

TRIAL LAWYERS INC.

HEALTH CARE



CONDITION CRITICAL:
THE LAWSUIT INDUSTRY'S EFFECT
ON AMERICAN HEALTH 2005

A Message from the Director

This report is the third entry in the Manhattan Institute Center for Legal Policy’s Trial Lawyers, Inc. project. Our initial report, *Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America, 2003*,¹ examined how the litigation industry operates in the U.S. Sensing a need to explore how the plaintiffs’ bar operates on an individual state basis, we released *Trial Lawyers, Inc., California, 2005*,² which examined how the litigation industry operates in the nation’s largest state.

Trial Lawyers, Inc.: Health Care represents a logical extension of this project. In our original report, we explained the business model of the plaintiffs’ bar and described how Trial Lawyers, Inc.—like any other big business—had various “business lines” crucial to its current and future profitability. Since our closer look at a particular state’s litigation industry proved so useful, we decided that an in-depth exploration of one of Trial Lawyers, Inc.’s many business lines might be equally revealing. For our first such effort, the health-care sector is a sensible starting place: health care represents over 15 percent of the U.S. economy, up from only 5 percent in 1961.³

While the excesses of the litigation industry alone cannot explain America’s mounting medical costs, litigation is a large, and growing, contributor to our health-care bill. As the graph below shows, medi-

cal malpractice liability—the “tort tax” on doctors and hospitals, whose costs constitute the majority of health expenses—has grown much faster than health-care inflation.⁴ Indeed, medical-malpractice liability alone constitutes over 10 percent of the entire U.S. tort tax, which by 2003 represented over \$3,300 for a family of four.⁵

Although medical-malpractice liability provides Trial Lawyers, Inc. with its largest health-care sector revenue stream, litigation over pharmaceuticals and medical devices exacts a staggering cost on an increasingly important part of the U.S. economy. Wyeth’s massive reserve for Fen-Phen litigation is \$21 billion,⁶ and Merck’s exposure to Vioxx lawsuits may total as much as \$50 billion.⁷ Such figures are astronomical in comparison with these companies’ individual budgets, representing nine to twelve times each company’s annual research and development costs.⁸ In fact, since each drug was only widely used for about four years, the approximate annualized liability cost of these two drugs comes to almost \$18 billion—equivalent to 10 percent of the annual revenues for the pharmaceutical industry as a whole.⁹

As this report will detail, far from limiting its attacks to doctors and drug makers, the plaintiffs’ bar is attacking all levels of the health-care distribution chain. Some of Trial Lawyers, Inc.’s favorite targets, nonprofit hospitals and nursing homes, are the health-care providers that minister to our nation’s most vulnerable—the poor and the elderly. And as if its effects on health costs were not bad enough, the litigation industry has focused its crosshairs on managed-care providers, who, while politically unpopular, are crucial to dispersing risk and providing for health care at affordable cost.

It is also important to emphasize that the direct costs of health-care litigation only begin to scratch the surface of the toll that these predatory lawsuits exact on our economy—and on our health itself. Med-mal lawsuits tend to inflate health-care costs by encouraging “defensive medicine”—unnecessary procedures and referrals that doctors and hospitals prescribe in order to limit their exposure to future litigation. Studies suggest that defensive medicine costs are several times higher than the direct liability costs themselves.¹⁰

Nor are we made safer by product-liability litigation over drugs and medical devices. Such suits inevitably drive innovation from the marketplace that would lead to net health improvements not only for U.S. society but for the entire world. Since any drug manufacturer might be held accountable for unanticipated liability of the magnitude of Vioxx and Fen-Phen, every drug company will consider such numbers in its research and investment decisions, and many drugs that would otherwise save lives or improve the quality of lives will never reach the market.

Trial Lawyers, Inc.’s defenders typically will assert that tort litigation has a deterrent effect on risky or negligent activity, which it undoubtedly does, but in our current civil justice system it also deters any activity that might lead to high-cost lawsuits, *which is not at all the same thing as actual risk*. For instance, a seminal Harvard Medical

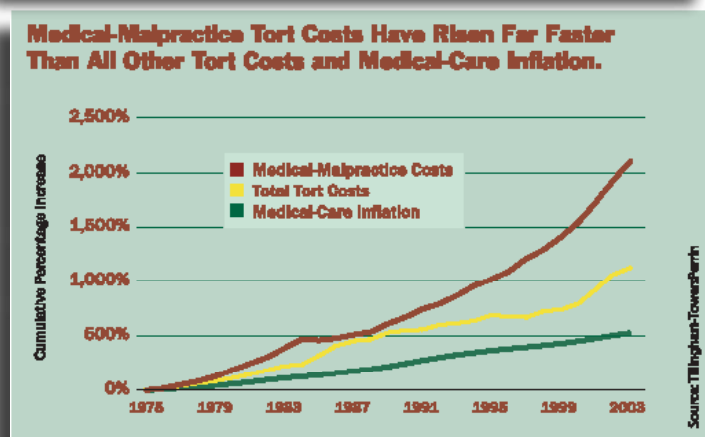
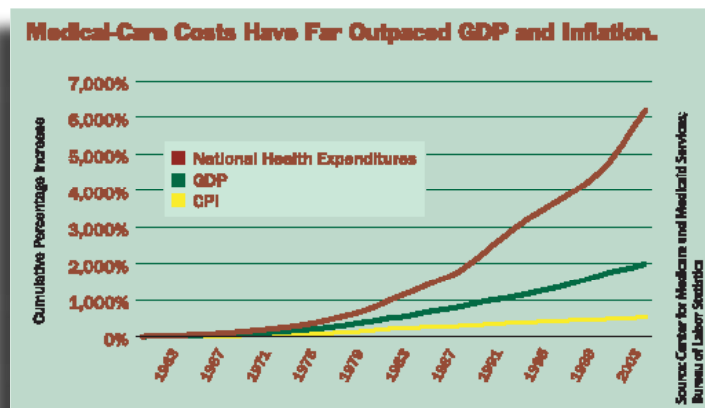
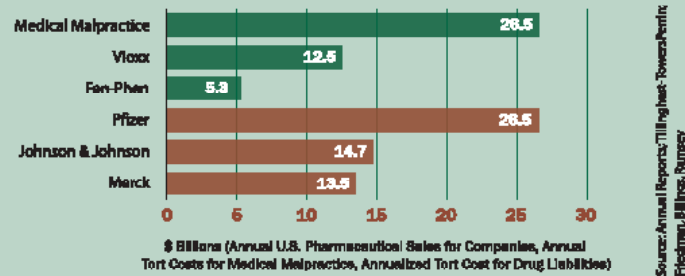


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Health-Care Tort Costs Are Staggering, Even Compared to the Largest Health Businesses' Revenues.



Practice Group study gathered data on more than 30,000 New York hospital patients from a weighted sample of more than 2.5 million and found that the vast majority of medical-malpractice suits did not involve actual medical injury—and that most cases in which there was actual injury involved no doctor error¹¹—which makes the claim that medical-malpractice litigation serves mainly to deter doctor misconduct a peculiar argument indeed. When our liability system punishes so indiscriminately, it does not efficiently deter bad conduct but rather reduces health-care access by reducing the supply of doctors; encourages expensive, unnecessary, and often dangerous procedures; and lowers the expected return from research into new medicines and medical devices that save lives.

Finally, it is worth noting that the litigation industry does a very poor job compensating the victims it professes to be protecting. Not only are most medical-malpractice claimants not harmed by avoidable doctor error, but most medical-malpractice victims never sue, and plaintiffs typically wait years to recover damages—then getting less than 50 cents on the dollar, with lawyers' and administrative fees soaking up the majority of settlements and verdicts.¹² When Trial Lawyers, Inc. pursues mass tort drug liability claims like Fen-Phen by gathering large numbers of highly questionable cases using attorney-sponsored screenings, and settles those along with legitimate claims, actual victims of drug side effects receive insufficient compensation.¹³

With *Trial Lawyers, Inc.: Health Care*, the Manhattan Institute hopes to shed light on the unwholesome effects of lawsuit abuse on our wallets and our well-being. In the concluding section, we'll offer prescriptions for restoring sanity to the system; while the current prognosis for U.S. health care is bleak, thoughtful reform can help protect medical innovation, reduce costs, improve efficiency, and ensure that the truly injured are compensated in a fair and timely fashion.



James R. Copland

James R. Copland
Director, Center for Legal Policy
Manhattan Institute for Policy Research

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Visit TrialLawyersInc.com for an online version of this report, the full 2003 report, and other resources.

HAZARDOUS TO OUR HEALTH

Trial Lawyers, Inc. hurts consumer health with its full-fledged assault on the U.S. medical system.

Last November, hundreds of trial lawyers converged on Las Vegas to plot a strategy for their assault on Merck Pharmaceuticals and its besieged painkiller Vioxx.¹⁴ They divvied up key tasks and traded marketing and legal ploys in a confab worthy of a Fortune 500 company launching a major new product.¹⁵

Meet the health-care division of Trial Lawyers, Inc., which regularly delivers outsize profits for the plaintiffs' bar at the expense of doctors, hospitals, consumers, and the health-care system itself. Trial lawyers have honed their health-care playbook to a simple but devastating formula—gin up public outrage, recruit intimidating hordes of plaintiffs, and rewrite medical science to fit the claims of injury.

Drug Torts: A Massive Pain

Trial Lawyers, Inc.'s highly effective business model has undone corporations from Armstrong World Industries to W. R. Grace,¹⁶ but arguably nowhere have the litigation industry's tactics been more aggressive and sophisticated than in the mass product-liability suits that have dogged pharmaceutical manufacturers for two decades. The plaintiffs' bar and its allies in consumer lobbies like Public Citizen have torpedoed dozens of drugs, driving many off the market.¹⁷ Of 39 pending product-liability cases currently before the Judicial Panel on Multi-District Litigation, which determines jurisdictional issues for mass torts, 22 involve drugs or medical devices.¹⁸ To be sure, some drugs have harmful side effects, but they are often exaggerated and avoidable. Others, such as Norplant, a long-term reversible contraceptive, have been hounded off the market despite evidence that its side effects are little more than a nuisance.¹⁹

Boostered by its success, and spurred on by the pharmaceutical industry's prolific development of useful and profitable new drugs, Trial Lawyers, Inc. has been stepping up its assault. The litigation industry is using increasingly sophisticated plaintiff-recruiting techniques, which include not only traditional advertising—fully 46 percent of all trial-lawyer advertising on television is directed at culling plaintiffs for drug lawsuits (see graph)²⁰—but also new tactics that vary from hitting daytime talk shows that attract the poor and unemployed to running Internet ads that can reach more sophisticated audiences.²¹

It's no surprise that the plaintiffs recruited by such techniques usually have feeble cases. Nor does it really matter. Trial Lawyers, Inc. needs only to get a couple of multimillion-dollar verdicts—usually in tort-friendly courts where judges are in the pocket of the plaintiffs' bar—and it can begin to make the real money from cowed defendants who settle the thousands of weaker claims—often for billions of dollars.

Consider the Fen-Phen mass tort, for example: a Mayo Clinic study found that the widely used diet drug appeared to cause heart-valve damage in 24 individuals, which prompted the Food and Drug Administration to pull the drug from the market;²² soon after, Trial Lawyers, Inc. set up echocardiogram mills in hotels across the country that churned out thousands of class-action claimants.²³ An audit of a sample of plaintiffs' echocardiograms found 70 percent ineligible for compensation, many of them having been doctored to produce evidence of disease.²⁴ Nevertheless, once Fen-Phen's maker, Wyeth, lost two verdicts totaling more than \$120 million, it began to settle.²⁵ So far, Wyeth has forked over \$14 billion and estimates its total liability at \$21 billion.²⁶

Doctors Under Siege

Their deep pockets make drug companies sitting ducks for Trial Lawyers, Inc., but the litigation industry has also found less well-heeled defendants, such as doctors, to be easy targets. The cost of these legal attacks is increasingly unaffordable liability insurance for doctors: according to the Congressional Budget Office, medical internists saw their malpractice premiums climb 50 percent between 1993 and 2002, and 33



BOB DAEMER/ICORIS

While the trial bar gets rich, the average consumer loses—through higher costs, reduced access, fewer products, and less innovation.

percent from 2000 to 2002 alone.²⁷ Vulnerable medical specialties like obstetrics and neurology have buckled under the ceaseless pressure from the trial bar. Skyrocketing malpractice-insurance premiums—and, in some cases, the inability even to buy insurance—have driven neurologists to refuse to staff emergency rooms and OB-GYNs to stop delivering babies.²⁸

Obstetricians continue to fall prey to suits alleging that the doctor's failure to perform a Cesarean section caused oxygen deprivation during delivery, which in turn caused cerebral palsy in the newborn. These suits, long a staple of the malpractice bar, have grossed millions in fees for trial lawyers like former senator and vice presidential candidate John Edwards.²⁹ Notwithstanding the fact that research has shown that cerebral palsy is only rarely attributable to birth asphyxiation³⁰—and that the dramatic increase in C-section rates has led to no decrease in the percentage of infants born with cerebral palsy³¹—plaintiffs' attorneys continue to flog this theory to gullible juries. Last year, one of the highest jury awards ever in a medical malpractice case—\$112 million (later settled for \$6 million based on a pre-verdict agreement)—went to a New York couple who claimed that doctors failed to act on signs of fetal distress during the mother's protracted labor.³²

The cost of such litigation industry tactics is lower-quality health care. Trial Lawyers, Inc.'s cerebral palsy suits not only have helped spur an increase in unnecessary C-sections, at a cost to mothers' health,³³ but also have succeeded in shutting down maternity wards—Philadelphia has lost three in recent years³⁴—thus forcing pregnant women in certain parts of the country to travel hours for treatment.

