

TRIAL LAWYERS INC. *California*

**A REPORT ON THE
LAWSUIT INDUSTRY IN
CALIFORNIA 2005**

A Message from the Director

In September 2003, the Manhattan Institute's Center for Legal Policy released *Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America*. Structured as an annual report, *Trial Lawyers, Inc.* was our attempt to shed light on the size, scope, and inner workings of the litigation industry.

The report found that the plaintiffs' bar had developed an increasingly sophisticated business model and was taking for itself an increasingly large share of national income. Beginning with asbestos litigation and exploding after the multistate tobacco litigation, trial lawyers' fees were skyrocketing, with leading plaintiffs' attorneys raking in as much as a billion dollars, at exorbitant rates as high as \$30,000 per hour. Viewed in the aggregate as a single business, Trial Lawyers, Inc. was among the most profitable businesses in the world, and its lobbying influence was unparalleled. Given the trial bar's unique access to the government's monopoly on the use of force—unlike normal businesses, Trial Lawyers, Inc. reaps its profits from unwilling customers—the litigation industry's growth and sophistication seemed deeply troubling.

A year and a half later, we find our concerns validated by subsequent events. The "tort tax," or share of the American economy consumed by tort litigation, has continued to grow faster than the overall economy. Trial Lawyers, Inc.'s revenues have risen to a staggering \$46 billion.¹ Over the past three years for which data are available, the litigation industry's revenues grew by 11.1 percent annually, as compared with 3.9 percent growth in gross domestic product, 2.2

percent growth in inflation, and a 5.6 percent annual decline in the stock market.²

But American tort law is not uniform throughout the 50 states, so that any efforts to reform the civil justice system must come at the state as well as the national level. Since releasing the original *Trial Lawyers, Inc.*, the Manhattan Institute has hosted events in a number of states. Some of these had strong tort-reform records, such as Colorado; others, like Georgia and Oklahoma, were considering comprehensive reforms.

We came to discover that there was a strong appetite not only for the national profile we painted in *Trial Lawyers, Inc.* but also for more comprehensive analyses of the situation in specific states. *Trial Lawyers, Inc.: California* is our first look at how the litigation industry operates on the state level. California is a logical starting place for such an endeavor: with a gross state product of over \$1.4 trillion, California would easily be a member of the G-7 industrialized nations as a stand-alone economy, and the state has far more lawyers than any industrialized nation other than the U.S. as a whole (see graph on page 3).³

In the late 1980s, a combination of legal rulings, legislative enactments, and a sharp drop in auto accidents led to a decline in tort filings in California, but in each of the last four recorded years, non-motor-vehicle tort filings have risen.⁴ Jury awards have been growing dramatically in the state: from 1996 to 2001, the average jury award in large California counties increased 144 percent, to a staggering \$1.5 million.⁵ Trial Lawyers, Inc. now has a firm and tightening grip on the state and its resources. The plaintiffs' bar in California has tremendous influence over the state legislature and has been able to manipulate Sacramento politics to facilitate its "bounty hunter" tactics. The state's courts have abetted these efforts, allowing California attorneys to collect fees even in losing cases. Little wonder that surveyed executives have ranked California among the seven worst states for litigation in each of the last four years.⁶

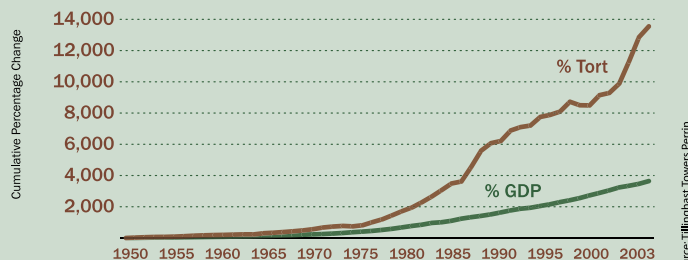
Trial Lawyers, Inc. has carved out profitable niches for itself in California:

- Suits over alleged *construction defects* have kept housing starts below the level needed to sustain the state's growing population—including the near-extinction of the California condo;
- *Employment* lawsuits make the state one of the riskiest places for companies to hire new workers; and
- *Securities class action* lawsuits aggressively target the state's core high-technology businesses.

Each of these profit centers for Trial Lawyers, Inc. drives business and jobs from the state. This report will examine these and other business lines in more detail.

Although the prospects for change in the entrenched California legislature seem slim, a number of positive developments give the

Changes in U.S. Tort Costs and GDP, 1950–2003



Trial Lawyers, Inc. 2003 U.S. Revenues vs. Select High-Margin California Businesses

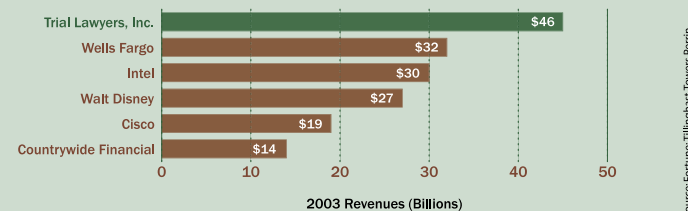


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state's residents some hope. First, Governor Schwarzenegger has been a strong proponent of legal reform. Among his initial legislative triumphs was a badly needed overhaul of the state workers' compensation program.

Moreover, in the most recent election, California voters themselves pushed back against the power of Trial Lawyers, Inc. through their referendum process by overwhelmingly passing Proposition 64. That initiative amends California's notorious "shakedown" statute—section 17200 of the state's civil code—to prevent lawyers from bringing claims without showing actual harm to their clients.

Finally, in medical malpractice liability, California has been a national tort reform leader. The state's MICRA legislation, passed in the mid-1970s, has kept the growth rate in malpractice payouts and premiums to less than one-third the national average.

Despite these advances, California remains a trouble spot for lawsuit abuse, and much more work remains. We hope that you find *Trial Lawyers, Inc.: California* to be a useful resource in understanding the operations of the litigation industry in our nation's most populous state.

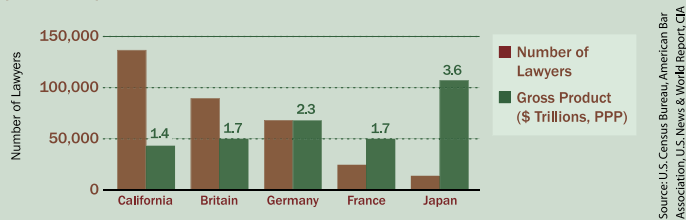


James R. Copland

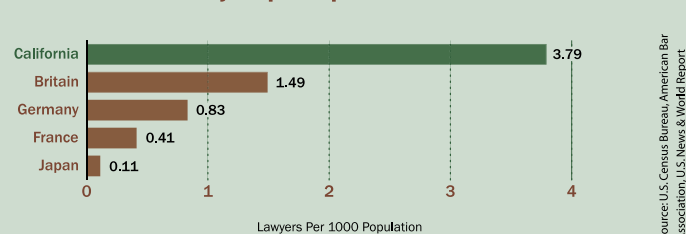
James R. Copland
Director, Center for Legal Policy
Manhattan Institute for Policy Research

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California Has More Lawyers than the Biggest (Non-U.S.) G-7 Economies . . .



. . . and Far More Lawyers per Capita



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

ANOTHER GOLD RUSH

The gold diggers of Trial Lawyers, Inc. enrich themselves at California's expense.

The discovery of gold in California in 1848 set off an international in-migration, with prospectors' pursuit of the American Dream helping to drive the state's explosive growth. In contrast, today's get-rich-quick schemers, the rapacious tort speculators of Trial Lawyers, Inc., threaten to make California a less populous and less prosperous place.

California is home to some of the nation's most prominent plaintiffs' attorneys, including:

- San Diego's Bill Lerach, perhaps America's most famous and successful securities lawyer;
- Los Angeles's Michael Piuze, who won 2 multibillion-dollar tobacco verdicts for individual lifelong smokers;
- Santa Monica's Brian Panish, the products liability, disaster, and mass-tort lawyer who has brought home more than 70 verdicts and settlements in excess of \$1 million;⁷ and
- The late Johnnie Cochran of O.J. Simpson-fame, who founded a law firm that touts itself as the largest personal-injury firm in the country.⁸

These and other members of the state "leadership team" of Trial Lawyers, Inc. have dominated California's massive legal system by developing sophisticated business plans both to exploit today's litigation opportunities and to identify key new legal "markets." The litigation industry has also contributed heavily to political and public-relations campaigns to perpetuate its success and to establish new opportunities for lawsuit abuse.

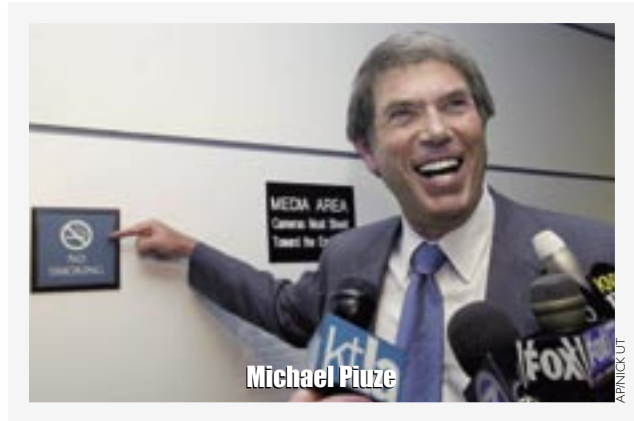
California Courts' High-Stakes Litigation Lottery

The cost of litigation in California is staggering, believed to be larger than any nation's apart from the United States itself. With over 1,600 judges and close to 8 million legal filings annually, the California court system is enormous.⁹ By 2001, tort jury verdicts in the state topped \$1.5 million on average.¹⁰

What has driven the growth in legal costs that now threatens California's housing, employment, and very economic base? California's initial litigation explosion came in the late 1970s and early 1980s, when tort filings in the state more than doubled.¹¹ The increase in filings reflected weakening liability standards, the onset of asbestos litigation, and relaxation of professional ethics rules against attorney advertising.¹² Another cause of the large increases in filings in California was the state supreme court's 1979 decision in *Royal Globe Insurance Co. v. Superior Court*, which held that injured parties could sue insurance companies in which they did not hold a policy for "bad faith."¹³ This rule inevitably encouraged plaintiffs to file two suits in each case, against both the policyholder and his insurer.¹⁴

Fortunately, the California Supreme Court reversed its *Royal Globe* decision in 1988 in *Moradi-Shalal v. Fireman's Fund*.¹⁵ In addition, California's voters eliminated joint and several liability for noneconomic damages with Proposition 51 in 1986,¹⁶ and the California legislature enacted reforms in 1987 that barred products liability claims for "inherently unsafe" products and tightened legal standards for awarding punitive damages.¹⁷ Over the following decade, legal filings fell by more than half.¹⁸

Trial Lawyers, Inc. would not go without a fight, however, and began chipping away at legal reforms, taking an increasing share of the state's economic pie. Tobacco lawyer Michael Piuze teamed with the state attorney general to carve out an exception to the products liability law, which paved the way for his record-setting \$28 billion verdict in a suit on behalf of an individual smoker.¹⁹ A series of legislative enactments and legal rulings made suits easier to file. Tort suits began to increase again, and the proliferation of class action and other aggregative litigation panned out to bigger awards for the average case. In addition, punitive damages rocketed upward, growing over 300 percent from the early to late 1990s.²⁰ From 1996 to 2001, the average jury award in California tort cases grew 144 percent.²¹ Last year, surveyed business executives ranked California's legal climate 45th out of the 50 states and deemed Los Angeles and San Francisco the worst and third-worst jurisdictions in the nation, respectively.²²



From 1996 to 2001, the average jury award in California tort cases grew 144 percent.

Buying Justice

Political largesse is central to the lawsuit industry's business strategy, since its revenue streams depend entirely on those who make and enforce the law. Thus, as it has throughout the nation, Trial Lawyers, Inc. has focused considerable resources on California's political players.

