	packing, friction materials	75,000*
Dresser Industries	1.6	textiles, refractory materials	15,000
Fibreboard	0.1	cements, pipe covering	72,000
Foster Wheeler	0.5	boiler insulation	14,000
WR Grace	1.7	coatings	18,000
AP Green Industries	0.1	fire bricks, pipe covering	16,000
Keene Corp	0.1	plasters, cloth, pipe covering	76,000
Owens-Corning Fiberglas	-0.4	cements, textiles, pipe covering	82,000
Pfizer Inc.	4.5	coatings	14,000
Union Carbide	2.4	raw asbestos, sealer board	75,000*
US Gypsum	-1.4	spray coatings, plasters, paint	34,000
Westinghouse Electric	4.4	circuit breakers	3,000

*Member of Center for Claims Resolution, a group of 20 asbestos defendants who share litigation costs. The Center has 75,000 claims pending against its members, though each member isn't named in every suit.

Sources: Owens-Corning Fiberglas Asbestos Litigation Reference Series; Center for Claims Resolution; *Forbes* estimates.

local Rubber Workers union officials around the country to set up health screenings for their members. Who footed the bill? Stemple and Gerry paid the costs of the screenings.

After a slide presentation graphically depicting the horrors of severe asbestos-related disease, the union members were ushered into the law firm's mobile examining room for X rays and breathing tests.

The lawyers' tests were performed by three doctors who didn't hesitate to find asbestos problems. One of them, Krishan Bharadwaja, wasn't licensed to practice in the U.S. The doctors' tests turned up evidence of asbestosis and pleural thickening in 65% of the thousands of workers screened. Compare this with a 1987 study by the National Institute for Occupational Safety & Health that found evidence of asbestosis in only 0.2% of tire workers and symptomless pleural changes in an additional 2.3%. Nevertheless, Stemple and Gerry brought suits in 12 states on behalf of 8,000 tire workers.

Raymark, a former maker of asbestos-containing tire parts, had already agreed to a mass settlement of 6,000 of Stemple's and Gerry's claims when it discovered the enormous disparity between the lawyers' screening and the government test. In a May 1990 opinion, Kansas district judge Patrick F. Kelly called Stemple and Gerry's litigation project a "professional farce. . . . The process makes a mockery of the practices of law and medicine."

After Judge Kelly's remonstrations, Gerry withdrew all but 6 of the 350 tire worker claims



Glenn Bailey of Keene Corp.

His company is named as a defendant in virtually all asbestos injury cases. Down to his last \$100 million of insurance, he has chosen to fight rather than settle.

he had filed in California against Pfizer and other former makers of asbestos-containing talc and insulation. Both Stemple and Gerry still have their hands in. They referred claims to other attorneys across the country, and will likely get a cut of any settlement they negotiate.

More personal injury lawyers adopted Stemple and Gerry's mass-screening technique. There were only about 20 asbestos cases pending in Bucks County, Pa. until 1988. Then the unions and the law firm of Timby & Dillon started screening steelworkers. Now there are over a thousand claims pending, filed by the law firms of Norman Perlberger, Lawrence Cohan and Timby & Dillon. Many of the claims are dubious. Cohan, for instance, filed suits on behalf of six men who had died of heart failure, kidney disease and other causes totally unrelated to asbestos.

For the granddaddy of asbestos cases, look at the mega class action, *Cimino v. Raymark et al.*, being fought out in federal judge Robert Parker's courtroom in Beaumont, Tex. (see box, p. 78). Beaumont plaintiff lawyers Walter Umphrey and Wayne Reaud created a class of 2,300 oil refinery workers and their families. They were selected from thousands of workers screened at Dr. Gary Friedman's Texas Lung Institute in Beaumont. Among the 2,300, Friedman diagnosed 32 cases of mesothelioma, 1,047 cases of asbestosis, 186 lung cancers, 57 other cancers and 972 cases of pleural thickening.

Yet refinery workers wouldn't seem to be a very likely group of asbestos claimants. Doctors

Asbestos suits

who reexamined some of the plaintiffs for the defense say that more than 50% of those reexamined showed no sign of asbestos exposure. Moreover, a 1989 study of refinery workers published in the *American Journal of Industrial Medicine* showed that refinery workers have a lower incidence of cancer than the general population does.

Why might Dr. Friedman's results differ so much from those of the *American Journal of Industrial Medicine*? Friedman owns the Texas Lung Institute, which is almost solely devoted to screening workers referred by plaintiffs' attorneys and unions. It has earned at least \$4 million in revenues since 1984. As an expert witness for the plaintiff, Friedman himself earns an additional \$3,500 a day when he testifies.

Contradictory medical evidence notwithstanding, the 2,300 plaintiffs in Cimino have already collected an estimated \$62,000 each from defending companies that have opted to settle out of the suit. The jury awards against companies that went to court rather than settle start at \$540,000; these will be appealed. The firms of lawyers Umphrey and Reaud have together already collected over \$57 million in contingency fees from pretrial settlements and would, on paper, be entitled to another \$430 million from this case if it is fully upheld on appeal.

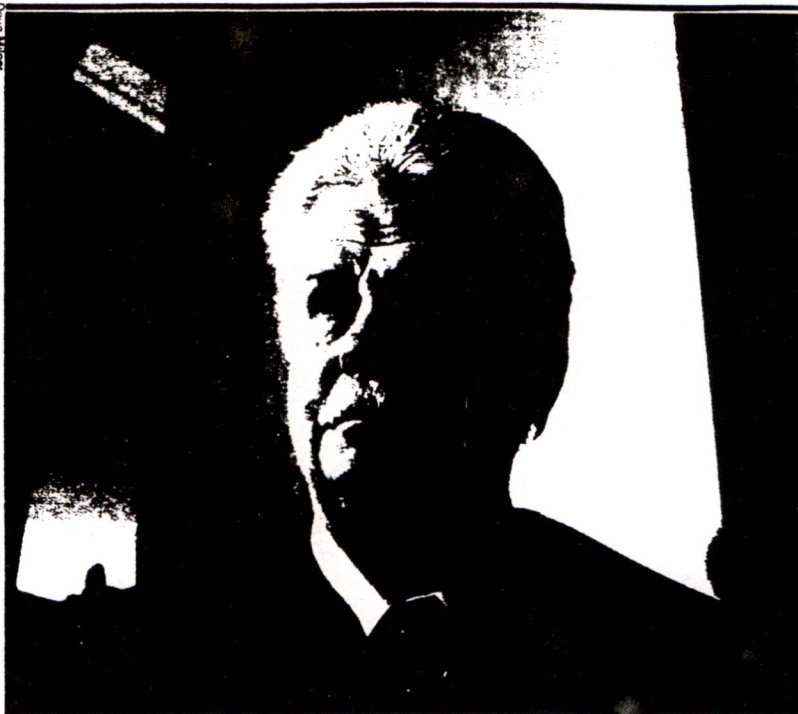
Lawyerly greed? Maybe, but there's a larger issue at stake here. The lawyers, good business people, are simply pursuing their own interests in an era when the tort system's rules for assigning blame and assessing fair compensation have become dangerously vague.

Consider this case: A man spent from 1941 to 1945 surrounded by potent spray-on asbestos insulation while constructing U.S. Navy warships. The insulation material used the deadly and rarely processed amphibole asbestos. Later on, the man worked as a mechanic at a USX steel plant and came into occasional contact with asbestos-containing tractor and crane parts made by subsidiaries of General Electric, GTE and Eaton. The parts contained the not-so-dangerous chrysotile asbestos fibers.

Late in life, the mechanic developed mesothelioma, from which he died. Was the cause of his death the spray-on amphibole asbestos in the Navy shipyards? In all likelihood, yes. But in November 1990 a Pennsylvania jury decided that the parts made by GE, GTE and Eaton were the primary cause of the mechanic's death. Along with three settling defendants, they were told to pay the mechanic's widow \$189,500.

Companies like Allied-Signal, GTE, GE and Eaton used asbestos as insulation in brake linings, circuit breakers and parts for industrial machinery. According to epidemiologist Dr. Robert N. Sawyer, "You can't get asbestos dust

Tilted scales



Federal judge Robert Parker

LUNG DISEASE? LUNG CANCER?

How to Collect
Money Even If...

• Even if you think there is nothing you can do about it
• Even if you think it's too late
• Even if the doctor told you smoking caused your problem.

Many people with cancer or other lung disease never find out about money they deserve right now for medical bills, lost wages and most of all, for physical and emotional suffering. They don't realize that they are entitled to collect because they were exposed to deadly asbestos dust at work or even in their own homes.

You may think that you were never exposed to asbestos. But thousands of people like you are collecting money for exposure they never knew about or had totally forgotten.

For free answers to your questions, over the phone or in the office call:
Boston 822-2222,
Houston 254-1282,
Farmington 872-9838,
Lynn 826-7171,
Cuney 226-6336,
Lynn 822-1303,
Waltham 880-6706.
Sponsored by the Law Office of
A. George Bromberg

Solicitation for
asbestos
claimants

**How to collect
even if your
doctor said
smoking
caused your
lung problems.**

out of most of those products." But for many judges and juries, such fine distinctions are irrelevant. They see deep pockets and go for them.

Keene Corp. is regularly sued for the asbestos insulation once manufactured by a subsidiary. Four years after Keene bought the subsidiary for \$8 million it stopped using asbestos in its insulation. Already Keene has spent \$330 million disposing of 64,000 asbestos claims, and another 76,000 claims are pending. It's the theory of "successor liability" that puts Keene on the hook for the subsidiary's alleged sins committed before that subsidiary was acquired. Other defendants like New Orleans-based McDermott International bought companies long after they had quit making asbestos products. Crown Cork & Seal never made asbestos-containing products. It simply owned an asbestos insulation manufacturer for 82 days. Under the new tort theories, such defendants are facing huge claims in asbestos-related lawsuits. It's as if Jones buys Smith's house and then gets sued by someone who fell down the stairs years ago when the house still belonged to Smith.

Such is the expense of litigation in the U.S. today that most defendants settle regardless of the merits of the case against them. Yes, settling asbestos claims is expensive, too; the litigation

In Gulf town Beaumont, Tex. asbestos litigation is a growth industry. Federal judge Robert Parker oversees some 4,000 asbestos cases, representing about 5,000 claimants. Most plaintiffs do not suffer from anything that can be laid directly to asbestos exposure, according to defendants' experts.

The court has resolved very few cases since 1986, though settling defendants keep mailing checks to Beaumont. With his backlogged asbestos docket, Parker is trying to devise a "national solution" to the asbestos mess.

Parker's model solution is laid out in *Cimino v. Raymark Industries et al.*, soon to be on appeal before the Fifth Circuit. In this enormous class action, some 2,300 oil refinery workers and their families

allege that they suffer from ill effects of asbestos in the refineries' insulation, pipes and machinery.

From the group, Parker selected 160 "sample plaintiffs" representing the five types of alleged malady in the suit. These plaintiffs were sent to jury trials; their verdicts averaged within each disease category. Ranging from \$540,000 to \$1.2 million per claimant, these averages were then awarded to the entire class of 2,300. Total awards: \$1.3 billion.

Parker's sample group was heavily weighted in favor of the plaintiffs. Even though only 1.4% of the whole plaintiff group had been diagnosed with mesothelioma, the most severe form of asbestos-related disease, fully 9% of Parker's sample group had mesothelioma. Moreover,

when deciding damages, Parker didn't allow the jury to hear evidence about the 2,000-strong plaintiffs outside the sample group.

In January 1990 the U.S. Court of Appeals for the Fifth Circuit protested that many of Judge Parker's courtroom methods in *Cimino* denied defendants' right to a fair trial. Parker modified some procedures slightly, and went ahead.

