TRIAL LAWYERS INC.

A REPORT ON THE LITIGATION LOBBY 2010
A Message from the Director

America’s litigation-friendly legal system continues to impose a heavy burden on our economy. The annual direct cost of American tort litigation—excluding much securities litigation, punitive damages, and the multibillion-dollar settlement reached between the tobacco companies and the states in 1998—exceeds $250 billion, almost 2 percent of gross domestic product. The indirect costs of excessive litigiousness (for example, the unnecessary tests and procedures characterizing the practice of “defensive” medicine, or the loss of the fruits of research never undertaken on account of the risk of abusive lawsuits) are probably much greater than the direct costs themselves.

Of course, tort litigation does do some good, and it does deter some bad behavior. The problem is that it deters a lot of good behavior, too. Indeed, the legal system does such a poor job of distinguishing between good and bad behavior that the high cost of litigation is effectively a “tort tax” paid by every American. The share of America’s economy devoted to lawsuits is far higher than that of other developed nations such as Germany and Japan (see graph below, left). Yet America is hardly safer as a result.

As this report details, the causes of the staggering growth in the overall economic costs of litigation in America (see graph below, right) are somewhat complex. A series of writings by academics and decisions by judges from the 1930s through the 1960s—many of which were well-intentioned—changed our legal rules to make it much easier to file and win lawsuits.

Alongside these doctrinal changes, the modern trial-lawyer lobby emerged. As the plaintiffs’ bar became wealthier, more organized, and more like an industry—we like to call it Trial Lawyers, Inc.—it grew into a major political force. Combining large-scale political giving with K-Street lobbying sophistication, the lawyers worked to maintain the legal shifts that had enriched them, as well as to initiate changes that would enrich them still more.

The litigation industry’s political strategy is multifaceted. Because tort law is state law in the United States, the states have been the focus of Trial Lawyers, Inc.’s political efforts. And because tort law is, for the most part, crafted by state judges rather than enacted by state legislatures, these efforts have centered on ensuring a friendly judiciary, whether appointed or elected.

With business groups now fighting back against Trial Lawyers, Inc.’s longtime grip on state judiciaries, the litigation lobby has turned its attention to state legislatures, where it is not only blocking tort reforms but working to expand its portfolio of litigation opportunities. Among other things, state legislators are authorizing new kinds of lawsuits, raising damage caps, and giving private lawyers authority to sue on behalf of the state.

Of course, the growth in federal regulation and law has made it necessary for Trial Lawyers, Inc. to lobby Congress as well. Thanks to large contributions, both to the Democratic Party and to individual legislators, lawyers have not only blocked most federal efforts at tort reform but are also working to coax goodies from Congress that pad their bottom line. Such efforts include:

- Lengthening statutes of limitations in employment law to make it easier to file discrimination suits;
- Spurring securities litigation by allowing suits to be filed against the vendors of corporations accused of fraud;
- Cutting contingent-fee lawyers a tax break worth over a billion dollars;
- Gutting arbitration contracts designed to encourage resolution of disputes that are too expensive to take to trial;
- Allowing state juries to override federal regulations.

The litigation industry isn’t making political headway because it is popular. Eighty-three percent of Americans think that the legal system makes it too easy to assert invalid claims. The plaintiffs’ bar became so nervous about its public image that it changed its name: in 2006, the Association of Trial Lawyers of America rebranded itself the American Association for Justice.

But general public unease over the conduct of litigation today cannot combat the overwhelming influence that Trial Lawyers, Inc. has obtained in the halls of power. In the last decade, lawyers and law firms—including lobbyists—have injected $780 million into federal campaigns, on top of $725 million donated to state

Tort Litigation Consumes Much More of America’s Economy than of Other Developed Nations’

Since 1950, U.S. Tort Costs Have Risen Much Faster than GDP

Source: Towers Perrin
races. Lawyers’ giving is so lavish that it exceeds all other industries’, and likely would do so even if donations by defense firms were backed out of total contribution figures (see note 36). Moreover, the plaintiffs’ bar strategically concentrates its giving, wielding disproportionate influence in contested state supreme court elections and over the leadership of both the U.S. Senate and key state legislatures.

The progress of the plaintiffs’ bar has not been entirely unimpeded. Since the Manhattan Institute issued, in 2003, its first report entitled Trial Lawyers, Inc., major tort-reform legislation in states such as Texas and Mississippi has forced plaintiffs’ lawyers to look for friendly new jurisdictions. Judges such as Janis Graham Jack have blown the doors off a program of manufactured testimony and medical examinations in the asbestos-lawsuit industry, producing a sharp drop in new case filings in that line of litigation. From 2004 through 2008, the cost of litigation to the economy rose more slowly than overall economic growth (see graph above). And four key members of our original Trial Lawyers, Inc.’s “leadership team” have left the business altogether: federal prosecutors uncovered bribery and kickback schemes that led to the imprisonment of Dickie Scruggs, Bill Lerach, and Mel Weiss; and former U.S. Senator John Edwards has retreated from the public scene in ignominy.19

But make no mistake: trial lawyers are reacting to recent setbacks not by licking their wounds but by flexing their political muscle. Newly enlarged Democratic majorities—swept into office by financial crisis, disaffection with the war in Iraq, and enthusiasm for “hope and change”—seem intent on rewarding their political benefactors. I hope that this report, by shedding light on their shenanigans, can help stem the damage.

James R. Copland
Director, Center for Legal Policy
Manhattan Institute for Policy Research
The late Fred Baron, one of the litigation industry’s most successful asbestos lawyers, was never bashful about acknowledging trial lawyers’ political influence. In 2002, in reaction to a recent Wall Street Journal editorial claiming that “the plaintiffs bar is all but running the Senate,” Baron quipped, “I really, strongly disagree with that. Particularly the ‘all but.’”

A past president of Trial Lawyers, Inc.’s political wing—known when he headed it as the Association of Trial Lawyers of America—Baron had personally donated millions of dollars to political causes. For his friend and fellow trial lawyer John Edwards’s 2004 and 2008 runs for national office, Baron directed fund-raising operations, lent the campaign his private jet, and infamously paid to relocate the candidate’s mistress, who was pregnant.

Baron was but one of many heavy-hitting plaintiffs’ lawyers who have ponied up big cash to political campaigns. Indeed, at the time Baron retired from his old firm Baron & Budd, in 2002, there were seven trial-bar contributors to federal campaigns that had given more than his firm: the industry’s political action committee; three fellow Texas personal-injury firms, Williams & Bailey, Nix, Patterson & Roach, and Provost Umphrey; and the law firms of asbestos kingpins Ron Motley (who also led the states’ multibillion-dollar litigation against tobacco companies), Peter Angelos (who now owns the Baltimore Orioles), and the recently deceased John O’Quinn (who also made a fortune on breast-implant suits).

### THE RISE OF THE PLAINTIFFS’ BAR

Although the legal profession and the Anglo-American system of tort law long predate the United States itself, an organized plaintiffs’ bar—and the rise in political influence of trial lawyers like Fred Baron—are relatively recent developments. As noted by legal historian John Fabian Witt, “For the first century and a half of U.S. history, the plaintiffs’ lawyer barely existed as a category.”

Until the late nineteenth century, torts was not recognized as a discrete branch of law; the first American treatise on the subject was not published until 1859. Early-American accident lawyers “shifted back and forth between representing defendants and plaintiffs,” and “[t]hrough the first half of the twentieth century, plaintiffs’ lawyers remained for the most part diffuse and unorganized.”

However, amid and following the upheavals of the Industrial Revolution, reformers during the Progressive era and the New Deal came to believe that the old common-law tort system was ill equipped to handle proliferating workplace injuries and thus promoted the establishment of a regulatory system. Borrowing from Germany, American states began to enact workers’ compensation laws that handled employees’ injury claims outside the tort system: “Between 1910 and 1921, forty-two states passed industrial injury legislation, replacing tort law with an administrative system affording compensation for accidental injuries arising on the job.”

From among the lawyers who handled these new workers’ compensation claims arose the trial-lawyer bar and its lobbying arm. In 1946, Sam Marcus, a Detroit workers’-comp lawyer...
If Trial Lawyers, Inc. had a single founder, it would have to be San Francisco personal-injury lawyer Melvin Belli, dubbed the “King of Torts” by Life magazine in 1954. Belli was “a man of scarlet silk-lined suits, of multi-colored Rolls Royces, of courtroom theatrics and Hollywood high-jinks.” His clients included the Rolling Stones, Lee Harvey Oswald killer Jack Ruby, and Hollywood stars Mae West and Errol Flynn. Belli also wrote several books, including the three-volume treatise Modern Trials, which earned him over $1 million in royalties.

Other lawyers had reason to buy Belli’s book, which explained the tactics he had to use to revolutionize the world of tort law. Belli had been the trial attorney in the famous 1944 case Escola v. Coca-Cola Bottling Co., which laid the foundation for strict liability—liability without fault—in product defect cases. In the 1950s, Belli launched modern pharmaceutical litigation with his successful case against a manufacturer of polio vaccines.

A seminal law review article he wrote, along with his aggressive advocacy, helped increase substantially the amounts awarded for “intangible” injuries like pain and suffering. And to play upon jurors’ heartstrings and put them in a more generous mood, he pioneered the use of “demonstrative evidence”—photographs and props that depicted and dramatized his clients’ suffering.

Many of Belli’s theatrics seem bold even today: in one case, he arranged to have “an injured, 680-pound client [hoisted] through the courthouse window,” and in another, he shocked a 1940s jury “by having a client bare her chest to show scars from an injury. She then shed tears that landed right on her scars.”

representing the Congress of Industrial Organizations, met Sam Horovitz, a Boston employee-claims attorney who represented the American Federation of Labor. In August of that year, the two formed the National Association of Claimants’ Compensation Attorneys (NACCA). Initial membership was eleven, and Marcus was the group’s first president. In 1949, NACCA began to take on its current form, when the nation’s most prominent personal-injury lawyer, Melvin Belli (see box), persuaded the group to admit all tort lawyers rather than merely those representing injured workers.