In the last two statewide election cycles, California's trial lawyers contributed approximately \$10 million in each campaign to statewide and state legislative candidates, including a staggering 25 percent of Attorney General Bill Lockyer's initial campaign war chest and 10 percent of former governor Gray Davis's initial campaign funds.²³ (Indeed, Trial Lawyers, Inc. gave Davis \$3.3 million for his first race, \$1.7 million for his reelection, and another million dollars in 2003 during his unsuccessful fight against his recall.)²⁴ Moreover, trial lawyers wield substantial influence in the California legislature: in the last two fully recorded campaigns, 2000 and 2002, trial lawyers contributed \$4 million and \$5 million, respectively, to state legislative candidates.²⁵

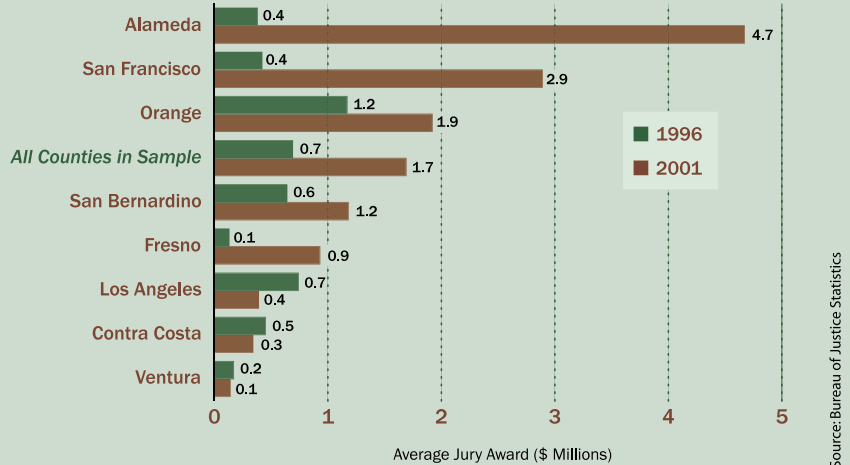
The lawsuit industry's generosity has not gone unnoticed in Sacramento. For instance, under the state's Business and Professions Code Section 17200, plaintiffs' attorneys mass-mailed letters to businesses threatening lawsuits over picayune paperwork omissions.²⁶ They sued hundreds of travel agents whose license numbers were not listed on their web pages and homebuilders who used the abbreviation APR rather than ANNUAL PERCENTAGE RATE in their ads.²⁷ Bill Lerach's firm even won \$3 million in attorneys' fees from lock manufacturer Kwikset because the Lake Forest company applied "Made in the USA" labels to locks that used six small screws that came from Taiwan.²⁸ Despite these widespread abuses, California's legislature never saw fit to reform the infamous "shakedown" statute.

Fortunately, California's voters amended section 17200 last November by passing Proposition 64, a major victory for tort reformers.²⁹ So, too, did voters use the referendum to stop the legislature and Gray Davis from their trial-lawyer-backed attempt in 1999 to overturn *Fireman's Fund*,³⁰ which would have led once again to a massive increase in tort filings.

But Trial Lawyers, Inc. has used the referendum process to further its own goals as well. One successful effort still on the books is the pernicious Proposition 65, California's toxic tort "bounty hunter" statute, which was initially adopted by referendum in 1986 and enables plaintiffs' lawyers to act as "private attorneys general" and file a wide array of suits "in the public interest."³¹ Ostensibly created to keep toxic substances out of drinking water, Prop 65 has become "a clever and irritating mechanism used by litigious NGOs and others to publicly spank politically incorrect opponents ranging from the American gun industry to seafood retailers."³²

Finally, California's civil justice system can never be sound until its courts start taking their responsibilities seriously. Too frequently, however, the state's judges have been strong supporters of Trial Lawyers, Inc. San Francisco's judges do not limit the number of cases for which a trial date can be assigned, and so they are giving only summary treatment to the thousands of asbestos cases choking their dockets.³³ Judges in Los Angeles's Central Civil West Division are widely known for their outlandish rulings and are even known to encourage astronomical jury awards (see page 14). Even the California Supreme Court, just last December, enshrined into law the "catalyst theory" of fee collection—i.e., the notion that attorneys can collect fees when they lose if they "catalyze change" in the business they sue—despite the fact that the U.S. Supreme Court had rejected the same theory for federal courts three years earlier.³⁴

California Jury Verdicts Have Exploded Since the Mid-1990s



HOUSING CONSTRICTION

Spurious lawsuits are strangling California's construction industry.

In 2003, Jon Olivieri, a framing sub-contractor in Sacramento, saw his construction insurance premium skyrocket 535 percent, from \$85,000 to \$540,000, despite a near-spotless record in his 19 years in the business.³⁵ The premium hike added so much to his costs, averaging about \$3,500 more per house, that one big account—Dunmore Homes, worth \$12 million in revenues to Olivieri—stopped doing business with him.³⁶

Olivieri is one of thousands of small to medium-size contractors in California who are seeing their businesses go south after enduring more than a decade of flimsy lawsuits alleging construction defects, which have driven insurers from the state and put a virtual halt to condominium construction. In 2000, insurers paid out \$2.95 for every premium dollar they took in.³⁷ As a result, only a handful of companies still write construction liability coverage in California; and they charge two to five times what they charge in other states.³⁸ And they won't touch condos.



The Endangered California Condo

Indeed, the construction of new condos—the home of choice for asset-strapped first-time homeowners—plummeted from 18,691 units in 1994 to 2,945 in 1999.³⁹ In the mid-1990s, 30 percent of new houses in California were condos; by 2000, only 2 percent were condos.⁴⁰ Areas of the state that were job engines in the 1990s, such as Silicon Valley, have started to lose population in part because of the lack of affordable housing.⁴¹ In 2002, California was building one new house for every 3.5 new jobs, barely half of what economists say is required to support growth.⁴²

The problem harkens back to the early 1980s, when new favorable tax treatment spurred condo construction in California and other parts of the Sunbelt.⁴³ Inevitably, a percentage of these new homes were shoddily built, and owners sued the contractors, often with some justification. Trial Lawyers, Inc. quickly determined that the market was lucrative, since hundreds of litigants could be brought into a single suit through their condo associations, vastly increasing the size of potential judgments—and of their lawyers' fees, which are based on a percentage of the verdicts.⁴⁴ Aggressive lawyers started blanketing condo communities with flyers listing a litany of potential defects, from leaky windows to loose carpet corners.⁴⁵ Firms specializing in construction-defects litigation surfaced, such as the Miller Law Firm of Orange County, whose website www.constructiondefects.com touts its success in “recovering” over \$400 million for construction-defects claims.⁴⁶

The result has been a flood of litigation in California courts, aided by the state's ten-year statute of limitations on structural defects, one of the longest in the nation, and its plaintiff-friendly strict liability laws.⁴⁷ Under a strict liability doctrine, homeowners do not have to prove that a builder was negligent—only that he built a structurally defective home. Thus, if a window leaks, the contractor is liable even if he installed the window properly and met industry standards.

Housing starts have failed to keep up with population and job growth, and most families cannot find affordable housing.

To dig into as many deep pockets as possible, lawyers typically name as defendants as many as 60 subcontractors on a project—and all their insurers—including some who had nothing to do with that portion of the construction where defects are being alleged.⁴⁸ As a result, portable-toilet vendors are being dragged into lawsuits over construction flaws, and roofers are being named in litigation over tennis-court defects, inflating costs and causing cases to drag on for years.⁴⁹ Insurers understandably prefer to settle these nuisance suits in order to cut their ever-increasing litigation tab.⁴⁹

Repairing the Damage?

Builders and subcontractors are starting to fight back, forming captive insurers (entities that businesses create themselves to provide coverage when insurance companies exit a market), writing more explicit warranties and arbitration clauses into their contracts, and soliciting homeowners for problems before disputes turn into lawsuits.⁵⁰ California home-builders groups are asking homeowners to call their builder, not a lawyer, if they have a problem with construction.⁵¹

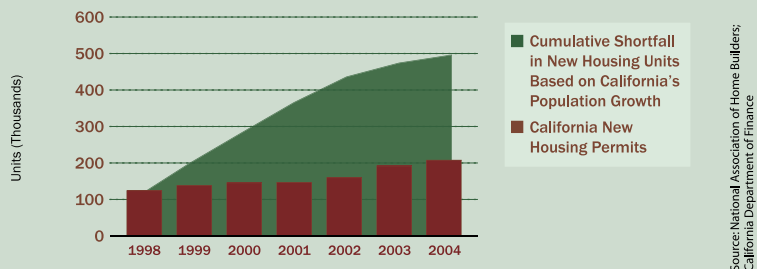
Most successfully, builders managed to get California lawmakers to pass a “right-to-repair” law in 2002 that requires most owners of condos and townhouses to give builders an opportunity to fix defects before taking them to court.⁵² Condo construction has picked up since its passage, but liability insurance rates are still climbing and skittish insurers have yet to resume writing coverage and are unlikely to come back into the market until they can get a better handle on risk.⁵³ Moreover, the law does not apply to remodeling projects or to homes built before January 1, 2003,⁵⁴ which leaves an estimated 1.5 million homes in the state vulnerable to litigation.⁵⁴

Ever resourceful, lawyers are now turning their attention to homes not covered by right-to-repair laws: single-family homes and seven- and eight-year-old condos that are starting to show wear. Not surprisingly, the rate of increase in building of new single-family homes is slowing, and last year, the Construction Industry Research Board predicted that California may actually see a 3 percent *decrease* in the number of new one-family homes built in the state.⁵⁵

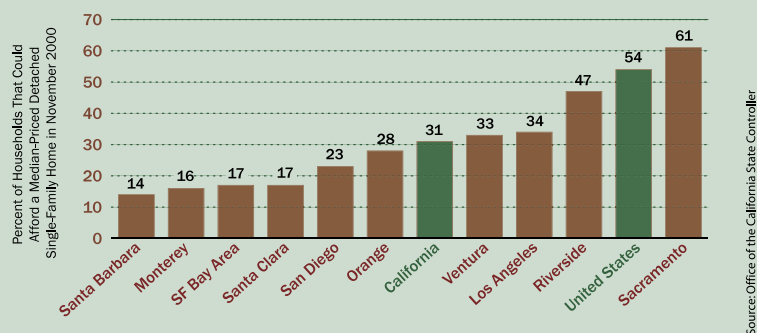
More troubling, lawyers have lately brewed up a potent mix of allegations that combine construction defects and toxic mold, paving the way for punitive damages and big pain-and-suffering awards.⁵⁶ With leaks the most common litigated defect in California, claims of toxic mold damage—and the physical ills it allegedly causes—are proliferating.⁵⁷ Despite the junk science that underpins many mold cases, water-related payouts more than doubled between 1997 and 2001 for California’s biggest insurers, from \$206 million to \$431 million,⁵⁸ “largely because of the increased cost in treating mold that results from the water damage.”⁵⁹

Developers are now pushing two bills in Sacramento that would plug some of the holes in the right-to-repair law, including one that would, among other things, force attorneys to tell prospective plaintiffs the alternatives to litigation.⁶⁰ Something needs to be done. In construction-defects litigation, Trial Lawyers, Inc.’s profits have been California citizens’ loss, as housing starts have failed to keep up with population and job growth, and most families cannot find affordable housing (see graphs above). The state’s sunny climate notwithstanding, a failure to address this problem could leave many Californians out in the cold.

California's Construction of New Homes Has Lagged Its Demand . . .



. . . Leading to a Death of Affordable Housing in the State



THE BOSS IN THE CROSSHAIRS

Gray Davis's parting shot was only the latest of Trial Lawyers, Inc.'s attacks on California employers.