One Beaumont lawyer who should hope Parker's methods are upheld on *Cimino*'s next trip to the appeals court is Walter Umphrey, the judge's former hunting partner (and lead plaintiffs' attorney in *Cimino*). Since 1986 his firm has grossed \$33 million in contingency fees from settlements in the *Cimino* case alone. Plain-

tiffs can settle with some defendants for cash while maintaining the case against other defendants. Thus, the lawyers keep their \$33 million even if the appeals court throws out the jury verdicts.

In October Judge Parker approved a payout to Umphrey's clients in *Cimino* of \$98 million from the Manville Trust. Of that, Umphrey's firm will likely keep a third.

Chief Justice William Rehnquist appointed Parker in September to a panel of six judges to advise on asbestos litigation solutions. If every current claimant in the country received even the smallest award in the *Cimino* case, the bill would come to over \$62 billion. Not exactly a solution, but apparently fine with the judge.

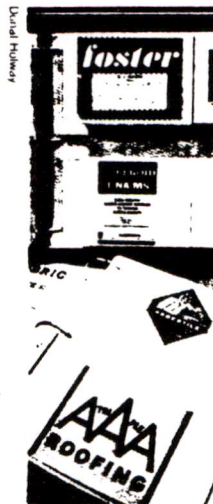
—L.S. and S.L.O.

counsel of one defendant with 15,000 pending cases alleging asbestos exposure from its refractory products says that settling a claim for \$500 can cost an additional \$5,000 in legal expenses.

But fighting is even more expensive. The cost of going to trial can be at least \$25,000 per defendant, before the costs of any award. And there is no telling what a jury will do.

Harry Nofts, for example, had worked as an insulator in a Firestone plant. At 73 he suffered from severe emphysema from a lifetime of smoking. Dr. Paul Wheeler, a radiologist at Johns Hopkins School of Medicine, says that Nofts had pleural plaques, but no other evidence of asbestos-related disease. A pulmonologist serving as expert witness for the defense told the jury that the heavy smoker's breathing trouble was caused by lung decay typical in emphysema patients.

The plaintiff's expert witness was Dr. Clara Gelbard, one of the three doctors who diagnosed the inordinately high rate of asbestos disease in the Tire Workers Litigation Project. Gelbard told the jury she saw asbestosis on Nofts' X ray, and blamed his shortness of breath in part on asbestosis. Judge Kurt Lewin forbade defense attorneys to tell the jury anything about Gelbard's work for the Tire Workers project. Nofts was awarded \$200,000.



Pages from a lawyer's reference guide to asbestos products

Recognize a label from a product you used? Then you can sue.

There is another incentive to settle: Punitive damages are now regularly awarded in cases of mere negligence. The threat of punitive damages has become a very powerful weapon used by the plaintiffs' lawyers to persuade companies to settle. Claims are typically settled for \$90,000 to \$105,000 each, with the sum usually split among as many as 40 defendants.

Asbestos litigation has cost defendants and their insurers about \$7 billion so far, most of that going to lawyers and experts. Pending cases could cost another \$20 billion, based on an average historical total cost of \$170,000 per claim. But this total may be too low. The cases are still coming in—at a rate of 2,000 a month. Thus, the final tab could hit \$50 billion or even \$100 billion, according to Paul MacAvoy, dean of the University of Rochester's business school and an expert on the costs of asbestos-related disease. That's not counting the cost of removing asbestos from buildings, currently estimated at \$100 billion.

Meanwhile, insurance coverage is running out. Eagle-Picher had only \$8 million left and 65,000 cases pending against it when it went bankrupt. If Fibreboard loses its appeal claiming unlimited asbestos liability coverage from two of its insurers, it will probably go bankrupt.

Who is next on the litigation hit list?

Sent to DT
& John m

CSR

Document Originally
Attached to
Following Page

**THE CASE FOR CIVIL JUSTICE REFORM
SUPPORTING MATERIAL**

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I. Overview of the Problem

- "In the past 30 years, our legal system has become burdened with excessive costs and long delays. Many features of the current legal system no longer serve to expedite justice or to ensure fair results. Instead, overuse and abuse of the legal system impose tremendous costs upon American society."¹

- "[T]he tort system of the 1980s has come to resemble a lottery, in which a few lucky litigants recover enormous windfalls and others are not even compensated for out-of-pocket losses. Increases in damage awards have far outstripped the inflation rate and they rationally relate less and less to the injuries involved and defendants' responsibility for those injuries."²

- Senator Biden has said "Too much money is wasted on a system that serves no one well, except our economic competitors who benefit by our squandering of resources on document production and depositions instead of research and development."³

- "In recent years, the civil justice system has been examined by such groups as the Federal Courts Study Committee, the Rand Corporation, the Brookings Institution, the Senate Judiciary Committee, and most recently the President's Council on Competitiveness. While there are some differences in degree, all of these groups have concluded that the present system is flawed and in serious need of reform."⁴

- The American Bar Association (ABA) has not only examined the civil justice system but has also released its own package of reform proposals, entitled the "ABA Blueprint to Improve the Civil Justice System." Moreover, according to ABA President Talbot D'Alemberte, "[t]he ABA supports the majority of the [President's Council on Competitiveness's] agenda."⁵

¹ President's Council on Competitiveness, Agenda for Civil Justice Reform in America i (August 1991).

² Alfred W. Cortese, Jr. & Yosef J. Riemer, Defining the Agenda for Serious Tort Reform, 24 San Diego L. Rev. 903, 903 (1987).

³ The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990 Before the Committee on the Judiciary of the U.S. Senate, 101st Cong., 2d Sess. 2 (1990).

⁴ Gregory B. Butler & Brian D. Miller, Fiddling While Rome Burns: A Response to Dr. Hensler, 75 Judicature 251, 253 (Feb.-Mar. 1992) (citations omitted).

⁵ Don J. DeBenedictis, ABA Releases Civil Justice Plan, ABA J., Apr. 1992, at 30.

• D'Alemberte commented, "We ought to be extremely grateful to Dan Quayle for just getting this issue on the table."⁶

• "A survey of more than 2,000 Americans in 1987 showed that 71 percent believe that the overall cost of lawsuits is too high, and that 57 percent believe that the system fails to provide resolution of disputes without delay. . . . The unfortunate fact is that the civil justice system as we know it today is not fulfilling its basic objective of providing the 'just, speedy and inexpensive' resolution of disputes."⁷

• In a recent case a defendant spent \$500,000 defending himself against claims that were ultimately found to be completely without merit.⁵

• "[A] New Jersey stable was sued by a rider whose horse was stung by a bee. The horse reared and injured the rider. The plaintiff claimed the stable was negligent and should have known about particular swarms of bees on particular trails. And in another case, were two Western wranglers responsible for a breach of duty when a sudden thunderstorm caused a couple of horses to spook and throw their riders? In both cases, the resorts were not held liable. But both lawsuits were expensive to litigate and took time to decide."⁶

• A recent poll of business executives conducted for Business Week by Louis Harris found that 83 percent of executives polled believe corporate decisionmaking is more affected by the fear of litigation today than they were 10 years ago, and 62 percent believe that the U.S. civil justice system significantly hampers the ability of U.S. companies to compete with Japanese and European companies.⁷ Forty percent of respondents said that the

⁶ Michele Galen et al., Guilty! Too Many Lawyers and Too Much Litigation, Bus. Wk., Apr. 13, 1992, at 65.

⁷ S. Rep. No. 416, 101st Cong., 2d Sess. 6, 7 (citing Louis Harris and Associates, Inc., Public Attitudes Toward the Civil Justice System and Tort Law Reform, 15, 19 (1987)).

⁵ See Christic Inst. v. Hull, 112 S. Ct. 913 (1992) (letting stand sanctions in excess of \$1 million against the plaintiffs and their attorneys for bringing a baseless action alleging that bomb explosion in Nicaragua that injured plaintiffs was the product of criminal enterprise among defendants in violation of RICO).

⁶ Marcia Chambers, Whatever Happened to the Sandlot?, Nat'l L. J., Apr. 22, 1991, at 15.

⁷ Michele Galen et al., Guilty! Too Many Lawyers and Too Much Litigation, Bus. Wk., Apr. 13, 1992, at 61.

high cost of defending the company in litigation has a major impact on the business, while only 11 percent of those who responded said that the cost did not have even a minor impact on their company. A full 97 percent of respondents favored much greater use of alternative dispute resolution methods, and 91 percent favored judicial screening of cases to eliminate apparently frivolous or very weak claims.⁸

II. Economic Effects

A. General

- In his book Liability: The Legal Revolution and Its Consequences 4 (1988), Peter Huber describes tort liability as a tax that "directly costs American individuals, businesses, municipalities, and other government bodies at least \$80 billion a year, a figure that equals the total profits of the country's top 200 corporations. . . . The extent of [the] indirect costs [imposed by the tort tax] can only be guessed at. . . ." ⁹

- A study by Tillinghast, an actuarial consulting firm, found the gross cost of the U.S. tort system in 1987 to be \$117 billion, almost three times the 1980 estimated gross cost of \$40 billion.¹⁰

- Four out of ten companies responding to one survey said that the product liability system has had a major adverse effect on their direct costs.¹¹

- "[T]he indirect costs -- the efforts of commercial and governmental bodies to avoid litigation -- exceed insurance premiums, which essentially reflect past litigation costs.

⁸ Michele Galen et al., Guilty! Too Many Lawyers and Too Much Litigation, Bus. Wk., Apr. 13, 1992, at 66.

⁹ One critic of the \$80 billion number, Joan Claybrook, president of Public Citizen, argued that the actual direct cost of torts to the U.S. economy is "just" \$30 billion, citing a study done by the Rand Corporation's Institute for Civil Justice. But James Kakalik, coauthor of the Rand study cited by Claybrook, contends that it is the Tillinghast \$117 billion number (cited in note 10), not Rand's \$30 to \$36 billion figure, that represents the direct "tort tax" imposed on the U.S. economy. See Leslie Spencer, The Tort Tax, Forbes, Feb. 17, 1992, at 40.

¹⁰ Robert W. Sturgis, Tort Cost Trends: An International Perspective 1, 2 (Tillinghast Co. 1989).

¹¹ E. Patrick McGuire, The Impact of Product Liability, The Conference Board Research Report No. 908, at 9 (1988).

American business is now so sensitized to tort suits and expanding concepts of liability in appellate court decisions that corporate legal departments and product managers see a plaintiff attorney behind every bush and post."¹²

- "American corporations spend more than \$20 billion annually on outside counsel defending lawsuits. The outside counsel expenses for some Fortune 100 companies exceed \$30 million annually, and in one case exceed \$100 million annually."¹³

- One 1989 study concluded that between 1950 and 1987, the cost of injury litigation rose 138 percent (quadrupling every 12 years), while the size of the real U.S. economy rose only 33 percent.¹⁴

- "A substantial majority of more than 1,000 experienced litigators and Federal trial judges said that the high cost of litigation unreasonably impedes access to the courts by the ordinary citizen."¹⁵

- Critics of the Competitiveness Council Report nevertheless agree on the need for reform: "There is much to criticize in the American civil justice system. . . . Legal expenses eat up too much of the amount spent to compensate harms--about half the total expenditures for tort litigation generally, and as much as 60 percent of the expenditures for more complex personal injury litigation[, such as that associated with asbestos]."¹⁶

- "In 1984, London reinsurers labeled the U.S. liability market 'uninsurable' and started a mass exodus. By 1985, Lloyd's, the world's biggest reinsurer, was scrambling to get out. . . . By

¹² Robert V. Wills, Lawyers are Killing America, at 10 (1990).

¹³ S. Rep. No. 416, 101st Cong., 2d Sess. 7 (citing Dockser, Companies Rein in Outside Legal Bills, Wall St. J., Nov. 9, 1988.)

¹⁴ Robert W. Sturgis, Tort Cost Trends: An International Perspective 7 (Tillinghast Co., 1989); see also Walter K. Olson, The Litigation Explosion 7 (1991).