Although Horovitz initially opposed Belli’s entreaties, he soon embraced the group’s expanded mission with gusto, and in 1949, he “took his family on a three-month, 10,800-mile tour across the South and Southwest in a silver aluminum Airstream trailer to establish local branches and chapters of the NACCA.” Dubbed the Silver Bullet Tour by the trial lawyers, Horovitz’s mission was wildly successful, bringing hundreds, and then thousands, of new recruits to the lawyer-lobby cause.

Because the regulated world of workers’ compensation offered attorneys far less upside than did the open and rapidly expanding world of tort law, the NACCA soon found itself departing from its original purpose. “Within just a few short years, the NACCA had become an organization dedicated not to the improvement of the workmen’s compensation system, but to its rollback. By the early 1950s, NACCA advocated the abolition of workmen’s compensation.”

Membership in the lawyer lobby swelled, and in 1960, the organization changed its name to the National Association of Claimants’ Counsel of America, which better reflected its new mission. Four years later, the group adopted the catchier-sounding American Trial Lawyers Association (ATLA), then switched again in 1972 to a similar name, Association of Trial Lawyers of America. The government-relations arm of Trial Lawyers, Inc. would keep this moniker for thirty-four years, before deciding in 2006 to disguise its mission by adopting the innocuous-sounding American Association for Justice.
Trial Lawyers, Inc. could never have grown into the big business it is if the traditional legal rules limiting the scope of litigation had not first been loosened. In 1944, pioneering trial lawyer Melvin Belli represented Gladys Escola, a waitress who had suffered severe hand injuries when a bottle of Coca-Cola exploded as she was putting it into a refrigerator. Under traditional doctrines, in order to establish liability, Belli would have had to prove negligence on the part of the bottling company. However, the bottle’s pieces had been discarded, and he had no evidence of error in the manufacturing process.

Belli persuaded the California Supreme Court to discard the existing legal standard and hold that a jury could deem the bottler negligent under the doctrine of res ipsa loquitur (“the facts speak for themselves”), permitting the court to infer and assign fault purely on the basis of evidence of the explosion. Escola ushered in the era of modern product-liability law; Belli remarked, thirty years later, “If there is one legal decision upon which Ralph Nader built, this was it.”

The Escola case is remembered less for its holding—few today would argue that it is unreasonable to hold a manufacturer liable for an exploding soda bottle—than for its concurrence, written by Justice Roger Traynor, who had taught Belli at the University of California at Berkeley’s Boalt Hall School of Law. Traynor argued that the court should dispense with negligence altogether and instead embrace the doctrine of “strict liability,” that is, “an absolute liability when an article that [a manufacturer] has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.” Traynor would enshrine strict liability in the law of California in the 1963 case Greenman v. Yuba Power Products, which, according to a 1996 poll of the membership of the Association of Trial Lawyers of America, was the most significant change made to tort law in the previous fifty years.

In 1965, a scant two years after Yuba Power was decided, William Prosser, a University of California, Hastings College of the Law professor, would incorporate Yuba Power’s strict-liability standard into the American Law Institute’s Second Restatement of Torts, which greatly influences state supreme courts around the country. (Prosser had argued for strict product liability in his 1941 torts treatise.) The Second Restatement also legitimized other theories of liability that have come to dominate product-liability litigation: “design defects” (which asks juries to play scientist and determine whether an alternative product design would have reduced or avoided injuries) and “failure to warn” (which asks juries to determine whether products’ warning labels—which have, understandably, proliferated as the result of application of the legal rule—are sufficient to notify customers of product risks).

In parallel with this expansion of the substantive law of tort, the procedural law went through a major overhaul, and this also facilitated a surge in litigation. Under both the common law and various state codes, filing a lawsuit required pleading a case with particularity—that is, meeting certain thresholds before a legal claim would be allowed to proceed. These pleading rules were “criticized for overemphasizing form over substance,” and when Yale Law School dean Charles E. Clark set about drafting the first Federal Rules of Civil Procedure during the New Deal, under authority delegated to the judicial branch by the Rules Enabling Act, he effectively gutted the old rules.

Code pleading had controlled the volume of litigation not only by requiring plaintiffs to plead facts with particularity but by requiring them to give notice to a defendant that a suit had been filed, to narrow the legal issues, and to exclude meritless claims. The new 1938 Federal Rules, however, dispensed with all such requirements save notice. Clark’s vision was to allow virtually any claim to have its day in court—where the truth of the matter would be determined—but it failed to anticipate the economic realities that the new system would create. The Federal Rules’ new, open-ended discovery process enabled wildly expensive fishing expeditions and—in combination with the “American rule” that each side in litigation must bear its own costs—encouraged shakedown suits and other forms of what was, in effect, legal extortion. Later procedural changes, including a shift to “opt out” class actions in a 1966 amendment of the Federal Rules, gave even more power to plaintiffs and the lawyers who represented them.
IT’S ALL ABOUT THE MONEY

When ATLA first set up the Attorneys Congressional Campaign Trust, in 1979, it was a relatively small player, giving only $400,000 to campaigns that year.35 It quickly became a much more powerful force: since 1990, the group’s PAC contributions to federal campaigns have exceeded $33 million, and lawyers altogether, excluding lobbyists, have contributed $1.05 billion to federal candidates (see graphs above).36 Not only have lawyers’ campaign contributions exceeded those of every other industry or profession over the last two decades; they have exceeded those of every other one in each two-year political cycle.37 Trial Lawyers, Inc.’s ability to keep tort reform off the table in the recent discussions over health-care reform is not surprising in light of the fact that lawyers’ congressional-campaign contributions in the last election cycle substantially exceeded the combined total of political donations from doctors, pharmaceutical companies, HMOs, hospitals, and nursing homes.38

As Fred Baron suggested, the plaintiffs’ bar has a stranglehold over the U.S. Senate. Two of the top five private contributors to the Democratic Senatorial Campaign Committee in the last campaign were plaintiffs’ law firms—New York asbestos and class action giant Weitz & Luxenberg ($505,400) and Illinois asbestos powerhouse Cooney & Conway ($326,500).39 Over the last five years, Weitz & Luxenberg has also been the third-largest contributor to Senate majority leader Harry Reid (D-Nev.), who counts plaintiffs’ firms as four of his top seven contributors.40 The top two, and seven of the top twenty, donors to Senate majority whip Dick Durbin (D-Ill.) are plaintiffs’ law firms, including Cooney &

Lawyers’ campaign contributions exceeded those of every other industry over the last two decades.
Conway and fellow in-state firms Simmons Cooper (his largest donor), Korein Tillery (his second-largest donor), Clifford Law Offices, Corboy & Demetrio, and Power, Roger & Smith—all featured in *Trial Lawyers, Inc.: Illinois*. In total, Trial Lawyers, Inc. dwarfs all other industries in contributing to the Senate leadership (see graphs above).

Since tort law exists primarily at the state level, Trial Lawyers, Inc. has of necessity been a force in state elections as well, giving almost $725 million over just the past decade. The trial bar works feverishly to control state supreme courts, and spending on many of these races, in states where they are held, has exploded since business began fighting back (see box, page 15). Trial lawyers also contribute hefty sums to state legislators, attorneys general, and other statewide officials. In some cases, leaders in part-time state legislatures are themselves plaintiffs’ lawyers or affiliated with personal-injury firms. In New York, for example, State Assembly Speaker Sheldon Silver and State Senate Democratic Conference Leader John Sampson each have “of counsel” relationships with major asbestos- and personal-injury-litigation firms, Weitz & Luxenberg and Belluck & Fox, respectively. The litigation industry’s massive contributions and web of financial ties to state political leaders have enabled it not only to block tort-reform efforts but also, increasingly, to craft an affirmative state-level agenda to expand litigation opportunities.
The litigation industry realizes that it has a popularity problem, as evidenced by its recent decision to change the name of its top industry association from the Association of Trial Lawyers of America (ATLA) to the American Association for Justice—a moniker less suggestive of a lobbying group for plaintiffs’ lawyers than of the Justice League of America, the team of superheroes in the 1970s Saturday-morning Super Friends cartoons. Lawyers will never be popular—doubts about barristers predate the American republic—but the trial bar has much to gain from obfuscating its avaricious business model and perpetuating its image as a loose cadre of individual advocates who simply hang their shingles and stand up for the little guy against corporate predators.

To meet its public-relations aims, Trial Lawyers, Inc. supplements its government-relations efforts with a strong web of ties to the academy, media, and various “consumer” groups. By encouraging law-review articles and amicus briefs; news stories, movies, and television programs; and studies and statements from purportedly independent nonprofit organizations, the trial bar works to reinforce its mythical identity—and thus head off and disarm popular opposition.

**IVORY-TOWER ADVOCATES**

As the organized plaintiffs’ bar developed, its leader, Melvin Belli, befriended septuagenarian law professor Roscoe Pound, former dean of Harvard Law School. Pound later penned a glowing introduction to Belli’s best-selling book Modern Trials. An early critic of the common law, Pound in his later years had become a fierce opponent of the New Deal, and he came to view the common law of tort as a substitute for the bureaucratic state. Pound thus became a leading advocate for the plaintiffs’ bar and, by doing so, gave it an air of academic legitimacy. The Harvard professor’s legacy continues to aid the litigation industry: the Pound Civil Justice Institute, a think tank founded by the plaintiffs’ bar in 1956, conducts seminars, including some for judges, and publishes papers to promote the interests of Trial Lawyers, Inc.

The tort bar continues to cultivate relationships with academics who are willing to speak on its behalf. Drawing upon their august institutions’ reputations for seriousness and their
own for independence, many of them profit handsomely from their ties to the trial bar. Law professors can earn hefty sums as “expert” witnesses by giving an academic seal of approval to mass-litigation settlements, dodgy fee arrangements, and questionable theories of injury.

Law professors’ work is regularly cited in support of pro-litigation positions, notwithstanding conflicts of interest. Consider Jones v. Harris Associates, a case for which the U.S. Supreme Court heard oral arguments on November 2, 2009. In Jones, the trial bar is seeking greater latitude to sue mutual funds over their management fees. A group of law professors signing a friend-of-the-court brief on behalf of the plaintiffs cited the work of three other professors who had already served as expert witnesses in the same case. Such practices are often undisclosed; the same trial bar that attacks any study even partly funded by industry tries to obscure its own role in enriching its ivory-tower advocates.