In a final payback to the trial lawyers who helped bankroll his failed effort to remain in office, recalled governor Gray Davis signed into law the Labor Code Private Attorneys General Act of 2004 a mere five days after his ouster.⁶¹ Modeled on the state's section 17200 "shakedown statute"—the infamous unfair competition law that empowers lawyers to sue businesses for any regulatory infraction, however trivial—the new labor law allowed suits against employers for similarly petty infractions of California's 500-plus-page labor code. Under this "Sue Your Boss" law, Trial Lawyers, Inc. could sue on behalf of current and former workers without having to allege—much less prove—that they were harmed.⁶²

Within six months of the law's becoming effective on January 1, 2004, more than 65 lawsuits had been filed, including dubious actions over violations as laughable as a company that displayed an employment poster that was printed in a non-regulation type size.⁶³ Predictably, many of these suits went after California's deepest pockets, such as entertainment giants Warner Brothers and Metro-Goldwyn-Mayer; nearly half of the 50 private-attorney cases that were filed in Southern California courts named entertainment companies as the offenders.⁶⁴

After this initial flurry of frivolous lawsuits, the legislature, under pressure from Governor Arnold Schwarzenegger, had to revisit the Sue Your Boss law only months after it went into effect. A compromise amendment passed in August will stifle some of the most flagrant abuses, such as private suits over notice-posting and filing lapses; moreover, the amended law requires employees to notify the state and the employer of an infraction before suing, giving the employer an opportunity to cure it.⁶⁵ Only time will tell whether these adjustments will be sufficient to prevent the statute from driving out California jobs.

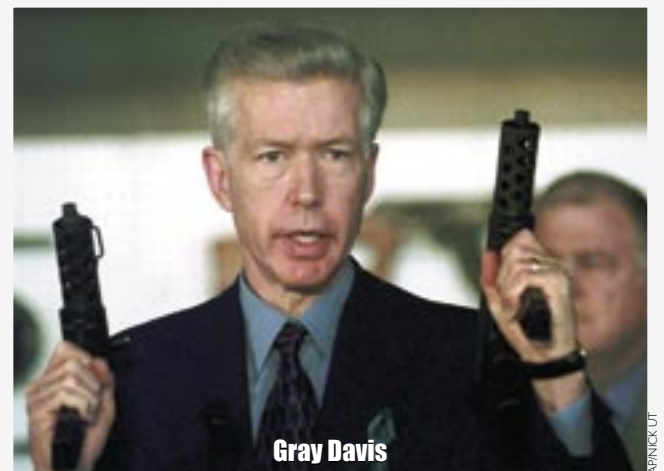
A Labor Lawsuit Legacy

However the Sue Your Boss-law saga turns out, that legislation is just the tip of the iceberg that is California's employment law, which undeniably has a chilling effect on job creation in the state. California has long been a national leader in suits alleging wrongful termination; by the early 1990s, not only were jury verdicts in employment cases in excess of \$1 million commonplace, but the *average* such award topped \$1.5 million.⁶⁶ California's supreme court aggressively stretched the law to accommodate wrongful firing suits, such as in a 1990 decision that determined that a company granting raises, promotions, and a "lack of criticism" for an employee could imply lifetime tenure, notwithstanding a specific statute providing that the worker could be terminated at will.⁶⁷

Although the California Supreme Court in recent years has not been quite so brazen, the proliferation of wage-and-hour regulations in the state—and the relative ease of bringing a private action—have nevertheless made employing California workers an expensive proposition. Examples abound of California wage-and-hour laws that, even if well-intentioned, undoubtedly are much more costly than alternative protections that could achieve the same results:

- California businesses cannot deduct advanced vacation pay from a final paycheck, even with the employee's prior consent.⁶⁸

Nearly 40% of surveyed companies plan to move jobs out of the state, and 50% "have explicit policies to halt employment growth in California."



THE WOMEN OF WAL-MART

Employment lawsuits in California are not limited to the individual. Rather, class action claims of workplace discrimination have emerged as a major growth market for Trial Lawyers, Inc. The attorney at the forefront of these suits is Berkeley lawyer **Brad Seligman**, who gained prominence in the early 1990s when he negotiated a \$107 million settlement in a sex-discrimination case against Lucky Stores.⁷⁸ Seligman used that money to form the Impact Fund, which has since spent millions sponsoring employment-discrimination class actions.⁷⁹

Seligman is now pursuing a much-publicized gender-discrimination suit against Wal-Mart on behalf of 1.6 million women workers.⁸⁰ Seligman's case, certified as a class by San Francisco federal judge Martin Jenkins last summer, is the largest employment-discrimination lawsuit ever filed.⁸¹

Although class actions are useful and efficient vehicles to combine many similarly situated claims, suits like this one filed against Wal-Mart are almost always unsuited for the class action device.⁸² The plaintiffs are linked only by the fact that they are women who worked at the company and failed to receive promotions.⁸³ Seligman's case alleges no overarching discriminatory policy but rather relies on statistics showing that women on average earn and are promoted less than men, which does not establish that the company discriminated.⁸⁴ Since so many women in the job force interrupt their careers to bear children and work only part-time while their kids are young, we should not be surprised to find women in the aggregate lagging men in salaries and promotions. Furthermore, Wal-Mart may have very good reasons for not promoting a particular worker; indeed, one of Seligman's plaintiffs admitted to being reprimanded for repeatedly returning late from lunch breaks, and another had been suspended for mishandling a customer refund.⁸⁵

But in a class action lawsuit, the employer cannot mount individual defenses about such details, and attorneys like Seligman can confuse juries by picking and choosing among different plaintiffs' claims, even when the claims are not consistent and not representative of the class as a whole.⁸⁶ Moreover, such cases are so large that the merits matter little: even for weak cases, litigation costs and the high verdict expected in the unlikely event of loss give defendants an almost overwhelming incentive to settle.⁸⁷

A company as large as Wal-Mart may indeed have discriminated against some of its employees, but such claims should be handled individually, rather than in massive suits involving millions of plaintiffs. Such class actions are really no more than corporate shakedowns. With California in the grasp of Trial Lawyers, Inc., attorneys such as Seligman will continue to try to manipulate—through litigation—the organizational structure of entire American businesses.



CHRIS STEWART/SAN FRANCISCO CHRONICLE/CORBIS

- Commissioned salespeople in California can file a complaint against their boss for “charging them back” for commissions on quickly canceled accounts, even if the employee wanted such an arrangement, and even if the employee is earning over \$100,000 per year.⁶⁹
- California employees who call in or check e-mail during their vacation may be entitled to full pay without deducted vacation time.⁷⁰

Some types of employees have been able to obtain special protections under California law that border from the merely onerous—computer consultants, even those earning six-figure incomes, are always entitled to overtime pay⁷⁰—to the absurd: under a 2000 law signed by then-governor Davis, exotic dancers can sue their employers for sharing in customer cash payments for “private dances,” rather than treating them as tips belonging solely to the dancer.⁷¹

Areas of the law that are pervasive nationally, such as suits over discrimination and harassment, are stretched to preposterous limits in California. California courts have held that workers can sue for age discrimination under the section 17200 unfair competition law—originally intended to curb antitrust offenses—because “an employer which practices age discrimination has an unfair competitive advantage.”⁷² And a California appeals court permitted the much-publicized sexual-harassment lawsuit against Warner Brothers for writers' purported off-color jokes during brainstorming sessions for the often risqué sitcom *Friends*.⁷³ California's elected leaders not only have been complicit in such expansion of the law; they have prodded it along. In 2003, the state legislature passed a law creating a right of action for sexual harassment against an employer for non-employees' conduct.⁷⁴

Suing Away Jobs

Trial Lawyers, Inc.'s employment-lawsuit business hurts not only California's companies but also its citizens, who are less able to find quality jobs as a result of the state's overlitigation. A study completed last year for the California Business Roundtable by the consulting firm Bain and Company found that, notwithstanding the high-technology boom, the state had underperformed the national average in high-value job creation since 1990.⁷⁵ An amazing 100 percent of executives surveyed ranked California's business climate “less favorably than other states,” and large business leaders ranked workers' compensation and litigation as their most pressing concerns in the state.⁷⁶ Unsurprisingly, nearly 40 percent of companies surveyed were planning to move jobs out of the state, and 50 percent “have explicit policies to halt employment growth in California.”⁷⁷ Until the state can fix its labor-lawsuit problem, the best option for California job seekers may be to *move*.

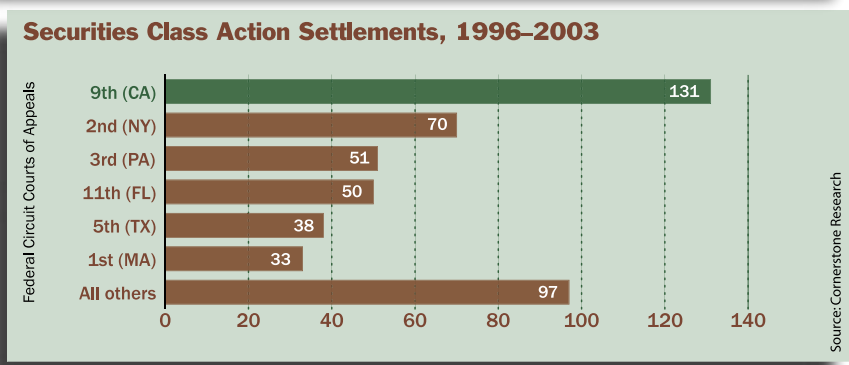
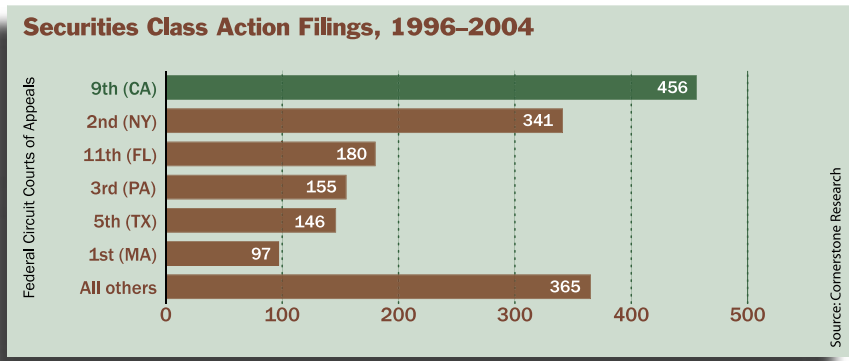
STOCK MARKET SHAKEDOWN

Securities lawsuits rough up California businesses, big and small.

In April 2003, in *Small v. Fritz Companies, Inc.*, the California Supreme Court ruled that a shareholder who neither bought nor sold stock, but who merely held on to shares he already owned, could sue a company if its public statements turned out to be false or misleading.⁸⁸ The leap in legal reasoning—one that federal courts have consistently rejected—sent tremors through California’s embattled corporate defense bar, which is now bracing for a wave of lawsuits by investors claiming they relied on a company’s faulty disclosure to . . . well, do nothing.⁸⁹

But for Trial Lawyers, Inc., which has made California the focal point of its securities-litigation business, the supreme court decision was only the latest victory in a long-running and largely successful campaign to wring money out of the Golden State’s embattled corporations. Of the 570 securities class actions filed in federal district courts from 2001 through 2003, a whopping 23 percent were filed in California.⁹⁰ The U.S. Court of Appeals for the Ninth Circuit, which includes California, has far outpaced other federal circuits in both filings and settlements (see graphs below).⁹¹

Indeed, the securities-litigation division of Trial Lawyers, Inc. has California’s high-growth, high-technology industrial base in its sights. High-tech companies’ shares and revenues are inherently volatile, and whenever these businesses must restate their finances or suffer a drop in stock price, they become prime targets of the plaintiffs’ bar. Emboldened by public outrage at the malfeasance uncovered at companies like Enron and WorldCom, trial lawyers have sued not only major corporations such as Cisco Systems, but virtually every tiny technology company that went public during the 1990s Internet boom.⁹² Between 1997 and 2004, 43 percent of the securities lawsuits brought in federal district court in the country were against technology companies.⁹³ The list of defendants reads like a who’s who of Silicon Valley: Oracle, Silicon Graphics, Nortel Networks and on and on.⁹⁴



Now, having worked their way through most of California’s high-tech sector and facing a diminishing number of targets, trial lawyers are turning their attention to the state’s burgeoning biotech industry. Nationally, suits against biotech companies tripled between 2001 and 2003.⁹⁵ In San Francisco alone, five companies are already in the crosshairs of the plaintiffs’ bar: Gilead Sciences, VaxGen, CV Therapeutics, Cerus, and Intermune.⁹⁶

Trial Lawyers, Inc.’s “Pit Bull”

Leading the charge to the courthouse in most of those cases is none other than San Diego pit bull Bill Lerach, who recently broke with plaintiff powerhouse Milberg Weiss Bershad Hynes and Lerach, and formed his own firm, Lerach Coughlin Stoia Geller Rudman and Robbins. With Lerach running their securities practices, these firms were lead or co-lead plaintiff in 51 percent of class action securities lawsuits brought in the U.S. between 1997 and 2004.⁹⁷ During that time, he extracted \$6 billion in settlements from corporations and pocketed an estimated \$2 billion for the firms.⁹⁸

Federal legislation enacted in 1995 to rein in Mr. Lerach and his ilk—the Private Securities Litigation

Between 1996 and 2003, 50 percent of the securities lawsuits brought in federal district court in California were against technology companies.