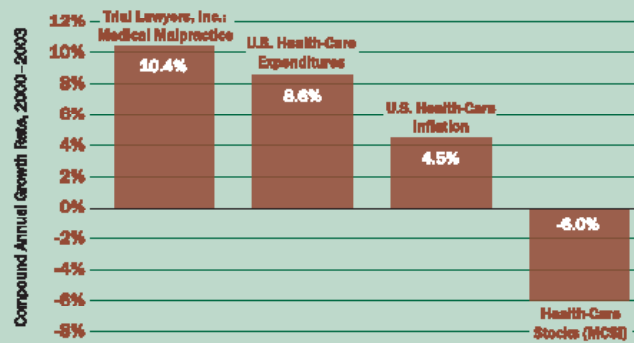
The Litigation Industry's New Health-Product Lines

Any well-run business must constantly explore new product lines, and the health-care division of Trial Lawyers, Inc. is no exception. In recent years, the plaintiffs' bar has been busily expanding its portfolio of health-care products. Having successfully persuaded some judges to accept novel theories of elder abuse, the trial bar has driven up the malpractice premiums of nursing homes.³⁵ Hospitals have long been accustomed to malpractice suits over surgical mishaps and birth defects, but now litigation-industry leaders like Dickie Scruggs, who led the states' suits against the tobacco companies, have made class-action defendants out of nonprofit hospitals that serve the nation's poorest citizens.³⁶

Yet Scruggs's nonprofit hospital suits are small potatoes compared with his ventures alleging, on behalf of 145 million patients, that health maintenance organizations were guilty of fraud and racketeering.³⁷ Copying a page from the playbook he used against Big Tobacco, Scruggs cozied up to Wall Street analysts and investors, intimating what the fallout of an adverse verdict might be.³⁸ Although the biggest cases ultimately were dismissed, two insurers—after watching their stock prices tank—settled for half a billion dollars each.³⁹

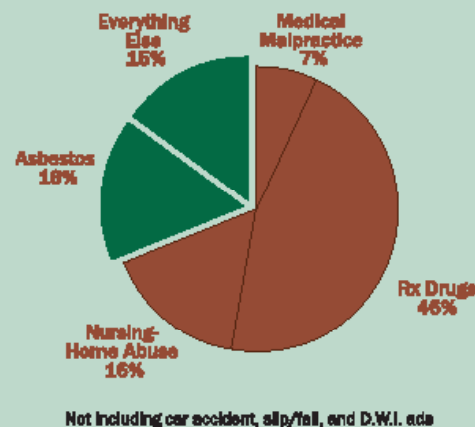
Ultimately, while Scruggs and his buddies in the plaintiffs' bar get rich, the average health-care consumer loses—through higher costs, reduced access, fewer products, and less innovation. Bloodletting was a core medical treatment from the time of Hippocrates to well into the last century, but if today's leeches in the litigation industry are not constrained, they may suck the lifeblood out of the American health-care system.

Trial Lawyers, Inc.'s Medical-Malpractice Returns Have Exceeded Health-Care Cost Increases.



Source: Tillinghast; Toussaint; Center for Medicare and Medicaid Services; Morgan Stanley Capital International

Two-Thirds of All Trial Lawyers, Inc. Advertising Is Aimed at the Medical Industry.



Source: TNS Media Intelligence

SAYING NO TO DRUGS

Breakthrough pharmaceuticals have driven medical progress for decades. Litigation may grind it to a halt.

Bolstered by war chests amassed in tobacco and asbestos suits and by an increased spirit of cooperation among law firms, Trial Lawyers, Inc. is going after drug companies and medical-device makers with new intensity. And it is busily trolling for customers: “You may be entitled to money,” blares the website ClassActionConnect.com, targeting Merck & Co.’s popular painkiller Vioxx.⁴⁰ A similar site claims to “give you all the facts you need to stake your claim to the billions of dollars sitting in financial accounts right now.”⁴¹

Vioxx, the first of a class of COX-2 inhibitor drugs, was created as a useful treatment for the many older individuals who suffer from debilitating rheumatoid arthritis and other painful chronic conditions but who are at risk for life-threatening reactions to medicine-chest standbys aspirin and ibuprofen, which themselves take thousands of lives a year.⁴² Last year, Merck voluntarily withdrew Vioxx from the market after a study showed an increased risk of heart attack and stroke after using the drug in heavy doses for 18 months.⁴³

What has followed has been the biggest bonanza for the trial bar since 2001 (when Wyeth put aside \$13 billion to settle lawsuits over the diet drug Fen-Phen—a number that subsequently climbed to \$21 billion).⁴⁴ More than 20 million Americans have taken Vioxx since it was introduced in 1999.⁴⁵ By this fall, Merck was facing almost 5,000 federal and state lawsuits stemming from the drug’s use, not to mention a slew of shareholder suits.⁴⁶ While financial estimates last year suggested that the Vioxx litigation could wind up costing Merck \$18 billion,⁴⁷ the overall take for the litigation industry could be much higher if the first Vioxx jury verdict (see box, p. 7) is any indication, and some analysts are now projecting that Merck could lose up to \$50 billion.⁴⁸

Junk Science in the Courts

While at least some Vioxx suits seek compensation for actual injury⁴⁹—Merck’s scientific tests did show an increased incidence of heart attack for some individuals who took a certain dosage over time—medical-products liability cases often seek compensation for “phantom risks” that are nonexistent, or at least unproven.⁵⁰ Trial Lawyers, Inc. has cashed in for billions of dollars with such claims of injury, lacking any real scientific evidence, by relying on what Manhattan Institute legal scholar Peter Huber calls “junk science”—assertions presented as scientific fact but in reality more like astrology than astronomy, more like alchemy than chemistry, and more like numerology than mathematics.⁵¹ By exploiting loose evidentiary requirements, clever lawyers have been able to use junk-science testimony to dupe unsophisticated juries into believing their far-fetched claims.⁵²

For example, in 1995, 400,000 women registered for a \$4.25 billion fund established to compensate them for injuries allegedly caused by silicone breast implants—notably, an increased risk of breast cancer and connective tissue diseases—despite any scientific evidence that such implants were harmful.⁵³ The settlement followed two 1992 studies “showing that breast implants were associated with a *reduced* rate of breast cancer”⁵⁴ and just preceded a major 1994 epidemiological study published in the *New England Journal of Medicine* that found “no association between implants and the connective tissue diseases and other disorders that were studied.”⁵⁵ Why would Dow Corning enter into bankruptcy



AP/DANIEL HULSHIZER

By exploiting loose evidentiary requirements, clever lawyers use “junk science” to dupe juries into believing far-fetched claims.

and a multibillion-dollar settlement, given such evidence and the total absence of studies establishing the litigation industry's allegations? After losing a \$7.5 million lawsuit to a woman claiming illness caused by breast implants,⁵⁶ Dow was flooded with suits—from some 20,000 women from 1992 to 1994—and lost, in trial and on appeal, tens of millions of dollars in jury verdicts to Trial Lawyers, Inc.⁵⁷

Though breast-implant litigation may strike some as trivial, since the device's typical purpose is cosmetic, drugs and devices with genuine lifesaving and life-enhancing effects have also been driven off the market by the litigation industry's junk-science lawsuits. Take, for instance, the morning-sickness drug Bendectin, which greatly improved the daily lives of pregnant women and by 1980 was used by as many as 25 percent of all expectant mothers.⁵⁸ Trial lawyers generated such a national panic over the claim that the drug was associated with birth defects—despite any evidence—that many women who had been taking the drug aborted their unborn fetuses.⁵⁹ By 1983, the manufacturer of Bendectin pulled the drug in the face of \$18 million in annual legal bills—against only \$20 million in total sales.⁶⁰ Though Bendectin is on the market elsewhere around the world, it remains unavailable to pregnant American women,⁶¹ despite more than 30 published studies—examining more than 130,000 patients—that have failed to find a link between the drug and birth defects.⁶² Since Bendectin was pulled from the market, the percentage of pregnant women hospitalized each year for morning sickness has doubled; the incidence of birth defects has not changed.⁶³

Compensating the Unsick

Even when there is scientific evidence that a drug can cause injury, our courts do a very poor job of distinguishing between credible and meritless cases, as demonstrated most recently in *Ernst v. Merck* (see box). So unscrupulous operators within the litigation industry can (and do) flood courts with mass tort claims that group together many claimants—most of whom have no recognizable medical injury—and settle claims that compensate the unsick, undercompensate the sick, and produce astronomical fees for themselves.

This tactic was pioneered by Trial Lawyers, Inc. in its long-established product line of asbestos litigation,⁶⁴ and today it drives product-liability claims over drugs and medical devices. A case in point is the litigation industry's attack on Fen-Phen, the diet drug that has already cost Wyeth \$14 billion in litigation expenses and damages (and is expected to cost \$7 billion more).⁶⁵ Doctors at the Mayo Clinic discovered a link between Fen-Phen and a heart-valve disorder.⁶⁶ According to Wyeth's initial models, the association was strongest for aortic valve damage, a rare condition.⁶⁷ Most of the plaintiffs, however, claimed that Fen-Phen had caused mitral valve damage, "a much more common condition among overweight people generally."⁶⁸

You might ask how this could happen. So did Judge Harvey Bartle III, of the Eastern District of Pennsylvania.⁶⁹ In one case, he held a six-day

THE IMPORTANCE OF BEING ERNST

Carol Ernst, the widow of a 59-year-old who had taken the pain-relieving drug Vioxx and died shortly after, was handed a \$253 million verdict from a Texas jury this August.⁹¹ Texas attorney **Mark Lanier**, who moonlights as an evangelical minister when he's not leading Trial Lawyers, Inc.'s pharmaceuticals division, scored the big win.⁹² Although the verdict will likely be reduced under Texas's punitive-damages cap,⁹³ the cap will not affect the jury's award of damages for the mental anguish suffered by the deceased's wife (of one year), which the jury determined to be \$24 million.⁹⁴



APPAT SULLIVAN

Ernst had taken Vioxx for only eight months, less than the 18 indicated as potentially unsafe in Merck's study; he had 70 percent blockage in his arteries; and the original diagnosis for his cause of death was heart arrhythmia, which has not been linked to Vioxx.⁹⁵ The Texas jury was apparently not persuaded by these facts.

The verdict in the *Ernst* case highlights the significant problems that American lay juries have in assessing complex medical claims of causation. One juror in the case told the *Wall Street Journal*, "Whenever Merck was up there, it was like wah, wah, wah. . . . We didn't know what the heck they were talking about."⁹⁶ Without the ability to assess competing scientific claims with any precision, jurors can be persuaded by charismatic plaintiffs' attorneys like Mark Lanier to accept legal claims that a more sensible legal system would deny.

inquiry focusing on 78 claimants who had been screened by one of only two doctors.⁷⁰ The first of these doctors “was working on contingency for the Hariton firm; he received an extra \$1,500 whenever a claimant he’d evaluated submitted a green form to the trust.”⁷¹ As for the second doctor, the judge stated that her “mass production operation would have been the envy of Henry Ford” and that her lead sonographer had been trained by an employee of the plaintiffs’ firm.⁷²

Drug Lawsuits Cost More than Money

By exploiting the legal system to sue manufacturers of drugs and medical devices that do not actually cause plaintiffs’ injuries, Trial Lawyers, Inc. deters companies from researching and manufacturing legitimate lifesaving and life-improving products.⁷³ Manufacturers try to maximize profit—they’re not charities—so they will only research and produce goods whose expected sales exceed expected costs.

Of course, were our legal system functioning efficiently, lawsuits would force pharmaceutical companies to internalize the costs of side effects caused by the drugs that they produce—which would encourage the manufacturers to withhold more dangerous products and which in turn would lower the net social cost of accidents.⁷⁴ But the legal system doesn’t function efficiently, and the evidence strongly suggests that tort lawsuits have done little to lower accident rates. Rather, seminal research from Yale’s George Priest showed two decades ago that accident rates fell significantly throughout the twentieth century—and indeed, fell even *faster* before tort law was expanded in the 1960s and 1970s than they did thereafter.⁷⁵ A more recent study, forthcoming from the Manhattan Institute, examines accident rates and tort reforms from 1980 through 2000 and shows that reforms designed to limit the scope of tort law—including noneconomic- and punitive-damage caps, higher evidentiary standards, and product-liability reform—are actually associated with *lower* accident rates.⁷⁶

In the drug context, these results should hardly be surprising, given that the system as we know it has punished safe products from breast implants to Bendectin and overpunished other drugs such as Fen-Phen and Vioxx. Pharmaceuticals and other products that improve health and save lives have been indiscriminately driven from the marketplace. As Peter Huber has explained, “When all is said and done, the modern [tort] rules do not deter risk: they deter behavior that gets people sued, which is not at all the same thing.”⁷⁷

The harmful side effects of overactive litigation go far beyond the actual products that are taken off the market. Countless other potentially useful drugs sit in petri dishes because companies hesitate to spend hundreds of millions of dollars on products that could land them in court, costing hundreds of millions more.

For example, lawsuits have prompted a virtual cessation in contraceptive research.⁷⁸ Following on the heels of successful lawsuits against the manufacturers of IUDs, Trial Lawyers, Inc. managed to kill off other contraceptives such as Norplant, a long-term reversible contraceptive that was used by a million women in the United States and that is still used by millions more in other countries.⁷⁹ Sued for alleged complications caused by Norplant’s silicone applicator, its maker, Wyeth, withdrew the product from the U.S. market in 2002 after five years of litigation and over \$50 million in legal costs—despite the fact that plaintiffs produced no evidence of harm.⁸⁰ Indeed, when lawyers couldn’t prove Norplant a health threat, they took to attacking Wyeth for failing to warn patients of its side effects.⁸¹ The upshot: U.S. companies have made no new contraceptive drugs since, and spend 20 times more money on cosmetics research than on developing new contraceptives.⁸²

The Vioxx case itself is a good example of how litigation exposure

THE NEW DRUG LORD

The new CEO of the drug division of Trial Lawyers, Inc.’s health-care practice might well be **Christopher A. Seeger**. Seeger recently wrung a \$700 million settlement out of Eli Lilly in a national suit over its anti-psychotic drug Zyprexa, which his suit alleged caused diabetes⁹⁷—a side effect deemed worth the risk by the Food and Drug Administration