AN UNSUSPECTING MEDIA

Trial lawyers have also aggressively courted the media. The little-guy-against-corporate-evildoer makes for good theater, so the trial lawyers’ mythology finds its way regularly into the popular media, for instance in the books and movies written by John Grisham and in television shows produced by David E. Kelly. Grisham is himself a former plaintiffs’ lawyer who makes no secret of his friendship with his fellow Mississippian Dickie Scruggs, a leader of Trial Lawyers, Inc. before he pleaded guilty to conspiring to bribe a judge.

Trial lawyers also work the news media to stir up public fear, primarily by funneling victim stories to consumer reporters. News analyst John Stossel, who earlier won nineteen Emmy Awards as a consumer reporter, notes that trial lawyers are the reporter’s “perfect source”:

This partnership between reporters and trial lawyers is not a good thing, but it’s hard for us reporters to resist, because trial lawyers are a perfect source. They do most of the work for us. We don’t need to make phone calls to search for victims; the lawyers identify the most telegenic of them, the people whose stories make you cry, and they’ll bring them right to our office.

Then they identify the “bad guy” for us. We don’t need to do much original investigating, since the lawyers use their subpoena power to force companies to turn over just about every record they’ve ever produced. The lawyers usually find some dirt (bet they’d find dirt on you if they got all your papers) and hand it to us. We double-check it, but we’re following the lawyers’ script.

CONSUMER GROUP SURrogATES

Trial Lawyers, Inc. often works with allied groups to cultivate an air of legitimacy in promoting its agenda to the press and general public. Chief among these are the Naderite consumer groups that purport to protect the public from alleged corporate abuses. The innocuous-sounding Citizens for Justice and Democracy, headed by Nader disciple Joanne Doroshow, exists exclusively to fight efforts at reforming the civil justice system. The group produces scores of position papers and “studies” designed to confuse the facts about the civil justice system; and through a subsidiary organization, Americans for Insurance Reform, it makes a practice of blaming the high price of medical-malpractice and other liability insurance on the greed and mismanagement of insurance companies rather than on the underlying litigation being insured against.

Other Naderite organizations—such as the Center for the Study of Responsive Law, the Public Interest Research Group, and Public Citizen—are less single-minded in their support of the trial bar, though their public positions significantly overlap. Public Citizen, for example, pushes Trial Lawyers, Inc.’s agenda directly, through its Litigation Group, which fights preemption of tort claims, arbitration clauses, and other issues adverse to interests of the plaintiffs’ bar, and indirectly, through its Health Research Group, which publicly attacks the safety of hundreds of drugs and medical devices that are the bread and butter of the mass-tort bar.

A Harvard-trained lawyer, Ralph Nader rose to fame in 1965, when the then-thirty-one-year-old published the book Unsafe at Any Speed, an attack on the automobile industry and its products. Nader focused his criticism particularly on the Chevrolet Corvair, an economy car that drew upon design features of European car models and thus differed from
Prominent plaintiffs’ attorneys have supported Ralph Nader’s consumer crusades “in every way possible.”

its American competitors. Although some of Nader’s safety criticisms doubtless had merit, the federal National Highway Transportation and Safety Administration (NHTSA)—founded by Congress in 1966, partially in response to Nader’s book—ultimately determined that “the 1960–63 Corvair compares favorably with contemporary vehicles used in the tests” and that “the handling and stability performance of the 1960–63 Corvair does not result in an abnormal potential for loss of control or rollover, and it is at least as good as the performance of some contemporary vehicles both foreign and domestic.”

Unfortunately, lay juries are unable to engage in the sort of comparative and cost-benefit analysis employed by the NHTSA. Nader’s attacks on the auto industry, in combination with substantive shifts in legal doctrine, helped generate waves of automobile “design defect” cases. Before long, the public was left with the impression that “all economy cars are inherently defective for tort purposes.”

Nader and the organizations he founded were of great use to the litigation industry, which in turn made them recipients of its largesse. In a 1999 interview, Joan Claybrook, president of Public Citizen at the time, admitted that her group received “about $200,000” per year from plaintiffs’ attorneys. Because the contributions it receives are not disclosed in public filings, it is impossible to determine whether other trial-lawyer money is funneled indirectly into its coffers. The comments of some trial lawyers would suggest that the sum Claybrook mentions is just part of the story: prominent California plaintiffs’ attorney Herb Hafif has said that the trial bar supported Nader “overtly, covertly, in every way possible,” and the late Texas tort king Pat Maloney noted that the litigation industry supported Nader’s efforts “for decades,” contributing “a huge percentage of what he raises.”

Although there is no reason to suspect that “Saint Ralph” and his organizational offspring operate from venal motives—many of “Nader’s Raiders” and their successors are true believers in their cause—his crusades seem to have provided him with a good living: the financial disclosure forms that he released during his 2004 presidential campaign showed him as having over $4 million in net liquid financial assets.

So appreciative of consumer groups is the plaintiffs’ bar that in 1986 ATLA attorneys set up their own charitable trust—the Civil Justice Foundation—to support those that are dedicated to furthering the trial bar’s interests. As for Nader, he plans to build an American Museum of Tort Law in his hometown.
In America’s federal system, common law is state law. The litigation industry spends heavily on state elections to protect itself. Over the last decade, lawyers and law firms have given almost $725 million to state political campaigns (see graph).

Whereas trial lawyers’ giving at the federal level tends to focus on Congress, at the state level the money is spread among all three branches of government. Because state judiciaries make most tort law—and have the power to invalidate statutory tort reforms as unconstitutional—the plaintiffs’ bar has long concentrated on getting its allies onto the state bench (see box, page 15). State legislatures, as the source of statutory tort reform, are another arena of interest: any state legislator who tries to advance tort-reform legislation immediately becomes a target of the trial bar and can expect a very expensive reelection campaign. The litigation industry has even begun to turn its attention to the executive branch, since state attorneys general can farm out representation of the state’s civil lawsuits to attorneys in private practice, and state treasurers and comptrollers, who control public-employee pension funds, can hire outside lawyers to initiate securities-fraud lawsuits (see box, opposite page). Such litigation can make plaintiffs’ lawyers millions of dollars through contingent-fee contracts, as it has already done in actions against tobacco and pharmaceutical companies.

**FEDERALISM AND LITIGATION**

Though federal courts can hear cross-state disputes, they must be guided by each state’s underlying substantive legal rules and tight limits on federal courts’ jurisdiction enable clever plaintiffs’ lawyers to keep many of their cases within state judicial systems. For Trial Lawyers, Inc., the federal system creates a powerful “race to the bottom” effect. Lawyers can shop their case to a favorable court—seeking out a county judge who is an ally of the plaintiffs’ bar, or a locality that has a jury pool with a proven propensity for awarding big verdicts. The odds are low that a defendant will succeed in getting its case removed to federal court, so once the local court allows the case to proceed, the plaintiffs’ attorney will happily find himself playing on home turf.

Even if a state improves the quality of its elected and appointed officials or enacts legislation that levels the playing field, the federal system allows many plaintiffs to move their cases to some other, more sympathetic state. When the judicial leadership in Madison County, Illinois, for example, decided to combat the county’s reputation as the nation’s worst “judicial hellhole,” a powerhouse local law firm then known as Simmons Cooper started shifting its caseload to Delaware. After tort reforms in Texas made its asbestos cases less profitable, Dallas plaintiffs’ giant Baron & Budd began directing its cases to California. Reforming the tort system state by state is thus very similar to a game of Whack-a-Mole: when trial lawyers are knocked down in one place, they inevitably pop back up somewhere else.

**AN AGGRESSIVE LEGISLATIVE AGENDA**

Historically, the trial bar’s political efforts vis-à-vis state legislatures were defensive. The courts, not the legislatures,
Increasingly, Trial Lawyers, Inc. is profiting from its government-relations efforts in the executive branches of state governments. In 1994, asbestos lawyer Dickie Scruggs of Mississippi joined forces with Mississippi attorney general Mike Moore to sue tobacco companies for any additional Medicaid costs that the state had incurred as the result of health problems of its citizens induced by tobacco use. Though he was representing the state government, Scruggs did his work on the basis of a fee arrangement that promised him a share of any eventual proceeds. Scruggs later brought in veteran South Carolina trial attorney Ron Motley to assist, and Moore won the cooperation of the attorneys general of other states. Eventually, all fifty states became participants in the litigation, and the private attorneys they retained profited handsomely from the contingent fees they scored on the states’ behalf, netting as much as $30 billion from settlements reached in 1998 with the major tobacco businesses.

In the years since Scruggs, Motley, and other attorneys in the tobacco litigation pocketed those windfalls, plaintiffs’ attorneys around the country have worked to secure similar arrangements with state attorneys general, who collect hefty campaign donations from lawyers to whom they later farm out the state’s work. While some states have adopted ethics rules to govern such contingent-fee contracts, including ones requiring competitive bidding and disclosure of contract terms, others have put off doing so. Darrell McGraw, West Virginia’s attorney general since 1992, was criticized by a judge and the state auditor for the contracting out of state legal business in the tobacco litigation, but in recent years, he has given no-bid contracts to private lawyers designated “special assistant attorneys general.” In 2001, McGraw hired four private firms that had given $47,500 to his reelection campaigns to sue Oxycontin manufacturer Purdue Pharma; the $10 million settlement the firms secured netted them $3 million in fees.

In addition to these collaborations with state attorneys general, trial lawyers are working with state treasurers and comptrollers, who control public-employee pension funds, either directly or as ex officio board members, and are therefore in a position to initiate lawsuits on the funds’ behalf. Because the 1995 Private Securities Litigation Reform Act (PSLRA) specified that the “lead plaintiffs” in securities class actions should be those “most capable of adequately representing the interests of class members”—that is, they should be the members of the class with the “largest financial interest” in the litigation—pension funds, as the largest investors in the market, especially those based in populous states such as California and New York, typically control such litigation. After the PSLRA became law, Trial Lawyers, Inc. set its sights on influencing the public officials who control such funds by donating generously to their campaigns.

Investing in officials with control over public pensions has proved to be profitable indeed for firms practicing securities law. In New York, for example, two law firms gave a combined $121,800 in campaign funds to Alan Hevesi, who, as state comptroller, was the sole trustee and manager of its public pension funds. Hevesi subsequently asked the same firms to handle the state pension funds’ lawsuits against Citigroup stemming from the collapse of MCI WorldCom. The attorneys collected over $300 million in contingent fees when the case settled in 2004. This sort of success has been repeated in other states, such as Louisiana, three of whose public-employee pension funds are among the five most active lead plaintiffs in securities lawsuits around the United States.