Reform Act (PSLRA)⁹⁹—required more in-depth pleading standards to support a securities claim and forced judges to select as the lead plaintiff in such cases the investor most likely to protect the class of claimants’ interests, typically the largest investor, rather than merely permitting the first plaintiff filing suit to control the litigation.¹⁰⁰ These changes put a stop to some of the most egregious abuses, including “strike suits”—claims filed within days or even hours of a drop in stock price even when little, if any, evidence of corporate wrongdoing existed.¹⁰¹

But an unintended consequence of the legislation was to stifle competition and concentrate power in a few big plaintiff firms that have the capital to spend time digging for the evidence now required by more rigorous federal pleading standards.¹⁰² The PSLRA also forced more marginal cases, such as *Small v. Fritz*, into state court, where pleading standards are more lenient.

In addition, the law’s stipulation that the shareholder with the biggest stake be the lead plaintiff had the effect of raising the ante for Mr. Lerach and his colleagues in the plaintiffs’ bar. Now, instead of having to trawl for small investors, Trial Lawyers, Inc. spends its time wooing public pension funds, whose boards of political appointees and labor representatives make them natural allies in the battle to wrest money from corporate America (see “Pension Politics,” page 12).

The Cost of Shareholder Suits

With the political establishment stacked against them and the exorbitant cost of defending years-long court battles, it’s no wonder that 80 percent of securities class action cases are settled, with only 1 percent of the companies willing to take their cases to trial.¹⁰³ Indeed, critics liken securities litigation to “legal extortion,” and one judge has gone so far as to compare lawyers at Lerach’s old firm to “‘squeegee boys’ who . . . run up to a stopped car, splash soapy water on its perfectly clean windshield and expect payment for the uninvited service of wiping it off.”¹⁰⁴

Although the plaintiffs’ bar disingenuously claims its mission is to reform management and protect the rights of the “little guy,” empirical evidence shows that securities class actions’ settlement values are unrelated to the merits of the underlying cases,¹⁰⁵ and the money to pay settlements comes directly from the corporate coffers of the company in which small shareholders have invested.¹⁰⁶ Securities claims are thus often nothing more than a mechanism for transferring assets from one group of shareholders to another, with a 30 percent cut for Trial Lawyers, Inc.

Furthermore, even for businesses that have yet to be sued, California’s extreme threat of litigation is helping to send accounting and insurance costs through the roof and is causing entrepreneurs to question the wisdom of going public.¹⁰⁷ James Currier, founder and CEO of San Francisco-based Tickle, Inc., canceled a round of funding last year that was intended to precede an initial public offering. Instead, he sold his company to Monster.com when he realized the high cost of going public.¹⁰⁸ As more company directors are implicated in shareholder suits, liability risks also are causing venture capitalists to take a second look at their traditional close involvement with the companies they bankroll. Vinod Khosla of Silicon Valley venture firm Kleiner Perkins Caufield and Byers this year resigned his seat on the board of Juniper Networks in part because new regulations have made board members liable for company reports. “It’s taking a risk,” he told the *San Jose Mercury News*.¹⁰⁹

PENSION POLITICS

Trial Lawyers, Inc. has its hands in the California taxpayer's wallet.

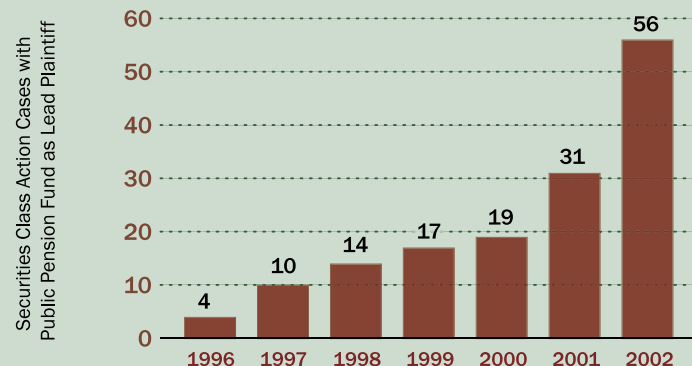
As already noted (see page 5), Trial Lawyers, Inc. injects millions of dollars into California politics, including roughly \$10 million to state legislative and statewide campaigns in each of the two most recent political cycles.¹¹⁰ The litigation lobby is quite strategic about how it spends its cash, typically pouring it into the races of vulnerable legislative supporters or using it to influence key state members of the executive branch, such as insurance commissioner John Garamendi (see box on page 13). And in recent years, the government-relations arm of Trial Lawyers, Inc. has focused particular attention on the states' mammoth public-employee pension funds: the California Public Employees' Retirement System (CalPERS) and the California State Teachers' Retirement System (CalSTRS).

Why? Much of today's shareholder litigation is driven by such funds, which are enormous investors. CalPERS and CalSTRS are the nation's largest and third-largest public pension funds, respectively, and together they manage over \$300 billion in shareholder assets.¹¹¹ Recent legislation has made these funds the 800-pound gorilla in securities litigation, and the political appointees on their boards—invariably beholden to the litigation industry—have been all too happy to play politics with their funds, and reward their legal contributors with business in the process.

The Origins of the Problem

When the 1995 Private Securities Litigation Reform Act (PSLRA) mandated that the biggest stockholders should act as lead plaintiffs in securities class actions, public pension funds took charge of much shareholder litigation merely as a function of their size. They have responded enthusiastically. According to a study released last year by PricewaterhouseCoopers, securities cases with public pension funds as lead plaintiffs rose steadily from four in 1996 to 56 in 2002 (see graph below).¹¹²

Public Pension Funds Have Increasingly Begun to Lead Securities Class Action Litigation



Source: PricewaterhouseCoopers



In recent years, the government-relations arm of Trial Lawyers, Inc. has focused particular attention on the states' mammoth public-employee pension funds.

Unlike mutual funds and hedge funds, whose ability to retain investors is dependent on their performance, public pension funds have captive investors who are promised defined benefits, i.e., taxpayers have to pick up the shortfall should the funds lose money. Realizing that it could profit handsomely by encouraging these funds to litigate and taking the legal fees for itself, Trial Lawyers, Inc. has invested heavily in the political appointees on the funds' union-dominated boards. In 2002 alone, Milberg Weiss gave \$250,000 to the California Democratic party, several members of which sit on the CalPERS board, including state treasurer Phil Angelides, state controller Steve Westly, and former San Francisco mayor Willie Brown.¹¹³ Angelides, an *ex officio* member of the CalPERS and CalSTRS boards, received 8 percent of his campaign contributions from the plaintiffs' bar when he was elected in 1998, for a total of over \$296,000.¹¹⁴ For his reelection in 2002, those contributions increased to over \$375,000.¹¹⁵

In turn, Angelides has been the most vocal proponent of using pension funds' clout to try to change corporate behavior. He has spurred CalPERS to oppose politically unpopular mergers, sue companies involved in labor disputes, and urge companies to settle "Holocaust restitution" lawsuits.¹¹⁶ Says Angelides, "Shareholders should start acting like the owners they are. . . . The age of investor complacency must be replaced by a new era of investor democracy."¹¹⁷

The Cost of Pension Politics

Ultimately, however, the shareholder activism of CalPERS and CalSTRS hurts both investors in targeted companies and California taxpayers. A study

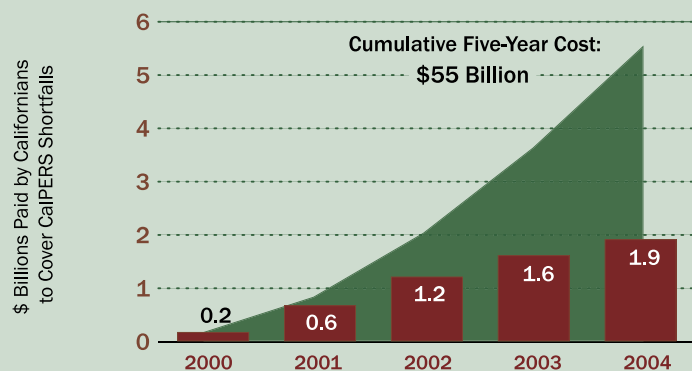
A Good Insurance Policy

How might trial lawyers ensure their market share? By investing in the campaigns of government officials who can later hire them to do work for the state. In October, California's insurance commissioner **John Garamendi** hired Bill Lerach's firm to file suit on the state's behalf against insurance brokers and insurers over the bid-rigging and contingent-commission scandals at Marsh & McLennan and elsewhere.¹²¹ (Lerach's firm has also filed private suits against many insurers and brokers, under the state's "private attorneys general" statute, "which allows virtually anyone to file a lawsuit on the public's behalf.")¹²² From 2002 through 2004, Lerach and his law firms contributed \$55,000 to Garamendi's political action committees.¹²³



APRICH PEDRONCELLI

California Taxpayers Pay a Steep Price for CalPERS's Mismanagement



Source: Pacific Research Institute

released this February by Lawrence McQuillan of the Pacific Research Institute (PRI) surveys published research on the topic and concludes that "[t]he overwhelming consensus among academic researchers is pension-fund activism does not create additional net social value."¹¹⁸ PRI awarded CalPERS with its 2004 "Golden Fleece" Award, noting: "From 2000 to 2004, [CalPERS's] investments under-performed and [the fund] suffered severe cash-flow problems, forcing taxpayers to pick up the tab" (see graph).¹¹⁹

The easy solution to pension fund shenanigans is removing political control from state employees' retirement savings. Governor Schwarzenegger has come out in support of a proposed state constitutional amendment, ACAX1, that would place state employees' retirement funds under their control in defined contribution plans similar to 401(k)s.¹²⁰ Hopefully, Californians can pass such a commonsense measure against the certain fight from Trial Lawyers, Inc.

LAWSUIT CENTRAL

Trial Lawyers, Inc. takes it to “the Bank” in Los Angeles.

For each of the past three years, the American Tort Reform Association has published a report, *Judicial Hellholes*, which focuses on the worst venues in the nation for lawsuit abuse. In each of those years, the Los Angeles County Court’s Central Civil West Division—cynically nicknamed “the Bank” by area plaintiffs’ attorneys—has made the list.¹²⁴ And this year, corporate executives surveyed by the Harris Interactive polling group ranked Los Angeles the least fair litigation environment in the nation.¹²⁵

It’s not hard to see why. Though California has a number of overly litigious jurisdictions—including San Francisco and Alameda Counties—Los Angeles stands out with an eye-popping list of verdicts.