¹⁵ S. Rep. No. 416, 101st Cong., 2d Sess. 7 (citing Louis Harris and Associates, Inc., Procedural Reform of the Civil Justice System, (March 1989)).

¹⁶ Deborah R. Hensler, Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform, 75 Judicature 244, 250 (1992).

1985, ninety reinsurers -- almost one-third of the companies that were doing business worldwide in 1983 -- were gone."¹⁷

B. Effect on International Competitiveness

- A Tillinghast study found that the costs of the U.S. tort system are far greater than for any of the twelve foreign economies studied (Australia, Austria, Belgium, Canada, Denmark, France, Italy, Japan, Spain, Switzerland, Great Britain, and West Germany), ranging between three and eight times the relative cost of tort systems in those countries.¹⁸

- In 1965, U.S. tort costs were slightly more than one percent of GNP which was approximately double the average of other economies. Since then, while the costs in other economies remained stable, those in the U.S. have grown to 2.5 percent of GNP, or almost five times the average of other countries.¹⁹

- A 1989 Tillinghast study found that America spends between three and eight times as much as its major industrial competitors on personal injury wrangling as a share of its economy, and that the gap is widening rather than narrowing.²⁰

- Several government agencies, numerous research organizations, trade associations, academics and private business persons believe current U.S. product liability laws not only force manufacturers to increase the prices charged for their products to cover costs stemming from the liability laws but also decrease business innovation by making management unduly adverse to risk taking.²¹

- A study commissioned by the U.S. Department of Commerce

¹⁷ Peter Huber, Liability: The Legal Revolution and Its Consequences 141 (1988).

¹⁸ Robert W. Sturgis, Tort Cost Trends: An International Perspective 12 (Tillinghast Co., 1989).

¹⁹ Robert W. Sturgis, Tort Cost Trends: An International Perspective 13 (Tillinghast Co., 1989).

²⁰ Robert W. Sturgis, Tort Cost Trends: An International Perspective 12 (Tillinghast Co., 1989).

²¹ Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at our Own Game, 9 J.L. & Com. 167, 169 (1989) (citing, inter alia, Committee for Economic Development, E.P. McGuire, Conference Board Report, Project on Civil Justice Reform, and Manhattan Institute for Policy Research).

found that the product liability insurance costs of foreign competitors of U.S. machinery manufacturers are 20 to 100 times lower than those of their U.S. competitors. In addition, foreign competitors are not burdened with all of the other product liability related costs.²²

C. Effect on Health Care

1. Behavior/Costs

- "New York officials have estimated payouts in suits against doctors and hospitals in their state have risen 300-fold in a generation -- not 300 percent, but 300-fold. By 1990 many New York obstetricians with good records were paying liability insurance rates of \$100,000 and more a year. Miami neurosurgeons with good records paid \$220,000. . . . A major National Institute of Medicine study found that 'defensive medicine' -- the taking of steps not considered clinically justified in order to fend off charges that doctors had not done everything they could -- had seriously compromised the quality of patient care, leading, for example, to the performance of millions of unnecessary Caesarean sections. One in five rural doctors had stopped delivering babies in the past five years, with liability the overwhelming concern."²³

- "[B]etween 1965 and 1984, the frequency of Caesarean sections increased fourfold."²⁴

- A Journal of the American Medical Association editorial reports that 12 percent of obstetricians have stopped delivering babies and 38 percent of surgeons avoid high-risk cases because of liability concerns.²⁵

- According to the American College of Obstetricians and Gynecologists, as of 1990 of ob/gyns nationally:

- 12.2% had given up obstetrics due to liability concerns;

- 77.6% have been sued at least once; in New York,

²² Randolph J. Stayin, The U.S. Product Liability System: A Competitive Advantage to Foreign Manufacturers, 14 Can.-U.S. L.J. 193, 197 (1988).

²³ Walter K. Olson, The Litigation Explosion 5-6 (1991).

²⁴ Peter Huber, Liability: The Legal Revolution and Its Consequences 175 (1988).

²⁵ 257 J. Am. Med. Ass'n 827 (1987).

the number is 83.4%;

- on average, three suits have been filed against each ob/gyn; the average in New York is almost four; and
- 24.2% had decreased the level of high-risk obstetric care that they provided.²⁶
- In some states the problem is worse than national figures show:
 - in Idaho, 34% of Ob/Gyn's had stopped practicing obstetrics by 1986;
 - a 1987 Oregon survey shows that the number of physicians delivering babies has declined by 25% since 1984;
 - a 1987 Iowa survey shows that of all physicians who had provided obstetric services since 1981, 31% had discontinued obstetrics; and
 - in addition, 50% of North Dakota physicians and 39.1% of Wyoming physicians planned to quit obstetrics within the next year.

Large numbers of family physicians are being forced to discontinue obstetrics as a result of the high cost of obstetric liability insurance:

- one-third of California's family physicians, almost 40% of Texas family physicians and approximately one-half of Nevada rural family physicians have also stopped practicing obstetrics;
- three-hundred of 441 family physicians responding to an Alabama survey have stopped delivering babies;
- more than half of Utah's general and family physicians who were delivering babies in 1980 have stopped practicing obstetrics; and
- in Kansas, almost half of the family physicians

²⁶ Medical Liability: Its Impact on Women's Health Care, Fact Sheet provided by the American College of Obstetricians and Gynecologists (Oct. 1991).

reported having given up obstetrics by 1987.²⁷

- "The American Medical Association estimates that the average number of malpractice claims filed per 100 doctors rose from five in 1975 to 16 in 1983. Forty thousand claims were filed in 1983, triple the 1975 number. . . . The average settlement was \$5,000 in 1970, \$26,000 in 1975, and is now \$333,000-\$650,000 in California, where the plaintiff need not prove the defendant acted negligently. (The California legislature has since put a cap on the amount a lawyer can make in a contingency fee malpractice suit.)"²⁸

- "By 1985. . . , one out of four obstetrician-gynecologists had been sued. Almost three-quarters won their cases, but it cost the physician or insurer an average of \$20,000 per claim to do so."²⁹

- "According to the director of the National Cancer Institute many physicians refuse to prescribe potentially curative doses of cancer chemotherapy for fear of litigation over side effects, and thousands of patients may die needlessly each year as a result of this kind of caution."³⁰

2. Drugs/Vaccines

- Lederle Laboratories, the only remaining manufacturer of the DPT vaccine, increased the single dose cost of the vaccine from \$2.80 in 1986 to \$11.40 in 1987, primarily to recoup increased product liability costs.³¹

- The American Medical Association concluded that product liability issues are having a profound negative effect on the development and utilization of potentially life-saving medical

²⁷ Medical Liability: Its Impact on Women's Health Care, Fact sheet provided by American College of Obstetricians and Gynecologists (Oct. 1991).

²⁸ Gordon Crovitz, Lawyers on Trial: How to Take the Profit Out of Suing, 35 Pol'y Rev. 72, 76 (1986).

²⁹ Peter Huber, Liability: The Legal Revolution and Its Consequences 111 (1988).

³⁰ Peter Huber, Liability: The Legal Revolution and Its Consequences 162 (1988).

³¹ E. Patrick McGuire, The Impact of Product Liability, The Conference Board, Research Report No. 908, at 10 (1988).

technologies.³²

- The National Academy of Sciences stated that "given the extremely high cost of vaccine-related injuries, many manufacturers may be unwilling to initiate or pursue the derivation or distribution of a vaccine to prevent AIDS."³³

- The general counsel of Johnson & Johnson recently indicated that, because of the substantial liability costs to which the company would be exposed, he would urge his company to withhold an AIDS vaccine until Congress passed protective legislation.³⁴

- Union Carbide developed a suitcase-sized kidney dialysis machine that could be used at home. Due to the company's analysis of the potential liability from marketing the machine, Union Carbide decided not to market the machine and sold it to a foreign company. Union Carbide also decided not to develop a line of medical devices related to intravenous treatment.³⁵

- "Research expenditures by U.S. companies working on contraceptives peaked in 1973 and plummeted 90 percent in the next decade. Steroidal oral contraceptives in this country underwent no significant changes after 1976, and no truly new contraceptive chemical entities have been introduced since 1968. Clinical tests of a contraceptive implant system called Capronor, developed by the National Institutes of Health, were stalled for more than a year for lack of liability insurance. The implanted contraceptive Norplant, which releases a hormone for five years, was developed by

³² Richard J. Mahoney & Stephen E. Littlejohn, Innovation on Trial: Punitive Damages versus New Products, Science, Dec. 15, 1989, at 1397.

³³ Richard J. Mahoney & Stephen E. Littlejohn, Innovation on Trial: Punitive Damages versus New Products, Science, Dec. 15, 1989, at 1397 (citing American Medical Ass'n, Impact of Product Liability on the Development of New Medical Technologies, Proceedings of House of Delegates, 137th Annual Meeting, June 18-22, 1988, Chicago, Ill., at 86).

³⁴ Testimony of W. Kip Viscusi, George G. Allen Professor of Economics, Department of Economics, Duke University, Durham, N.C., before the Subcommittee on Competitiveness and Economic Opportunity of the Senate Committee on Small Business 4 (Nov. 7, 1991).

³⁵ Richard J. Mahoney & Stephen E. Littlejohn, Innovation on Trial: Punitive Damages versus New Products, Science, Dec. 15, 1989, at 1397 (citing a speech by Warren Anderson, at the Annual Meeting of the National Association of Casualty and Surety Executives (Oct. 7, 1986)).

the New York Population Council and as of 1986 was on the market in five other countries. But no American firm dared to market it at home. A new and effective IUD, the Copper-T 380A, won FDA approval, but no major firm was willing to market it for several years. In late 1987, one tiny company finally announced that it would sell the product, at a price vastly above the cost of manufacture, and without any liability insurance (which was, in any event, unavailable), presumably on the assumption that if a wave of lawsuits struck, bankruptcy would provide a quick and clean exit from the market. So the United States, a leader in contraceptive research and marketing well into the early 1960s, has today lost its edge and its hunger for progress. Research on other aspects of reproduction has suffered as well. 'Who in his right mind,' the president of a major pharmaceutical company asked in 1986, 'would work on a product today that would be used by pregnant women?'"³⁶

- The number of U.S. pharmaceutical companies producing contraceptives has decreased from 13 in the early 1970s to two in 1988.³⁷

- "Liability fears have helped drive U.S. firms out of manufacturing vaccines -- DPT in particular -- explaining sharp increases in vaccine costs."³⁸

- In 1986, a new claim was being filed against the manufacturers of whooping cough vaccine every week; one former manufacturer faced 100 suits demanding more than \$2 billion in compensation, or 200 times the total annual sale revenues -- of the vaccine.³⁹

- "Only a few hundred American children suffer from cystinosis, a fatal kidney disease. About 2,000 adults suffer from Charcot-Marie-Tooth disease, a rare nerve disorder (unrelated to teeth) that severely impairs motor function. About 1,000 suffer from leprosy and experience an extremely painful allergic reaction on their skin. A tiny number suffer from a rare but incapacitating

³⁶ Peter Huber, Liability: The Legal Revolution and Its Consequences 155 (1988).

³⁷ Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at our Own Game, 9 J.L & Com. 167, 199 (1989)

³⁸ Testimony of Robert E. Litan, Senior Fellow, The Brookings Institution before the Subcommittee on Competitiveness and Economic Opportunity of the Senate Committee on Small Business 6 (Nov. 7, 1991).