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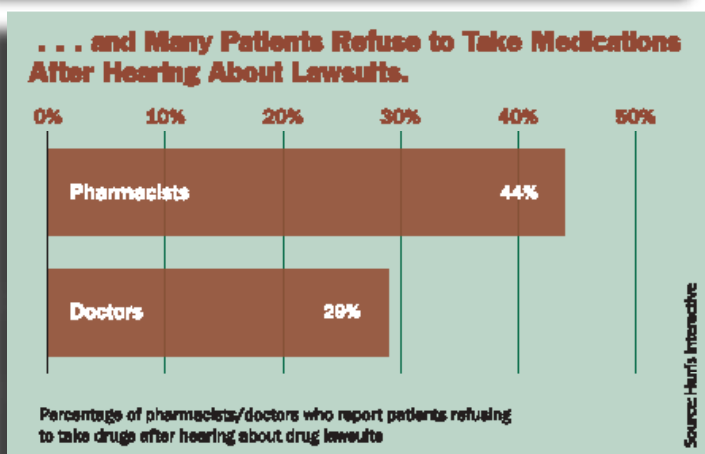
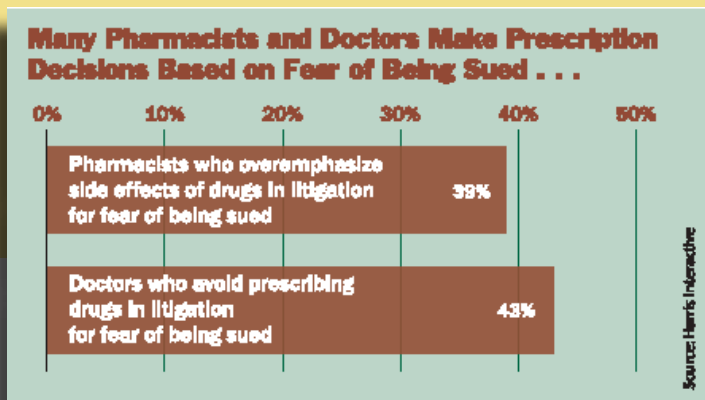
for a medication that effectively treats schizophrenia and manic depression:⁹⁸ when untreated, sufferers from these conditions face far more serious threats to their quality of life than regular insulin injections. Seeger now serves as a lead counsel or member of the

plaintiffs’ steering committee in many of the most prominent drug mass torts in the country—including suits against anti-diabetes drug Rezulin, anti-heartburn drug Propulsid, and weight-loss drug Dexatrim—and in April, plaintiffs’ lawyers unanimously elected him to serve as co-lead counsel for the multidistrict litigation over Vioxx.⁹⁹ Shortly after the decision in *Ernst v. Merck*, Seeger began his opening arguments in the second Vioxx case alleging that the drug caused a heart attack, a New Jersey lawsuit still pending as this publication went to press.¹⁰⁰

Do we really want schizophrenics to stop taking Zyprexa because they saw the trial bar's TV ads recruiting plaintiffs who had taken the drug?

can stifle potentially lifesaving research, since Vioxx had been shown experimentally to prevent the growth of precancerous lesions in people at risk of developing colon cancer.⁸³ Given the threat posed by such cancers, many patients would accept a moderately increased risk of heart attack to have an effective cancer treatment. But if trial lawyers have their way, people with real health needs won't have such choices, and Vioxx's potential efficacy as a cancer preventative may die along with its use as a painkiller.⁸⁴

In addition to removing lifesaving drugs from the market and stifling research, the specter of drug litigation can adversely affect health by changing patient and doctor behavior. More than 40 percent of doctors say they don't prescribe drugs that are under threat of litigation for fear that they will be drawn into the suit (see graph, above left).⁸⁵ Even more frightening, 40 percent of pharmacists report that patients have refused to take prescribed medications that they knew were the subject of litigation (see graph, below left).⁸⁶ Given the millions of dollars spent on drug-lawsuit advertising across the country (see graph, p. 5), such risks are very real, and when patients stop taking medications without legitimate medical reasons, they endanger their own health and, in some cases, the public at large: do we really want individuals with



schizophrenia and bipolar disorder to stop taking their Zyprexa because they saw one of Trial Lawyers, Inc.'s thousands of television advertisements recruiting plaintiffs who had taken the drug?

An Attack on Democracy

Finally, Trial Lawyers, Inc.'s assault on the drug industry has undermined the democratic authority of Congress itself, which vests the Food and Drug Administration with responsibility for pharmaceutical regulation.⁸⁷ The FDA has been scrambling to reassert itself as the arbiter of drug safety as lawyers and juries usurp its role and increasingly make cost/benefit decisions that are rightly left to patients and their doctors. Necessarily, lawsuits such as those against Fen-Phen and Vioxx undermine the FDA's regulatory mandate from Congress to oversee drugs and patient health, as the agency itself has recently argued.⁸⁸ Though the FDA is far from perfect and needs reform, its onerous approval processes are specifically designed to test drugs' safety and efficacy with an eye toward the big picture: they determine whether the costs of allowing a drug into the marketplace are higher or lower than the benefits that the drug is expected to bring.

In contrast, juries that decide lawsuits over drug side effects can consider only the case at hand, not the broader cost/benefit analysis. Such juries can impose punitive damage awards to "send a message" to drug companies, notwithstanding other juries' decisions to send the same message—or indeed, other juries' decisions that the message need not be sent. And Trial Lawyers, Inc. can exploit lax venue and jurisdiction rules to shop cases to the most lenient state courts, which not only have much looser evidentiary rules but also see lawsuits against out-of-state manufacturers as a cottage industry.⁸⁹ These venues are what plaintiffs' attorney Dickie Scruggs, a longtime Trial Lawyers, Inc. executive, calls "magic jurisdictions"—where "judges are elected with verdict money" and "it's almost impossible to get a fair trial if you're a defendant."⁹⁰

Effectively, the litigation industry is imposing its own national health-care policy, case by case—a policy not primarily concerned with the public's health but with the trial bar's power and wealth. The legal assault on the makers of our medicines and medical devices threatens our health and that of our children and grandchildren. We all need to just say no to Trial Lawyers, Inc.'s war on drugs.

VACCINATION LITIGATION

After almost killing the childhood vaccine market, Trial Lawyers, Inc. takes another stab at these vital medications.

Vaccines are among the greatest accomplishments of modern medicine, eliminating the widespread scourge of killer diseases like diphtheria, polio, and smallpox. Each year, millions of American children are vaccinated against many such infectious diseases, an essential precaution for the broader public health.¹⁰¹ Unfortunately, a very small percentage of vaccinated children can develop side effects, or even die.¹⁰² Thus it was that, beginning in the 1960s and accelerating in the early 1980s, the market for vaccines faced a new plague that threatened its very existence—one that continues to infect vaccine manufacturing today and that has proven itself resistant to statutory remedy. The plague, of course, is the virulent lawsuit abuse sponsored by Trial Lawyers, Inc.

The 1980s Vaccine Litigation Explosion

The sordid story of lawsuits targeting vaccine side effects is one of the most compelling examples of what ails our liability system. As late as 1965, the Second Restatement of Torts opined that drug and vaccine manufacturers could not be held strictly liable for selling unavoidably dangerous products, since such products are “apparently useful and desirable . . . with a known but apparently reasonable risk.”¹⁰³

In the 1960s and 1970s, however, courts loosened these requirements in permitting liability for the Sabin live-virus polio vaccine under a “failure to warn” theory.¹⁰⁴ Moreover, the federal government assumed liability for side effects caused by the swine-flu vaccine in the 1970s and soon faced more than 4,000 claims, upon which it paid out over \$72 million.¹⁰⁵ As the courts continued to apply novel liability theories, vaccine manufacturers were flooded with lawsuits, which, in the case of the diphtheria, pertussis, and tetanus (“DPT”) vaccine, escalated from one suit in 1979 to 255 in 1986.¹⁰⁶

A watershed was breached in 1984, when juries slapped vaccine makers with huge verdicts over two individual claims: the first—against a manufacturer of the DPT vaccine—was for over \$1 million;¹⁰⁷ and the second—against a manufacturer of the Sabin polio vaccine—was for \$10 million, including \$8 million in punitive damages.¹⁰⁸ Each case was predicated on the theory that alternative vaccines were available or could have been developed¹⁰⁹—an interesting irony. Although the latter verdict was subsequently overturned, the damage had been done. Claims multiplied: vaccine maker Lederle estimated that total sales of its 1983 polio vaccine were only one-twelfth the value of claims filed against it;¹¹⁰ its 1983 DPT vaccine sales were dwarfed by claims 200 to 1.¹¹¹

Vaccine manufacturers responded predictably to this avalanche of lawsuits. First, they exited the market: of the 26 vaccine manufacturers in business in 1967, 15 were still extant in the early 1980s, but the number plummeted to three by the middle of the decade.¹¹² Second, they raised prices: DPT vaccine cost 10,000 percent more in 1986 than it did in 1980.¹¹³ The few remaining suppliers reported that they were having trouble finding liability insurance at all, and the Centers for Disease Control, fearing a shortage, asked doctors to delay giving children DPT booster shots.¹¹⁴

Congress Steps In

Responding to the crisis, Congress passed legislation in 1986 establishing the Vaccine Injury Compensation Program (“VICP”), which bars all tort claims until parents of children allegedly injured by a vaccine have exhausted a no-fault remedy.¹¹⁵ In essence, the system makes the federal government the insurer for vaccine-related injuries, with payouts coming from a fund supported by a small vaccine surtax.¹¹⁶ Claimants appear before a special master and have the burden of establishing injury, according to a “vaccine injury table,” and if successful, the Justice Department has the option of contesting the finding if it can show that the injury was not caused by the vaccine.¹¹⁷



DARRELL BISHANSKI/FRANCISCO CHRONICLE/CORBIS

There are now only two flu-vaccine makers worldwide—down from five in 1994—and supply shortages are an annual rite of winter.

The VICP largely stemmed the tide of vaccine lawsuits. Having reached a high of 255 suits in 1986, the number of DPT suits fell to only 19 by 1990 (see graph).¹¹⁸ In general, the program effectively compensated those legitimately injured and rejected bad claims.¹¹⁹ The average award under the system has been high—\$824,463—for the minority of claims that have been compensated,¹²⁰ but with much lower administrative costs than traditional tort litigation—only 9 percent under the VICP, compared with 54 percent for the average tort claim.¹²¹

With the liability climate more stable and predictable, research into new vaccines began to proliferate: safer “whole cell” DPT vaccines replaced older versions, and several new vaccines were widely adopted.¹²² Having only recently been a dead-end field for R&D, the vaccine industry was now attracting new entrants, including biotechnology firms.¹²³

Trial Lawyers, Inc. Fights Back

While the VICP has been successful in protecting those vaccines designed for childhood diseases, Trial Lawyers, Inc. has continued to attack the supply of vaccines that fall outside the law’s ambit. In 1999, less than a year after GlaxoSmithKline introduced LYMERix, an adult vaccine for Lyme disease (the multi-symptom inflammatory and neurological ailment that has affected more than 150,000 people since 1982), Trial Lawyers, Inc. brought a class-action suit claiming that the vaccine causes chronic arthritis.¹²⁴ By 2002, LYMERix was off the market—and reported cases of Lyme disease, stable since the vaccine’s introduction, jumped 40 percent.¹²⁵

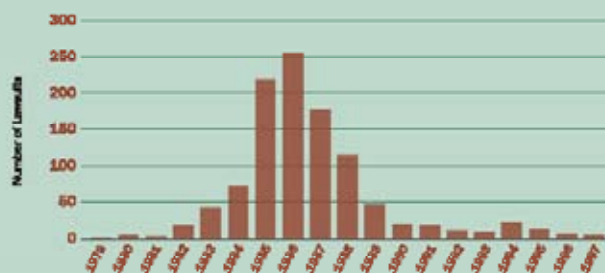
Trial Lawyers, Inc. has also sued flu-vaccine manufacturers, despite the fact that influenza kills 36,000 people annually and costs the U.S. economy over \$12 billion each year in lost work time.¹²⁶ Unsurprisingly, there are now only two vaccine makers worldwide—down from five in 1994—and supply shortages are now an annual rite of winter.¹²⁷

Trial Lawyers, Inc.’s latest gambit is to claim injury caused not by vaccines themselves but by thimerosal, the mercury-based compound used to preserve them.¹²⁸ Unsurprisingly, the litigation industry’s claims lack solid scientific foundations. The thimerosal furor erupted in 1999, when the Environmental Protection Agency hypothesized that, theoretically, a combination of infant vaccines could lead to blood mercury levels above EPA guidelines.¹²⁹ That same year, the Clinton administration recommended removing thimerosal from vaccines, and drug manufacturers began doing so when possible.¹³⁰

While high doses of mercury can indeed cause neurological damage, subsequent research has concluded that “mercury was cleared from the blood in infants exposed to thimerosal faster than would be predicted for methyl mercury,” such that “[b]lood levels of mercury did not exceed [EPA] safety guidelines for methyl mercury for all infants in these studies.”¹³¹ Moreover, last year the Institute of Medicine’s Immunization Safety Review Committee issued a definitive report concluding that the “body of evidence favors rejection of a causal relationship between thimerosal-containing vaccines and autism,”¹³² the ailment typically associated with the preservative in suits by Trial Lawyers, Inc.¹³³ Little wonder that the American Academy of Pediatrics continues to advise giving thimerosal-preserved flu shots to children as young as six months old,¹³⁴ and that the World Health Organization still recommends using thimerosal as a vaccine preservative.¹³⁵

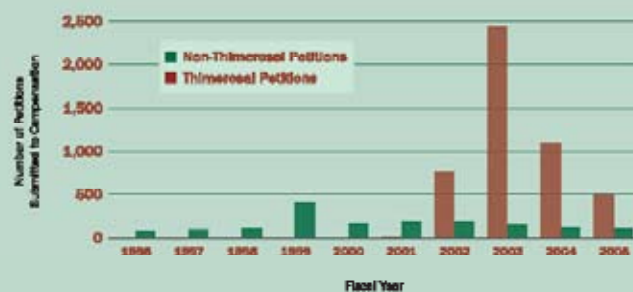
Regardless of the scientific evidence—and despite the fact that a vaccine’s preservative plausibly fits within the statutory protection that Congress erected against vaccine litigation—the lawsuits came. In 2001, four Oregon families filed a class-action suit against 12 drug companies, alleging that 6 million children in the United States received potentially toxic doses of mercury from thimerosal-laced vaccines.¹³⁶ In another suit, plaintiffs are seeking \$30 billion in damages—from an industry with total annual sales of barely \$6 billion.¹³⁷ Such continuing outbreaks of vaccine litigation, even in the face of congressional action designed to stop them, show just how difficult it is to inoculate society against the infectious reach of Trial Lawyers, Inc.

The Vaccine Injury Compensation Program Effectively Controlled Vaccine Lawsuits . . .



Source: Centers for Disease Control and Prevention, Division of Field Epidemiology, Office of the Assistant Secretary for Health Policy and Practice

. . . until Trial Lawyers, Inc. Began to Flood the System with Suits over the Preservative Thimerosal.



Source: U.S. Dept. of Health & Human Services

MALPRACTICE MALADIES

Doctors continue to flee states with out-of-control medical-injury verdicts.

Over the last two years, many state legislatures have responded to the crisis in medical-malpractice insurance rates by trying to rein in out-of-control medical-liability lawsuits.¹³⁸ While several states have been successful in enacting substantial reforms, the American Medical Association continues to list 20 states “in crisis” over malpractice litigation.¹³⁹ Overall, then, these efforts have yet to derail the med-mal gravy train that has been one of Trial Lawyers, Inc.’s longest-running and most lucrative business lines.