For example, in 1998, a judge in the Central Civil West Division, Richard Hubbell, urged the jury to “send a notice out to the world,” to which they responded with a \$760 million punitive-damage award.¹²⁶ The case was brought by infamous “toxic tort” lawyer Thomas Girardi against five companies that had supplied allegedly harmful chemicals for Lockheed’s F-117 Stealth fighter factory, where the 28 plaintiffs had worked from the 1950s through the 1980s.¹²⁷ An appellate court reversed Judge Hubbell and overturned the punitive award in its entirety, determining that the facts of the case did not support a finding of “despicable conduct” but rather, at most, “a tragedy arising in an industry developing weapons whose purpose was to defend this country during the Cold War.”¹²⁸

Perhaps no case in the district is more notorious than the 1999 products liability case in which Brian Panish scored a then-record \$4.2 billion verdict for six automobile passengers injured in an explosion.¹²⁹ Panish argued that the Chevy Malibu the plaintiffs were driving was defective and overly susceptible to explode in rear-end collisions. Incredibly, however, presiding judge Ernest Williams did not permit General Motors to introduce testimony on the Malibu’s low fire-accident rates—nor to enter evidence that the driver who had rear-ended the plaintiffs had been driving at 70 miles per hour, while drunk.¹³⁰ And when GM wanted to call high-ranking public officials to rebut the plaintiffs’ claim that the automaker had lobbied to limit regulations on fuel-tank safety, the judge denied that, too.¹³¹

L.A. attorney Michael Piuze broke Panish’s record in 2002, with an over-the-top \$28 billion verdict awarded to a 64-year-old lifelong smoker.¹³² Piuze had earlier won a \$3 billion award in 2001 on behalf of a 56-year-old lifelong smoker.¹³³ Both awards were ultimately reduced to the tens of millions, in accordance with federal constitutional requirements.¹³⁴

Just last year, a Los Angeles jury held a local store liable for \$4.1 million for selling a dietary supplement that had allegedly caused a plaintiff’s stroke.¹³⁵ In taking the extreme step of holding a retailer liable for its supplier’s product, jurors stated that they wanted to let retailers know that “if you are going to sell something that is dangerous, you better warn the consumer or take it off your shelf.”¹³⁶

Fixing Los Angeles’s broken legal system is easier said than done, but one necessary change is making sure that jury service in the Central Civil West Division is more representative. The division’s clerk is noted for getting potential jurors off long trials for virtually any reason, so that those summoned who have jobs or other social responsibilities do not serve, and those left in the jury pool are hardly an adequate cross-section of the population.¹³⁷ Ultimately, however, it is the district’s trial-lawyer-backed judges who have made a mockery of justice with their wacky rulings; until they are replaced with jurists who take their oaths seriously, the Bank will be open for business.



Though California has a number of overly litigious jurisdictions, Los Angeles stands out with an eye-popping list of verdicts.

LEADERSHIP TEAM

California’s litigation industry is dominated by leading plaintiffs’ attorneys and their allies, who could be deemed “division presidents” of Trial Lawyers, Inc. In addition to **Brian Panish** (page 14), the Golden State’s legal leadership includes:



Bill Lerach

President, Securities Class Actions

Lerach is the terror of California’s high-tech industry, and he and his firms have used “squeegee boy” tactics to take corporations for five verdicts or settlements topping \$1 billion.¹³⁸

REUTERS/CORBIS



Elizabeth Cabraser

President, Product Class Actions

Cabraser has been involved in over 250 class action lawsuits that brought in billions of dollars, including dubious suits over diet drugs and breast implants.¹³⁹

SAN FRANCISCO CHRONICLE/LACY ATKINS



Brad Seligman

President, Employment Class Actions

Civil rights attorney Seligman is leading the largest employment class action case in history in his effort to use litigation to regulate the retail giant Wal-Mart.¹⁴⁰

CHRIS STEWART/SAN FRANCISCO CHRONICLE/CORBIS



Michael Piuze

President, Tobacco

Piuze has shattered records for individual jury verdicts against tobacco companies, though his multi-billion-dollar awards were later reduced on appeal.¹⁴¹

REUTERS/CORBIS



Thomas Girardi

President, Toxic Torts

Among the over \$1 billion in toxic tort “recoveries” for Girardi’s firm is the big win against Pacific Gas & Electric portrayed (falsely) in the movie *Erin Brockovich*.¹⁴²

AP/REED SAXON



Thomas E. Miller

President, Construction Defects

Having literally written the book on construction-defects litigation, Miller has bullied builders into 75 verdicts and settlements worth over \$1 million each.¹⁴³

SEVEN LOCKS PRESS



Phil Angelides

Co-President, Government Relations

As an *ex officio* member of California’s mammoth public pension funds, the state treasurer has been a vocal advocate for Trial Lawyers, Inc.¹⁴⁴

AP/THE FRESNO BEE/DARRELL WONG



Bill Lockyer

Co-President, Government Relations

California’s attorney general won election and reelection with the help of \$1.4 million and \$1.2 million, respectively, from Trial Lawyers, Inc.¹⁴⁵

DEANNE FITZMAURICE/SAN FRANCISCO CHRONICLE/CORBIS

CLEANING HOUSE

Governor Schwarzenegger looks to give California a fresh start by sweeping away lawsuit abuse.

When Arnold Schwarzenegger ran for governor in California's 2003 recall election, Trial Lawyers, Inc. fought hard to keep the Austrian-born actor out of office. The plaintiffs' bar pumped almost \$2 million into the recall race to support incumbent governor Gray Davis and Lieutenant Governor Cruz Bustamante.¹⁴⁶ The Consumer Attorneys of California—Trial Lawyers, Inc.'s public-relations arm for the state—forecast judicial doom under a Schwarzenegger administration.¹⁴⁷

The typically savvy litigation industry had reason to be afraid. Having long relied on political influence to stymie reform, the trial bar knew that in Schwarzenegger they faced a leader whose charisma would enable him to take his case directly to the people and circumvent Sacramento gridlock—no mere cliché, given California's thriving tradition of voter initiatives. Although the state still has far to go, early results are promising.

Recent Reforms

One of Governor Schwarzenegger's first policy successes was his overhaul of California's dysfunctional workers' compensation system. California has the nation's longest disability absences, and the state's workers' comp program cost two to three times the national average.¹⁴⁸ Threatening to take the issue to the voters by referendum, the Governor forced the legislature to enact a badly needed reform.¹⁴⁹

The comprehensive reform requires injured workers to seek immediate medical care to get them back on the job sooner.¹⁵⁰ The bill caps temporary disability payments at two years and has adopted the American Medical Association's methodology for determining whether a disability is permanent.¹⁵¹ Payments for permanent disability have been reduced for less serious injuries but almost doubled for the most severe ones; thus, the law is hardly an exclusively pro-business reform.¹⁵² Though the legislation is certainly not perfect—e.g., litigation over what constitutes a "permanent disability" will surely follow¹⁵³—it was a resolute step in the right direction and a sharp rebuke to Trial Lawyers, Inc.

MICRA'S POWERFUL PRESCRIPTION

One long-standing California reform success is the 1975 Medical Injury Compensation Reform Act (MICRA),¹⁷⁰ which has made medical malpractice litigation in the state a notable exception to the generally bleak lawsuit landscape. Due to MICRA, California has escaped the much-publicized medical malpractice liability crisis, which has led doctors in many states to abandon high-risk but crucial procedures, retire early, and move to less tort-friendly jurisdictions.¹⁷¹ MICRA has been so successful at containing medical malpractice liability costs that President Bush has urged the legislation as a model for medical malpractice liability reform at the federal level.¹⁷²

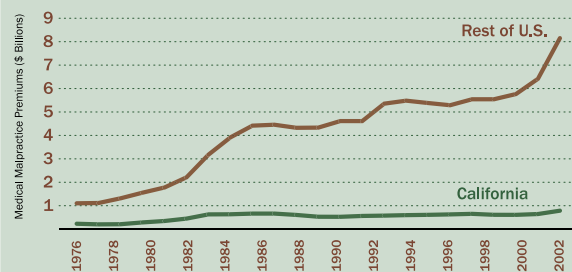
How does MICRA work? The law caps medical malpractice liability awards for noneconomic damages—hard-to-quantify losses such as pain and suffering, mental anguish, and emotional distress—at \$250,000.¹⁷³ MICRA also limits the percentage that plaintiffs' lawyers receive from awarded judgments, setting their contingency fees according to a sliding scale that goes down as awards go up.¹⁷⁴

MICRA's results have been dramatic. In the law's first 27 years, California's medical malpractice insurance premiums increased 245 per-

cent, compared with 750 percent for the rest of the nation.¹⁷⁵ A recent study by the RAND Institute examined a database of 257 California jury verdicts in med-mal cases between 1995 and 1999 in which the plaintiffs won, and found that MICRA reduced total payouts 30 percent on average.¹⁷⁶ The fee caps affected fewer than half of all cases.¹⁷⁷ Moreover, due to the attorney-fee restrictions, the average plaintiff recovery fell by only half as much as payouts, i.e., patients kept a higher percentage of the smaller judgments.¹⁷⁸ For the average noneconomic damage award, the typical plaintiff recovery actually increased 7 percent, and for 97 percent of all verdicts, the patient's payout fell by 7.5 percent or less.¹⁷⁹ The average attorney award, RAND noted, fell by 60 percent.¹⁸⁰

So while Trial Lawyers, Inc. suffers under MICRA, the law has been nothing but salutary for California's doctors and citizens.

California Medical Malpractice Premiums Have Grown Much More Slowly than Those in the Rest of the U.S.

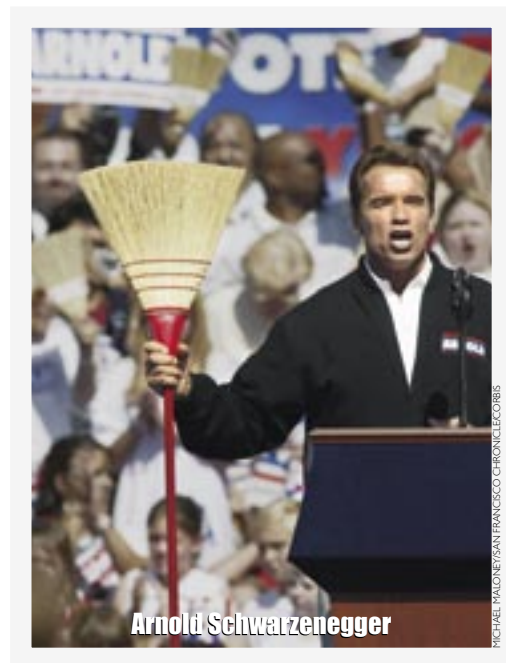


Source: National Association of Insurance Commissioners

Governor Schwarzenegger was less successful in reforming punitive damages in the state. Schwarzenegger proposed that 75 percent of all punitive-damage awards should go to the state, rather than to claimants or their attorneys¹⁵⁴—the theory being that since punitive damages are intended to deter egregious conduct rather than compensate injury, the plaintiff is not really entitled to the funds. Schwarzenegger’s reform proposal would also have mandated that punitive damages only be awarded once for any “single act or omission,” thus ensuring that multiple juries could not punish the same conduct over and over.¹⁵⁵

Unfortunately, the trial bar’s Sacramento allies undid the governor’s proposal. Politicians like Santa Ana Democrat Joe Dunn, who received over \$350,000 from trial lawyers for his 2002 reelection (31 percent of his entire war chest), pressed changes in the new law that stripped it of meaningful reform: it lacks the multiple-punitive-awards prohibition and assures plaintiffs’ lawyers 25 percent of the government’s take.¹⁵⁶ Moreover, the bill only applies to lawsuits filed after August 2004 and adjudicated by the end of June 2006.¹⁵⁷ Since few large cases will reach a final judgment so quickly, the law accomplishes little.

Despite the punitive-damages law’s failure, reformers push ahead on other fronts, such as last year’s Proposition 64, which sought to eliminate section 17200’s perverse provision allowing suits to be filed without a client and without establishing actual injury.¹⁵⁸ Trial Lawyers, Inc. fought vigorously to defeat the measure, spending \$4.5 million, largely on television commercials in the weeks before the election.¹⁵⁹ The Consumer Attorneys of California ponied up \$725,000 to fight the referendum, and its then-president James Sturdevant gave \$415,000 of his own money.¹⁶⁰ Litigation-industry leaders Bill Lerach, Elizabeth Cabraser, and Brian Panish forked out between \$50,000 and \$150,000, as individuals or through their firms.¹⁶¹ Ultimately, however, 59 percent of California’s voters supported Prop 64, in large part due to the endorsement of Governor Schwarzenegger and a well-planned campaign that attracted financial support from a broad spectrum of the business community and “vote yes” editorials from the state’s major newspapers.¹⁶² Two appellate courts have already ruled that the proposition applies retroactively to all pending litigation.¹⁶³



Agenda for the Future

So where does California go from here? Reformers should follow up on Prop 64 by limiting the costly “bounty hunter” regime Prop 65 has instituted (see page 5). Protections against abusive construction-defects litigation should be extended to single-family homes (see page 7). The state should reform its byzantine wage-and-hour laws (see pages 8–9). And the state should eliminate the perverse role its public-employee pension funds play in federal securities litigation by shifting to privately managed accounts, as the governor has proposed (see page 13).