Over time, while heightened political competition has lowered the litigation industry’s ability to determine the composition of state judiciaries, shifting political trends have produced or increased majorities of trial-lawyer-friendly Democrats in state legislatures. In turn, Trial Law-
yers, Inc. has worked to increase its profits by encouraging legislators to draft statutes that generate more lawsuits, increase recoverable damages, or weaken or eliminate statutes of limitation and legal defenses.

Some of the bills and enactments pushed by Trial Lawyers, Inc. at the state level in recent years include:

- **Authorizing lead-paint litigation.** One of the litigation industry’s new business lines involves suing paint manufacturers over the “public nuisance” of having to eliminate lead-based paint from homes—paint that the manufacturers stopped producing over thirty years ago. In Maryland—where asbestos lawyer Peter Angelos, owner of the Baltimore Orioles, pioneered such litigation—a legislature historically beholden to Angelos’s interests continues to flirt with legislation that would authorize such suits.

- **Expanding consumer-fraud litigation.** In response to the enactment of tort reforms, trial lawyers have resorted to the private-enforcement mechanisms of many state consumer-protection acts, which often require no showing of actual injury for plaintiffs to recover. Iowa, the last holdout against this tide, finally relented, in 2009, under pressure from trial lawyers. Washington broadened its consumer-fraud statutes last year. And lawyers have tried, unsuccessfully, to broaden consumer-fraud laws in Michigan and New Hampshire.

- **Expanding securities litigation.** In New York, a group of legislators tried to add a private right to sue to the state’s Martin Act—the state’s securities-fraud statute that Eliot Spitzer, as attorney general, controversially used to reshape the nation’s finance and insurance industries. In 2009, the American Tort Reform Association gave the amendment its Silver Award for being that year’s worst civil-justice bill, for New York Assembly Speaker Sheldon Silver, who moonlights as “of counsel” for the mammoth plaintiffs’ asbestos firm Weitz and Luxenberg.

- **Authorizing new whistle-blower lawsuits.** In recent years, New Mexico, New Jersey, and Oklahoma have all adopted new *qui tam* statutes, which deputize plaintiffs’ lawyers as “private attorneys general” (see box, page 17). Many other state legislatures have considered whistle-blower bills without (yet) passing them.

- **Expanding recovery of noneconomic damages.** Lawyers have worked aggressively to overturn various state limitations on recovery of noneconomic damages. In 2007, Illinois passed a law permitting recovery for “grief, sorrow, and mental suffering.” Also in 2007, Iowa extended recovery for “loss of consortium” from parents of minor children to parents of adult offspring. In New Jersey, an effort to create the new damage categories of “mental anguish, emotional pain and suffering, and loss of companionship” passed the legislature but was defeated by a pocket veto.

- **Increasing damage caps.** In 2009, Oregon raised its limitations on recoverable damages against the state. Trial lawyers have tried to get other states to raise damage limits, albeit without significant success.

- **Eliminating or extending statutes of limitation.** Many state legislatures have attempted to eliminate or lengthen the time limits within which plaintiffs must file tort claims. In California last year, only a gubernatorial veto stopped a bill that would have allowed “fair pay” employment claims to be filed, regardless of how much time had passed since the matter in question occurred.
Twenty-one states have popularly elected supreme courts, and thirty-nine states elect judges at some level. Since most tort law reposes in judicial decisions, not legislative enactments, Trial Lawyers, Inc. has long understood state judicialities to be essential to its business, and has accordingly spent big bucks on judicial races to ensure that its favorite sons join or remain on the bench. Inevitably, the business lobby started fighting back, and expensive—and often ugly—campaigns were the result. Just as inevitably, conflicts of interest have arisen between judges’ role as neutral interpreters of the law and their status as elected officials with a need to fund-raise for campaigns.

In the 1980s, Texas emerged as a hotbed of political activity in judicial races, and the home of the first million-dollar campaigns. After “business” scored a win over “lawyers” in the 1988 elections, plaintiffs’ lawyer Pat Maloney defiantly asserted: “We are resilient, and we will bounce back.” In 1990, another trial lawyer brazenly told Forbes magazine: “[U]ntil last year the plaintiff bar owned and controlled the Texas Supreme Court.”

Both sides continue to struggle for dominance, in Texas and elsewhere. From the 1990s to the past decade, campaign contributions to judicial races nationwide doubled, and judges raised over $200 million in the decade leading up to the 2008 elections. In many states, multimillion-dollar judicial elections have become the norm (see graph). In some hotly contested races, expenditures of independent interest groups on television commercials have exceeded the entire spending of the campaigns themselves.

In the 2009 elections, the judicial race to watch was the Pennsylvania Supreme Court contest between Democratic incumbent Jack Panella and Republican Joan Orie Melvin. Melvin won the race, but not before being outspent by Panella more than two to one. Panella’s $1.85 million campaign war chest received hundreds of thousands of dollars in contributions from the plaintiffs’ bar, including $500,000 from the Philadelphia Trial Lawyers Association alone.

Although it failed to get Panella reelected, Trial Lawyers, Inc., in concert with the Michigan Democratic Party, did succeed at its top priority of the previous year: defeating Michigan Supreme Court Chief Justice Cliff Taylor, who had presided over a divided court. Taylor was a highly respected jurist—the author of the state’s definitive, three-volume text on Michigan personal-injury law, he was endorsed by the generally left-leaning Detroit Free Press—but was undone in part by a late “dirty tricks” television commercial that accused him of sleeping on the bench.

The unseemly nature of high-dollar state supreme court elections drew the attention of the U.S. Supreme Court in Caperton v. A.T. Massey Coal Co., which was decided last year. A divided court determined that Caperton’s constitutional due-process rights had been violated when West Virginia Supreme Court Justice Brent Benjamin heard his case after receiving over $3 million in campaign contributions from the chairman of the coal company opposite Caperton in the legal dispute. The facts of Caperton tested the outer bounds of propriety, but the conflict of interest they posed was hardly isolated; as Chief Justice Roberts noted, “‘Consumers for Justice’—an independent group that received large contributions from the plaintiffs’ bar—spent approximately $2 million” on the same judicial campaign.

Caperton notwithstanding, it is unlikely that the courts will venture often or more deeply into such a thorny thicket. Judicial elections compromise impartiality, or at least cast suspicion upon it, but there are no easy solutions. Judicial appointment systems can be highly political themselves—witness the federal nomination and confirmation process—and in states with judicial “nominating boards,” the appointment systems can be highly political themselves. In states with judicial “nominating boards,” the plaintiffs’ bar has often worked to stack such committees with its allies. In 2009, the U.S. Chamber of Commerce Institute for Legal Reform—a major player in state judicial campaigns—published a report on such bodies, with an eye toward developing “best practices” that would curb political influence.

---

### Multimillion-Dollar Campaigns Have Become the Norm in Contested Judicial Elections

<table>
<thead>
<tr>
<th>State</th>
<th>2000-08, $, Millions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>40.9</td>
</tr>
<tr>
<td>Ohio</td>
<td>21.2</td>
</tr>
<tr>
<td>Illinois</td>
<td>20.9</td>
</tr>
<tr>
<td>Texas</td>
<td>18.4</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>16.1</td>
</tr>
<tr>
<td>Michigan</td>
<td>13.0</td>
</tr>
</tbody>
</table>

Source: Justice at Stake
Until recently, the main purpose of Trial Lawyers, Inc.’s involvement in federal politics was to block reform legislation that would deny it various lucrative lines of business. In 1995, for example, Bill Clinton, an ally of trial lawyers, vetoed the Private Securities Litigation Reform Act (PSLRA), which was designed to stop class action “strike suits” against companies whenever their stock’s price sharply declined. But Congress overrode the veto, and the new law has helped improve the securities litigation climate.

When, in 1996, Congress tried to pass a product-liability law designed to curb frivolous suits by limiting punitive damages, it, too, met with a Clinton veto, even though he had supported such legislation as governor of Arkansas. This time, however, Congress lacked the votes to override.

Clinton’s successor, George W. Bush, was a president friendly to litigation reform: as governor of Texas, he had successfully steered comprehensive tort reform through the Texas Legislature. But with one exception, he was unable to get traction against the lawyer lobby’s Washington power, which doomed his efforts to reform medical-malpractice law by imposing national caps on damages, as it did his efforts to shift thousands of questionable, if not fraudulent, asbestos claims out of the courts and into an administrative system. Bush’s one success was the Class Action Fairness Act of 2005 (CAFA), which prevented plaintiffs’ lawyers from “shopping” large, national class actions to the most lawsuit-friendly jurisdictions in the country by allowing defendants to remove them to federal court.

With the Democratic Party currently controlling both Congress and the White House, the litigation industry is taking a somewhat different tack. No longer satisfied with fending off efforts to reform lawsuit abuse, the plaintiffs’ bar is now actively seeking to expand its business opportunities. One of the bills backed by Trial Lawyers, Inc.—the first passed by the new Congress—extends the time that plaintiffs have to file suit, allowing attorneys to dredge up long-dormant claims. Other legislation would facilitate legal “fishing expeditions” by permitting claims to go forward that rested upon the shakiest of allegations. Still other proposed acts of Congress would expand the universe of parties that plaintiffs can sue.

LED BY LEDBETTER

Perhaps the clearest evidence of Congress’s new penchant for generating litigation is the transformation of Lilly Ledbetter, a former employee at a Goodyear Tire plant in Gadsden, Alabama, into a Democratic symbol of victimization by corporations. Invited to speak on the second night of the 2008 Democratic National Convention, right before keynote speaker Mark Warner, the former governor of Virginia, Ledbetter was the subject of a 2007 decision by a divided U.S. Supreme Court that denied her sex-discrimination claim against her former employer.
Of the legislative gifts that Congress has bestowed on Trial Lawyers, Inc., one of the most bounteous is the right—enshrined in qui tam, or “whistle-blower” statutes—to police frauds allegedly committed against the federal government. After the False Claims Act (FCA), enacted in 1863, was expanded in 1986, it became big business for the plaintiffs’ bar. Since then, whistle-blower actions have produced more than $20 billion in claim payments.