Trial Lawyers, Inc.’s medical-malpractice lawsuits are legion: of the 46,000 members of the American College of Obstetricians and Gynecologists, 76 percent have been sued at least once, 57 percent at least twice, and 41.5 percent three times or more.¹⁴⁰ And the litigation industry tends to file far more cases than actually have merit: nearly half of malpractice suits—49.5 percent—are dropped, dismissed, or settled without payment.¹⁴¹ Indeed, in a study of medical-malpractice cases filed against New York hospitals, the Harvard Medical Practice Group found that in the majority of medical-malpractice claims, the plaintiff exhibited no medical injury whatsoever; the plaintiff was injured by doctor negligence only 17 percent of the time.¹⁴²

The High Costs of Malpractice Liability

So if Trial Lawyers, Inc.’s suits against doctors are wide-ranging, and often meritless, just how much do they cost? By 2003, medical-malpractice liability costs in the United States had reached an astounding \$26 billion annually.¹⁴³ That staggering sum represents a 2,000 percent increase over costs in 1975.¹⁴⁴ At 12 percent per year, the growth rate in medical malpractice costs since 1975 is four times the rate of inflation and twice the rate of *medical-care* inflation.¹⁴⁵

In jury trials, million-dollar verdicts are now the norm. Fifty-two percent of all awards exceed \$1 million while the average award now weighs in at \$4.7 million.¹⁴⁶ In crisis states, jury verdicts can be truly astronomical. For example, in 2002 in New York State, where juries delivered five of the top ten malpractice awards,¹⁴⁷ insurers incurred losses of over \$1 billion and paid out \$747 million in claims.¹⁴⁸ Though such outsize verdicts are often reduced by pretrial agreements and constitute only 4 percent of all med-mal case resolutions,¹⁴⁹ they establish a benchmark for future settlements. Between 1997 and 2003, the average settlement climbed 93 percent, to \$1.9 million.¹⁵⁰

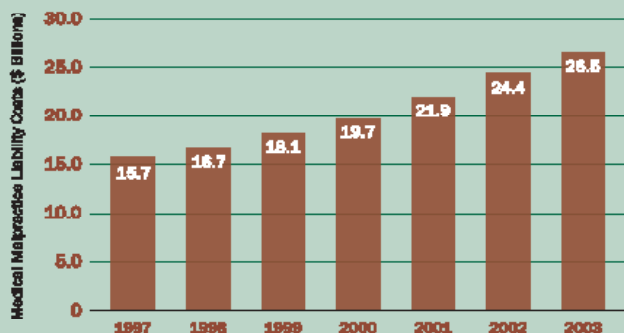
An Insurance Crisis

These legal-defense and settlement costs are driving doctors’ insurance premiums into the stratosphere. Trial Lawyers, Inc.’s carpet-bombing tactics helped drive average premiums up 18 percent in 2003 alone¹⁵¹—more than twice the rate of growth of total health-care spending per person.¹⁵² Doctors in plaintiff-friendly states and those in high-risk specialties like obstetrics, orthopedics, surgery, and neurology have borne the brunt of the assault. In plaintiff-friendly Cook County, Illinois, obstetricians paid \$230,428 for coverage in 2004, up 67 percent from 2003 and nearly 12 times what they would pay in nearby Minnesota.¹⁵³ In St. Clair County, Illinois, where 1,100 defendants were named in more than 400 lawsuits between 2001 and 2003, neurosurgeons last year paid an average of \$228,396, five times the going rate in Wisconsin.¹⁵⁴

Even so, these sky-high premiums have not kept pace with payouts and with the costs of defending the 70 percent of suits that are spurious.¹⁵⁵ In 2003, insurers paid out \$1.38 for every premium dollar they took in.¹⁵⁶ Little wonder that many of them are running for the exits. SCPIE Indemnity Company stopped selling medical-liability insurance in every state but California in 2003.¹⁵⁷ American Physicians Assurance pulled out of Nevada early last year even after the state legislature passed reforms.¹⁵⁸ In 2002, MIIX Insurance in New Jersey declined to renew 7,000 policies because it had lost over \$200 million in 2000 and 2001.¹⁵⁹ In Maryland, where cowed legislators prefer to tax HMOs to pay for doctors’ insurance rather than take on the plaintiffs’ bar, there are only four medical-liability insurers left, down from 14 in 1995.¹⁶⁰

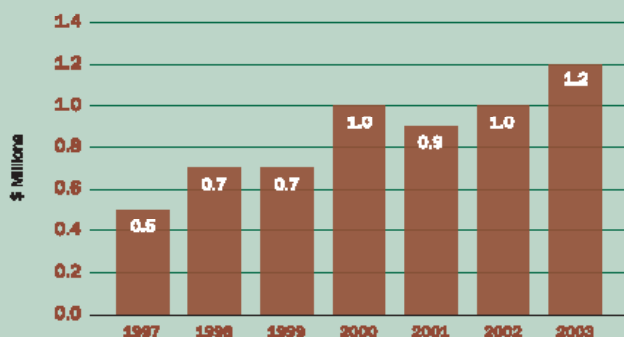
The exodus of viable insurers has left doctors scrounging for coverage. Facing the huge increases, some doctors are forgoing insurance, taking their chances against being sued. Others, loath to put everything they own at risk, are retiring, moving out of plaintiff-friendly jurisdictions, or abandoning procedures—including delivering babies—that are the favorite targets of the plaintiffs’ bar. In Illinois, three Park Ridge obstetricians recently decamped for Wisconsin after their 2004 premiums jumped 48 percent, to more than \$500,000 a year.¹⁶¹ In Kenosha, which then had caps on pain-and-suffering awards (see p. 18), they would pay only \$50,000.¹⁶² Kentucky, another AMA crisis state, lost a third of its obstetri-

Since 1997, Medical-Malpractice Liability Costs Have Risen by Two-Thirds, to over \$26 Billion Annually.



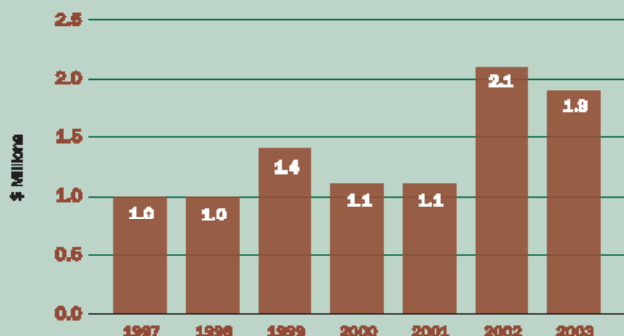
Source: Tillamach-TowersPerrin

Median Medical-Malpractice Jury Verdicts Have Doubled since 1997, to over \$1 Million.



Source: Jury Verdicts Research

Average Medical-Malpractice Settlements Have Also Roughly Doubled since 1997, to close to \$2 Million.



Source: Jury Verdicts Research

As the AMA journal has recently observed, “It has never been safer to have a baby and never more dangerous to be an obstetrician.”

cians between 1999 and 2003.¹⁶³ Pennsylvania—with total malpractice payouts at twice the national average—lost 36 percent of its general surgeons and 16 percent of its neurosurgeons between 1995 and 2002.¹⁶⁴

The Human Costs of Malpractice-Liability Excess

As doctors have abandoned lawsuit-prone states and given up procedures most likely to land them in court, those most vulnerable—pregnant women and accident victims requiring specialists’ care—have been left in the lurch. The human costs of Trial Lawyers, Inc.’s excesses are tragic, even deadly.

For example, Palm Beach County, Florida, is one of those tort-friendly locations where doctors increasingly shun risky cases. In five of the county’s 13 hospitals, there are no neurologists working in the emergency room, and accident victims and stroke and seizure patients must be transferred to hospitals in Gainesville and Tampa for treatment, over 100 miles away.¹⁶⁵ Last year, 53-year-old Barbara Masterson died of a stroke while a hospital searched desperately for an out-of-county doctor to treat her; no local neurosurgeon would do it.¹⁶⁶ Similarly, maternity patients in some parts of the country have to travel long distances because many obstetricians have stopped delivering babies. In upstate New York, seven counties have no OB/GYNs at all.¹⁶⁷ *The Journal of the American Medical Association* recently observed in an article entitled “Who Will Deliver Our Grandchildren?” that “It has never been safer to have a baby and never more dangerous to be an obstetrician.”¹⁶⁸

The gaps in coverage are not just in sparsely populated rural areas, as trial lawyers like to contend. When Methodist Hospital stopped delivering babies in 2002 because of the rising cost of liability insurance, South Philadelphia lost its only maternity ward.¹⁶⁹ In Manhattan, Elizabeth Seton Childbearing Center—30 percent of whose patients were on Medicaid—shut down in 2003 when its liability premiums soared to \$2 million a year.¹⁷⁰

The Push for Reform

Recently, pressure from doctors and hospitals and consumer uproar over doctor shortages have emboldened some lawmakers to enact

An Ohio jury awarded \$3.5 million to the family of a heart-attack victim whose doctor failed to help the man lose weight and quit smoking.

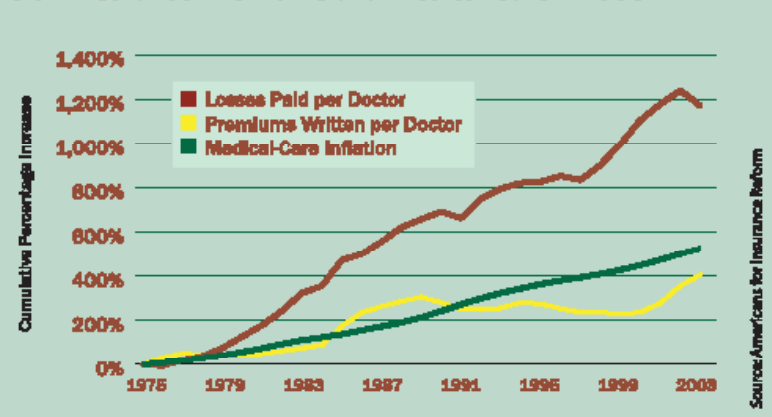
DR. TRIAL LAWYER

Doctor and lawyer Harvey F. Wachsman is one of the most prominent leaders of Trial Lawyers, Inc.'s medical-malpractice division, along with erstwhile partners Steven Pegalis and Stephen Erickson.¹⁸⁰ Their firm shocked the legal community in 1998 and 2001 by pulling out two jury verdicts of over \$100 million for birth-defect cases, the two largest medical-malpractice verdicts in New York State history.¹⁸¹ In the public debate over the medical-malpractice crisis, Wachsman regularly delivers Trial Lawyers, Inc.'s favorite (and falsifiable: see below) sound bite, one well-honed by the litigation industry's coterie of "consumer group" surrogates (see box, p. 19): "Blame insurance companies."¹⁸²



AP/FRANK FRANKLIN II

Medical-Malpractice Tort Costs Have Risen Far Faster than Insurance Premiums and Medical-Care Inflation.



reforms. Since 2002, 15 states have made at least some progress against runaway lawsuits.¹⁷¹ The benefits are starting to show. In Texas, where new statutes cap pain-and-suffering damages at \$250,000, Texas Medical Liability Trust lowered its premiums 12 percent the first year and another 5 percent the second.¹⁷² In Los Angeles (where 30 years ago lawmakers limited noneconomic damages to \$250,000), 2004 OB/GYN premiums were half as large as those in Texas and less than a third of those in Dade County, Florida.¹⁷³

Even at that, it's an uphill battle. Many of the new laws are riddled with loopholes that allow payouts to exceed the new statutory limits. Trial lawyers have already taken Florida, West Virginia, and Ohio to court over new caps on noneconomic damages.¹⁷⁴ Similarly, federal efforts to rewrite the rules of medical-liability practice have foundered; reform measures have died multiple times in the Senate, and it's far from clear that the Bush administration can secure the necessary votes to win passage.¹⁷⁵

Trial Lawyers, Inc. Fights Back

All the while, the plaintiffs' bar is busy conjuring up new causes of action. Last April, trial lawyers successfully overturned 20 years of case law when the New York Court of Appeals held that a patient could be compensated for the emotional distress of a miscarriage or stillbirth if it was caused by malpractice.¹⁷⁶ With 19,000 miscarriages and stillbirths a year in New York, beleaguered obstetricians are bracing for a new flood of lawsuits.¹⁷⁷

Ever resourceful, lawyers also are coming up with new categories of medical negligence. In 2003, a jury in Ohio awarded \$3.5 million to the family of a man who died of a heart attack, claiming that the man's doctor failed to help the man lose weight and quit smoking.¹⁷⁸ Such outcomes promise to inflate the already staggering cost of defensive medicine, the \$60 billion to \$108 billion spent annually on costly and unnecessary tests that doctors order to forestall lawsuits.¹⁷⁹ If such verdicts become a trend, expect doctors to refuse to treat overweight smokers—for anything.

INHOSPITABLE TREATMENT

Trial Lawyers, Inc.'s medical-malpractice operations today include suits against not only individual doctors but also health-care facilities such as hospitals, nursing homes, and clinics. Juries tend to have less sympathy for what they perceive to be impersonal, faceless institutions. Accordingly, hospitals lose over half of malpractice cases—doctors lose only one-third—and the average compensation in suits against hospitals is over \$6 million, a healthy 225 percent more than the average verdict against doctors.¹⁸³

As a result of the litigation industry's relentless assault, hospitals are seeing their medical-liability premiums soar as payouts escalate. In 2002, 44 percent of the hospitals in the country saw premium increases in excess of 50 percent—without any corresponding increase in coverage.¹⁸⁴ Hardest hit were places like New York, which is now deemed one of the “medical liability crisis states” by the American Medical Association.¹⁸⁵ In New York, premiums rose 51 percent in 2004 on top of a 23 percent increase in 2003.¹⁸⁶ In crisis states, hospitals pay an average of \$11,435 in malpractice-insurance costs per staffed bed, compared with \$4,228 in states that have instituted medical-liability reforms.¹⁸⁷

Hospitals' soaring costs and their inability to attract or retain willing physicians have caused many of them to shut down high-risk services (see, e.g., the idle West Virginia heart-surgery operating room, below) or shelve plans for new ones. In Philadelphia and its suburbs, eight maternity units have closed their doors in the past three years.¹⁸⁸ One of them, at Darby Mercy Fitzgerald Hospital, closed in June 2003 after the 17-bed unit had lost \$2 million in each of the previous two years.¹⁸⁹ In 2003, Florida Hospital in Orlando abandoned plans to build a \$55 million, 60-bed full-service satellite facility 20 miles from its main campus in Orlando because it couldn't find the doctors to staff it.¹⁹⁰ At Winter Park Memorial Hospital near Orlando, the number of surgeons willing to do emergency appendectomies and gall-bladder removals dropped from 14 in 2000 to zero in 2003, forcing the hospital to transfer to other facilities patients who required immediate treatment.¹⁹¹

Nursing homes, too, are staggering under medical liability costs, as lawsuits against them have become one of the fastest-growing markets for the plaintiffs' bar. Nationally, long-term-care facilities saw malpractice costs per bed increase 700 percent between 1992 and 2003.¹⁹² If such trends continue, it will become increasingly difficult to care for our aging population.