Moreover, the state must get a handle on its asbestos-litigation problem. Over 2,000 asbestos cases are still pending in northern California, with the Bay Area threatening to become the center of the asbestos-litigation storm. The San Francisco courts have attracted forum-shopping litigators by rapidly processing multiple cases without sufficient inquiry into the merits of each;¹⁶⁴ to restore due process of law for defendants and plaintiffs alike, the state must put a brake on this activity and permit each claim to get the fair hearing it deserves.¹⁶⁵

California also must reform its class action procedures. The recently adopted federal Class Action Fairness Act prevents national class actions from being filed in state courts, which will force Trial Lawyers, Inc. to file more state-centered cases.¹⁶⁶ Expect California to be their favored destination: it’s the nation’s most populous state, and no procedure exists under California law for appealing class certification before trial—a right that exists in federal court and many other states.¹⁶⁷ Thus, a single judge elected with trial-bar money can determine a class on whose behalf Trial Lawyers, Inc. can sue; businesses, unable to appeal that determination to a higher court, are forced to settle.

Finally, California should change the way its courts award fees, which are unconscionably high, and which allow Trial Lawyers, Inc. both to invest in new litigation efforts and to purchase the political influence that makes those efforts pay off.¹⁶⁸ In addition to reversing the California Supreme Court’s misguided adoption of the “catalyst fee” theory (see page 5), the state would be well advised to adopt an “early offer” settlement mechanism to speed case resolution and prevent unscrupulous attorneys from exploiting unsophisticated clients. In addition, the state should adopt a “loser pays” rule—consistent with most of the rest of the world—to discourage meritless claims.¹⁶⁹

The prospects for such reforms in California are the best they have been in two decades. With Governor Schwarzenegger’s considerable political muscle, the state may soon be able to say “hasta la vista” to some of Trial Lawyers, Inc.’s most egregious lawsuit abuses.

1. Trial Lawyers, Inc. revenues are assumed to be 19 percent of total U.S. tort costs in 2003, both as defined by Tillinghast, see U.S. TORT COSTS: 2003, TRENDS AND FINDINGS ON THE COSTS OF THE U.S. TORT SYSTEM 17 (Tillinghast-Towers Perrin 2003); U.S. TORT COSTS: 2004 UPDATE, TRENDS AND FINDINGS ON THE COSTS OF THE U.S. TORT SYSTEM 5 (Towers Perrin [Tillinghast] 2005) [hereinafter U.S. TORT COSTS: 2004].
2. The compound annual growth rate of Trial Lawyers, Inc.'s revenues is calculated from 2000–03 based on Tillinghast data, see *id.* (showing U.S. tort costs of \$245.7 billion in 2003 vs. \$179.2 billion in 2000); in gross domestic product from the Bureau of Economic Analysis, see <<http://www.bea.doc.gov/bea/dn/gdplev.xls>> (last visited Mar. 3, 2005) (estimating U.S. GDP for 2000 and 2003 at 9,817 and 11,004, respectively); in inflation from the Bureau of Labor Statistics, from 2000 and 2003, see <<ftp://ftp.bls.gov/pub/special.requests/cpi/cpiait.txt>> (last visited Mar. 3, 2005) (showing average CPI of 172.2 in 2000 and 184.0 in 2003); in the stock market from Standard and Poor's (ending value of 500 Index on December 31, 2000 and 2003, at 1,320.28 and 1,111.916, respectively).
3. California gross state product (2003) is estimated by the Bureau of Economic Analysis, Regional Economic Accounts, see <<http://www.bea.gov/bea/regional/gsp/>> (last visited Mar. 3, 2005). The “group of seven” nations other than the United States, and their gross domestic products in trillions of U.S. dollars (2003, at purchasing power parity), are Japan (3.6), Germany (2.3), France (1.7), the United Kingdom (1.7), Italy (1.6), and Canada (1.0), see THE WORLD FACTBOOK 2004 (updated as of Feb. 10, 2005), available at <<http://www.cia.gov/cia/publications/factbook/index.html>> (last visited Mar. 3, 2005) [hereinafter WORLD FACTBOOK 2004].
4. See *Tort Filings in 16 States, 1975–2000*, National Center for State Courts, at <http://www.ncsconline.org/D_Research/csp/FRI/1975-2000_Tort.xls> (last visited Mar. 3, 2005); 2004 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 50 at tab. 4 (Judicial Council of California 2004). Notably, however, these measures do not include filings for medical malpractice and products liability claims. See National Center for State Courts, *State Court Caseload Statistics, 2003* 196 at fn. A.
5. The mean statewide verdict is calculated from the total jury verdicts and number of plaintiff wins in the nine California counties included among the 75 largest counties sampled in 2001 by the Bureau of Justice Statistics, see Thomas H. Cohen & Steven K. Smith, *Civil Trial Cases and Verdicts in Large Counties, 2001*, BUREAU OF JUSTICE STATISTICS BULLETIN app. F (Apr. 2004). The statewide rate of growth is calculated from the weighted average change in mean verdicts in the eight California counties included in both the Bureau's 2001 survey, see *id.*, and its survey for 1996, see *Civil Trial Cases and Verdicts in Large Counties, 1996*, BUREAU OF JUSTICE STATISTICS BULLETIN app. D (Sept. 1999). The median jury verdict increased for each county in the survey between 1996 and 2001; five of the counties saw their median verdict increase over 50 percent, and the largest increase was 273 percent. The percentage of cases tried in which the plaintiff won a verdict increased from 44 percent in 1996 to 52 percent in 2001 in the comparison counties. Total jury compensatory damage awards increased 90 percent. Of course, only a small fraction of claims ever reach a jury—for civil tort claims, there were only 1,275 jury trials in California in 2002–03, a scant 1.7 percent of total dispositions. See 2004 COURT STATISTICS REPORT, *supra* note 4, at 47 tab. 3. Nevertheless, jury verdicts undoubtedly drive the expected value of litigation and thus the settlement value of claims.
6. See U.S. CHAMBER OF COMMERCE, 2005 STATE LIABILITY SYSTEMS RANKING STUDY 13 tab. 3, available at <<http://www.instituteforlegalreform.org/harris/pdf/HarrisPoll2005-FullReport.pdf>> (last visited Mar. 4, 2005).
7. See Panish's firm's website, <<http://www.gbtwp.com/attorneys/layout/panish.htm>> (last visited Mar. 3, 2005) (“Brian has successfully obtained more than 70 verdicts and settlements in excess of one million dollars, including eight verdicts in excess of 10 million dollars.”).
8. See The Cochran Firm's website, <<http://www.cochranfirm.com/cochran-aboutthefirm.html>> (last visited Mar. 3, 2005) (“Johnnie L. Cochran, Jr.'s national law firm . . . has emerged to become ‘The Cochran Firm,’ America's largest personal injury plaintiffs tort law firm.”).
9. See 2004 COURT STATISTICS REPORT, *supra* note 4, at vi, 20 tab. 1, 60 tab. 12.
10. See discussion *supra* note 5.
11. See *Tort Filings in 16 States*, *supra* note 4.
12. See generally Bates v. State Bar of Arizona, 433 U.S. 350; James M. Wootton, *How We Lost Our Way: The Road to Civil Justice Reform*, Critical Legal Issues Working Paper Series No. 120 (Washington Legal Foundation 2004); Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPPERDINE L. REV. 33 (2004); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).
13. See generally Royal Globe Ins. Co. v. Superior Court of Butte County, 23 Cal. 3d 880 (1979).
14. See ALEXANDER B. AIKMAN & KAREN A. VISCIA, JUDICIAL COUNCIL OF CALIFORNIA, EXPLORING THE WORK OF THE CALIFORNIA TRIAL COURTS: A 20-YEAR RETROSPECTIVE 45 (2003).
15. 46 Cal. 3d 287.
16. Proposition 51, The Fair Responsibility Act, was enacted in 1986 and codified at CAL. CIV. CODE § 1431.2 (West 2005).
17. Act of Sept. 30, 1987, § 3, 5, 1987 Cal. Legis. Serv. 1498 (West) (codified at CAL. CIV. CODE §§ 1714.45, 3294 (West 2005)).
18. See *Tort Filings in 16 States*, *supra* note 4.
19. See Sylvia Hsieh, *Tobacco Giant Smoked for \$28 Billion*, LAW. WEEKLY USA, available at <<http://www.lawyersweeklyusa.com/lotypiuze2002.cfm>> (last visited Mar. 3, 2005) (describing how Piuze had lobbied for a “decade” to repeal section 1714.45, and succeeded “when the state Attorney General's Office wanted to join the national ‘grave train’ of suing the tobacco industry for the health costs of smoking”); see also Act of Sept. 29, 1997, §§ 1, 2, 1997 Cal. Legis. Serv. 570 (West) (codified at CAL. CIV. CODE § 1714.45 (West 2005)) (deleting “tobacco” from section 1714.45(a)(2) of the civil code, and restoring “common law rules with respect to the manufacture or sale of tobacco products by tobacco manufacturers and their successors in interest”).
20. See J. CLARK KELSO & KARI C. KELSO, AN ANALYSIS OF PUNITIVE DAMAGES IN CALIFORNIA COURTS, 1991-2000 16, tab. 9 (Capital Center for Government Law & Policy 2001) (showing 223 verdicts with punitive damages in 1991–95, with a mean punitive award of \$5,671,942, and 266 verdicts with punitives in 1996–2000, with a mean punitive award of \$19,273,391).
21. See discussion *supra* note 5.
22. See U.S. Chamber of Commerce, *supra* note 5, at 14 tab. 3, 17 tab. 5.
23. Campaign contributions from trial lawyers are as tabulated by the Civil Justice Association of California, see <<http://www.cjac.org/research/contributionsarchive.html>> (last visited Mar. 4, 2005); Press Release, *Personal Injury Lawyers' Political Spending Political Money a Shade under \$10 Million in 2001-02 Cycle* (Mar. 19, 2003) [hereinafter *Political Spending 2002*]; *California Statewide Races: Total Trial Lawyers Contributions 97-98*, at <<http://www.cjac.org/research/contributions98/sw123198.pdf>> (last visited Mar. 4, 2005) [hereinafter *California Statewide Races 97-98*].
24. See *id.*; *Political Spending 2002*, *supra* note 23; *Trial Lawyer Campaign Spending Update*, available at <<http://www.cjac.org/research/contributions030204.pdf>> (last visited Mar. 4, 2005) (showing Davis and Lieutenant Governor Cruz Bustamante receiving over \$1.6 million for the reporting period January 1, 2003, through March 2, 2004).
25. See *Political Spending 2002*, *supra* note 23; *Campaign Contributions 2000*, at <<http://www.cjac.org/research/contributions110700.pdf>> (last visited Mar. 4, 2005).