³⁹ Peter Huber, Liability: The Legal Revolution and Its Consequences 166-67 (1988).

disease characterized by uncontrollable twitching of the eye muscles. There are some 5,000 other orphan diseases that shorten lives or bring agonizing disability to tiny groups. Therapies are available or under development for some 500 of them. But insurance is often all but impossible to obtain. Chemie Grunenthal, for example, a West German company that once supplied thalidomide to American leprosy victims, announced in 1986 that it planned to abandon the U.S. market to avoid the risk of liability that might arise if, for example, the drug was used in excess or fell into the wrong hands. Until recently, another West German chemical company supplied Americans with botulinum, a paralytic poison that is just right for controlling the eye-twitching disease, but the company cut off supplies in 1986 for similar reasons. Orphan drugs are condemned, in a sense, to be perennial newcomers to the commercial world and are therefore forever uninsurable under the modern rules. Business realities take care of the rest."⁴⁰

- Merck & Company continues to be the only U.S. producer of a measles vaccine for American schoolchildren, continuing production solely out of a sense of social responsibility.⁴¹

D. Discontinued Products/Businesses

- WEPCO, Inc., a small business originally started to develop driving aids for the handicapped, was forced to close its doors because it was unable to secure product liability insurance, despite the fact that the company was certified by the Veterans Administration, and had never had a product liability suit filed against it.⁴²

- Dyneet Corporation stopped production of its helicopter clutches, although it had not had any product liability claims filed against it, because it could no longer afford to purchase liability insurance for the clutch.⁴³

⁴⁰ Peter Huber, Liability: The Legal Revolution and Its Consequences 158-59 (1988).

⁴¹ Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. Com. 167, 199-200 (1989).

⁴² E. Patrick McGuire, The Impact of Product Liability, The Conference Board, Research Report No. 908, at 18 (1988).

⁴³ Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. Com. 167, 200 (1989).

- Crawford Fitting Company has decided to eliminate hot air balloon valves from its product line due to a 1,535 percent increase in liability insurance.⁴⁴

- The McJunkin Corporation of Charleston, West Virginia, has decided to sell its coal-mining equipment division because the company's product liability insurance increased by 500 percent in 1985.⁴⁵

E. New Products/Innovation

- "The slowing of innovation is directly attributable to a dramatic increase in product liability lawsuits caused not by more unsafe products or injuries but by two legal developments: the shift from negligence to strict liability and a continued increase in punitive damage jury awards."⁴⁶

- U.S. auto manufacturers delayed and even fought the introduction of airbags, in part out of fears of being sued when the bags misfired.⁴⁷

- Foster-Miller, Inc. has refused to accept contracts to build equipment to produce football and hockey helmets, calling these products "lawyers' dreams."⁴⁸

⁴⁴ Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. Com. 167, 200 (1989).

⁴⁵ Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. Com. 167, 200-01 (1989).

⁴⁶ Richard J. Mahoney & Stephen E. Littlejohn, Innovation on Trial: Punitive Damages versus New Products, Science, Dec. 15, 1989, at 1395 (citing P. Reuter, The Economic Consequences of Expanded Corporate Liability: An Exploratory Study, 25-27 (Rand 1988)).

⁴⁷ Innovation and Competitiveness in the Small Business Industry, 1991 Hearings Before the Subcommittee on Competitiveness and Economic Opportunity of the Senate Committee on Small Business, 102d Cong., 1st Sess. 7 (Nov. 7, 1991) (statement by Robert Litan).

⁴⁸ Innovation and Competitiveness in the Small Business Industry, 1991 Hearings Before the Subcommittee on Competitiveness and Economic Opportunity of the Senate Committee on Small Business, 102d Cong., 1st Sess. 3 (Nov. 7, 1991) (statement of Edward J. Goldman).

- Livermore Lab in California discovered that a particle accelerator, developed for a weapon system, could be used instead of harmful pesticides on newly harvested crops to kill insects, larvae and parasites. Livermore decided that the technology was too risky at least in part because of current product liability laws so the potential new use was abandoned.⁴⁹

- A research scientist at the Lawrence Livermore National Laboratory in California who has worked on a number of new product ventures claims that "There's clearly a chilling effect. Its becoming difficult to get venture capital for new ideas. People are afraid of potential liability."⁵⁰

- The fear of litigation cuts back the motivation to develop new products.⁵¹

- Industries for which liability costs (as reported to their insurers) are not a major burden relative to their sales actually increased their innovative activities (measured by R&D expenditures and new products introduced).⁵²

F. Effect on Cities

- "Cities, fearful of lawsuits from the family of a child who takes a tumble from a jungle gym and winds up a quadriplegic, have removed equipment or closed urban playgrounds entirely. City pools from Los Angeles to Chicago to New York have taken their diving boards off, leaving some to wonder where the deep end lies. In small towns, warning signs abound: No running, no swimming, no biking, no fishing, no camping."⁵³

⁴⁹ William Broad, Does Fear of Litigation Dampen the Drive to Innovate? N.Y. Times, May 12, 1987, at C9.

⁵⁰ Paul Proctor, Product Liability Costs Cited as Key Factor in Delivery Slump, Aviation Week and Space Technology, July 27, 1987, at 55.

⁵¹ Alyson Pytte, Bush Gives Presidential Nod to New Liability Standards, Cong. Q., Feb. 2, 1990, at 326 (quoting Phyllis Eisen, Director of Risk Management for the National Association of Manufacturers).

⁵² Testimony of Robert E. Litan Senior Fellow, The Brookings Institution, before the Subcommittee on Competitiveness and Economic Opportunity, Senate Committee on Small Business, Nov. 7, 1991, at 7.

⁵³ Marcia Chambers, What Happened to the Sandlot?, Natl L. J., Apr. 22, 1991, at 15.

• "In Chicago, more than two-thirds of the area's riding stables simply closed their doors between 1983 and 1987." ⁵⁴

• "Los Angeles . . . paid nearly all of a \$2.16 million judgment on a 1979 traffic accident after a driver high on drugs ran a stop sign. The city's fault? Inadequate trimming of certain bushes that perhaps obstructed the drugged driver's vision. San Diego paid \$1.6 million to a car passenger on the scenic Torrey Pines Road who was left a quadriplegic when a speeding drunk driver crossed the center lane on a curve and smashed into his car. The drunk offered his insurance policy limit of \$25,000; the city was then sued for faulty road design." ⁵⁵

• "Between 1978 and 1985, New York City's liability payments jumped from \$23 million to \$118 million. . . . [T]he city of Hartford, Connecticut, was charged \$1.8 million for \$4 million of coverage (a premium-to-coverage ratio of 0.45)." ⁵⁶ "[T]he insurance deductible for the city of Baton Rouge, Louisiana, was raised from \$100,000 in 1985 to \$500,000 in 1986." ⁵⁷

• "The city of Boston went without liability insurance between 1984 and 1986 when a policy was canceled by an insurer that had decided to abandon the municipal liability business entirely. Wilmington, Delaware, dropped its liability policies in January 1986. Fort Lauderdale, Florida, could not find a general liability policy to cover accidents on the sidewalks of the Intracoastal Waterway. In early 1986, thirty California cities were operating without any insurance at all." ⁵⁸

• "One survey found the damage claims against cities doubled between 1982 and 1986. . . . Average verdicts against cities rose almost tenfold, to \$2 million. The first jury verdict exceeding \$1 million came in 1962; in 1975 there were fewer than

⁵⁴ Marcia Chambers, What Happened to the Sandlot?, Natl L. J., Apr. 22, 1991, at 15.

⁵⁵ Peter Huber, Liability: The Legal Revolution and Its Consequences 79 (1988).

⁵⁶ Peter Huber, Liability: The Legal Revolution and Its Consequences 140 (1988).

⁵⁷ Peter Huber, Liability: The Legal Revolution and Its Consequences 141 (1988).

⁵⁸ Peter Huber, Liability: The Legal Revolution and Its Consequences 138-39 (1988).

twenty; by 1988 there were over 400 a year."⁵⁹

- "A man mutilated after he deliberately jumped in front of a subway train sued New York City, claiming that the driver should have stopped faster, and walked off with \$650,000. The father of a thirteen-year-old who committed suicide at home sued school officials, several of the boy's teachers, and the local police, claiming they should have known of the boy's troubles and prevented the harm."⁶⁰

- "Even slightly risky activities, like law students running the annual five-mile Race Judicata at Yale Law School, have been scrapped because a financially beleaguered city can no longer provide traffic protection at intersections."⁶¹

III. Courts, Attorneys and Expenses

A. Legal Fees and Other Expenses

- "For the middle class of this country . . . the courthouse door is rapidly being slammed shut. Access to courts, once available to everyone, has become for middle-class Americans a luxury that only others can afford."⁶²

- "A report from the Federal Trade Commission showed that 97 percent of lawyers took injury cases only on contingency, refusing to consider hourly rates, however generous."⁶³

- In 1989, Forbes magazine reported that each of 63 trial lawyers earned more than \$2 million a year and that 19 plaintiffs' attorneys collected fees in excess of \$5 million in single cases.⁶⁴

⁵⁹ Peter W. Huber, Liability: The Legal Revolution and Its Consequences, 9-10 (1988).

⁶⁰ Peter Huber, Liability: The Legal Revolution and Its Consequences 78 (1988).

⁶¹ Marcia Chambers, Whatever Happened to the Sandlot?, Natl L. J. Apr. 22, 1991, at 15.

⁶² The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 Before the Committee on the Judiciary, 101st Cong., 2d Sess. 1 (1990) (statement of Sen. Biden).

⁶³ Walter K. Olson, The Litigation Explosion 47 (1991).

⁶⁴ Peter Brimelow & Leslie Spencer, The Plaintiff Attorneys' Great Honey Rush, Forbes, Oct. 16, 1989, at 197.

- "[A] federal judge awarded one of New York's biggest law firms \$62,000 for getting their 'pro bono' client an award of \$2,500. The plaintiff said the New York City police had used excessive force in arresting him after a high-speed chase."⁶⁵

- "The total price tag for processing all the various types of civil cases is estimated at \$2 billion [for 1982], including \$1.7 billion in state courts and \$0.3 billion in the federal courts--all of which is on top of what the litigants themselves pay."⁶⁶

- According to the Administrative Office of the U.S. Courts, the total daily cost of a civil jury trial is \$2,549. This figure includes the salaries of judge and staff, facilities, security, jurors' expenses and administrative office cost. It does not include attorneys' fees.⁶⁷

- A study done by the Institute for Civil Justice estimates that the total amount spent by defendants on legal fees and expenses for all tort cases in state and federal courts of general jurisdiction during 1985 was \$4.7 to \$5.7 billion or \$5,400 to \$6,600 per lawsuit.⁶⁸

- Estimated budget authority for the federal district courts is just over \$1 billion for fiscal year 1992. Litigants filing in the district courts pay a filing fee of \$120. Using the caseload figures for 1990, the most recent published figures, if these filing fees were paid in 186,000 civil cases (not including cases filed by the United States as plaintiff), the fees would amount to \$22.3 million or roughly 2.2 percent of the federal judicial budget at the trial level.⁶⁹ "[S]ome states run

⁶⁵ Gordon Crovitz, Lawyers on Trial: How to Take the Profit Out of Suing, 35 Pol'y Rev. 72, 74 (1986).

⁶⁶ Institute for Civil Justice, Rand Corporation, Annual Report April 1, 1991 - March 31, 1992 50 (1991) (citing James S. Kakalik & Randy L. Ross, Costs of the Civil Justice System: Court Expenditures for Various Types of Civil Cases).

⁶⁷ Administrative Office of the U.S. Courts, Budget Branch, Daily Cost of a Civil Jury Trial, Feb. 19, 1991.

⁶⁸ James S. Kakalik & Nicholas M. Pace, Institute for Civil Justice, Rand Corporation, Costs and Compensation Paid in Tort Litigation 58 (1986).