As if targeting care for the elderly were not enough, tobacco mastermind Dickie Scruggs has put the poor in his crosshairs in a series of class-action suits that he has led against nonprofit hospitals.¹⁹³ Notwithstanding that nonprofit hospitals delivered \$23 billion in free care in 2003 alone, Scruggs alleges that they have abused their tax-exempt status by overcharging the poor while discounting the cost of care to other patients.¹⁹⁴

Thus far, federal judges hearing these cases have given them the treatment that they justly deserved, throwing out suits in Alabama, Michigan, and New York.¹⁹⁵ New York judge Loretta Preska went so far as to rebuke Scruggs for his “orchestrated assault on scores of nonprofit hospitals, necessitating the expenditure of those hospitals' scarce resources to beat back meritless legal claims,” which she characterized as “part of the litigation explosion that has been so well documented in the media.”¹⁹⁶ Nevertheless, some hospitals have been sufficiently intimidated that they have capitulated; one six-hospital system in Mississippi and Alabama, North Mississippi Health Services, has already agreed to refund money to poor, uninsured patients.¹⁹⁷

Finally, even as new reforms capping noneconomic damages have put a damper on some suits, they've also generated creative new causes of action against hospitals. In Ohio, lawyers now sue hospitals for corporate negligence—claiming, for example, that a doctor should not have been permitted to perform a certain surgery.¹⁹⁸ Similarly, in Texas, lawyers have alleged that patients are being harmed because in its drive to make money, a hospital neglected safety.¹⁹⁹ By casting run-of-the-mill malpractice claims as claims against corporate malfeasance—which lie outside the statutory limits that several states have placed on malpractice damages—the litigation industry is performing an end run around those states' democratically instituted tort reforms. When it comes to protecting its bottom line, Trial Lawyers, Inc. can be downright inhospitable.



ARSCOTT MCCLUSKEY

THE TRIAL BAR'S HMO RACKET

Trial Lawyers, Inc.'s smooth talkers paint HMOs as gangsters, and cash in on subscriber dissatisfaction.

Essential to Trial Lawyers, Inc.'s business model is its constant search for new products—and new villains. Lately cast in the role of the heavy are managed-care providers such as health maintenance organizations, insurers that work to regulate the dispensing of health care by channeling subscribers into their approved networks of specialists and influencing the selection of treatment options. Once seen as a fulcrum for health-care reform, HMOs have become—along with drug companies—an industry that Americans love to hate, thanks in no small part to the litigation industry's propaganda machine. Homing in on the public's disenchantment with HMOs, lawyers have managed to all but decimate the cost-control tools that are at the heart of the benefits that managed care confers on the health-care system.

Treating Broken Legs with Brain Surgery

In 1993, Memorial Sloan-Kettering Cancer Center in New York City sued Empire Blue Cross Blue Shield for \$12 million, including \$10 million in punitive damages, for refusing to pay for bone-marrow transplants for breast-cancer patients, despite the fact that the treatment was unproven.²⁰⁰ Later that year, a California jury awarded \$89.3 million, including \$12 million for emotional distress, to the family of a deceased woman whose HMO declined to pay for a similar treatment.²⁰¹ Thus rebuked, insurers started routinely doling out \$100,000 per treatment for bone-marrow therapy for breast-cancer patients—an estimated 30,000 women received the treatment during the 1990s.²⁰² Insurers finally stopped providing the treatment in 1999—after wasting \$3 billion—when four separate studies proved the treatment to be a failure, and the lone South African study that suggested effectiveness was exposed as having been based on falsified data.²⁰³

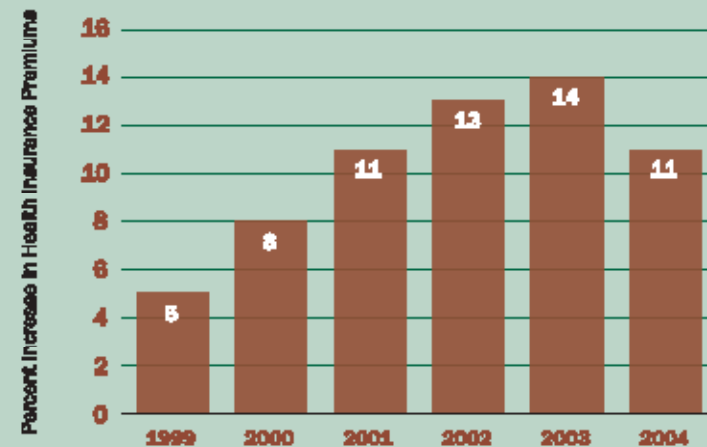
The suits against HMOs for refusing to cover speculative bone-marrow treatments were just the beginning of Trial Lawyers, Inc.'s all-out assault on medical cost-control measures. In the late 1990s, the litigation industry began to leverage its powerful government-relations divisions in states such as Texas and California to enact new “patients’ rights” laws.²⁰⁴ These statutes typically created direct causes of action against HMOs for “negligent misconduct”—a catchall phrase that made managed-care providers not only liable for treatment and non-treatment decisions but also for any medical malpractice of doctors covered under the plan.²⁰⁵ Thus emboldened, trial lawyers increasingly turned subscribers’ gripes into lucrative lawsuits.

Fortunately, the United States Supreme Court last year shut down this particular trial-lawyer profit stream when it ruled that the Employee Retirement Income Security Act preempted such state laws.²⁰⁶ The Court unanimously determined that Congress had set up clear national rules that funneled aggrieved patients into federal courts, where they could recover only the cost of treatments denied—not punitive and other damage awards.²⁰⁷

Who's the Racketeer Here?

Trial Lawyers, Inc.'s other big assault on the HMO industry used the riskier but potentially more lucrative tactics the plaintiffs’ bar honed to a science in its wars against Big Tobacco. Beginning in 1999, plaintiffs’ lawyers have mounted some three dozen class actions against HMOs under the federal anti-racketeering RICO statute that allows for treble damages—all the time insisting that their real motive is to change the managed-care industry’s alleged moneygrubbing ways.²⁰⁸

Unable to Control Costs, Health Insurers Have Been Forced to Increase Premiums.



Source: Kaiser Family Foundation

The cost of family coverage has soared a whopping 59 percent since 2000, making it increasingly unaffordable for employers.



APROCELIO SOLIS

The biggest of these suits was led by Dickie Scruggs (pictured left), the Mississippi lawyer who masterminded the state lawsuits against tobacco companies, and David Boies, the litigator of *Bush v. Gore* fame.²⁰⁹ Their massive class action, consolidated as *In re Managed Care* in U.S. District Court in Miami, alleged that ten HMOs committed fraud by, among other things, cheating doctors out of their rightful fees and delivering inferior health care because of their undue attention to the bottom line.²¹⁰ The potential damage to the industry—and to the public, which will ultimately pay the price in higher premiums—is mind-numbing. Brought on behalf of 600,000 doctors and 145 million subscribers, the suits seek disgorgement of profits, recovery of part of subscribers’ premiums, and the treble damages allowed by RICO.²¹¹

In 2002, the court threw out the subscriber claims of substandard care as too speculative, dealing Scruggs and Boies a painful rebuke.²¹² But the court allowed some of the doctors’ claims to go forward, under the leadership of attorneys including the Trial Lawyers, Inc. securities litigation powerhouse Milberg Weiss.²¹³ Wary of the resentful juries they would likely face if the cases went to trial, some insurers have settled, including Aetna and Cigna—who in 2003 forked over \$470 million and \$540 million, respectively—handing Trial Lawyers, Inc. a major victory—and over \$100 million in legal fees.²¹⁴

Those settlements are sure to spawn more lawsuits, especially against smaller, regional HMOs and against other types of managed-care organizations, such as prescription-benefit managers. Dentists have already piled on, having filed a class-action suit in 2001 in Miami federal district court alleging RICO violations against numerous HMOs.²¹⁵ Aetna, for one, settled with the 147,000 dentists last July, agreeing to speed up claims payments and reduce administrative requirements, among other things, as well as ponying up \$5 million for the dentists, the American Dental Association Foundation—and their lawyers.²¹⁶

The Costs of HMO Regulation by Litigation

The real cost of litigation against HMOs is borne by the average consumer. Managed-care organizations are nothing more than private insurance providers. Their treatment decisions, while often controversial, are the only mechanism of imposing cost discipline on health-care provision when consumers and their doctors do not directly bear the cost of procedures.

In the face of the litigation industry’s charges of HMO profiteering, managed-care companies increasingly relaxed the guidelines that had kept a lid on costs. The court-approved settlement with Aetna specifically “requires changes and commitments in Aetna’s business practices,” policy modifications estimated to cost at least \$300 million.²¹⁷

The result? For the past four years, the cost of health insurance has risen annually between 10.9 percent and 13.9 percent, five times faster than inflation and wage growth.²¹⁸ The cost of family coverage has soared a whopping 59 percent since 2000, making it increasingly unaffordable for employers.²¹⁹ Indeed, between 2001 and 2004, the percentage of workers who get health-care insurance through their employers dropped from 65 percent to 61 percent, according to the Kaiser Foundation Employer Health Benefits 2004 Summary.²²⁰ Much of the drop took place in the small firms that employ the majority of American workers and where medical coverage fell from 68 percent to 63 percent.²²¹

Though review of HMO treatment decisions might be at times appropriate, such oversight should not be in the hands of lay juries liable to be swayed by the emotional pleas of smooth-talking, self-interested trial lawyers. Should the litigation industry’s assault on managed-care providers continue to succeed, the tragic cost will be less affordable health care for most Americans.

READY MONEY

Trial Lawyers, Inc. finds politics a lucrative investment.

Tort reform is a bitter pill for Trial Lawyers, Inc. to swallow, and the litigation industry gives lavishly to buy the support of legislatures and judges. At the national level, Trial Lawyers, Inc. wins over politicians with concentrated political-action-committee giving and bundled individual contributions. In the last political cycle, lawyers and law firms again led all industries in federal political giving, spending a staggering \$182 million on federal campaigns alone—outspending the corporate health-care sector by more than 50 percent (see graph, p. 19).²²² Although no comprehensive numbers are available for state-by-state trial-lawyer giving, anecdotal evidence from some of the nation’s largest states suggests that the litigation industry’s political influence at the state level exceeds, if anything, its influence at the federal level.²²³

Federal Giving: Trial Lawyers, Inc. Stands Apart

PAC donations from the Association of Trial Lawyers of America (ATLA)—Trial Lawyers, Inc.’s government-relations “home office”—are perennially among the nation’s highest to the Democratic Party.²²⁴ Democrats receive 93 percent of ATLA’s contributions, which helps explain why every Democratic senator opposed the president’s medical-malpractice reform bill in the last Congress.²²⁵

PAC gifts, however, only scratch the surface of litigation-industry giving, which Trial Lawyers, Inc.’s leaders and their firms bundle and distribute directly to candidates. Senator John Edwards’s presidential campaign was almost wholly funded by the lawsuit industry,²²⁶ and when he joined John Kerry’s ticket, much of that fund-raising apparatus followed: the Texas law firm of Fred Baron, who chaired the Kerry-Edwards campaign’s fund-raising efforts, has made a princely fortune in Fen-Phen litigation.²²⁷ Other major 2004 contributors included Waters & Kraus, a firm whose suits have targeted Vioxx, vaccines containing thimerosal, and the cholesterol-lowering drug Crestor;²²⁸ and SimmonsCooper, a firm in Madison County, Illinois (the nation’s worst jurisdiction, according to the American Tort Reform Association),²²⁹ which has a major practice suing the manufacturers of painkiller OxyContin and hormone-replacement therapy Prempro.²³⁰

While 74 percent of lawsuit-industry contributions go to Democrats²³¹—including almost all those given by the large donors mentioned above²³²—Trial Lawyers, Inc.’s health-care division funds key Republicans, as well. The Senate judiciary committee chairman, Republican Arlen Specter, has been called “the favorite senator of the trial lawyers.”²³³ Small wonder: Specter’s son Shanin (pictured with his parents below)—one of Pennsylvania’s most successful medical-malpractice lawyers—is also one of Trial Lawyers, Inc.’s top fund-raisers.²³⁴ Florida’s newest senator, Mel Martinez, is also a former plaintiffs’ lawyer, as are his fellow Republican senators Lindsey Graham of South Carolina and Mike Crapo of Idaho.²³⁵ And Trial Lawyers, Inc. is keen to recruit more GOP candidates, particularly in the populist, socially conservative South.²³⁶

A Multipronged State-by-State Attack

Tort law is largely in the jurisdiction of the states, and the trial bar has diligently cultivated its influence over state legislatures. West Virginia’s legislature is so beholden to the trial bar that the American Tort Reform Association calls its entire legal system a “judicial hellhole.”²³⁷ In larger states, the litigation industry targets political giving to maximize influence. Trial lawyers gave \$10 million to legislative and statewide-office candidates in California’s last two political cycles, including over \$1 million for state attorney general Bill Lockyer’s last two campaigns.²³⁸

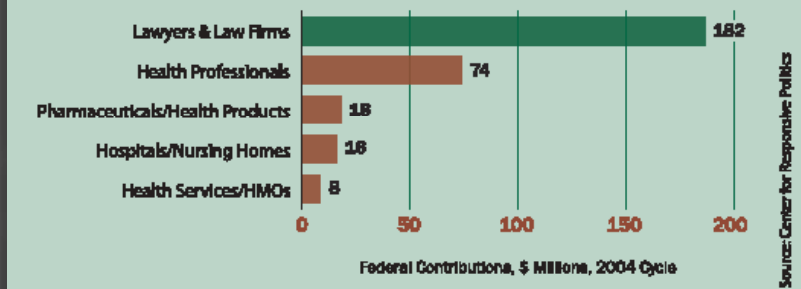
When Trial Lawyers, Inc. loses in the legislature, it falls back on the courts, using its most seasoned strategy—litigation—to block reform. For years, the lawsuit industry has packed the courts with friendly judges who not only liberally interpret rules to the trial bar’s advantage but also unabashedly engage in judicial activism to strike down tort-reform measures as unconstitutional, often on tendentious legal grounds. Just this summer, the Wisconsin Supreme Court struck down the state’s statutory \$350,000 cap on noneconomic damages in medical-malpractice actions.²³⁹ Why? In an opinion authored by chief justice Sarah Abrahamson—who receives almost half her campaign funding from the trial bar²⁴⁰—the court found the statute to be “unreasonable and



AP/JOSEPH KACZMAREK

While 74 percent of lawsuit-industry contributions go to Democrats, Trial Lawyers, Inc.’s health-care division funds key Republicans as well.