The qui tam provisions of the FCA permit private attorneys representing whistle-blowers to obtain damages, on the government’s behalf, of three times the amount of money lost in the alleged fraud. The whistle-blower and his attorney can collect up to thirty percent of these sums. The resulting windfalls can total tens of millions of dollars. Because of the potential for abuse of such statutes, the courts have worked to limit their reach by insisting that the targets of fraud suits actually intended to defraud the government— as the U.S. Supreme Court did in its unanimous 2008 decision in Allison Engine Co. v. United States. The Fraud Enforcement and Recovery Act of 2009, signed into law in May 2009, overturns Allison Engine, even with respect to those cases that stem from conduct that occurred before the act’s passage. The new law dramatically expands the plaintiffs’ bar’s reach in qui tam suits by allowing lawyers to go after subcontractors to businesses that do government work, though they never worked directly for the government themselves or intended to commit fraud. The bill’s sponsor, Senate Judiciary Committee chairman Patrick Leahy (D-Vt.), has received more than twice as much money from lawyers since 2005 as he has from any other industry, and those donations overwhelmingly come from the plaintiffs’ bar.

An even more audacious power grab for Trial Lawyers, Inc.’s qui tam business was attempted by Rep. Lloyd Doggett (D-Tex.) during the markup of health-care reform legislation in the House. Doggett tried to insert language into the bill that would allow suits involving Medicare to be filed on behalf of the U.S. government, even when it objected. Fortunately, Republicans on the committee insisted on removing the provision.

The Lilly Ledbetter Fair Pay Act, which reversed the Supreme Court’s decision, and made that reversal retroactive to the day before the decision was issued, became law in January 2009. It was the first piece of legislation signed by the new president, who proclaimed that Ledbetter was “just a good hard worker who did her job . . . for nearly two decades before discovering that for years, she was paid less than her male colleagues for doing the very same work.”

The president’s statement—like most media accounts of the case—is simply false. In fact, Ledbetter admitted in deposition testimony that “[d]ifferent people that I worked for along the way had always told me that my pay was extremely low” relative to the pay of other workers. Ledbetter further noted that she had learned from a superior of a pay discrepancy in 1995, three years before filing, at which time she complained that she “needed to earn an increase in pay . . . to get in line with where my peers were.”

In determining that Ledbetter’s claim was filed outside the six-month statute of limitations specified by Title VII of the 1964 Civil Rights Act, the Supreme Court noted that Ledbetter had failed to argue that the statute of limitations should have started running only after she learned of her injury, an
“equitable tolling” rule long recognized in other contexts by the Court.182 The Court’s decision also emphasized that Ledbetter might have had a valid discrimination claim under another statute—the Equal Pay Act—that has a longer statute of limitations.183 Thus, Ledbetter probably did have some legal recourse, notwithstanding her failure to sue earlier—and the fact that her former supervisor, a key witness in the case, had died while she delayed in pursuing her claim.184

Politicians under the sway of Trial Lawyers, Inc., however, were undeterred by these facts. The law enacted in Ledbetter’s name could have clarified the period in which a Title VII suit can be filed by stating that it would start only upon discovery of the alleged discrimination, a rule that would not have been in conflict with the Court’s actual decision. Instead, the first act of the 111th Congress gutted the statute of limitations in pay-discrimination claims entirely. It now effectively allows potential plaintiffs to wait years before suing, as paycheck after insufficient paycheck piles up, adding to the damages that can be claimed and forcing employers to maintain old employment records indefinitely.185 Moreover, the new law dramatically expands the class of potential litigants in such suits by changing the long-standing rule that a claimant had to be an actual victim of discrimination; the new law states that anyone “affected by” the discrimination being alleged can sue.186

GOING FISHING

In addition to extending the period in which employees may file pay-discrimination claims, the new Congress is considering legislation that would make it dramatically easier to file suits across the board. As noted on page 6, the 1938 Federal Rules of Civil Procedure abolished traditional pleading requirements for filing a civil lawsuit and implemented a system of “notice” pleading whereby a litigant merely has to place a defendant “on notice” of being sued and of the factual and legal claims against him.187 Notice pleading, combined with new, liberal discovery rules that enabled plaintiffs’ lawyers to demand essentially any document or file that might be remotely relevant to a lawsuit,188 licensed “fishing expeditions” in federal courts: plaintiffs could file first, seek documents at defendants’ expense, and determine whether they actually had a case once the documents came in.189

In recent years, the Supreme Court has tried to place outer boundaries on these expeditions. In a 2007 case, Bell Atlantic v. Twombly,190 plaintiffs’ lawyers filed a class action alleging that local telephone companies had conspired to restrain trade in violation of the antitrust laws. The Court determined that the plaintiffs’ allegations, even if true, could not sustain a valid claim because the plaintiffs did not allege “enough factual matter (taken as true) to suggest that an agreement was made” among the phone companies—a legal requirement for finding such an antitrust violation.191

In May 2009, the Supreme Court considered another case, Iqbal v. Ashcroft,192 in which a Pakistani Muslim detained after the September 11, 2001, terrorist attacks alleged that he had been mistreated while in custody. Iqbal’s lawsuit targeted various federal officials, including the attorney general of the United States and the director of the Federal Bureau of Investigation. The Court determined that Iqbal’s complaint was insufficient to support a claim under Twombly, since the legal standard required proof of intentional discrimination by the individuals named, who would have had to be driven by animus toward the plaintiff, and Iqbal alleged no facts that would permit even an inference of discriminatory intent.193

Needless to say, Twombly and Iqbal, though cases of limited applicability, sent shock waves through the plaintiffs’ bar by threatening to imperil lawyers’ strategy of launching fishing expeditions. To “fix” this problem, Pennsylvania Democrat Arlen Specter—whose son Shanin is a major Philadelphia plaintiffs’ lawyer and a vocal public critic of tort reform194—introduced a bill, the Notice Pleading Restoration Act of 2009,195 which would overturn the Supreme Court’s decisions in Twombly.

The new Congress is considering legislation that would make it dramatically easier to file suits across the board.
and *Iqbal*. Even critics of those decisions, however, have noted that Specter’s poorly drafted bill would likely interfere with statutory pleading requirements well beyond the scope of the Court’s recent decisions.196

**SECURITY-SUIT SCHEMES**

Senator Specter has not limited himself to protecting Trial Lawyers, Inc.’s fishing license; he has also been working hard to ensure that plaintiffs’ lawyers can cast their lines in new waters. Notwithstanding stricter rules imposed on securities suits by the 1995 PSLRA197 and the “kickback” conspiracy convictions that put the two most prominent securities class action attorneys, Mel Weiss and Bill Lerach, in federal prison,198 recent financial crises—the bursting of the dot-com bubble, the subprime-mortgage debacle, and the subsequent collapse of major financial institutions—have left ample opportunity for the securities litigation industry to thrive (see graph, right).

In 2008, however, the Supreme Court decided not to extend the judicially created “right to sue” over alleged securities fraud to plaintiffs suing third parties.199 In that case, *Stoneridge v. Scientific Atlanta*, the Court considered a class action filed by the stockholders of a cable company that had inflated its books. However, their suit was not against the cable company itself but rather its vendors. The Court noted there was no evidence that Congress intended to authorize private securities litigation against third parties under an “aiding and abetting liability” theory and that doing so would “expose a new class of defendants” to litigation risks, raise “the costs of doing business,” deter “[o]verseas firms . . . from doing business here,” “raise the cost of being a publicly traded company under our law,” and “shift securities offerings away from domestic capital markets.”200

Indeed, securities class actions do little more than arbitrarily shift dollars from one group of shareholders to another. In such suits, one group of shareholders, which bought or sold shares in a given time period, sues the company whose shares they own. Unfortunately, suing the company means essentially suing all the other shareholders. Generally speaking, then, small, diversified shareholders, who are about as likely to be holders as buyers of any given security, particularly if they are invested in pension or mutual funds, are also as likely to be defendants as plaintiffs in such litigation.201 In addition to failing to compensate the victims of a successfully executed fraud, securities class actions are ineffective at deterring fraud, since research shows that securities class actions’ settlement values are unrelated to the merits of the underlying cases.202 Securities lawsuits, therefore, serve mainly to enrich the plaintiffs’ bar by extracting massive settlements from companies experiencing stock-price turbulence.203

Nevertheless, last summer Senator Specter introduced the Liability for Aiding and Abetting Securities Violations Act of 2009,204 which would overturn *Stoneridge* and create an explicit, open-ended private right of action against anyone who provided “substantial assistance” to anyone else guilty of violating “any rule or regulation” under any of the vast number of securities laws.205 Specter’s bill would go far beyond the narrow facts of the *Stoneridge* case to create a whole new class of securities class action defendants—and a whole new spectrum of legal shakedown opportunities for Trial Lawyers, Inc.  

**Over the Last Ten Years, Securities Class Action Settlements Have Skyrocketed**

![Graph showing securities class action settlements over the last ten years.](source: Cornerstone Research)
The Democrats in Washington can’t seem to decide what they think about arbitration. On the one hand, one of the top legislative priorities of the congressional leadership and the White House is the Employee Free Choice Act (EFCA), which calls for mandatory arbitration of all union disputes. So deep is the EFCA-backers’ faith in arbitration that the law would even empower government-appointed arbitrators to write labor contracts from scratch when newly formed unions cannot agree to terms with management—in effect, to dictate the terms of a labor “contract” without reference to any actual underlying contract into which the parties freely entered.

On the other hand, congressional leaders are waging an all-out war to eliminate all arbitration clauses in consumer and employment contracts. Such provisions are standard in many industries—they are indeed the only way that small injuries can ever get compensated, given the expense of litigation that often makes legal representation unavailable, because such cases offer plaintiffs’ attorneys only paltry contingent fees. But arbitration and other forms of alternative dispute resolution remove the middleman—the trial lawyer—which, to the plaintiffs’ bar’s political patrons, makes such extralegal approaches unthinkable.