⁶⁹ Filing fees are established at 28 U.S.C. §§ 1913 note and 1914. Caseload figures are taken from the Annual Report of the Director of the Administrative Office of the United States Courts (1990), Tables B-6 and C-2, the most recent figures available.

surpluses by charging user fees meant to cover the full costs of the system. Not surprisingly, these states do not have the case backlogs of states that charge only nominal fees."⁷⁰

- "Sixty cents of every dollar spent on malpractice liability insurance are absorbed by administrative and legal costs. The corresponding figures are 60 cents on the dollar for products liability and 50 cents for traffic-accident liability. These numbers do not account for the tax-payers' direct support of judges, law clerks, secretaries, and the rest of a swelling, increasingly bureaucratic judicial system."⁷¹

B. Awards and Compensation

- "[In 1985], the system spent \$16-19 billion in transaction costs to deliver \$14-\$16 billion to plaintiffs in net compensation. Of all the money paid in compensation and legal fees and expenses, the successful plaintiff received about 56 percent in net compensation, with the system consuming the rest. Adding the value of time spent by the litigants makes the costs even higher; injured parties' net compensation is reduced to 46 percent of the total cost."

"Plaintiffs' net compensation as a percentage of total expenditures was 52 percent for auto torts and 43 percent for all other torts, reflecting higher defendants' litigation costs for nonauto torts. Defense legal fees and expenses for nonauto tort cases were 28 percent of total compensation paid, compared with 16 percent for auto tort cases. However, litigation costs paid by plaintiffs as a percentage of total compensation were essentially the same for auto tort (31 percent) and nonauto tort cases (30 percent)."⁷²

Budget figures are taken from Budget of the United States Government, Fiscal Year 1993, Appendix One at 193. The budget documents do not segregate costs between civil and criminal cases. Although the budget figure for the district courts includes expenses for criminal as well as civil cases, it does not include other costs partially attributable to civil cases such as fees of jurors, court security, and judicial automation.

⁷⁰ Gordon Crovitz, Lawyers on Trial: How to Take the Profit Out of Suing, 35 Pol'y Rev. 72, 74 (1986).

⁷¹ Peter W. Huber, Liability: The Legal Revolution and Its Consequences, 151 (1988).

⁷² Institute for Civil Justice, Rand Corporation, Annual Report April 1, 1991 - March 31, 1992 52 (1991) (citing James S. Kakalik & Nicholas M. Pace, Institute for Civil Justice, Rand Corporation, Costs and Compensation Paid in Tort Litigation).

- "Over the past five years [from 1981 to 1985], the average annual growth rate in average compensation paid per liability claim has been about 12 percent for auto claims and 17 percent for other tort claims. During the same period, the consumer price index grew an average of 7 percent."⁷³

- Professor Jeffrey O'Connell of the University of Virginia has estimated that when all costs are counted, only approximately 15 percent of the cost of injury litigation actually compensates claimants.⁷⁴

- "Almost half of all monetary awards in personal injury cases go to two percent of the claimants, who win \$1 million or more."⁷⁵

C. Number of Attorneys

- The American Bar Association estimates that by the year 2000, there will be one million lawyers available in the United States, which represents a 34 percent increase over the 748,028 in 1990.⁷⁶

- "The legal profession grew by 90% in the 1970s and an additional 48% from 1980 to 1988. During the years of fastest growth--from the mid-1970s to the early 1980s--the lawyer population increased by more than 25,000 persons per year, or almost as much as it grew during the entire generation from 1940 to 1960. By 1988, the ratio of lawyers to the general population was far more than twice its historic average."⁷⁷

- Great Britain's Cambridge Law Journal reported that the United States has twenty times the number of lawyers as Japan per

⁷³ Institute for Civil Justice, Rand Corporation, Annual Report April 1, 1991 - March 31, 1992 52 (1991).

⁷⁴ Walter K. Olson, The Litigation Explosion 10 (1991).

⁷⁵ Peter Huber, Liability: The Legal Revolution and Its Consequences 150 (1988).

⁷⁶ One Million Lawyers, Wall St. J., Jan. 21, 1992, at B-1; see also Michele Galen et al., Guilty! Too Many Lawyers and Too Much Litigation, Bus. Wk., Apr. 13, 1992, at 61.

⁷⁷ Richard H. Sander & E. Douglass Williams, Why Are There So Many Lawyers? Perspectives on a Turbulent Market, 14 Law & Soc. Inq., 431, 432 (1989).

100,000 population.⁷⁸

- "[T]he recent spectacular growth in the number of lawyers in America has been a source of renewed concern. . . . Today approximately one U.S. citizen in every 364 is a lawyer. Our nation has about twenty times more lawyers per 1,000 people than Japan; each year we graduate more than twice as many lawyers as there are in that entire society. Likewise, our society has three times as many lawyers as Germany and ten times as many as Sweden."⁷⁹

- "The United States now has nearly three times as many lawyers per capita as any other advanced industrial society."⁸⁰

- According to the National Association of Manufacturers, companies are expanding their legal departments faster than their research and development departments.⁸¹

D. Case Management

1. Filings and Delays

- "The Federal Courts are suffering today under the scourge of two related and worsening plagues. First, the costs of civil litigation, and delays that contribute to those costs, are high and are increasing; they limit access to the courts to only those who can afford to pay the rising expenses; and they undermine the ability of American corporations to compete both domestically and abroad. Second, the Federal courts have a scarcity of

⁷⁸ W. John Moore, Knocking the System, 47 Nat'l J. 2844, 2847 (1991); see also Michele Galen et al., Guilty! Too Many Lawyers and Too Much Litigation, Bus. Wk., Apr. 13, 1992, at 61 (noting that the United States has 307.4 lawyers per 100,000 versus 102.7 for Great Britain, 82 for Germany and 12.1 for Japan).

⁷⁹ Eve Spangler, Lawyers for Hire, Salaried Professionals at Work 2 (1986) (citations omitted).

⁸⁰ Richard H. Sander & E. Douglass Williams, Why Are There So Many Lawyers? Perspectives on a Turbulent Market, 14 Law & Soc. Inq., 431, 432 (1989) (citing Marc Galanter, Adjudication, Litigation, and Related Phenomena, Law & Soc. Sci. 166 (1987)).

⁸¹ Alyson Pytte, Bush Gives Presidential Nod to New Liability Standards, Cong. Q., Feb. 3, 1990, at 326 (quoting Phyllis Eisen, Director of risk management for the National Association for Manufacturers).

resources."⁸²

- The Federal Courts Study Committee found that from 1958 to 1988 the caseload in the federal district courts more than trebled. Similarly, the caseload in the federal courts of appeals increased tenfold.⁸³

- Private civil case filings in the federal district courts increased as follows: 32,000 in 1950, 64,000 in 1970, and over 161,000 in 1986.⁸⁴

- Between 1950 and 1986, aggregate filings in the federal district courts increased 197 percent, most of which increase derived from civil suits. Civil filings increased 367 percent, while the criminal caseload increased 7 percent.⁸⁵

- "The percentage growth for both U.S. [cases involving the United States as plaintiff or defendant] and private civil cases [during the period 1950 to 1986] was substantial--309 percent and 406 percent, respectively. However, private civil litigation has been moving steadily ahead of civil actions involving the United States, and by 1986 private suits represented a greater proportion of all civil suits (64 percent) than at any previous time in the history of the federal court system."⁸⁶

- The average caseload in the federal appellate courts increased by more than 350 percent from 1945 to 1985.⁸⁷

⁸² Senate Comm. on the Judiciary, The Judicial Improvements Act, S. Rep. No. 416, 101st Cong., 2d Sess. 1-2, reprinted in 1990 U.S.C.C.A.N. 6802, 6804 (1990) (committee report).

⁸³ Federal Courts Study Committee, Report of the Federal Courts Study Committee, Apr. 2, 1990, at 5.

⁸⁴ Terrence Dungworth & Nicholas M. Pace, Institute for Civil Justice, Rand Corporation, Statistical Overview of Civil Litigation in the Federal Courts vi-vii (1990).

⁸⁵ Terrence Dungworth & Nicholas M. Pace, Institute for Civil Justice, Rand Corporation, Statistical Overview of Civil Litigation in the Federal Courts 5 (1990).

⁸⁶ Terrence Dungworth & Nicholas M. Pace, Institute for Civil Justice, Rand Corporation, Statistical Overview of Civil Litigation in the Federal Courts 5 (1990).

⁸⁷ Terrence Dungworth & Nicholas M. Pace, Institute for Civil Justice, Rand Corporation, Statistical Overview of Civil Litigation in the Federal Courts 2 (1990).

- According to the National Center for State Courts, from 1984 to 1989 the number of tort cases filed increased 33.7 percent, the number of real property cases filed increased 26.0 percent and the number of contract cases filed increased 21.6 percent. During the same period, the resident population of the United States increased 5 percent.⁸⁸

- In 1986, the time to disposition in almost 40 percent of private civil cases filed in the federal district courts was more than one year. Approximately 61 percent of all private civil cases reached disposition within 1 year of filing, compared with 23 percent within two years, 9 percent within three years, and 7 percent later than that.⁸⁹

- In the pharmaceutical area "[f]or non-Dalkon Shield and non-Bendectin defendants between 1981 and 1986, the annual number of lawsuits filed doubled and the number of different defendants nearly doubled."⁹⁰

- In 1989, the General Accounting Office (GAO) studied product liability cases in five states (North Dakota, Massachusetts, South Carolina, Arizona and Missouri). The GAO reported that in these five states, product liability cases took an average of 2 1/2 years from the filing of the complaint to the beginning of the trial. The average trial lasted an additional 12 days while on average an appeal extended the process 10 months.⁹¹

- The American Insurance Association and the Alliance of American Insurers studied large products liability cases in 1985 and found that fewer than 7 percent were closed within one year. Over one half were terminated within three years, but 31 percent

⁸⁸ National Center for State Courts, State Court Caseload Statistics 1984-1989.

⁸⁹ Terrence Dungworth & Nicholas M. Pace, Institute for Civil Justice, Rand Corporation, Statistical Overview of Civil Litigation in the Federal Courts viii, 21 (1990).

⁹⁰ Richard J. Mahoney & Stephen E. Littlejohn, Innovation on Trial: Punitive Damages versus New Products, Science, Dec. 15, 1989, at 1397.

⁹¹ U.S. General Accounting Office, Report to the Chairman, Subcommittee on Commerce, Consumer Protection, and Competitiveness of the Committee on Energy and Commerce, House of Representatives: Product Liability, Verdicts and Case Resolution in Five States, H.R. Doc. No. 89-99, Sept. 1989, at 4.

took four years or more to be resolved.⁹²

- "The problem of civil trial delay in the Los Angeles Superior court worsened in the 1980s and is now nearing crisis proportions. The time from filing to jury trial has reached five years--far longer than the two-year period generally accepted as ideal for civil cases. The percentage of civil cases in Los Angeles in which a jury trial is held has shrunk in recent years, suggesting that long delays may discourage some litigants from waiting for trial. As more litigants opt for settlement in the face of the five-year delay, concerns have been raised about citizens' access to justice."⁹³

- "[T]he current system is cruelly slow. Last year the backlog of personal-injury, product-liability and other civil damage suits in the Law Division of the Cook County Circuit Court reached 67,776 cases, 20 percent of them 5 years old or older. Delays of 6 to 10 years between filing and trial are common."⁹⁴

2. Discovery

- "The discovery process has become, for both sides, a litigation weapon to discourage and prevent prosecution of claims, to force a settlement or merely to wear down an adversary. Counsel, regrettably, often look upon discovery as a meal ticket or annuity rather than as a quick and inexpensive quest for evidence. These were obviously not the intentions of the draftsmen of the Federal Rules of Civil Procedure, and should not be permitted to thwart the right of litigants to their day in court."⁹⁵

- "Although both judges and lawyers identify the failure to comply with discovery requests as a frequently encountered abuse of discovery, the present sanctioning system does not effectively deter such abuse principally because judges are unwilling to impose sanctions after-the-fact to punish most transgressors, preferring

⁹² American Bar Ass'n Judicial Admin. Div., Action Comm'n to Reduce Court Cost and Delay, Attacking Litigation Costs and Delay (1984), cited in Thomas C. Fischer, Toward Legal Gridlock?, 24 New Eng. L. Rev. 697, 707 (1990).