26. See Walter Olson, *The Shakedown State*, WALL ST. J., July 22, 2003.
27. See Walter Olson, *Stop the Shakedown*, WALL ST. J., Oct. 29, 2004.
28. See *id.*
29. See Carolyn Said, *Citizens' Right to Sue Limited*, S.F. CHRON., Nov. 4, 2004, at C1.
30. See *Insurance Claims Practices. Civil Remedy Amendments. Referendum*, at <<http://primary2000.ss.ca.gov/VoterGuide/Propositions/31analysis.htm>> (last visited Mar. 5, 2005); Catherine Bridge, *Voters Spank Trial Lawyers, Judiciary*, RECORDER, Mar. 9, 2000, at 1.
31. Proposition 65, The Safe Drinking Water and Toxic Enforcement Act, was enacted in 1986 and codified at CAL. HEALTH & SAFETY CODE § 25249 (West 2005); see § 25249.7(d); *Proposition 65's Effect on Small Businesses, 1999: Hearing Before the House Comm. On Small Business, 1999 WL 983519 (F.D.C.H.)* (Oct. 29, 1999) (statement of Jeffrey B. Margulies, Haight, Brown & Bonesteel, LLP), available at <<http://www.calprop65.com/docs/margulies.doc>> (last visited Mar. 5, 2005) [hereinafter "Margulies testimony"].
32. PEW PCB Study Reveals NGO Strategies for 2004 & Beyond, at <<http://www.fisheries.ifcnr.com/>> (last visited Mar. 5, 2005); see also Margulies testimony, *supra* note 31.
33. See Dominica C. Anderson & Kathryn L. Martin, *The Asbestos Litigation System in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis*, 45 SANTA CLARA L. REV. 1, 1-2 (2004).
34. Compare *Graham v. DaimlerChrysler*, 101 P.3d 140, 149 (Cal. 2005) ("We continue to conclude that the catalyst theory, in concept, is sound."), with *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources* 532 U.S. 598, 600 (2001), and *Graham*, 101 P.3d at 161 (Chin, J., dissenting) ("This court has never awarded attorney fees to a party with no judicial ruling in its favor. We should not start now. . . . [The majority] adopts the so-called catalyst theory, a theory that was once prevalent in federal courts, but that the United States Supreme Court has now repudiated. We should not resurrect it.").
35. *Insurers' Rate Hikes Hammer Builders*, SACRAMENTO (Cal.) BUS. J., May 2, 2003, at 1.
36. *Id.*
37. See Kelly Zito, *Insurance Nightmare: Flood of Lawsuits Alleging Defective Construction Leaves Builders Scrambling to Find Coverage for New Projects*, S.F. CHRON., July 11, 2002, at B1 (noting that in 2000, insurers collected \$15.2 million in premiums from contractors' liability policies in California and paid out \$44.8 million, for construction defects as well as other types of losses) (citing information from the Insurance Services Office, Inc., which provides research for insurance companies). By comparison, insurers in 1998 collected \$19.3 million and paid out about \$36 million; *i.e.*, they paid out \$1.87 for every dollar they took in. See *id.*
38. Twenty to thirty licensed California insurers offered defect-liability coverage in 1998. See *Insurers' Rate Hikes Hammer Builders*, *supra* note 35, at 1 (quoting Mark Sektnan, assistant vice president of the western region for the American Insurance Association in Sacramento). "There are a small handful of insurers that will provide programs," Greg Van Ness, managing director of Acordia of California Insurance Services Inc. in Rancho Cordova, California, told local media. *Id.*; see Sue McAllister, *Law Spurs Condo Construction*, CONTRA COSTA TIMES (Cal.), Nov. 12, 2004, at F4. Cf. Melissa C. Tronquet, *There's No Place Like Home. . . Until You Discover Defects: Do Prolitigation Statutes Relating to Construction Defect Cases Really Protect the Needs of Homeowners and Developers?*, 44 SANTA CLARA L. REV. 1249, 1250 (2004) (discussing the impact of the flood of litigation against the construction industry, which has been "particularly pronounced" in California).
39. See Zito, *supra* note 37, at B1.
40. See *Homeless Masses*, ECONOMIST, July 12, 2003 (explaining that an "epidemic of lawsuits over construction defects [has] made some housing uninsurable. A particular target has been condominiums—jointly owned apartment blocks that are a useful way of putting more people in a limited space."); see Zito, *supra* note 37, at B1 (quoting San Francisco attorney Tyler Berding and Phil Serna, spokesman for the Home Builders Association of Northern California).
41. See *Homeless Masses*, *supra* note 40 (citing U.S. Census Bureau figures released July 2003).
42. *Id.*
43. See Roger Dunstan & Jennifer Swenson, CONSTRUCTION DEFECT LITIGATION AND THE CONDOMINIUM MARKET 3 (1999), available at <www.library.ca.gov/crb/99/notes/v6n7.pdf> (last visited Mar. 4, 2005).
44. California state law gives homeowners associations the right to make claims on behalf of all owners in their communities. Davis-Stirling Common Interest Development Act, CAL. CIV. CODE §§ 1350-76 (West 2005); see also Tronquet, *supra* note 38, at 1261-1262 & nn.95, 96 (discussing evolution of condominium construction-defects claims).
45. See *Homebuilders fighting defect lawsuits get aggressive*, SACRAMENTO (Cal.) BUS. J., Apr. 30, 2004, at 3.
46. Miller Law Firm, Welcome, at <<http://www.constructiondefects.com>> (last visited Mar. 4, 2005).
47. See, e.g., CAL. CIV. PROC. CODE §§ 337, 337.1, 337.15 (West 2005); see also Tronquet, *supra* note 38, at 1255 n.45; Cynthia Kroll et al., *The Impact of Construction Defect Litigation on Condominium Development*, CPRC BRIEF, Oct. 2002, at 22 & tbl. 2 (Cal. Pol'y Res. Center 2002), available at <http://www.novoco.com/Research_Center/Defect_Litigation_Effects.pdf> (last visited Mar. 4, 2005). See generally RESTATEMENT OF TORTS (THIRD): PRODUCTS LIABILITY § 1 (1997); Tronquet, *supra* note 38, at 1257.
48. See *Homebuilders Fighting Defect Lawsuits Get Aggressive*, *supra* note 45, at 3; Melanie Payne, *Contractors, Lawyers Square Off*, SACRAMENTO (Cal.) BEE, Apr. 4, 2004, at D1.
49. See *Homebuilders Fighting Defect Lawsuits Get Aggressive*, *supra* note 45, at 3.
50. See *id.*; *Homebuilders Create New Liability Insurance Options*, SACRAMENTO (Cal.) BUS. J., Apr. 30, 2004, at 8.
51. See *Homebuilders Fighting Defect Lawsuits Get Aggressive*, *supra* note 45, at 3.
52. S.B. 800, 2001-02 S. (Cal. 2002), codified at CAL. CIV. CODE §§ 895-945.5, 1375 (West 2005).
53. See McAllister, *supra* note 38, at F4 (quoting Michelle Wolkoy of Hanley Wood Market Intelligence, a research organization used by home builders, and Roger Menard, president of Summerhill Homes in Palo Alto, California, on increase in condominium construction). Sales for new condos in metro areas throughout California were up 80 percent in 2004 over 2002 sales, and sales of condos accounted for 17 percent of all new homes sales in the first three quarters of 2004, compared with just 8 percent in all of 2002. See *id.* (citing Hanley Wood research). Nevertheless, minimum insurance on a \$1.5 million, three-unit condo development in San Francisco's Mission District would run about \$250,000, twice what it would have been several years ago. See Zito, *supra* note 37, at B1 (quoting Hugh Coyle, a broker at Willis Insurance Services in San Francisco).
54. See S.B. 800, *supra* note 52, at 895(f).
55. Andrew LePage, *Home Building Soars in State*, SACRAMENTO (Cal.) BEE, Jan. 30, 2004, at D2.
56. See Tamara L. Boeck & Linda M. Boldau, *Underlying Exposures in Mold Claims: What Are the Damages?*, 70 DEF. COUNS. J. 218 (2003).
57. See Zito, *supra* note 37, at B1; MANHATTAN INSTITUTE, TRIAL LAWYERS, INC.: A REPORT ON THE LAWSUIT INDUSTRY IN AMERICA 2003 14-15 (2003), available at <<http://www.triallawyersinc.com>> (last visited Mar. 4, 2005); THE GROWING HAZARD OF MOLD LITIGATION, MANHATTAN INST. CIV. JUST. REP. NO. 8 (2003), available at <<http://www.instituteforlegalreform.org/resources/ILRmold.pdf>> (last visited Mar. 4, 2005).
58. See INSURANCE INFORMATION NETWORK OF CALIFORNIA, CALIFORNIA WATER DAMAGE CLAIMS, 1997-2001 (2002), available at <<http://www.iinc.org/news/home/waterdamage.html>> (last visited Mar. 4, 2005).
59. Dean Calbreath, *Cost of Homeowner Insurance Rising Fast: Officials Seek Ways to Safe-*