The Lawsuit Industry Gives Far More to Federal Elections than the Entire Health-Care Sector Does.



Trial Lawyers, Inc. spent trying to drum up opposition.²⁴³ Also last year, Nevada citizens voted in limits on pain-and-suffering awards and contingency fees in malpractice cases.²⁴⁴

While voter-referendum drives have met with success, the litigation industry often counters with initiatives of its own. Last year, for example, Florida’s citizens passed an initiative limiting excessive contingency fees in medical-malpractice suits.²⁴⁵ Trial lawyers responded with two successful initiatives, including a “three-strikes” rule that strips the license of doctors who lose three malpractice suits.²⁴⁶ A three-strikes provision sounds sensible—until one considers that doctors already settle thousands of groundless suits and that legal outcomes in medical-malpractice cases bear little or no relationship to actual doctor error, so that doctors who wish to stay in practice face a powerful incentive to settle even the weakest claims, for sizable amounts. While it’s unclear whether the trial bar will generate enough new settlements to recoup its lost contingency fees, experts like law professor Lester Brickman argue that, with this counter-initiative, the lawyers have “trumped the doctors.”²⁴⁷ As the Florida story shows, Trial Lawyers, Inc.’s sophisticated government-relations operations make it difficult for reformers to keep the upper hand for long.

PUBLIC PITCHMEN

To block reform, Trial Lawyers, Inc. goes beyond its direct political contributions to influence public, legal, and academic opinion with its well-oiled public-relations machine. Trial Lawyers, Inc. targets the media with allied “consumer groups” bearing innocuous names like Consumers Union, Public Citizen, the Center for Justice and Democracy (CJD), and CJD’s subsidiary, Americans for Insurance Reform. But these “public interest” groups have deep connections to the litigation industry. Consumers Union receives between 9 and 20 percent of its budget from unclaimed class-action funds.²⁴⁸ Public Citizen Foundation’s board looks like a Trial Lawyers, Inc. leadership meeting, including Lisa Blue of plaintiffs’ firm Baron & Budd and Joseph Cotchett, who’s also on the Association of Trial Lawyers of America board;²⁴⁹ Public Citizen boasts its own litigation division,²⁵⁰ and group founder Ralph Nader has come under fire from other consumer advocates for his deep financial ties to the trial bar.²⁵¹ While the CJD closely guards its donor list, its sole stated mission is to “educate the public about the importance of the civil justice system and the dangers of so-called ‘tort reforms,’”²⁵² and its board is populated with the trial bar’s most zealous advocates in the academy, as well as media hounds Michael Moore and Erin Brockovich.²⁵³

In taking on big pharmaceutical companies, the lawsuit industry is helped immeasurably by Public Citizen’s scare tactics. They led the fight against breast implants and Bendectin, both of which have been shown repeatedly to pose little health risk. Sidney Wolfe,²⁵⁴ the director of Public Citizen’s Health Research Group, calls prescription drugs a “massive public health problem” costing 100,000 lives per year²⁵⁵—without mentioning the millions more lives saved and improved by modern drug technology. Public Citizen produces an annual report, “Worst Pills, Best Pills,” which paints scores of prescription and over-the-counter medications as too dangerous for public use: their “do not use” list now numbers 185 and includes such medicine-chest standbys as the cough syrup Robitussin, the decongestant Sudafed, and the antacid Mylanta.²⁵⁶ While urging consumers to avoid these common medicines “under any circumstances” may seem bizarrely extreme, consider that Public Citizen’s “health letter” last year extravagantly suggested that “[w]eapons of mass destruction are hard to find in Iraq [but] in modern medicine they are abundant.”²⁵⁷

Beyond attacking pharmaceuticals, Public Citizen and its allies issue disingenuous reports designed to obscure the very real danger posed by medical-malpractice litigation. Since April, Public Citizen, CJD, and Americans for Insurance Reform have each issued separate “studies” that blame the med-mal liability crisis on insurance companies.²⁵⁸ Long-term statistical analysis of the groups’ own numbers, however, shows that medical-malpractice payouts have risen far faster than insurance premiums (see graph, p. 14).²⁵⁹ While these “public interest” groups resort to statistical misrepresentation to make their case, their reports are still uncritically trumpeted by mainstream media outfits like the *New York Times*²⁶⁰—lending unearned credibility to Trial Lawyers, Inc.’s public-relations flacks.

PRESCRIPTIONS FOR CHANGE

Reformers look for healthy solutions to rein in Trial Lawyers, Inc.

Reforming the legal system to facilitate better health care is a delicate—but not impossible—operation. The aggressive public- and government-relations arms of Trial Lawyers, Inc. work tirelessly to oppose change; America’s federalist system makes reform a state as well as a national concern; and the highly complex issues involved in civil justice reform are not easily understood by elected representatives and policymakers—even those not beholden to the trial bar’s campaign financiers. Still, after the high costs of medical-malpractice-lawsuit abuse galvanized doctors, who raised tort reform’s visibility through well-publicized demonstrations and strikes,²⁶¹ the public has begun to understand that an out-of-control legal system has serious real-world health effects. Aggressive grass-roots efforts have the litigation industry on the defensive, but reformers need to capitalize on this momentum by prescribing comprehensive solutions to effectively treat a health-care system ravaged by Trial Lawyers, Inc.



States Push for Change

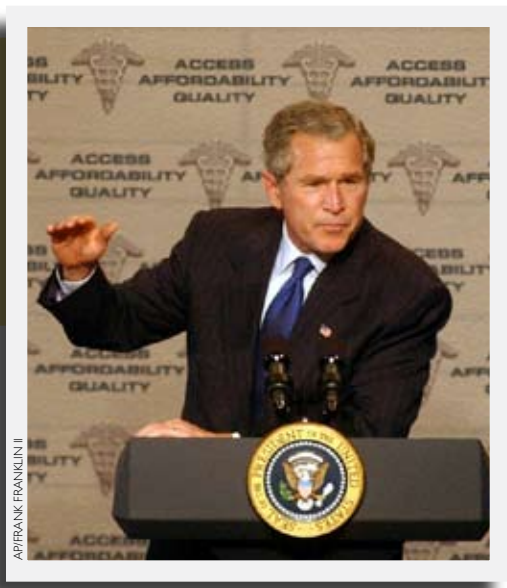
Tort law rests primarily in the states, and the states have been at the forefront of reform. State capitols around the country now have medical liability reform on the agenda: in 2005, legislators in 48 states introduced more than 400 bills on the issue.²⁶² More than 60 of these bills are now law, including measures to cap noneconomic damages, establish standards for expert witnesses, and set statutes of limitation on filing malpractice suits.²⁶³ In all, 27 states now limit noneconomic damages in medical-liability cases.²⁶⁴

While states’ laws vary in their effectiveness, in those states where damage caps and other broad reforms have passed, malpractice premiums have generally come down and doctors’ shingles have stayed up. Since Texas legislators imposed a \$250,000 limit on noneconomic damages in 2003, malpractice suits have dropped by half, and the five largest insurers have announced rate cuts that will save doctors and hospitals \$50 million a year.²⁶⁵ An Agency for Healthcare Research and Quality study found that rural counties in states with such caps saw a 3.2 percent rise in doctors per capita.²⁶⁶ Over the long run, medical-malpractice reforms have been highly successful: since California passed its \$250,000 noneconomic damages cap in 1975, its medical-malpractice premiums have risen “only” 245 percent, versus 750 percent nationwide.²⁶⁷

Federal Reform: What's on the Table

Success at the state level, however, cannot by itself fix the health-care liability problem. Trial Lawyers, Inc. shops its cases to the most lenient forums, so suits against drug and medical-device manufacturers—whose products are sold nationwide—often wind up in “magic jurisdictions” that function as cash registers for the plaintiffs’ bar (see p. 9).²⁶⁸ Critics of federal tort reform often point out, rightly, that tort law is a historical province of the states. But products-liability law has expanded dramatically in the last 50 years,²⁶⁹ and the litigation industry’s forum-shopping enables plaintiff-friendly states to impose costs on other states, even when those states have conflicting regulations or statutes.²⁷⁰ Thus, federal products-liability reform fits easily within the ambit of Congress’s power to regulate interstate commerce.²⁷¹ The case for federal reform of medical-malpractice liability is less clear-cut; but considering that Medicare and Medicaid constitute close to half of medical spending, taxpayers nationwide bear the costs of outlier states’ plaintiff-friendly tort systems, so the case for federal remedy is compelling.²⁷²

Understanding the national implications of the issue, President Bush has led the fight for medical-liability reform at the federal level and has proposed legislation to limit liability on medical malpractice as well as on pharmaceuticals and medical devices.²⁷³ The bill—the Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2005—would place a \$250,000 cap on noneconomic-damage awards, limit attorneys’ fees, enact a three-year statute of limitations for malpractice cases, and mandate standards for expert witnesses.²⁷⁴ Also, the federal legisla-



The litigation industry's assault on American health care is a threat both to our wealth and our health, and effective reform requires bold action.

tion borrows from Michigan's salutary law—now under siege by Trial Lawyers, Inc.—that prohibits certain suits against companies that have complied with their regulators:²⁷⁵ the HEALTH Act would prohibit punitive damages against a manufacturer whose product has been approved by the Food and Drug Administration.

The president's proposed remedy, however, will be a hard prescription to fill. Although the House passed the president's bill in July—as it has seven times before—the legislation remains stalled in the Senate.²⁷⁶ Trial Lawyers, Inc. is spending millions to keep it there and has hired additional lobbyists to turn up the heat on lawmakers who might be considering voting for it. Democrats are lined up against the bill, ready to mount a filibuster if neces-

sary, and won't let the bill go anywhere without changes, such as increasing the damages cap.²⁷⁷ Even then, its passage is not assured unless the president can convert some key opponents of the legislation, Republicans as well as Democrats.²⁷⁸

What's Missing: A Comprehensive Plan for Reform

In calling for the elimination of punitive-damage awards for FDA-approved drug litigation, the HEALTH Act administers a much-needed antidote of reason for Trial Lawyers, Inc.'s feverish public-relations campaign against the pharmaceutical industry, but the legislation really does not go far enough. As shown in *Ernst v. Merck*—where the jury gave a \$24 million compensatory award for mental anguish²⁷⁹—it is far too easy for juries to use noneconomic damages like “pain and suffering” to punish companies even where punitive damages are limited by law. An effective federal reform must limit all noneconomic damages—not just punitive awards—that juries could extract from drug companies that have complied with the FDA.

Moreover, a strong case can be made that Congress should preempt state drug suits altogether.²⁸⁰ Whether assessing the causal link between Vioxx and Robert Ernst's death, or the general safety of breast implants and Norplant, lay juries have demonstrated enormous difficulty in assessing complex scientific claims. When juries make unpredictable, often wrong, decisions in the thousands of state drug lawsuits led by Trial Lawyers, Inc., they interfere with federal regulatory schemes designed to foster innovation, and they endanger medical progress.

Preempting state drug suits need be neither unsafe nor unfair. As demonstrated throughout this report, the haphazard system of drug litigation tends not to efficiently deter bad behavior, but certainly deters research and innovation. By eliminating a system in which tort suits are shopped to judges beholden to Trial Lawyers, Inc. and tried before juries unable to make accurate scientific judgments, federal preemption would lower the tax on drug research and prevent the litigation industry from interfering with the FDA's role of protecting public safety. Furthermore, preempting state suits against drug makers who comply with the FDA does not mean that individuals injured by drugs or medical devices must go uncompensated: the existing federal no-fault Vaccine Injury Compensation Program offers a template for fairly and efficiently compensating those harmed by drug side effects.²⁸¹

To improve the handling of medical-malpractice liability claims, states would be well advised to experiment with comprehensive solutions of their own. One model would establish special health courts in which judges with experience in adjudicating medical issues would vet expert witnesses and try cases without juries.²⁸² Juryless courts already exist in family law and for tax and bankruptcy cases, and focus on equitable treatment of the parties involved rather than meting out blame and punishment to wrongdoers. By eliminating junk science, sympathetic juries, and grandstanding lawyers, such courts could dramatically reduce costs while expediting the process of compensating injured patients. They would establish precedents to guide future adjudication and discourage the groundless, scattershot suits that fill court dockets today.

The litigation industry's assault on America's health-care system is a threat to both our wealth and our health, and effective reform requires bold action. The reforms outlined above would improve our legal system to better deter accidents while encouraging innovation, allow consistent standards that would award uniform compensation to similar claimants, and lower the steep tax that Trial Lawyers, Inc. levies on the U.S. health-care system. But the plaintiffs' bar will fight even marginal reforms. No magic pill will eliminate the tort plague, but effective curatives exist if the American people can muster the will to administer them.