⁹³ Institute for Civil Justice, Rand Corporation, Annual Report April 1, 1991 - March 31, 1992 16 (1990).

⁹⁴ John McCarron, Too Many Lawsuits Spoil Torts, Courts, Chi. Trib., May 19, 1991, at 3.

⁹⁵ Martin I. Kaminsky, Proposed Federal Discovery Rules for Complex Civil Litigation, 48 Fordham L. Rev. 907, 922 (1980) (citations omitted).

instead to give the offending party a second chance to comply."⁹⁶

- "Discovery, like pleading, is too easily abused, the consequences of such abuse in terms of delay, expense and public resentment are too serious, and the federal judiciary is too busy to continue the present reliance on protective and sanction orders as the principal weapon against abuse. While those powers must be retained and firmly exercised, we are persuaded that the effort to state and enforce proper standards of professional conduct for attorneys offers a significant opportunity to deter excessive discovery and other abuse."⁹⁷

- In a 1988 poll of 200 federal and 800 state judges, discovery abuse was cited more often than any other factor as the cause of court delay. Approximately 80 percent of the judges polled said they have at least some problems with the discovery process.⁹⁸

- Precedent exists for both a mandatory disclosure requirement and limits on discovery:

- * Rule 6 of the Rules of Court, Central District of California, "Early Meeting of Counsel--Report to Court--Status On Conference," requires counsel (1) to exchange all documents then "reasonably available to a party which are then contemplated to be used in support of the allegations of the pleading filed by the party"; (2) to exchange "any other evidence reasonably available to the party to obviate the filing of unnecessary discovery motions"; and (3) to exchange a "list of witnesses then known to have knowledge of the facts supporting the material allegations of the pleading filed by the party." See also S.D. Fla. Ct. R. 14(A).

- * The rules of the U.S. Tax Court require parties "to attain the objectives of discovery through informal consultation or communication before utilizing the discovery procedures provided in these Rules." U.S. Tax Ct. R. of Prac.

⁹⁶ American Bar Ass'n, Section of Litigation, Second Report of the Special Committee for the Study of Discovery Abuse, 5 Litig. News 9, 10 (1980) (quoting Ellington, A Study of Sanctions for Discovery Abuse 42-43, 56 (1979)).

⁹⁷ American Bar Ass'n, Section of Litigation, Second Report of the Special Committee for the Study of Discovery Abuse, 5 Litig. News 9, 11 (1980).

⁹⁸ Louis Harris and Assocs., Inc., Judges Opinions of Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases, 69 B.U.L. Rev. 731, 733 (1989).

and Proc. 70.

* In 1987, the Supreme Court of Nevada adopted a rule, providing that, within 30 days after the service of the answer, the attorneys for the parties must meet to request and exchange discoverable documents and lists of people having knowledge of the relevant facts. Nev. Ct. R. Anno. R. 21.

* The American Bar Association has twice proposed (in 1977 and 1980) making limits on discovery part of the Federal Rules of Civil Procedure.⁹⁹

* A 1986 Federal Judicial Center survey of 12 districts with a local rule limiting the number of interrogatories found a majority of the 271 responding attorneys approved of the rule, with 73 percent reporting that the limitation controlled certain abusive, excessive or pointless discovery.¹⁰⁰

* At least one federal district court has a local rule imposing quantitative restrictions on the taking of depositions. See E.D. Va.

E. Expert Witnesses

• "There is no 'bright-line' test to distinguish real science from junk science, but there are some clear signals. . . . [J]unk science is often espoused by an 'expert' who is not really an expert (someone you would trust if your health and well-being depended on it.) The expert . . . typically has not published in the field, has not been a member of any relevant professional society, is not familiar with the relevant literature, and does not understand key principles of the relevant science. The expert is often a journeyman witness who makes a living in the courtroom, not the laboratory."¹⁰¹

• "A curious group of expert witnesses has emerged in the sympathetic sort of case where neighbors charge that pollution from a chemical factory or dump has made them ill. Lawyers for the neighbors can usually show that the defendants released at least

⁹⁹ See American Bar Ass'n, Report of the Special Committee for the Study of Discovery Abuse 18, 20 (1970) (limiting parties to 30 questions as of right); American Bar Ass'n, Second Report of the Special Committee for the Study of Discovery Abuse (1980).

¹⁰⁰ J. Shepard & C. Seron, Federal Judicial Ctr. Staff Paper, Attorneys' Views of Local Rules Limiting Interrogatories (1986).

¹⁰¹ Barry Epstein & Marc Klein, Keeping "Junk Science" Out of the Courtroom, N.J.L.J., Sept. 19, 1991, at 7.

minute quantities of hazardous substances into the local air, water, or soil. The experts then come along to testify that even very low-level exposure to chemicals can ravage people's immune systems -- the dramatically effective catch-phrase is 'chemical AIDS.'. . . The experts do their own battery of tests on the complainants and come up with immune system abnormalities that tests by other scientists fail to reveal."

"The 'chemical AIDS' idea has been emphatically rejected by leading medical authorities as without foundation. But a Missouri court awarded \$49 million after claims of this sort -- later remanded for retrial -- and complainants from Tennessee to California have been winning verdicts ranging up to \$13 million, although many get thrown out on post-trial motions or appeal."¹⁰²

- "[T]he issue should not be considered in 'pro-plaintiff' or 'pro-defendant' terms. A defendant could use junk science to defeat a plaintiff's legitimate claims for compensation every bit as well as a plaintiff could use junk science to prevail on an unjust claim. . . . Aside from yielding unjust results, [junk science] can compromise the integrity of our judicial system, undermine the public's perception of it, and drive vital products from the marketplace."¹⁰³

- "Why would you, the diligent lawyer, settle for a scientist who will say that PCBs may in some circumstances affect health, though how and at what concentrations is most unclear, if you can find one who will swear that they are one of the most lethal substances known to man, that they subvert the immune system, and they undoubtedly were to blame for this plaintiff's migraine headaches? . . . The middle of the road, in law even more so than in politics, belongs to the yellow stripes and the dead armadillos. . . . It is the strength of the expert's support for your position that comes first."¹⁰⁴

IV. Punitive Damages

- One commentator has opined: "[P]unitive damages are out of control. Certainly recent awards are unprecedented in both incidence and amount. Moreover, the explosion in punitive judgments has not been accompanied by a reform of the terms of their imposition. Punitive damages may be inflicted without adequate procedural safeguards, in the absence of meaningful

¹⁰² Walter K. Olson, The Litigation Explosion 162-63 (1991).

¹⁰³ Barry Epstein & Marc Klein, Keeping "Junk Science" Out of the Courtroom, N.J.L.J., Sept. 19, 1991, at 11.

¹⁰⁴ Peter W. Huber, Galileo's Revenge, Junk Science in the Courtroom (1991).

substantive standards, and in virtually unlimited amounts."¹⁰⁵ In cases stemming from allegedly defective product design or manufacture, he questioned the fairness of punishing a defendant "ten or twenty or a hundred times over, in cumulations so extravagant and destructive as to defy any rational justification and threaten the civil extinction of major business entities."¹⁰⁶

- From 1984 to 1988, the number of punitive awards in all pharmaceutical product liability cases was fifteen times greater than the number of awards in the entire decade of the 70s.¹⁰⁷

- According to a study by Stephen Daniels and Joanne Martin of the American Bar Foundation published in the Minnesota Law Review in 1990, punitive damages were awarded in 9 percent of the product liability cases won by plaintiffs from 1981 to 1985.¹⁰⁸

- A study released by the Roscoe Pound Foundation in early 1992 reported that in the cases in which punitive damages were awarded in the past 25 years:

- * punitive damages exceeded \$1 million in 36 percent of the cases;

- * punitive damages exceeded compensatory damages in 59 percent of the cases; and

- * the amount of the punitive damages was more than twice the amount of the compensatory damages in 38 percent of

¹⁰⁵ John Calvin Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 139 (1986).

¹⁰⁶ John Calvin Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 146 (1986).

¹⁰⁷ Richard J. Mahoney & Stephen E. Littlejohn, Innovation on Trial: Punitive Damages versus New Products, Science, Dec. 15, 1989, at 1397 (citing Amicus Curiae Brief of the Pharmaceutical Manufacturers Ass'n and the American Medical Ass'n to the U.S. Supreme Court in Browning Ferris Industries v. Kelco Disposal, Inc., No. 88-556, at 12 n. 28).

¹⁰⁸ Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 37-38 (1990); see also John Moore, Knocking the System, 47 Nat'l J. 2844, 2849 (1991).

the cases.¹⁰⁹

- A study undertaken by the Justice Department's Tort Policy Working Group in 1987 indicated that uncertainties in the punitive damages system "serve as a significant obstacle to the settlement process by giving the plaintiff unrealistic expectations of the value of his case even where the defendant has made a generous settlement offer."¹¹⁰ The study noted: "It is close to impossible to negotiate sensibly with a plaintiff who believes that he can shoot for the moon."¹¹¹

- The plaintiff in Layman v. Xerox Corp.¹¹² sued under state tort law and federal age discrimination law and recovered \$145,000 in back pay, \$140,000 in compensatory damages and \$8.8 million in punitive damages.

- "In Georgia in 1987, a jury awarded a construction company \$5 million in punitive damages for \$53,000 of property damage to a bulldozer where the bulldozer merely hit a petroleum line that was not buried deep enough."¹¹³

- In Aetna Life Insurance Co. v. Lavoie,¹¹⁴ an Alabama

¹⁰⁹ Michael Rustad, Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts 29 (1991). It is important to note that the conclusion of Professor Rustad's study is that punitive damages are rarely awarded, even more rarely paid and frequently reduced after trial. According to Professor Rustad, his study demonstrates that "companies have nothing to worry about in punitive damages as long as they act responsibly." Milo Geyelin, Product Suits Yield Few Punitive Awards, Wall St. J., Jan. 6, 1992, at B-1.

¹¹⁰ R. Willard & R. Willmore, An Update on the Liability Crisis: Tort Policy Working Group 51 (1987).

¹¹¹ R. Willard & R. Willmore, An Update on the Liability Crisis: Tort Policy Working Group, 51 (quoting Twerski, A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution, 18 U. Mich. J.L. Ref. 575, 612 (1985)).

¹¹² (N.D. Tex. 1990), reported in Martha Brannigan & Karen Blumenthal, Who Will Lead Prosecution of Noriega, Wall St. J., Jan. 11, 1990, at B-8.

¹¹³ Griffin B. Bell & Perry E. Pearce, Punitive Damages and The Tort System, 22 U. Rich. L. Rev. 1, 2 (1987).

¹¹⁴ 470 So. 2d 1066 (Ala. 1984), vacated, 475 U.S. 813 (1986).

jury awarded \$3.5 million dollars in punitive damages against an insurance company for its bad faith refusal to pay a \$1,650.22 hospital bill. Although some jurisdictions require a reasonable relationship between the actual and punitive damages, the Alabama courts do not require such a correlation.¹¹⁵

V. Availability and Cost of Liability Insurance

- Many companies are finding it increasingly difficult to obtain the services of qualified persons to serve on their boards of directors because of the increasing threat of liability and soaring insurance costs. The number of claims against directors has gone up 257 percent since 1974, and the average total cost per claim has risen 84 percent.¹¹⁶

- "More than a dozen Pennsylvania fireworks celebrations have been called off, including one at the state capital in Harrisburg. Officials in Prairie Village, Kansas, canceled their annual display after they could not find an insurance company to provide \$1 million in coverage.

"And here in Detroit, where a 45-minute fireworks display is planned for the annual Canadian-American festival Wednesday, officials say their liability insurance premiums have doubled since last year. . . . Canonsburg, Pa. dropped plans for its fireworks show. It could get liability insurance for the stadium but only if there were no fireworks. There will be the regular parade, but the co-chairman of the festival, Stephen Zemencik, said the high point of the show that has annually brought thousands of people to his little town 23 miles from Pittsburgh would not be seen.