**THE VALUE OF ARBITRATION**

In contrast to the EFCA’s heavy-handed provisions, standard employment and consumer arbitration contracts operate against a backdrop of preexisting contractual norms and rules of law. Professional arbitrators—usually senior attorneys from the time of the New Deal onward, the Left has generally favored a strong national regulatory regime, while conservatives have generally fought its relentless expansion. It is therefore curious that the Democratic majority in Congress should be considering bills permitting tort actions to be brought under state law against the financial and automobile industries, for example—even if such state tort claims conflict with the federal regulatory regime.

State tort litigation can make a mess of the federal regulation of interstate commerce. Consider the situation in health care, one of the most heavily regulated—and litigated—industries. In 2008, the U.S. Supreme Court considered a case, originating in New York, in which a patient had been injured by the bursting of a balloon catheter during surgery. The patient alleged that Medtronic, the device’s manufacturer, was at fault. The facts of the case, however, told a different tale: the catheter’s labeling—as required by the U.S. Food and Drug Administration (FDA)—indicated that it should not be used in “calcified” arteries and that it was designed to withstand only “eight atmospheres” of “rated burst pressure.” As the Court noted, however, Riegel’s doctor failed to heed these warnings. The artery into which the doctor inserted the catheter was “heavily calcified,” yet he attempted to force a full ten atmospheres of pressure through it.

Fortunately, Congress included express language in 1976 statutory amendments that forbade the states from setting standards for medical devices beyond those required by the FDA. On that basis, the Court made the commonsense ruling that Riegel’s lawsuit against the manufacturer was barred. Unfortunately, the express preemption language that governs medical devices does not apply to all FDA-regulated products. Indeed, such clauses are rare within the federal code, much of which was written before the litigation explosion of the last five decades.

Perhaps unsurprisingly, the lawyer-dominated Congress is working to eliminate the statutory provision that barred Riegel’s product-liability claim. Worse, the bill in question, the Medical Device Safety Act of 2009, would permit suits to proceed that stem from injuries that originated long before the law’s effective date, if otherwise valid under state law.
or retired judges—resolve claims without incurring the time and expense of civil litigation, which takes, on average, more than two years\(^{220}\) and can cost thousands of dollars.

Thus, arbitration has served as a major avenue for providing justice to small claimants. In 2002, the American Arbitration Association handled more than 200,000 claims—a figure corresponding to roughly 80 percent of all federal civil cases.\(^{221}\) In 2006, the National Arbitration Forum handled 214,000 arbitrations dealing solely with debt collection.\(^{222}\)

Although you wouldn’t know it from the criticisms issued from the trial bar and its allies, these private arbitration systems are not tilted in business’s favor. A November 2009 study released by the Searle Center on Law, Regulation, and Economic Growth at Northwestern University School of Law examined comprehensive data sets of consumer arbitrations and found that after controlling for variations in case characteristics, consumers were more likely to prevail in arbitration than in court and that there was “no statistical difference in the amount they were awarded as a percentage of the amount sought.”\(^{223}\)

Americans in general realize the value of arbitration. When asked whether they would choose litigation or arbitration if they could “choose the method” of resolving “any serious dispute” between themselves and a company, 82 percent of those surveyed said that they would opt for arbitration.\(^{224}\) And 71 percent said that they opposed Congress’s “remov[ing] arbitration agreements from contracts consumers sign with companies.”\(^{225}\) Unfortunately, such consumer sentiment may not be sufficient to hold back Congress’s assault on contract, which is propelled by the lobbying clout of Trial Lawyers, Inc.

**FUNNY BUSINESS**

Before he was a senator, Al Franken (D-MN) entertained the public as a writer and performer on the sketch comedy show *Saturday Night Live*. Perhaps it’s fitting, then, that Franken’s first legislative success,\(^{226}\) an amendment supported by Trial Lawyers, Inc.,\(^{227}\) became the premise of comedians’ jokes and spoof websites.

On October 1, Senator Franken took to the Senate floor to relate the sad plight of Jamie Leigh Jones, who claimed that she was harassed, drugged, and gang-raped four days after arriving in Iraq to work for Kellogg Brown & Root (KBR).\(^{228}\) Jones initially filed an arbitration complaint, then sought to sue her employer in court. KBR tried to consolidate the complaint before the arbitration panel, which Jones opposed. After three years of legal wrangling, the Fifth U.S. Circuit Court of Appeals held the arbitration clause unenforceable in Jones’s case because her claimed injury was not “related to” her employment, and the court gave Jones the go-ahead to proceed with her civil claim.\(^{229}\)

Franken said on the floor of the Senate that three years was “simply too long for a rape victim to wait, just to have her day in court.”\(^{230}\) He therefore proposed an amendment to an appropriations bill for the Defense Department that would, he said, “extend much of the Fifth Circuit’s reasoning to government contractors who continually subject workers to these so-called mandatory arbitration clauses.” But it would do so, he said reassuringly, only by “narrowly target[ing] the most egregious violations.”\(^{231}\)

When thirty Republican senators voted against Franken’s amendment, they became fodder for comic ridicule. *The Daily Show’s* Jon Stewart exclaimed, on the air, “I understand we’re a divided country, some disagreements on health care. How is anyone against this?”\(^{232}\) A video posted on the web-
On October 12, 2009, lawyers at the class action firm Coughlin Stoia Geller Rudman & Robbins reached a settlement with toy maker Mattel and its Fisher-Price subsidiary resolving a suit over the 2007 recall of 967,000 toys, manufactured in China, that may have contained lead-based paint. The lawyers stand to pocket a hefty $12.9 million in fees—likely to be a high percentage of the total settlement value—but the litigation overall is hard to condemn: a major manufacturer distributed products that contained a dangerous substance banned under U.S. law.

Notwithstanding the righteous concern about Mattel’s potentially dangerous products, the congressional response to the public panic over the lead-containing toys—the Consumer Product Safety Improvement Act (CPSIA), signed into law on August 14, 2008—is a regulatory nightmare and litigation time bomb that threatens to place virtually every producer of items for children on the wrong side of the law. Hawked by lawyer-allied consumer groups like the Public Interest Research Group, and pushed by House Speaker Nancy Pelosi (D-Cal.), the bill was drafted in the House under the watchful eye of Energy and Commerce Committee Chairman Henry Waxman (D-Cal.), a longtime ally of trial lawyers whose second-largest campaign donor over the last twenty years has been the plaintiff’s bar’s political action committee, now known as the American Association for Justice.

That same lawyer PAC once employed as a registered lobbyist David Strickland, who developed the CPSIA in the Senate, where he served as counsel to the Commerce Committee. (Strickland now oversees American automobile regulation as the head of the National Highway Transportation Safety Administration.)

With such a cast of characters drafting the bill, it is unsurprising that the CPSIA goes beyond the lead-paint concerns that provoked the health scare. Anne Northup, a commissioner of the federal Consumer Product Safety Commission (CPSC), observes that the law reaches products “that do not create a lead hazard for children” and that “such ordinary items as zippers, buttons, belts, the hinge on a child’s dresser—and even that bicycle from Santa Claus—are outlawed,” making any manufacturer or retailer of such products subject to a lawsuit premised on an alleged violation of the statute’s provisions.

To make things easy for the lawyers, the statute authorizes an open website for reporting violations—which attorneys will doubtless use both to identify claims and “establish” purported wrongdoing. Also waiting in the wings are suits by pioneering, politically ambitious state attorneys general (see box, page 13), who are authorized to enforce the law alongside the CPSC. As reported in Crain’s Chicago Business, suits arising from the CPSIA are among the “most likely” successors to the litigation industry’s long-standing asbestos-lawsuit profit center.

The CPSIA’s costs are not conjectural—the CPSC estimates that the law cost toy manufacturers $2 billion in the eight months following its enactment—and they will grow exponentially once all of the statute’s testing requirements come into effect. Economies of scale permit large manufacturers like Mattel to meet the CPSIA’s onerous testing and labeling requirements, but the prohibitive cost of complying with these rules has prompted small manufacturers and retailers of toys to shut their doors. Although the CPSIA has generated many a public outcry, Congress has predictably resisted holding hearings to learn about the grievances of those affected.
contractor from contracting with its employees to choose private arbitrators over the civil courts to resolve virtually any kind of employment dispute—a far broader provision than Franken’s invocation of the gruesome allegations in Jones’s case would suggest. But given the public caricature of Franken’s amendment, it is unsurprising that it made it into the final law.

AN ASSAULT ON CONTRACT

Senator Franken’s amendment is but one of the litigation industry’s attacks on private arbitration. Other such bills being pushed in Congress by Trial Lawyers, Inc. include:

- The Fairness in Nursing Home Arbitration Act (H.R. 1237, S. 512) would make unenforceable all arbitration clauses regulating disputes between nursing homes and their boarder-patients.
- The Mortgage Reform and Anti-Predatory Lending Act (H.R. 1728), which passed in the House of Representatives, would make unenforceable arbitration clauses in mortgage loans or home-equity line of credit.
- The Payday Loan Reform Act (H.R. 1214) would present challenges to arbitration clauses in “payday loans,” and the Taxpayer Abuse Prevention Act (S. 585) would prohibit arbitration clauses in loans given in anticipation of tax refunds.
- The Consumer Fairness Act (H.R. 991) would make consumer-arbitration contracts unenforceable, while the Arbitration Fairness Act (H.R. 1020, S. 931) would go even further and make unenforceable arbitration clauses in all employer, franchise, and consumer contracts.

Each of these pieces of legislation would reduce consumer choice, increase costs, and deny compensation to many truly injured individuals. But they would all help the bottom line of Trial Lawyers, Inc.

A TRIAL-LAWYER TAX BREAK

One way that Trial Lawyers, Inc. is exploiting its congressional influence is by seeking an old-fashioned tax break. A group of legislators led by Republican-turned-Democrat Arlen Specter—“the favorite senator of the trial lawyers”—has introduced a bill giving the plaintiffs’ bar a $1.6 billion cut in its taxes.

Under the traditional common law, “maintenance” and “champery” were crimes (and torts). Generally speaking, it was illegal for anyone, including an attorney, to maintain, support, or promote another’s litigation (maintenance), whether or not an agreement existed to pay the supporter a portion of a lawsuit’s proceeds (champery), should there be any. On its face, the personal-injury bar’s financing structure—the “contingent fee,” the share of the proceeds that a winning client pays his attorney, who has fronted the cost of the litigation—runs afoul of the historical understanding of champery. Therefore, expenses in contingent-fee cases have been treated by courts not as support of litigation per se but rather as loans to clients, to be repaid upon a winning lawsuit’s resolution.