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2. MANHATTAN INSTITUTE CENTER FOR LEGAL POLICY, TRIAL LAWYERS, INC., CALIFORNIA: A REPORT ON THE LAWSUIT INDUSTRY IN CALIFORNIA, 2005, available at <http://www.triallawyersinc.com/ca/ca01.html>.
3. Centers for Medicare & Medicaid Services, Office of the Actuary: Data from the National Health Statistics Group, available at <http://www.cms.hhs.gov/statistics/nhe/default.asp>.
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5. See *id.* at 5 (showing tort cost per capita of \$845), 15 (showing overall tort cost at \$246 billion and medical-malpractice cost at \$27 billion).
6. See Alison Frankel, *The Fen-Phen Follies*, AM. LAW., Mar. 1, 2005, available at <http://www.law.com>.
7. See *The Pain Is Just Beginning*, BUSINESS WEEK ONLINE, Sept. 5, 2005, available at http://www.businessweek.com/magazine/content/05_36/b3949056_mz011.htm (citing analyst David Moskowitz of Friedman, Billings, Ramsey & Co.).
8. Merck's 2004 research and development expenditures were \$4.01 billion, based on the company's 2004 annual report, available at <http://www.merck.com/finance/annualreport/ar2004/home/>. Wyeth's 2004 research and development expenditures were \$2.46 billion, based on the company's 2004 annual report, available at <http://library.corporate-ir.net/library/78/781/78193/items/141903/AR04.pdf>.
9. The Centers for Medicare & Medicaid Services assesses total U.S. prescription drug spending at \$179.2 billion for 2003, the most recently available year. See <http://www.cms.hhs.gov/statistics/nhe/historical/t3.asp>.
10. See, e.g., Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Q.J. ECON. 353-90 (1996).
11. Troyen A. Brennan, et al., *Incidence of Adverse Events and Negligence in Hospitalized Patients: Results of the Harvard Medical Practice Study I & II*, New ENGL. J. MED. 324, 370-84 (1991); see also Richard Anderson, *An "Epidemic" of Medical Malpractice? A Commentary on the Harvard Medical Practice Study*, 27 CIV. JUST. MEMO (Manhattan Inst. Center for Legal Pol'y, July 1996), available at http://www.manhattan-institute.org/html/cjm_27.htm.
12. See TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2003 UPDATE, TRENDS AND FINDINGS ON THE COST OF THE U.S. TORT SYSTEM 17 (2003).
13. See Frankel, *supra* note 6.
14. See David Hechler, *First Vioxx Fight: Where to Litigate*, NAT'L L.J., Nov. 15, 2005, at 1 (discussing "conference sponsored [in Las Vegas] by Mass Torts Made Perfect, for plaintiffs' lawyers only, [which] featured five hours of Vioxx presentations on Nov. 11 and 12").
15. Mass Torts Made Perfect "provides ambitious, goal-oriented attorneys with the knowledge and methods that attract mass tort clients, take the case into the courtroom and win over even the most formidable competition." See <http://www.massortsmadeproof.com/html/aboutus.html>.
16. See TRIAL LAWYERS, INC., *supra* note 1, at 10 (citing American Association of Actuaries).
17. Public Citizen boasts that Vioxx was "the ninth drug removed from the market in the previous seven years that we warned consumers not to use," see <http://www.worstpills.org/moreaboutpc.cfm>.
18. See http://www.jpml.uscourts.gov/Pending_MDLS/Products_Liability/products_liability.html.
19. Levonorgestrel, or Norplant, is no longer available in the United States; see <http://www.rxlst.com/cgi/generic2/norplant.htm>. For a discussion of the litigation industry's attack on Norplant, see Marc Arkin, *Products Liability and the Threat to Contraception*, 36 CIV. JUST. MEMO (Manhattan Inst. Center for Legal Pol'y, Feb. 1999), available at http://www.manhattan-institute.org/html/cjm_36.htm.
20. Data from TNS Media Intelligence (on file with Manhattan Institute).
21. For an example of a Trial Lawyers, Inc. website trolling for class-action "customers," see <http://www.myclassactionlawsuit.com/>. For a discussion of how plaintiffs' lawyer Mark Lanier exploited one juror's affinity for the Oprah Winfrey show in his closing argument in *Ernst v. Merck*, see Heather Tesoriero et al., *Merck Loss Jolts Drug Giant, Industry*, WALL ST. J., Aug. 22, 2005, at A1.
22. See Heidi M. Connolly et al., *Valvular Heart Disease Associated with Fenfluramine-Phentermine*, 337 NEW ENG. J. MED. 581, 581-88 (1997); Frankel, *supra* note 6.
23. See *id.*
24. See *id.*
25. See *id.*
26. See *id.*
27. See Congressional Budget Office, *Limiting Tort Liability for Medical Malpractice*, Jan. 8, 2004, available at <http://www.cbo.gov/showdoc.cfm?index=4968&sequence=0>.
28. See TRIAL LAWYERS, INC., *supra* note 1, at 13.
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30. A January 2003 report issued by the American College of Obstetricians and Gynecologists and American Academy of Pediatrics found that "that use of nonreassuring fetal heart rate patterns to predict subsequent cerebral palsy had a 99% false-positive rate." *Neonatal Encephalopathy and Cerebral Palsy: Defining the Pathogenesis and Pathophysiology* (American College of Obstetricians and Gynecologists and American Academy of Pediatrics Jan. 31, 2003), available at http://www.acog.org/from_home/Misc/neonatalEncephalopathy.cfm (executive summary).
31. See Steven L. Clark, *Temporal and Demographic Trends in Cerebral Palsy—Fact and Fiction*, 188 AM. J. OBSTETRICS & GYNECOLOGY 628, 628-33 (Mar. 2003) ("The rate of cerebral palsy has not decreased in developed countries over the past 30 years, despite the widespread use of electronic fetal heart rate monitoring and a 5-fold increase in the cesarean delivery rate over the same period of time").
32. See Nora L. Toohar, *High-Low Agreement Deflates \$111.7 Million Award in Med-Mal Case*, LAWYERS WEEKLY USA TOP TEN JURY VERDICTS OF 2004, available at <http://www.lawyersweekkyusa.com/usa/8topten2004.cfm> (discussing *Reden v. Wagner* Jan. 26, 2004).
33. See D. B. Petitti, *Maternal Mortality and Morbidity in Cesarean Section*, 28 CLINICAL OBSTETRICS & GYNECOLOGY 763, 763-69 (Dec. 1985).
34. See Pennsylvania Medical Society Alliance, *Closing Hospitals*, available at <http://www.fightingdocs.com/closingHospitals.htm>; Joseph B. Treater, *Rise in Insurance Forces Hospitals to Shutter Wards*, N.Y. TIMES, Aug. 25, 2002; Steven Malanga, *Tort Turns Toxic*, CITY J., Autumn 2002, available at <http://www.city-journal.org>.
35. See THERESA W. BOURDON & SHARON C. DUBIN, *Long Term Care: General Liability and Professional Liability*, 2004 ACTUARIAL ANALYSIS (Aon Consulting, July 2004).
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37. See Susan Beck, *HMO Postmortem*, AM. LAW., Oct. 10, 2003, available at <http://www.law.com>.
38. See *id.*
39. See *id.*
40. See http://www.classactionconnect.com/issue_vioxx.htm.
41. See <http://classactionamerica.com/>.
42. See http://www.aphroditewomenshealth.com/news/20040424000521_health_news.shtml (noting that "NSAIDs, including the pain medications aspirin, ibuprofen and naproxen, are one of the leading causes of stomach ulcers and have been associated with side effects ranging from stomach upset to stomach bleeding, which can be life threatening. In fact, NSAID use leads to more than 103,000 hospitalizations and 16,500 deaths each year in the United States").
43. See, e.g., Press Release, U.S. Food and Drug Admin., *FDA Issues Public Health Advisory on Vioxx as Its Manufacturer Voluntarily Withdraws the Product* (Sept. 30, 2004), available at <http://www.fda.gov/bbs/topics/news/2004/NEW01122.html>. The Vioxx study has subsequently been published in the *New England Journal of Medicine*; see Robert S. Bresalier et al., *Cardiovascular Events Associated with Rofecoxib in a Colorectal Adenoma Chemoprevention Trial*, 352 NEW ENG. J. MED.

- 1092-1102 (Feb. 15, 2005).
44. See Frankel, *supra* note 6.
45. See Associated Press, *Jury Finds Merck Liable in Landmark Vioxx Case* (Aug. 19, 2005), available at <http://www.msnbc.msn.com/id/9006921/>.
46. See Bloomberg, *Merck Says Vioxx Lawsuits Increased 15 Percent in Past Month* (Aug. 25, 2005), available at http://www.coreynahman.com/vioxx_lawsuit.html.
47. See United Press International, *Vioxx Recall Seen as Costing Billions* (Nov. 4, 2004).
48. See Aaron Smith, *Merck's Vioxx Bill Could Hit \$50 Billion*, CNN/Money, Aug. 22, 2005, at <http://money.cnn.com/2005/08/22/news/fortune500/merck/>.
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50. See generally PHANTOM RISK: SCIENTIFIC EVIDENCE AND THE LAW (Kenneth R. Foster et al., eds., 1993).
51. PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 2-3 (1991).
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55. Sherine E. Gabriel et al., *Risk of Connective-Tissue Diseases and Other Disorders after Breast Implantation*, 330 NEW ENG. J. MED. 1697-1702 (June 16, 1994).
56. See Bernstein, *supra* note 54.
57. See Angell, *supra* note 53.
58. See L. B. Holmes, *Teratogen Update: Bendectin*, 27(2) TERATOLOGY 277-81 (Apr. 1983).
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63. See Paolo Mazzotta et al., *Attitudes, Management and Consequences of Nausea and Vomiting of Pregnancy in the United States and Canada*, 70 INT'L J. GYNECOLOGY & OBSTETRICS 359 (2000).
64. See TRIAL LAWYERS, INC., *supra* note 1, at 10-11, available at <http://www.triallawyersinc.com/html/part05.html>.
65. See Frankel, *supra* note 6.
66. See *id.*
67. See *id.*
68. *Id.*
69. See *id.*
70. See *id.*
71. *Id.*
72. *Id.*
73. See generally PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 153-71 (1988).
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76. See Paul H. Rubin & Joanna Shepherd, *Tort Reform and Accidental Deaths*, Emory Public Law Research Paper No. 05-29 (Aug. 2005), available at <http://papers.ssrn.com/sol3/DisplayAbstractSearch.cfm>.
77. HUBER, *supra* note 73, at 164.
78. See Arkin, *supra* note 19.
79. See *id.*
80. See *id.*; Patient Compensation Exploratory Committee, *The Impact of the Tort Litigation Machine on Women's Reproductive Health* (2003); Walter Olson, *Company to Settle 36,000-Plus Norplant Suits*, at <http://www.overlawyered.com/archives/99aug2.html#990827c> (discussing \$50 million partial settlement of Norplant claims).
81. Cf. *Davis v. American Home Products Corp.*, 844 So. 2d 242 (La. Ct. App. 2003).
82. See Arkin, *supra* note 19.
83. See News Release, *The University of Texas M.D. Anderson Cancer Center, Researchers Confirm Vioxx Nearly Doubled Cardiovascular Risks in Cancer Prevention Study* (Feb. 15, 2005) (citing Vioxx study primary author, Robert S. Bresalier, as saying that Vioxx and related drugs "potentially ha[ve] very important roles in a variety of diseases—arthritis, cancer prevention, cancer treatment, treatment of Alzheimer's disease, treatment of precancerous lesions, not only in the colon but in the esophagus and many other organs") (on file with Manhattan Institute).
84. See *id.*
85. See Harris Interactive, *Pharmaceutical Liability Study* (July 13, 2003), available at http://www.instituteforlegalreform.org/resources/PharmaceuticalLiabilityStudy_report.pdf.
86. See *id.*
87. See generally Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 (2004).
88. See, e.g., *Amicus Brief*, *Motus v. Pfizer, Inc.*, Nos. 2-55372, 02-55498 (9th Cir. Sept. 3, 2002).
89. Cf. Eric Helland and Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341, 341-70 (2002).
90. Richard Scruggs, *Asbestos for Lunch*, Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), in INDUSTRY COMMENTARY (Prudential Securities, Inc., New York), June 11, 2002, at 5.
91. See Heather Won Tesoriero, *Merck Loss Jolts Drug Giant*, *Industry*, WALL ST. J., Aug. 22, 2005, at A1.
92. See Roger Parloff, *The Preacher Who's Raising Hell with Merck*, *FORTUNE*, Aug. 8, 2005, at 20.
93. See Tex. Civ. Prac. & Rem. Code §§ 41.003, 41.008 (2004).
94. See Ted Frank, *Ernst v. Merck—one more view*, *PointOfLaw.com*, Aug. 22, 2005, at <http://www.pointoflaw.com/archives/001477.php#1477>.
95. See Richard Epstein, *Ambush in Angleton*, WALL ST. J., Aug. 22, 2005, available at <http://www.pointoflaw.com/columns/archives/001482.php>.
96. Tesoriero, *supra* note 91, at A1.
97. See Alex Berenson, *Lilly to Pay \$690 Million in Drug Suits*, *N.Y. TIMES*, June 10, 2005, at C1.
98. Though the FDA has required Eli Lilly to put a warning label on Zyprexa, it has kept the drug on the market. See *id.*
99. See SeegerWeiss LLP, Firm Profile, Christopher A. Seeger, at <http://www.seegerweiss.com/lawfirm/EmployeeIndex.aspx>.
100. See *id.*; cf. Paul Davies, *Merck Begins Its Defense in Second Vioxx Trial*, WALL ST. J., Sept. 15, 2005, at A16.