. . . .

"The dimming of fireworks is only the latest installment in the liability insurance problem that is pinching many forms of summer fun. A variety of facilities and business, from water slides at carnivals to horseback riding in national parks are affected.

. . . .

"Recreation industry officials say that if coverage can be obtained, premiums are double or triple last year's.

. . . .

"[Akron, Ohio's] Fourth of July ethnic festival . . . was for a while in danger of cancellation for lack of insurance. The premium on the policy that was finally obtained is the same as last year, but the coverage is only \$500,000, not the \$1 million it was last year.

¹¹⁵ Griffin B. Bell & Perry E. Pearce, Punitive Damages and The Tort System, 22 U. Rich. L. Rev. 1, 6 (1987).

¹¹⁶ Tamar Lewin, Director Insurance Drying Up, N.Y. Times, March 7, 1986, at D-1.

. . . "On Mount McKinley . . . guides are leading tours on only limited sections of the highest peak in North America because of new restrictions in their insurance policies."¹¹⁷

- In 1987, half of all ice skating rinks reported they could not obtain liability coverage and were threatened with closure.¹¹⁸

- By 1986, most of the country's 400 largest consulting engineering firms were unable to buy pollution liability insurance in any amount, or at any price, and were refusing to handle toxic waste sites unless their clients assumed all liability.¹¹⁹

VI. Product Liability

A. Generally

- "Insurance brokers in Europe say some small companies have decided to forgo the American market rather than pay the large product liability premiums."¹²⁰

- A comprehensive analysis of jury verdicts in the United States prepared by the Rand Institute for Civil Justice shows that the growth in the average award in product liability suits "has been truly explosive, reflecting increases ranging from 200 to more than 1000 percent" from the period 1960-1964 to 1980-1984.¹²¹

- In 1974, the average product liability award was \$345,000; by 1985, it averaged more than \$1 million.¹²²

¹¹⁷ James Barron, Liability Costs Dampen Summer Fun, N.Y. Times, July 2, 1986, at A-12.

¹¹⁸ R. Willard & R. Willmore, An Update on the Liability Crisis: Tort Policy Working Group 18 (1987).

¹¹⁹ Peter W. Huber, Liability: The Legal Revolution and Its Consequences 140 (1988).

¹²⁰ Jacques Neher, Liability Insurance Costs Discourage European Exports to U.S., Wash. Post, Dec. 28, 1986, at K-5.

¹²¹ D. Hensler, et al., Trends In Tort Litigation: The Story Behind the Statistics 18 (1987).

¹²² Dee, Chairman of the National Ass'n of Manufacturers, Blood Bath, 10 Enterprise 3 (Mar/Apr 1986), cited in Marc Galanter, The Day After the Litigation Explosion, 46 Md. L. Rev. 3, 4 (1986); see also Time, Mar. 24, 1986, at 20.

- In California, a man was injured when a drunk driver lost control of his car, veered into a parking lot, and crashed into a telephone booth where the man was standing. The man sued the companies that had designed, installed, and maintained the booth. In 1983, Chief Justice Rose Bird of the California Supreme Court held that these companies could be held liable for the injuries.¹²³

- The American product liability system inflates insurance costs, creates uncertainties for business, stifles corporate research and development, and ultimately increases consumer costs. Fear of litigation also undermines research and development of new, beneficial products, and costs American workers jobs.¹²⁴

- "[L]iability premiums tripled in a three-year period from 1984-1986."¹²⁵

- "A textile machine manufacturer that had been in business since 1830 was forced to shut down after defending against 36 product liability claims. One of these claims involved a machine that left the plant in 1895."¹²⁶

- "Consulting engineers report that they systematically favor old products over new ones in their design specifications fearing (quite correctly) that newer design options carry a greater risk of liability, whatever real decrease in risk they might actually represent."¹²⁷

- "Liability-conscious universities decline to license patents to small companies despite the fertile environment they

¹²³ Gordon Crovitz, How to Take the Profit Out of Suing, 35 Pol'y Rev 72, 72 (1986).

¹²⁴ Product Liability, Senate Panel Hears Testimony on Reform Bill; Effect on Insurance Debated, Daily Rep. For Executives, (BNA) Apr. 6, 1990, DER No. 67, at A-6.

¹²⁵ Testimony of W. Kip Viscusi, George G. Allen Professor of Economics, Department of Economics, Duke University Durham, N.C. before the Subcommittee on Competitiveness and Economic Opportunity of the U.S. Senate Committee on Small Business, at 15 (Nov. 7, 1991).

¹²⁶ Alfred W. Cortese, Jr. and Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. & Com. 167, 198 (1989).

¹²⁷ Peter W. Huber, Liability: The Legal Revolution and Its Consequences 156 (1988).

offer for innovation, fearing that anyone suing over a patent-related product would be sure to go for the university's deep pocket as well."¹²⁸

- A 1988 survey of 500 company chief executive officers conducted by the American Tort Reform Association found the product liability system nationwide harms the ability of companies to plan for the future. Survey results showed that some companies were forced to close their operations or lay off workers, and others to cancel plans for new products.

The survey also found that CEOs believe product liability laws in this country have made the United States less competitive in world markets.

For example, the National Machine Tool Builders' Association has reported that 23 percent of its members have no product liability insurance, and for those that do have coverage, premiums have risen by 55 percent from 1986 to 1988.¹²⁹

- The costs associated with product liability suits have a disproportionate effect on small firms. Unlike some large firms, small businesses are unable to pass the increased costs of insurance and litigation onto the consumer and remain competitive.¹³⁰

- "Under the current product liability system, everyone is hurt -- the manufacturer; the injured claimants, who may be left uncompensated if all the manufacturers' resources are depleted due to the lack of available, affordable insurance; and the public, who are denied access to products."¹³¹

- "The median company in the machine tool industry is forced to spend seven times more on product liability costs than it

¹²⁸ Peter W. Huber, Liability: The Legal Revolution and Its Consequences 156 (1988).

¹²⁹ Susan Wollner, Business Groups Back Product Liability Reform, 5 Bus. First - Buffalo, May 22, 1989, at 13.

¹³⁰ R. Wendell Moore, Acting Chief Counsel for Advocacy, U.S. Small Business Administration, statement before the Subcommittee on Competitiveness and Economic Opportunity of the Senate Committee on Small Business (Nov. 7, 1991).

¹³¹ Edward J. Goldman, (on behalf of NMTBA - the Association for Manufacturing Technology), statement before the Subcommittee on Competitiveness and Economic Opportunity of the Senate Committee on Small Business, at 2 (Nov. 7, 1991).

is able to spend on new product research and development."¹³²

- The American machine tool industry is about three quarters what it was a decade ago. Overseas competitors have filled many of the gaps. One of the impediments in competing against foreign companies is product liability costs.¹³³

B. Private Planes

- Both Beech Aircraft and Piper Aircraft suspended production of light single- and twin-engine aircraft.¹³⁴

- "In 1977 . . . for example, small-plane manufacturers paid a total of \$24 million in liability claims. By 1985, their payout was \$210 million. Companies like Beech, Cessna, and Piper curtailed or suspended production; they quickly discovered that the new-model planes, carrying a 50 percent surcharge for liability insurance, could no longer compete with used planes already on the market. Aircraft technology, however, had been advancing steadily, so the new models kept off the market were notably safer than the old ones people went on using instead. Worse still, small-plane development has traditionally been the richest source of aerodynamic research and innovation for the aircraft industry in general, so what private pilots and hobbyists lose today, the public will likely lose a decade or two later in commercial aviation."¹³⁵

- "The U.S. private aircraft industry has also been hard hit. Whereas American firms produced over 17,000 private planes in 1979, by 1987 their production had dropped to 1,085. The high

¹³² Edward J. Goldman, (on behalf of NMTBA -- The Association for Manufacturing Technology) statement before the Subcommittee on Competitiveness and Economic Opportunity of the Senate Committee on Small Business, at 3 (Nov. 7, 1991).

¹³³ Hearings on Product Liability Reform, Before the Subcomm. On Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy, 100th Cong., 1st Sess. at 75, 77 (statement of John B. Curcio, CEO of Mack Trucks, on behalf of the National Assn of Manufacturers) (Mar. 24, 1987).

¹³⁴ Penny Pagano, Liability Costs Cut into Airplane Sales, Los Angeles Times, June 30, 1986, Part IV, at 1.

¹³⁵ Peter W. Huber, Liability: The Legal Revolution and Its Consequences 161 (1988).

liability costs average \$100,000 per plane."¹³⁶

- "Piper Aircraft Corp., in the midst of its second bankruptcy, is currently attempting to move its operations outside of the country, most likely to Canada. The main reason is to get out from under the product liability laws of this country, which can reach back 50 years to an aircraft's manufacturer and sue a company and force them to pay for damages even though the accident is due to pilot negligence."¹³⁷

- Senator Jake Garn (Utah), who is restoring a private plane he bought in 1969 for \$5,000, observed that the cost of liability has dramatically driven up the cost of replacement parts for airplanes. He was required to pay \$5,300 for two fuel tanks and \$72 for an oil dipstick.¹³⁸

- "Burt Rutan, the pioneering designer of the Voyager, didn't have the resources to compete with larger manufacturers, but he had a cheaper way of getting his products out into the marketplace. He sold construction plans for novel airplanes to do-it-yourselfers who built the planes in their garages. But in 1985, fearful of the lawsuits that would follow if a home-built plane based on his designs crashed, he stopped selling the plans."¹³⁹

- The President of Unison Industries, Inc., said his firm is withholding from the market a new and advanced electronic ignition system for light aircraft because of the liability risk that might result from its release and use.¹⁴⁰

- The President and CEO of Will-Burt Co. said that he gave up making aircraft parts in 1985 "because the attorneys told me to

¹³⁶ Testimony of W. Kip Viscusi, George G. Allen Professor of Economics, Department of Economics, Duke University, Durham, N.C. before the Subcommittee on Competitiveness and Economic Opportunity of the U.S. Senate Committee on Small Business, at 4 (Nov. 7, 1991).

¹³⁷ Cong. Rec. S-4682 (daily ed., Apr. 2, 1992) (Senator Jake Garn).

¹³⁸ Cong. Rec. S 4682-83 (daily ed., Apr. 2, 1992).

¹³⁹ Peter W. Huber, Liability: The Legal Revolution and Its Consequences 156 (1988).

¹⁴⁰ Hearings Before the Subcommittee on Transportation, Aviation and Materials of the House Comm. on Science and Technology, statement of Frederick B. Sontag, President, Unison Industries, at 75 (Oct. 22, 1985).

stop doing it"; this meant laying off 80 people.¹⁴¹

- "The average cost per airplane for product liability insurance alone ranges between \$60,000-\$70,000, and this does not include accident investigation, defense and engineering costs. In some cases these total liability costs exceed the cost of the aircraft itself."¹⁴²

C. Safety

- "There's little evidence that specific liability verdicts have led to the development of safer products. To be sure, tort suits have encouraged manufacturers to change or expand their warnings, but there also is little concrete evidence that the redesigned warnings have resulted in fewer deaths and injuries."¹⁴³

- "[W]hen it comes to actual product design . . . the far more important impulses for safety come from outside the liability system, principally from safety regulation."¹⁴⁴

- "Professor John Graham of Harvard found no statistical evidence that the expansion of liability doctrines and case filings has been a significant cause of passenger safety improvements since World War II."¹⁴⁵

- "Professor Graham suggests that the decision by

¹⁴¹ Hearings on S. 1400, The Product Liability Reform Act of 1989 before the Senate Consumer Subcommittee of the Senate Commerce Comm., Statement of Harry Featherstone, at 274 (Apr. 5, 1990).