The IRS has thus forbidden plaintiffs’ lawyers working on the basis of contingent-fee arrangements to deduct, for tax purposes, litigation costs as “expenses” when they are incurred. Rather, such expenses are treated as loans, to be expensed as “losses” only in the event that the loan is “uncollectible” after a losing case has been closed (or, alternatively, to be deducted from the sum of taxable proceeds following profitable verdicts or settlements).

Specter’s bill would change the IRS rule and allow all litigation costs to be expensed immediately, even though other kinds of loans generally are not. This tax break would encourage lawyers to file both a greater number of cases and weaker cases, and “the federal government [would], for all intents and purposes, share in the cost and risk of bringing the initial litigation. Under current and certainly potential future tax laws, this could be as much as [forty percent] of the cost of bringing litigation.”

Unsurprisingly, the trial bar’s advocates in Congress would prefer to avoid an up-or-down vote on the legislation on its own. Thus, lawyer-lobbyists have worked to “tuck it into something” else—for example, a 2008 bill that extended (but did not change) various research-and-development and energy tax credits.
The academics and judges who transformed American tort law and civil procedure in a relatively brief period of time did not anticipate the full consequences of the changes they wrought, though they received fair warning from a few of their colleagues that some of the changes would prove calamitous. Even defensible expansions of liability had the unhappy effect of creating a litigation industry that has depressed economic growth and impeded American competitiveness. As Harvard Business School professor Michael Porter has observed, the competitive advantage of U.S. companies is hampered by a tort-law system that is “extreme compared [with that of] other nations” because “[t]he risk of lawsuits is so great and the consequences so potentially disastrous.”

Reforming the liability system should be a political priority, especially in a deep recession like the present one, with double-digit unemployment, but it has proved difficult, given the litigation lobby’s clout. Last fall, former Democratic National Committee chairman Howard Dean candidly admitted, “The reason why tort reform is not in the [health-care reform] bill is because the people who wrote it did not want to take on the trial lawyers.” In December, the president of the trial lawyers’ lobbying group, the American Association for Justice, declared the organization’s lobbying effort on health care “a stunning victory,” as well he should have: neither the House nor Senate health-care bills dared to tackle liability reform, and the version that passed the House contained provisions that, perversely, would impede liability reform (by discouraging state reforms adverse to the litigation industry’s interests) and expand litigation opportunities (by empowering state attorneys general to enforce federal regulatory provisions, which could involve the hiring of private lawyers on a contingent-fee basis to help them do so). (At the time this report went to print, it was unclear whether these provisions would be included in the final House-Senate bill.)

It is unsurprising that the litigation industry has evolved into such a powerful political force. Whereas trial lawyers’ interests are concentrated in the issue of liability, on which their livelihoods depend, opposing factions, like business and the medical profession, have interests that are diffuse. In the public-policy universe, doctors care about liability but are more worried about the repercussions of health-care reform and the size of Medicare reimbursements; car companies care about liability but are more anxious about cap-and-trade legislation and fuel-efficiency standards. In some instances, industries can be at cross-purposes; efforts at asbestos-liability reform, for example, were stymied in part by a conflict of interest between insurers and manufacturers.

In addition to holding these systemic advantages, lawyers have shown themselves to be peculiarly capable of navigating the waters of modern political influence. Campaign finance laws that limit contributions (to $2,400 per candidate at the federal level) frustrate concentrated giving in many industries, but the organized plaintiffs’ bar has proved adept at coordinating its giving, both within firms and across states.

Notwithstanding the power of the lawyer lobby, efforts at reform are not futile. Even in the current political environment, some states have been working to restore sanity to their own liability systems. In 2009, for instance, Oklahoma’s legislature passed a comprehensive package of tort reforms that included...
stricter evidentiary standards, caps on noneconomic damages, and limitations on a lawyer’s ability to “shop” cases to the most favorable forum.\textsuperscript{280} Over time, states that rein in lawsuit abuse have an advantage in attracting businesses and doctors.

Furthermore, only five years ago, a differently constituted Congress did pass a major liability reform, the Class Action Fairness Act (CAFA),\textsuperscript{281} that limited lawyers’ ability to bring large national class actions in the most favorable state courts. Barack Obama, then the junior senator from Illinois, voted for CAFA, unlike his major rivals for the Democratic presidential nomination.\textsuperscript{282} The president has, in fact, expressed an understanding of the problems of lawsuit abuse,\textsuperscript{283} and his large and diverse base of campaign donors has made him less dependent on Trial Lawyers, Inc. than congressional leaders such as Senators Harry Reid of Nevada and Dick Durbin of Illinois. Although the president has voiced opposition to damage caps, his rhetoric and his record suggest that, were congressional leadership to change, he might be open to the funding of state-level experiments in reform or supporting legislation that, like CAFA, tightens federal procedural rules.

Reforming America’s liability rules is not easy: the lawsuit lobby is unusually strong, and America’s system of government is structured to make change difficult. But the very reason that Trial Lawyers, Inc. devotes so many resources to its government-relations and public-relations efforts is that the political objective for which it is fighting—the maintenance of the oversized lawsuit industry—is both harmful and unpopular. In recent years, proponents of legal reform have made progress, if haltingly, and the American public does want to curb lawsuit abuse. So while the litigation industry today is aggressively leveraging its political power to advance its self-interested legislative agenda, change for the better may not be too far beyond the horizon.\textsuperscript{284}

The following federal legislation is mentioned in this report:

**EXPANDING LIABILITY**
- Notice Pleading Restoration Act (S. 1504) (lawsuit-filing standards)
- Liability for Aiding and Abetting Securities Violations Act (S. 1551) (securities lawsuits)
- Carmelo Rodriguez Military Medical Liability Act (H.R. 1478) (medical-malpractice lawsuits)
- Fraud Enforcement and Recovery Act (S. 386) (whistle-blower lawsuits) (enacted 5/20/2009 as Public Law 111-21)

**RESTRICTING PRIVATE ARBITRATION**
- “Franken Amendment” (SA 2588) (defense contractors) (enacted 12/19/2009 as Public Law 111-118)
- Fairness in Nursing Home Arbitration Act (H.R. 1237, S. 512) (nursing homes)
- Mortgage Reform and Anti-Predatory Lending Act (H.R. 1728) (mortgages and home-equity lines)
- Payday Loan Reform Act (H.R. 1214) (payday loans)
- Taxpayer Abuse Prevention Act (S. 585) (tax-refunds loans)
- Consumer Fairness Act (H.R. 991) (consumer contracts)
- Arbitration Fairness Act (H.R. 1020, S. 931) (employer, franchise, and consumer contracts)

**PROHIBITING FEDERAL PREEMPTION**
- Consumer Financial Protection Agency Act (H.R. 3126) (national banks)
- Right to Clean Vehicles Act (H.R. 609) (automobile emissions standards)
- Medical Device Safety Act (H.R. 1346, S. 540) (medical devices)

**FACILITATING CONSUMER AND HEALTH-CARE LAWSUITS**
- Consumer Product Safety Improvement Act of 2008 (lead standards) (enacted August 14, 2008 as Public Law 110-314)
- Affordable Health Care for America Act (H.R. 3962) (state attorney-general lawsuits)

**CUTTING LAWYER TAXES**
- “Trial-Lawyer Tax-Break Bill” (H.R. 2519, S. 437) (contingent-fee deductibility)

For a full and updated listing of pending trial-lawyer “earmarks,” visit www.triallawyerearmarks.com, sponsored by the U.S. Chamber of Commerce Institute for Legal Reform.

[The Towers Perrin] studies are particularly useful in assessing long-term trends in liability-cost burdens (since long-term data will tend to transcend the vagaries of passing hard/soft markets) and in international comparisons (since well-defined liability insurance markets exist in other advanced countries and can be subjected to comparable metrics). Perhaps for those very reasons, and because the figures are widely acknowledged within the industry as having a high degree of accuracy in measuring what they set out to measure, the [Towers Perrin] numbers have been furiously attacked by organized trial lawyers and their allies.


See infra p. 6.


See Al Kamen, Just Don't Call Them the Suers, WASH. POST, July 14, 2006, at A19.


See Center for Responsive Politics, supra note 11. As the “Rank” column indicates, lawyers and law firms, not including lobbyists, rank first for every election cycle, except for 2004 and 2008. The “industry” ranking first in those cycles is “retired persons,” so lawyers are the largest givers among industries and professions in each election cycle. See also infra note 36.


See In Re: Silica Products Liability Litigation, MDL No. 1553 (S.D. Tex.) (June 30, 2005) (“Order No. 29 at 116”) (“[T]hese diagnoses were driven by neither health nor justice; they were manufactured for money.”). New asbestos filings fell dramatically: from a high of 70,412 nonmalignant and 6,435 malignant claims filed in 2002 to 2,462 malignant and 2,596 nonmalignant claims in 2007. See Tanella, supra note 14 at 12 and e-mail.


See Michael Parrish, Leading Class-Action Lawyer Is Sentenced to Two Years in Kickback Scheme, N.Y. TIMES, Feb. 12, 2008.

See Jonathan D. Glater, High-Profile Trial Lawyer Agrees to Guilty Plea, N.Y. TIMES, Mar. 21, 2008.


21. See Jason Embry, Baron’s Rebuilding Efforts Already Showing Results, AUSTIN AMER.-STATESMAN, Nov. 12, 2006.


29. See id.


31. See id.

32. Witt, supra note 24, at 23.

33. John Fabian Witt, First, Rename All the Lawyers, N.Y. TIMES, October 24, 2006.

34. See Kamen, supra note 10.


36. See Center for Responsive Politics, http://www.opensecrets.org/industries/indus.php?ind=K01 (last visited Jan. 13, 2010). Data include contributions from lawyers in defense-oriented and generalist firms, not simply those of plaintiffs’ lawyers. Thus, contributions from what we call Trial Lawyers, Inc. constitute only a portion of these dollars. However, even if plaintiffs’ lawyers give only half of all such contributions (according to Towers Perrin, a consulting firm, plaintiffs’ lawyers collect about 57 percent of litigation dollars that go to attorneys), such contributions would generally exceed those from most other industries. In the last political cycle, lawyers gave more than twice as much to federal campaigns as any other industry save securities/investment (and lawyers gave 97 percent more than that industry). See id. at http://www.opensecrets.org/industries/mems.php?party=A&cycle=2008 (last visited Jan. 13, 2010).