101. See generally THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 142-70 (2002).
102. See generally *id.*
103. Restatement of the Law 2d, Torts, § 402A comment k (American Law Institute 1965).
104. See *Givens v. Lederle*, 556 F.2d 1341 (5th Cir. 1977); *Reyes v. Wyeth Laboratories, Inc.*, 498 F.2d 1264 (5th Cir. 1974); *Davis v. Wyeth Laboratories*, 399 F.2d 121 (9th Cir. 1968).
105. See BURKE, *supra* note 101, at 144 (citing Edward W. Kitch, *Vaccines and Product Liability: A Case of Contagious Litigation*, REGULATION, May/June 1985, at 13).
106. See *id.* at 163.
107. See *Toner v. Lederle*, 828 F.2d 510 (1987).
108. See *Johnson v. Amer. Cyanamid Co.*, 718 P.2d 1318 (Kan. 1986).
109. See BURKE, *supra* note 101, at 144.
110. Statement of Robert B. Johnson, president, Lederle Laboratories Division, American Cyanamid, House Subcommittee on Health and the Environment, *Vaccine Injury Compensation*, Sept. 10, 1984, cited in Burke, *supra* note 101, at 250 n.30.
111. *Id.*
112. See U.S. General Accounting Office, *Childhood Vaccines: Ensuring an Adequate Supply Poses Continuing Challenges* 5 (Sept. 2002), available at <http://www.gao.gov/new.items/d02987.pdf>; Jim Copland, *Liable to Infection Flu Vaccine in Short Supply Partly Because of Trial Lawyers and "Tort Tax"*, DALLAS MORNING NEWS, Dec. 14, 2003, available at http://www.manhattan-institute.org/html/_dmn-liable_to_infection_flu.htm.
113. See BURKE, *supra* note 101, at 150.
114. See Testimony of James Mason, director, Division of Immunization of the Center for Prevention Services, Centers for Disease Control, Public Health Service, House Subcommittee on Health and the Environment, *Vaccine Injury Compensation*, Dec. 19, 1984, cited in BURKE, *supra* note 101, at 250 n.29.
115. See National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300 (2004).
116. See BURKE, *supra* note 101, at 160-61.
117. See *id.*
118. See *id.* at 163 (citing U.S. Dept. of Health & Human Services).
119. See *id.* at 161.
120. See *id.*
121. See *id.*
122. See *id.* at 163.
123. See *id.*
124. See Centers for Disease Control, *Lyme Disease—United States, 2001–2002*, at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5317a4.htm>; Centers for Disease Control, *Lyme Disease—United States, 1999*, at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5010a1.htm>. For an example of class-action litigation over LYMERix, see the practice area under the firm website for the law firm Sheller Ludwig & Badley, at <http://sheller.com/PracticeAreas.asp>.
125. See Kenneth Todar, *Lyme Disease*, TODAR'S ONLINE TEXTBOOK OF BACTERIOLOGY, at <http://textbookofbacteriology.net/Lyme.html> ("Between 1996 and 2001 the number was level at about 17,000 new cases per year, but increased by nearly 7,000 cases in 2002.").
126. See William Tucker, *La Grippe of the Trial Lawyers*, WEEKLY STANDARD, Oct. 25, 2004, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/004/793dgqvs.asp>; Richard Kent Zimmerman, American Academy of Family Physicians, *Lowering the Age for Routine Influenza Vaccination to 50 Years: AAFP Leads the Nation in Influenza Vaccine Policy*, Nov. 1, 1999 (citing W. W. Williams et al., *Immunization Policies and Vaccine Coverage among Adults: The Risk for Missed Opportunities*, 108 ANN. INTERN. MED. 616, 616-25 (1988)).
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128. See Copland, *supra* note 112.
129. See U.S. Food and Drug Administration, *Thimerosal in Vaccines*, at <http://www.fda.gov/cber/vaccine/thimerosal.htm> ("At the initial National Vaccine Advisory Committee-sponsored meeting on thimerosal in 1999, concerns were expressed that infants may lack the ability to eliminate mercury.").
130. See *Politicizing Vaccines*, WALL ST. J., Nov. 18, 2002, available at <http://www.ph.ucla.edu/epi/bioter/politicizingvaccines.html>.
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133. See Copland, *supra* note 112.
134. See American Academy of Pediatrics, *Recommended Childhood and Adolescent Immunization Schedule, United States, 2005*, at <http://www.cispimmunize.org/IZSchedule.pdf>.
135. See World Health Organization, *Statement on Thiomersal*, Aug. 2003, at http://www.who.int/vaccine_safety/topics/thiomersal/statement200308/en/index.html ("The Global Advisory Committee on Vaccine Safety . . . concluded that the latest pharmacokinetic and developmental studies do not support concerns over safety of thiomersal (ethyl mercury) in vaccines. The Committee has concluded, and advises accordingly, that there is no reason on grounds of safety to change current immunization practices with thiomersal-containing vaccines, since the benefits outweigh any unproven risks.").
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137. See Copland, *supra* note 112.
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139. See American Medical Association, *Medical Liability Crisis Map*, available at <http://www.ama-assn.org/ama/noindex/category/11871.html>.
140. AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *MEDICAL LIABILITY SURVEY* (2004).
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165. See *Neurologists Scarce or Absent in Many ERs*, PALM BEACH POST, June 28, 2004, at A1.
166. See *Patients Die as Doctors Fear Malpractice*, FOX NEWS.COM, Apr. 25, 2004, at <http://www.foxnews.com/story/0,2933,118049,00.html>.
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191. See Barry Flynn, *ER Surgeries Will Return, Hospital Says*, ORLANDO SENTINEL, Aug. 30, 2003, at C1.
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195. See *Burton v. William Beaumont Hosp.*, No. 04-27235, slip op. at 31-32 (E.D. Mich. June 20, 2005), available at http://www.mied.uscourts.gov/_opinions/Cohnpdf/04-27235AC-01.pdf; *Kolari v. N.Y. Presbyterian Hosp.*, No. 04 Civ. 5506 (LAP), slip op. at 35 (S.D.N.Y. Mar. 2005), available at <http://www.nysd.uscourts.gov/courtweb/pdf/D02NYS05-01919.PDF>; Michael DeBow, *Nonprofit Hospital Suit Tossed Out*, POINT OF LAW.COM, Oct. 25, 2004, at <http://www.pointoflaw.com/archives/000620.php>.
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197. See *Mississippi Nonprofit Hospital System Agrees to Settle Uninsured Patients' Claims*, 13 BNA HEALTH L. REP. (Aug. 12, 2004), available at <http://www.bna.com>.
198. See Albert, *supra* note 178.
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201. See Erik Eckholm, *\$89 Million Awarded Family Who Sued H.M.O.*, N.Y. TIMES, Dec. 30, 1993, at A1.
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204. See Jill S. Brown, *Managed Care Enrollees Gain Ground*, AARP BULLETIN, Feb. 2002, available at <http://www.aarp.org/bulletin/yourhealth/a2003-08-05-managedcare.html>.
205. See, e.g., Tex. Civ. Prac. & Rem. Code Ann. § 88.002 (2004) (“A health insurance carrier, health maintenance organization, or other managed care entity for a health care plan . . . is liable for damages for harm to an insured or enrollee proximately caused by its failure to exercise such ordinary care. . . . [and] is also liable for damages for harm to an insured or enrollee proximately caused by the health care treatment decisions made by its: (1) employees; (2) agents; (3) ostensible agents; or (4) representatives.”).
206. See *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004).
207. See *id.*
208. See Beck, *supra* note 37.
209. See *id.*
210. See *In re Managed Care Litigation*, MDL No. 1334, 2003 WL 22850070 (S.D. Fla. Oct. 24, 2003).
211. See Beck, *supra* note 37.
212. See *id.*
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214. See *id.* In addition to Aetna and Cigna, WellPoint, Prudential, and HealthNet have settled class-action RICO claims by physicians. Humana, PacifiCare Health Systems, UnitedHealth Group, Anthem, Blue Cross Association, and Coventry Health Care remained in litigation over RICO claims when this publication went to press.
215. See James Berry, American Dental Association, Aetna Settles Claims with Physicians (May 23, 2003), available at <http://www.ada.org/prof/resources/pubs/adanews/searchnews.asp>.
216. See MedicoUnlimited Healthcare News, Aug. 18, 2003, at <http://www.medicounlimited.com/News.htm>.
217. See 2003 WL 22850070, at *3.
218. See KAISER FAMILY FOUNDATION & HEALTH RESEARCH AND EDUCATIONAL TRUST, EMPLOYER HEALTH BENEFITS: 2004 ANNUAL SURVEY 1 ex.A (2004).
219. See *id.* at 2.
220. See *id.* at 1.
221. See *id.* at 5.
222. Data taken from the Center for Responsive Politics, available at <http://www.opensecrets.org/industries/index.asp>.
223. See, e.g., ILLINOIS CIVIL JUSTICE LEAGUE, JUSTICE FOR SALE: THE JUDGES OF MADISON COUNTY (2002), available at http://www.icjl.org/resources_studies.htm; Civil Justice Reform Association of California, Plaintiffs' Lawyers Campaign Spending, at <http://www.cjac.org/research/index.cfm>.
224. For the 2004 cycle, see <http://www.opensecrets.org/pacs/index.asp>.
225. See *id.*; Jim Drinkard, *Dems Defeat Bill to Curb Awards in Malpractice Suits*, USA TODAY (July 9, 2003), available at http://www.usatoday.com/news/washington/2003-07-09-malpractice_x.htm.
226. See Thomas B. Edsall & Dan Balz, *3-Month Push Gave Edwards Democratic Fundraising Edge: Trial Lawyers Are Key Contributors to \$7.4 Million Total*, WASH. POST, Apr. 17, 2003, at A8; Editorial, *Favorite Son Candidacy*, WALL ST. J., Apr. 21, 2003, at A12.
227. See Walter Olson, *Edwards & Co.*, WALL ST. J., July 12, 2004, available at http://www.manhattan-institute.org/html/_wsj-edwards_and_co.htm; http://www.baronandbudd.com/DRUGS_FENPHEN.html ("Baron & Budd represents many individuals injured by [Fen-Phen] that have claims filed with the class action settlement trust or who 'opted out' of the class action settlement to pursue a remedy in a court of law.").
228. See the Waters & Kraus firm website, <http://www.asbestos-lawyer.com/CM/Custom/TOCPracticeAreaDescriptions.asp>, which lists thimerosal-containing vaccines, Vioxx, and Crestor as practice areas.
229. See AMERICAN TORT REFORM ASSOCIATION, JUDICIAL HELLHOLES 2004, available at <http://www.atra.org/reports/hellholes/report.pdf>.
230. The SimmonsCooper website, <http://www.simmonscooper.com/CM/Custom/TOCFirmOverview.asp>, lists OxyContin and Prempro as major practice areas.
231. Figures are for the 2004 cycle; see <http://www.opensecrets.org/industries/index.asp>.
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233. Timothy P. Carney, *Specter's Voting Record*, WASH. TIMES, Nov. 11, 2004, available at <http://www.washtimes.com/op-ed/20041110-102002-3431r.htm>.
234. See *id.*; Larry Rulison, *Lawyers, Malpractice and Money*, PHILADELPHIA BUS. J., June 11, 2004, available at <http://philadelphia.bizjournals.com/philadelphia/stories/2004/06/14/story1.html>.
235. See Walter Olson, *The Next Sandra Day*, WALL ST. J., July 7, 2005, available at http://www.manhattan-institute.org/html/_wsj-sandra_day.htm.
236. See Ramesh Ponuru, *Social Injustice: Trial lawyers Woo Social Conservatives*, POINTOFLAW.COM, Sept. 15, 2005, available at <http://www.pointoflaw.com/columns/archives/001595.php> (reprinted from NAT'L REV.). Among the plaintiffs' attorneys whom trial lawyers have been recruiting for runs at higher office are cable-TV personality and former Congressman Joe Scarborough; see Lesly Conn, *Scarborough for Senate?*, PENSACOLA NEWS J., Aug. 17, 2005, available at <http://www.pensacola-newsjournal.com/apps/pbcs.dll/article?AID=/20050817/NEWS01/508170327/1006>, and Texas Vioxx lawyer and evangelical minister Mark Lanier, see Alex Berenson, *Vioxx Verdict Raises Profile of Texas Lawyer*, N.Y. TIMES, Aug. 22, 2005, at C5.
237. See AMERICAN TORT REFORM ASSOCIATION, *supra* note 229.
238. See Press Release, Civil Justice Association of California, Personal Injury Lawyers' Political Spending Political Money a Shade under \$10 Million in 2001-02 Cycle (Mar. 19, 2003), at <http://www.cjac.org/research/index.cfm>; Civil Justice Association of California, California Statewide Races: Total Trial Lawyers Contributions 97-98, at <http://www.cjac.org/research/index.cfm>.
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241. No. 2003 AP 988, slip op. at 53.
242. *Id.* at 60 n.141.
243. Statement of John Sullivan, President, Consumer Attorneys of California (Mar. 3, 2005); see also Walter Olson, *Stop the Shakedown*, WALL ST. J., Oct. 29, 2004, available at http://www.manhattan-institute.org/html/_wsj-stop_the_shakedown.htm.
244. See Jim Copland, *Turning Out Trial Lawyers, Inc.*, NAT'L REV. ONLINE, Nov. 8, 2004, at <http://www.nationalreview.com/comment/copland200411080818.asp>.
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249. See <http://www.citizen.org/documents/Form9902003Foundinc.pdf>.
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253. See <http://www.centerjd.org/about/board.htm>.
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Other Resources

http://www.atra.org/files.cgi/7927_Record7-05.pdf.

265. See Alan J. Ortals, *Dramatic Changes Follow Texas Medical Malpractice Tort Reform*, ILL. BUS. J., May 9, 2005, available at http://www.ibjonline.com/print_medical_malpractice_tort_reform.html.
266. See William E. Encinosa & Fred J. Hellinger, *Have State Caps on Malpractice Awards Increased the Supply of Physicians?*, HEALTH AFFAIRS, May 31, 2005, available at <http://content.healthaffairs.org/cgi/content/abstract/hlthaff.w5.250>.
267. National Association of Insurance Commissioners Profitability Index (2003) (showing increase in annual California premiums from \$228 million to \$787 million from 1976 to 2002, versus an increase from \$958 million to \$8.15 billion nationally, excluding California).
268. See Scruggs, *supra* note 90.
269. See generally HUBER, *supra* note 73.
270. See, e.g., John H. Beisner et al., *One Small Step for a County Court . . . One Giant Calamity for the National Legal System*, 7 CIV. JUST. REP. (Manhattan Inst. Center for Legal Pol'y, Apr. 2003), available at http://www.manhattan-institute.org/pdf/cjr_07.pdf.
271. Such activity should fall under "the particular restraints imposed on the authority of the States, and certain powers of the judicial department," which James Madison noted were an essential constitutional function to "provide for the harmony and proper intercourse among the States." *Federalist* 42.
272. A federal scheme for handling all medical-malpractice claims is less feasible, and perhaps less desirable, than one for drugs. Doctors are regulated by the states, not the federal government. Furthermore, cross-state forum shopping is much less common for medical malpractice than for drug litigation; typically, doctors are sued in the plaintiff's home state or where the alleged injury occurred. So, if a state has bad medical-malpractice laws, it will lose doctors to its neighbors, and thus its citizens bear much of the cost of their own inadequate legislation. Still, the fraction of health spending assumed by the federal government—of \$1.7 trillion in U.S. health expenditures in 2003, over \$500 billion came from the federal government, see National Health Expenditures, at <http://www.cms.hhs.gov/statistics/nhe/historical/t3.asp>—certainly gives the federal government a constitutional nexus for overarching reform. *Cf.* South Dakota v. Dole, 483 US 203 (1987).
273. See Press Release, Office of the Press Secretary, President Discusses Lawsuit Abuse at White House Economy Conference (Dec. 15, 2004), available at <http://www.whitehouse.gov/news/releases/2004/12/20041215-11.html>.
274. See H.R. 534, 109th Cong. (2005).
275. Michigan House Bill 4981, introduced June 21, 2005, proposes to amend section 4 of the Michigan Consumer Protection Act, MICH. COMP. LAWS § 445.901 *et seq.* (2004), which provides statutory defenses to product liability claims, including adherence to government standards, FDA standards, and sellers' defenses.
276. See Sandra Lee Breisch, *BOC Measures Professional Liability Concerns*, AM. ACAD. OF ORTHOPAEDIC SURGEONS BULL., June 2002, available at <http://www.aaos.org/wordhtml/bulletin/jun02/fline1.htm> (citing six prior passages, not including the subsequent 108th Congress).
277. For instance, Senator Feinstein, one of the Senate Democrats most amenable to tort reform, supports a \$500,000 noneconomic-damages cap. See <http://www.feinstein.senate.gov/03Releases/r-medmal.htm>.
278. See Drinkard, *supra* note 225 (noting majority opposition to the 2003 HEALTH Act, including Republican Senators Lindsey Graham and Richard Shelby).
279. See Frank, *supra* note 94.
280. See Epstein, *supra* note 95.
281. See BURKE, *supra* note 101, at 160–63.
282. See, e.g., Betsy McCaughey, *Medical Courts*, WALL ST. J., Aug. 25, 2005, at A8; Editorial, "Health Courts" Offer Cure, USA TODAY, July 4, 2005, available at http://www.usatoday.com/news/opinion/editorials/2005-07-04-our-view_x.htm; Philip K. Howard, *A Case for Medical Justice*, PHILADELPHIA INQUIRER, May 16, 2004, available at <http://cgood.org/healthcare-reading-cgpubs-opeds-26.html>.

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