¹⁴² Hearings of the Subcommittee on Transportation, Aviation and Materials of the House Comm. on Science and Technology, statement of Edward W. Stimpson, President, General Aviation Manufacturers Ass'n, at 58 (Oct. 22, 1985).

¹⁴³ Testimony of Robert E. Litan, Senior Fellow, the Brookings Institution before the Subcommittee on Competitiveness and Economic Opportunity, Senate Committee on Small Business, Nov. 7, 1991, at 3.

¹⁴⁴ Testimony of Robert E. Litan, Senior Fellow, The Brookings Institution before the Subcommittee on Competitiveness and Economic Opportunity, Senate Committee on Small Business, Nov. 7, 1991, at 4.

¹⁴⁵ Testimony of Robert E. Litan, Senior Fellow, the Brookings Institution before the Subcommittee on Competitiveness and Economic Opportunity, Senate Committee on Small Business, Nov. 7, 1991, at 4.

manufacturers to phase out tension relievers in seat belts, motivated largely by liability fears, led to the replacement 'slack' belts, which are less safe than their predecessor."¹⁴⁶

- "[I]t is striking that European auto companies who operate in a less aggressive liability climate than U.S. companies have generally been more aggressive in introducing safety improvements in their cars -- more crash-worthy structures, pretensioned seat belts, and antisubmarining seats -- than their U.S. competitors."¹⁴⁷

- "U.S. auto manufacturers delayed and even fought introduction of the airbag, in part, out of fears of being sued when the airbags misfired -- suits which are now beginning to make their way to the courts since airbags have become available. . . . [Murray MacKay, professor and director of the Accident Research Unit at the University of Birmingham in England,] also suggests that U.S. companies have been reluctant to install child restraint seats out of fear of adverse liability rulings."¹⁴⁸

- "[T]he threat of liability may have discouraged both safety and innovation. Dr. Stanley Reiser of the University of Texas suggests that the spate of medical malpractice suits has eroded trust between patients and doctors that is essential for quality care. Fears of liability verdicts have discouraged doctors from admitting error, a process that is essential to improving medical practices over time."¹⁴⁹

D. Effect on Recreation and Sports

- "Youth sports activities are slowly becoming extinct --

¹⁴⁶ Testimony of Robert E. Litan, Senior Fellow, The Brookings Institution before the Subcommittee on Competitiveness and Economic Opportunity, Senate Committee on Small Business, Nov. 7, 1991, at 5.

¹⁴⁷ Testimony of Robert E. Litan, Senior Fellow, the Brookings Institution before the Subcommittee on Competitiveness and Economic Opportunity, Senate Committee on Small Business, Nov. 7, 1991, at 6.

¹⁴⁸ Testimony of Robert E. Litan, Senior Fellow, the Brookings Institution before the Subcommittee on Competitiveness and Economic Opportunity, Senate Committee on Small Business, Nov. 7, 1991, at 7.

¹⁴⁹ Robert E. Litan, Senior Fellow, the Brookings Institution, testimony before the Subcommittee on Competitiveness and Economic Opportunity of the Senate Committee on Small Business, at 4-5 (Nov. 7, 1991).

from fear of lawsuits. From expanded liability theories that win judicial approval. From soaring insurance costs. Americans are now finding their choices, their freedoms, restricted, whether it be a scuba diving vacation, a mountain climbing adventure or a flip from a diving board at a public pool. . . . Group sports are in deep trouble. Girls' and boys' clubs, fishing and hiking clubs, and roadrunners have curtailed or eliminated activities because of high insurance premiums or the inability to find insurance or the fear of lawsuits, which these days, may be brought for any conceivable reason."¹⁵⁰

- Product liability costs for American sporting goods manufacturers in 1982 were 4.2 percent of total sales compared to 0.5 percent of sales for their Japanese competitors.¹⁵¹

- In the last ten years, the number of companies that manufacture football helmets dropped from 11 to 2. Recently, one of the last two companies announced its plan to sell that business because of the liability exposure and cost. In 1985, insurance and legal costs were higher than all production costs combined.¹⁵²

- Only two makers of lacrosse equipment remain in the U.S. and both are experiencing difficulty obtaining liability insurance.¹⁵³

¹⁵⁰ Marcia Chambers, Whatever Happened to the Sandlot?, Natl L. J. Apr. 22, 1991, at 15.

¹⁵¹ Randolph J. Stayin, partner in Taft, Stettinius & Hollister, Testimony, Mar. 24, 1987.

¹⁵² Hearings on Product Liability, Before the Subcommittee on Consumers of the Senate Comm. on Commerce, Science and Transport., 99th Cong., 2d Sess. at 69 (1986); see also R. Willard & R. Willmore, An Update on the Liability Crisis: Tort Policy Working Group 19 (1987); Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. & Com. 167, 199 n.197 (1989) and accompanying text ("The number of football manufacturers decreased from 18 in 1976 to 3 in 1986.").

¹⁵³ Hearings on Product Liability, Before the Subcomm. on Consumers of the Senate Commerce, Science and Transp., 99th Cong., 2d Sess. at 69 (1986) (statement of Larry McClain, Vice President, Rawlings Sporting Goods Co, on behalf of the Sporting Goods Manufacturers Assn.), cited in Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. & Com. 167, 199 (1989); see also Brown, Insurance Costs, Lawsuits Injure U.S. Sports, J. Com., July 13, 1988, at A-1, A-5.

- Spaulding, a major sporting goods manufacturer, has withdrawn from production of protective sporting equipment entirely because of increased insurance costs and increases in the number of associated product liability suits.¹⁵⁴

- Uvex Winter Optical in Rhode Island has stopped manufacturing and distributing motorcycle and ski racing helmets because of liability costs.¹⁵⁵

- U.S. sporting goods manufacturers have stopped making hockey equipment, which now comes primarily from Czechoslovakia, Sweden, and Canada, and trampolines, which must also be obtained from foreign sources.¹⁵⁶

- Some amusement park rides have been closed, including the temporary closing of the Cyclone ride at the Coney Island Amusement Park, Astroland.¹⁵⁷

¹⁵⁴ Malott, Commentary: Product-Liability System Hampers Competitiveness, Financier, Jan. 1988, at 30; Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. & Com. 167, 199 (1989); R. Willard & R. Willmore, An Update on the Liability Crisis: Tort Policy Working Group 19 (1987).

¹⁵⁵ Hearings on Product Liability Reform, Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy, 100th Cong., 1st Sess. at 77 (statement of John B. Curcio, CEO of Mack Trucks, on behalf of the National Ass'n of Manufacturers) (Mar. 24, 1987), based on a letter from Douglas Wilson, President of Uvex Winter Optical; see also Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. & Com. 167, 200 n. 211 (1989).

¹⁵⁶ Hearings on Product Liability, Before the Subcomm. on Consumers of the Senate Comm. on Commerce, Science and Transp., 99th Cong., 2d Sess. at 69 (1986) (statement of Larry McClain, Vice President, Rawlings Sporting Goods Co., on behalf of the Sporting Goods Manufacturers Ass'n); cited in Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. & Com. 167, 199 (1989); see also Richard W. Stevenson, Athletic Supplies: Stakes are High, N.Y. Times, June 10, 1986, at B-9.

¹⁵⁷ Testimony of W. Kip Viscusi, George G. Allen Professor of Economics, Department of Economics, Duke University, Durham, N.C. before the Subcommittee on Competitiveness and Economic Opportunity of the U.S. Senate Committee on Small Business, at 4 (Nov. 7,

• "A seven-figure jury verdict against a Holiday Inn years ago sounded the death knell for diving boards at all but large, supervised pools."¹⁵⁸

• "Forty percent of the rafting companies in Colorado have closed or been sold in the last three years, largely due to rising liability costs. The Sierra Club discontinued its mountaineering activities in 1988 because climbing insurance had soared to \$350,000, more than double the premium for the rest of its activities."¹⁵⁹

• Part of the reason ski lift ticket prices have soared from \$5 a day in the 1960s to \$38 to \$40 a day now in Southern Vermont is that the defense of assumption of risk has been narrowed considerably in the courts, so the cost of insurance and litigation in recent years has been borne by the skier.¹⁶⁰

VII. Mass torts

A. Asbestos

• "Legal expenses eat up too much of the amount spent to compensate harms--about half the total expenditures for tort litigation generally, and as much as 60 percent of the expenditures for more complex personal injury litigation[, such as that associated with asbestos]."¹⁶¹

• "Nearly two new asbestos cases are filed for every one completed."

"While one case was pending in court, 488 of the original plaintiffs died, a result many jurists say is routine."

"For every \$1 recovered by an asbestos victim, almost \$2

1991).

¹⁵⁸ Robert V. Wills, Lawyers are Killing America 22 (1990).

¹⁵⁹ Marcia Chambers, Whatever Happened to the Sandlot?, Natl L. J. Apr. 22, 1991, at 15.

¹⁶⁰ Marcia Chambers, Whatever Happened to the Sandlot?, Natl L. J. Apr. 22, 1991, at 15.

¹⁶¹ Deborah R. Hensler, Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform, 75 Judicature 244, 250 (1992).

goes to litigation costs -- mainly to the attorneys on both sides."¹⁶²

B. Other Torts

• "The same legal forces that knocked the Dalkon Shield off the market also dispatched two other kinds of IUD. The Dalkon Shield without question deserved to go; the next two, however, were the safest effective alternatives available to many women. Leftover IUDs are still used by over 2 million Americans; when the time comes for these devices to be replaced, it has been estimated that there will be 160,000 unintended pregnancies caused by the lack of equally acceptable and effective replacements. These will result in 72,000 live births and 88,000 induced abortions -- which collectively pose a far greater risk than any IUD would ever have created.

"The demise of Bendectin marked progress of a similar kind. Here pregnant women lost their only certifiably safe relief from sometimes debilitating morning sickness. Obstetricians and gynecologists have retreated too. Many of their services have become wholly unavailable in rural and less affluent communities. So women and children won their expanded right to sue, but lost services essential to their health and safety. The complication that develops in the back seat of the car heading to the delivery room at a distant hospital is not likely to yield a munificent tort award, even though it is more likely to end in a tragedy. If the child is delivered uneventfully, the tort system will continue its assault on her welfare in later years."¹⁶³

• "[I]n the early 1970s, Bendectin claims burgeoned. In one early case, a jury decided that the child's injuries were not caused by the drug but tried to award \$20,000 for medical expenses anyway. Merrell-Dow won almost all the early cases, but each trial stimulated a flood of new claims. Eleven hundred claims were consolidated in a single class action. Faced with the staggering legal costs of taking such a case to trial, Merrell-Dow offered to settle for \$120 million. Plaintiffs' lawyers foolishly torpedoed the offer. The case was then tried, and Merrell-Dow won again. But hundreds of other claimants had opted out of the class action, and their cases were still pending. In 1987 a jury awarded \$2 million to a six-year-old boy born with club feet. Another jury awarded \$95 million for another birth defect. As of July, 1987, seventeen juries had considered the Bendectin birth defect link. Merrell-Dow won twelve times, plaintiffs five. Throughout, the

¹⁶² Steve France, Asbestos Solution Proposed, ABA Journal, June 1991, at 16.

¹⁶³ Peter W. Huber, Liability: The Legal Revolution and Its Consequences 162 (1988).

overwhelming scientific consensus, in the FDA and in all respectable scientific circles, had not moved an inch: Bendectin does not, in fact, cause birth defects. 'With Bendectin,' a New York Times editorial commenting on the original class action concluded, 'the law has made a devastation and called it a settlement.' In 1985, under the mounting pressure of litigation, the drug was pulled from the market."¹⁶⁴

- "Five Bendectin cases produced no award at all; a sixth netted the plaintiff a \$95 million verdict."¹⁶⁵

¹⁶⁴ Peter W. Huber, Liability: The Legal Revolution and Its Consequences 102 (1988).

¹⁶⁵ Peter W. Huber, Liability: The Legal Revolution and Its Consequences 110 (1988).