There is good reason to believe that bundled contributions from the plaintiffs’ bar well exceed those from the defense bar. Big corporate-defense firms do show up on contributions tables, but that is primarily because of their size. The average lawyer at the giant defense firm DLA Piper has contributed $118 to federal campaigns, and at peer firms K&L Gates and Hogan & Hartson it has been $232 and $264, respectively; by comparison, the average lawyer at the giant defense firm DLA Piper has contributed $7,917, and at Clifford Law Offices $14,175. Moreover, the defense bar and plaintiffs’ bar have congruent economic interests when it comes to litigation: loose substantive liability rules, loose pleading standards, and open-ended discovery rules increase the defense bar’s profits. While defense lawyers are less likely to lobby aggressively against tort-reform legislation—out of a desire not to antagonize their clients—very few lawyers, whether representing plaintiffs or defendants, advocate litigation reform.

37. See id. at http://www.opensecrets.org/industries/indus.php?ind=K01 (last visited Jan. 13, 2010). Figures for lawyers include all non-lobbyist contributions from lawyers and law firms. See also supra note 13.


40. See id. at http://www.opensecrets.org/politicians/contrib.php?cycle=2010& Cicn=D00009922&ctype=C&mem= (last visited Jan. 13, 2010). The other large plaintiffs’ bar contributors to Sen. Reid have been the Law Offices of Peter G. Angelos, Simmons Cooper LLC, and Girardi & Keese.

persons” have given more collectively to Sen. Durbin than has Korein Tillery, though not more than has Simmons Cooper.

followthemoney.org/database/IndustryTotals.php?l=0&s=0&b%5B%5D=
K1000 (last visited Jan. 13, 2010).

depaul.edu/news/2009/09/03/.


45. See, e.g., Seth Berkley, “Global Health: The Story of the Global Fund to


47. See id. at 459.

48. See id. at 456.

49. The doctrine of res ipsa loquitur dates to the 1863 British case Byrne v.
Boadle, 2 H. & C. 722, 159 Eng. Rep. 299 (holding that evidence that a
barrel of flour had dropped from a store window onto a passerby’s head was
sufficient on its face to infer negligence).

50. See Offit, supra note 49, at 159.

51. See id. at 461.


53. Jeffrey Robert White, Top 10 in Torts: Evolution in the Common Law,

54. See Restatement (Second) of Torts § 402A (1965).

55. See William L. Prosser, Prosser on Torts, 688-89 (1941).

56. See Restatement, supra note 62, at § 402A & comment j (“In order to
prevent the product from being unreasonably dangerous, the seller may be
required to give directions or warning, on the container, as to its use.”).

57. See Charles Alan Wright & Mary Kay Kane, Law of Federal Courts 471
(6th ed. 2002); see David M. Roberts, Fast Pleading, Notice Pleading,

58. See Christopher M. Fairman, The Myth of Notice Pleading, 45 ARIZONA L.


60. See 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND
PROCEDURE § 1202, at 68 (2d ed. 1990).

61. See FED. R. CIV. P. 8(a)(2).

62. Unlike in most other countries in the world, the longstanding American rule
has been that each party normally must pay its own fees and expenses. See, e.g.,
Arcambel v. Wiseman, 3 U.S. (3. Dall.) 306 (1796). For a discussion of
the policy relevance of this rule, and how to incorporate loser-pays principles into
American law, see Marie Gryphon, Greater Justice, Lower Cost: How a “Loser Pays”
Rule Would Improve the American Legal System, MANHATTAN INST. CIV.

63. See FED. R. CIV. P. 23(g)(5)(B). By shifting from an “opt in” to an “opt out”
rule, the advisory committee effectively created modern class action litigation.
Because class members are included in such litigation unless they request
exclusion, these types of cases are essentially lawyer-driven. Securities class
action attorney Bill Lerach once boasted, “I have the greatest practice of law
in the world. I have no clients.” See Neil Weinberg, Shakedown Street, FORBES.
weiss-biz-cz_nwe_0211lerach.html.

64. See Kamen, supra note 10.

65. The Justice League of America first appeared in DC Comics in 1960. See
(last visited Jan. 13, 2010). The fictional group starred for several seasons
beginning in 1973 on a Saturday-morning television cartoon, Super Friends.
(last visited Jan. 13, 2010).

66. See, e.g., Jonathan Rose, Medieval Attitudes Toward the Legal Profession: The

67. See Witt, supra note 30, at 252-58.

about.aspx (last visited Jan. 13, 2010).

69. See Brief of Law and Finance Antici Curiae in Support of Respondent at 5
n.a., Jones v. Harris Associates, 527 F.3d 627 (7th Cir. 2008), cert., granted,
129 S. Ct. 1579 (Mar. 9, 2009) (No. 08-586).

70. Grisham’s books have often developed themes of small-scale crusading
lawyers taking on big corporations. See, e.g., JOHN GRISHAM, THE RAINMAKER
OF TORTS (2003). Kelly’s television shows, such as Ally McBeal, The Practice, and
Boston Legal have often reinforced these themes.


72. See Ashby Jones & Paulo Prada, Richard Scruggs Pledges Guilty, WALL ST. J.,

73. See, e.g., Past as Prologue: How I Exposed Hucksters, Cheats, and Scam
Artists and Became the Scourge of the Liberal Media 158 (2004).

about.php (last visited Jan. 13, 2010).

75. See Americans for Insurance Reform Web Page, http://www.insurance-
reform.org/about/index.html (last visited Jan. 13, 2010).

l.org/ (last visited Jan. 13, 2010).

13, 2010).

13, 2010).

litigation/index.cfm (last visited Jan. 13, 2010).

org/hrg/drugs/index.cfm (last visited Jan. 13, 2010).

81. See Ralph Nader, Unsafe at Any Speed (1965).

82. See Bob Helt, Government Tests Prove the Corvair Does Not

83. See Peter W. Huber, Liability: The Legal Revolution and Its Consequences
42 (1988).

84. See Hrab, supra note 35, at 4.

85. See Peter Brimelow & Leslie Spencer, The Plaintiff Attorneys’ Great Honey Rush,

86. Michael Kinsley coined the term “Saint Ralph” in reference to Nader in a
December 6, 1985, article in The New Republic.


aboutus.html (last visited Jan. 13, 2010).

89. See Laura Longhine, Display Cases, LEGAL AFF., Nov.-Dec. 2005, available
at http://www.legalaffairs.org/issues/November-December-2005/scene_
longhine_novdec05.asp.

90. See, e.g., Robert A. Levy, The Great Tobacco Robbery: Lawyers Grab
accompanying note 136.


93. Plaintiffs’ home turf can be quite favorable. Plaintiffs’ lawyer Dickie
Scruggs once candidly admitted that there are “magic jurisdiction[s]” in
which “the judiciary is elected with verdict money,” and he noted that “it’s
almost impossible to get a fair trial if you’re a defendant in some of these
places.” Richard Scruggs, Asbestos for Lunch, Prudential Securities Financial
Research and Regulatory Conference (May 9, 2002) (on file with author).

94. Every year, the American Tort Reform Foundation (ATRF) publishes a
study listing the nation’s worst jurisdictions for being a civil defendant—
which “the judiciary is elected with verdict money,” and he noted that “it’s
almost impossible to get a fair trial if you’re a defendant in some of these
places.” Richard Scruggs, Asbestos for Lunch, Prudential Securities Financial
Research and Regulatory Conference (May 9, 2002) (on file with author).

95. Madison County has improved its legal climate in recent years. See id.

96. See Allen Adonite, Watch Out Delaware: We’re Chasing Them Out of
Illinois (July 18, 2005), http://www.legalfreeminthenews.com/Op-
Ed/Op_Ed-ICJL-SimmonsCooper.html; Steve Korris, Asbestos Shift to
133. See Editorial, Hevesi vs. the Holdouts, N.Y. SUN, July 26, 2004, available at http://www.nysun.com/editorials/hevesi-vs-the-holdouts/78541/. Note that although Hevesi subsequently pleaded guilty to a felony relating to his conduct in public office, see Michael Cooper, Hevesi Pleads Guilty to a Felony and Resigns, N.Y. TIMES, Dec. 23, 2006, the allegations of wrongdoing leading to that guilty plea are unrelated to his handling of the MCI WorldCom litigation.


135. See Editorial, supra note 39.


139. See Brimelow & Spencer, supra note 96.

140. See id.


149. See id. at 13 (Roberts, C. J., dissenting).


240. See H.R. 991, 111th Cong. (2009). As of this writing, the consumer-arbitration market is in serious jeopardy. In July 2009, Minnesota attorney general Lori Swanson sued the National Arbitration Forum, alleging deceptive trade practices. To settle the charges, the National Arbitration Forum, the largest provider of these services, agreed to stop processing new consumer-arbitration claims. The American Arbitration Association announced its own moratorium on hearing most consumer-debt disputes.


245. Id. at 1005.

246. See id.

247. See id.


249. See 128 S. Ct. at 1008.


253. The ratio of attorneys’ fees to actual settlement value depends on the responses of class members. Mattel’s liability to claimants is $10.875 million or less from the purchase returned; plus no more than $10 to each responding individual who had already submitted a recalled toy for a voucher. Given the number of toys had already submitted a recalled toy for a voucher. Given the number of toys, the lawyers’ take seems likely to be an expansive strict product liability were “not looking squarely at all the facts” and that such a program would have “consequences beyond the law of torts.”


256. See e.g., Silverton v. Commissioner, 36 T.C.M. (CCH) 817 (1977), aff’d, 647 F.2d 172 (9th Cir. 1981).

257. See Pri. Ltr. Rul. 94-32-002 (Mar. 30, 1994) (“[P]ayment by one taxpayer of the obligation of another taxpayer is not considered an ‘ordinary and necessary’ expense for purposes of section 162(a)(7).”)


262. See Noruthop, supra note 258.

263. See id.

Visit the Manhattan Institute’s legal web magazine PointOfLaw.com and Walter Olson’s Overlawyered.com for regular commentary and discussions on legal reform.