- guard Coverage, SAN DIEGO UNION-TRIB., Feb. 7, 2003, at C1.
60. A.B. 108, 2005-06 Assem., Reg. Sess. (Cal. 2005) (introduced by Assembly Member Houston, Jan. 11, 2005) (requiring certain disclosures by attorneys in advertising for construction-defects litigation); A.B. 406, 2005-06 Assem., Reg. Sess. (Cal. 2005) (introduced by Assembly Member Hayes, Feb. 15, 2005) (addressing prelitigation procedure for construction defects in homes sold before 2003).
61. See Jeff Chorney & Jahna Berry, *Last Minute Spending Spree: Plaintiffs' Lawyers Are Opening Their Wallets in Effort to Keep Democrat in Governor's Office*, RECORDER, Oct. 7, 2002, available at <<http://www.law.com/>> (last visited Mar. 4, 2005); S.B. No. 796 (introduced by Sen. Dunn, filed Oct. 12, 2003), codified at CAL. LABOR CODE §§ 2698 et seq. (West 2005); see also Robert Salladay & Evan Halper, *Governor Angered by 'Chaos' Over Budget; Schwarzenegger Berates Democrats but Prods the GOP Too, Dissolving a Veneer of Cooperation*, L.A. TIMES, July 16, 2004, at 1A.
62. See CAL. LABOR CODE §§ 2699(c) (West 2005); see also Pillsbury Winthrop LLP, "We're Not in Kansas Anymore": *California Employment Law for the Non-California Employer - Part 1*, MONDAQ BUS. BRIEFING, Feb. 15, 2005.
63. See Morrison & Foerster LLP, "Sense and Sensibility": *Legislative Amendments to the California Labor Code's Private Attorneys General Act (8/04)*, MONDAQ BUS. BRIEFING, Sep. 9, 2004 (on flurry of lawsuits); Mark E. Terman, *New Year Will Ring in New Employment Laws: Here's How You Can Make Sure You're in Compliance*, Vol. 6, No. 73 CAL. CPA, Dec. 1, 2004, at 22 (on type-size suits).
64. See Andrew Simons, *Labor Litigation Landslide Hits L.A. Entertainment Companies: Up Front*, L.A. BUS. J., June 14, 2004, at 11.
65. See Senate Bill 1809 (amending CAL. LABOR CODE §§ 98.6 and 2699 and repealing § 431); Dale Kasler, *Labor Law Was Budget Blocker: Compromise on 'Sue Your Boss' Provisions Is Meant to Ward Off Nuisance Complaints*, SACRAMENTO BEE, July 29, 2004, at D1; Michael A. Hood, *New Laws That Will Impact California Employers in 2005*, ORANGE COUNTY BUS. J., Dec. 6, 2004, at 26.
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68. See CAL. LABOR CODE § 227.3 (West 2005); James J. McDonald, *Wage-Hour Law for Law firms: the risks are increasing*, ORANGE COUNTY LAW., Mar. 2001.
69. See CAL. LABOR CODE § 221 (West 2005); Hudgins v. Neiman Marcus Group, Inc., 41 Cal. Rptr. 2d 46 (Cal. App. 1995).
70. See CAL. ADMIN. CODE tit. 8, § 11010 ¶ 5 (West 2005).
71. See McDonald, *supra* note 68; CAL. LABOR CODE § 350 (West 2005); A.B. 2509 (introduced by Assemblyman Steinberg, filed Sept. 29, 2000); see *Exotic Dancers Alliance, Accomplishments*, at <<http://www.eda-sf.org/>> (last visited Mar. 2, 2005).
72. Ogletree, Deakins, Nash, Smoak & Stewart, P.C., *Court Upholds \$5 Million Award in Age Bias Case*, CAL. EMP. L. LETTER, July 7, 2003; see Alch v. Superior Ct., 19 Cal. Rptr. 2d 29 (Cal. App. 2004); Herr v. Nestle USA Inc., 135 Cal. Rptr. 2d 477 (Cal. App.), *rev. denied* (Cal. 2003).
73. Lyle v. Warner Bros. Television Prods., 12 Cal. Rptr. 3d 511 (Cal. App.), *rev. granted & opinion superseded*, 16 Cal. Rptr. 3d 331 (Cal. 2004); see *California Supreme Court to Review Sexual Harassment Claim of "Friends" Writers' Assistant*, ENT. L. REP., Oct. 2004.
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75. CALIFORNIA BUSINESS ROUNDTABLE, CALIFORNIA COMPETITIVENESS PROJECT: ASSESSMENT OF CALIFORNIA COMPETITIVENESS (2004), available at <<http://www.cbtr.org/economy.html>> (last visited Mar. 4, 2005).
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78. See Stender v. Lucky Stores, 803 F. Supp. 259 (N.D. Cal.1992).
79. Justin M. Norton, *Costco Latest in Wave of Gender Bias Suits*, RECORDER, Aug. 18, 2004, available at <<http://www.law.com/>> (last visited Mar. 5, 2005).
80. See Steven Malanga, *Class Action? Third Aisle to the Left*, WALL ST. J., June 29, 2004.
81. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 142, 187 (N.D. Cal.2004).
82. See Jim Copland, *These Actions Have No Class*, S.F. EXAMINER, Sept. 15, 2004.
83. See *id.*
84. See *id.*
85. See Malanga, *supra* note 80.
86. See JOHN H. BEISNER ET AL., ONE SMALL STEP FOR A COUNTY COURT... ONE GIANT CALAMITY FOR A NATIONAL LEGAL SYSTEM, MANHATTAN INST. CIV. JUST. REP. No. 7, at 8 (2003), available at <http://www.manhattan-institute.org/html/cjr_7.htm> (last visited Mar. 5, 2005) (noting that in aggregative litigation, attorneys "may pick and choose among the facts presented by the many plaintiffs in attempting to establish all the various elements of the claim and the jury is often left with the indelible impression that the collective evidence counsel offers satisfies each individual plaintiff's particular burden of proof").
87. See Victor E. Schwartz et al., *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. LEGIS. 494, 490-92 (2000).
88. 65 P.3d 1255 (Cal. 2003).
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90. PRICEWATERHOUSECOOPERS, 2003 PRICEWATERHOUSECOOPERS SECURITIES LITIGATION STUDY 7 (2004).
91. See *id.*; LAURA E. SIMMONS & ELLEN M. RYAN, CORNERSTONE RESEARCH, POST-REFORM ACT SECURITIES SETTLEMENTS, UPDATED THROUGH DECEMBER 2004 16 (2005).
92. Bernadette Tansey, *Rise in Biotech Lawsuits Industry Blames Law Firms Looking for New Targets*, S.F. CHRON., Jan. 26, 2004, at E1; Edward Iwata, *Bruised Cisco Faces Crucial Juncture on Road to Recovery*, USA TODAY, Dec. 31, 2001, at B1.
93. Simmons & Ryan, *supra* note 91, at 15.
94. See Nursing Home Pension Fund, Local 144 v. Oracle Corp., 380 F.3d 1226 (9th Cir. 2004); Brody v. Silicon Graphics Inc., No. C-96-0393-FMS (N.D. Cal. filed Jan. 29, 1996); Weinstein v. Nortel Networks Corp., No. 1:01-cv-01855-RMB-MHD (S.D.N.Y. filed Mar. 2, 2001).
95. Tansey, *supra* note 92, at E1 (reporting that PricewaterhouseCoopers reported that three times as many biotech firms were sued in 2003 as in 2001).
96. See *In re* Gilead Sciences Secs. Litig., No. C03-4999 MJJ, 2005 WL 181885 (N.D. Cal. Jan. 26, 2005); Whitkens v. Vaxgen, Inc., No. 3:03-cv-01129 (N.D. Cal. filed Mar. 17, 2003); *In re* CV Therapeutics, Inc. Secs., 59 Fed.R.Serv.3d 251, 2004 WL 1753251 (N.D. Cal. 2004); Laffin v. Cerus Corp., No. C 03-5517-JF RS., 2004 WL 3080344 (N.D. Cal. Mar. 22, 2004); *In re* Intermune, Inc. Secs. Litig., No. C 03-2954 SI., 2004 WL 1737264 (N.D. Cal. July 30, 2004).
97. Simmons & Ryan, *supra* note 91, at 14.
98. Robert Lenzner & Emily Lambert, *Mr. Class Action*, FORBES, Feb. 16, 2004, at 8; Neil Weinberg & Daniel Fisher, *The Class Action Industrial Complex*, FORBES, Sept. 20, 2004, at 150.

99. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 & 18 U.S.C.A.).
100. *Id.* at § 21D(b); § 21D(a)(3)(B)(i).
101. See James A. Kassis, *The Private Securities Litigation Reform Act of 1995: A Review of Its Key Provisions and an Assessment of Its Effects at the End of 2001*, 26 SETON HALL LEGIS. J. 119, 122-24 (2001).
102. See Tamara Loomis, *In Spite of Reform Law, Milberg Weiss Emerges as Winner in Securities Suits*, 229 N.Y.L.J., Apr. 22, 2003, at 1.
103. Tansey, *supra* note 92, at E1 (citing a report by NERA Economic Consulting).
104. See *id.* at E1 (“Silicon Valley executives accused the [Milberg Weiss Bershad Hynes and Lerach] firm of what they called ‘legal extortion.’ Dozens of companies settled shareholders suits, if only to avoid the expense of defending them.”); *Judge Compares Milberg Weiss Case to the Squeegee Man*, NEW YORK LAW., Apr. 18, 2002, available at <<http://www.nylawyer.com/news/02/04/041802e.html>> (last visited Mar. 5, 2005).
105. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) (concluding that the settlement value in securities fraud cases is not function of merit).
106. In a typical securities case, shareholders who bought or sold shares within the time period of the alleged fraud receive compensation from the company. Other shareholders, as owners of the company, by definition pay the money out to the claimants. Small investors who passively hold diversified portfolios of investments inevitably lose from such suits, given their transaction costs, if the suits do not actually deter misconduct.
107. See John Shinal, *Going Public Getting Harder as IPOs Become Costlier, Some CEOs Decide to Sell*, S.F. CHRON., Aug. 30, 2004, at C1 (reporting that accounting costs and liability insurance have increased “significantly”).
108. See *id.* (reporting on Mr. Carrier’s decision not to take Tickle, Inc. public and stating that “[a] growing number of entrepreneurs, faced with spiraling accounting costs and stiffer corporate governance rules, are choosing to keep their startups private or sell them to a rival rather than take them public”).
109. Matt Marshall, *VC Leaves Juniper Board, Blames New Rules*, (San Jose, Cal.) MERCURY NEWS, Apr. 12, 2004, at 1C.
110. See *Political Spending 2002*, *supra* note 23; *California Statewide Races 97-98*, *supra* note 23.
111. CalPERS’s investment portfolio market value was \$182.8 billion as of December 31, 2004, see *Facts at a Glance: Investments*, at <<http://www.calpers.ca.gov/eip-docs/about/facts/investme.pdf>> (last visited Mar. 7, 2005). CalSTRS’s investment portfolio market value was \$123.3 billion as of January 31, 2005, see *Current Investment Portfolio*, at <<http://www.calstrs.com/investments/Invport.aspx>> (last visited Mar. 7, 2005).
112. STEVEN SKALAK & DANIEL DOOLEY, PRICEWATERHOUSECOOPERS, SECURITIES LITIGATION UPDATE: THE PENSION FUND FACTOR 2 (2003).
113. Contributions data for Milberg Weiss come from the website of the California Secretary of State, at <<http://cal-access.ss.ca.gov/Campaign/>> (last visited Mar. 7, 2005).
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116. See Press Release, *At Urging of California Treasurer Angelides and CalPERS President Sean Harrigan, CalPERS Will Actively Oppose Controversial Merger of Wellpoint Health Networks, Inc. and Anthem, Inc.* (June 14, 2004), at <http://www.treasurer.ca.gov/news/releases/2004/061404_wellpoint.pdf> (last visited Mar. 7, 2005); Thomas J. Donahue, *CalPERS Needs Reforms*, S.F. EXAMINER, June 24, 2004, available at <http://www.uschamber.com/press/opeds/040624tjd_sanfran_op_ed.htm> (last visited Mar. 5, 2005) (“[S]tate Treasurer Phil Angelides[] appears to be exploiting the Safeway issue as a platform for his expected gubernatorial bid.”); *California State Treasurer’s Office: Holocaust* *Restitution*, at <<http://www.treasurer.ca.gov/holocaust/>> (last visited Mar. 7, 2005) (“California State Treasurer Phil Angelides has long been active in seeking reparations and justice for Holocaust survivors, both in his role as State Treasurer and as a member of the boards of the California Public Employees’ Retirement System (CalPERS) and the California State Teachers’ Retirement System (CalSTRS) . . .”).
117. Nicole Gelinis, *Corporate America’s New Stealth Raiders*, CITY J., Winter 2005, available at <http://www.city-journal.org/html/15_1_corporate_america.html> (last visited Mar. 5, 2005).
118. Lawrence J. McQuillan, Pacific Research Institute Briefing, *CalPERS’ Corporate Activism Does Not Help Shareholders or Pensioners*, Feb. 2005, at 2, available at <http://www.pacificresearch.org/pub/sab/entrep/2005/pension_brief.pdf> (last visited Mar. 7, 2005).
119. Anthony P. Archie & Lawrence J. McQuillan, Pacific Research Institute, *Flawed and Outdated Public-Pension System Earns California Golden Fleece Award*, CAL. GOLDEN FLEECE AWARDS NO. 10 (2005), at <http://www.pacificresearch.org/centers/cfe/cgfa/cgfa_10.html> (last visited Mar. 3, 2005).
120. See McQuillan, *supra* note 118, at 1.
121. See Theo Francis & Vanessa Fuhrmans, *Class-Action Threat Added to Challenges Facing the Insurers*, WALL ST. J., Oct. 20, 2004, at C1.
122. See Angela R. Thompson, *United States: Insurance Industry Under Fire over Bid-Rigging and Contingent Commissions*, JORDAN BURT LLP/MONDAQ, Oct. 28, 2004, at <<http://www.mondaq.com/>> (last visited Mar. 7, 2005).
123. See website of the California Secretary of State, *supra* note 113.
124. AMERICAN TORT REFORM FOUNDATION, JUDICIAL HELLHOLES 31 (2004); AMERICAN TORT REFORM ASSOCIATION, BRINGING JUSTICE TO JUDICIAL HELLHOLES 11 (2003); BRINGING JUSTICE TO JUDICIAL HELLHOLES 5 (2002)].
125. See U.S. Chamber of Commerce, *supra* note 6, at 17 tab. 5.
126. See Kenneth Reich, *\$700 Million Award May Be Reduced: Judge’s Remarks in Lockheed Workers Case Against Oil Firms May Be Focus of Review, Experts Say*, L.A. TIMES, Aug. 10, 1998, at B1.
127. See Arnold v. Ashland Chemical Co., No. B121434, 2000 WL 1094103, at 4 (Cal. App. 2 Dist. Feb. 18, 2000).
128. See *id.* at 17.
129. See Gary Gentile, *GM Appeals Billion-Dollar Verdict in Crash Case. Courts: Original Award Was \$4.9 Billion in the Fiery Malibu Accident*, ORANGE COUNTY REGISTER, Dec. 7, 2000, available at 2000 WL 29972745.
130. See *id.*; Fred J. Heistand, *Courts Out of Step with Common Sense*, BUSINESS PRESS (Ontario, Cal.), Mar. 6, 2000, at 27; *Opportunity to Right a Wrong Missed by Judge Ruling on GM Damage Award*, L.A. DAILY NEWS, Sept. 2, 1999, at N1.
131. See *id.*
132. See *Bullock v. Philip Morris Inc.*, No. BC 249 171 (L.A. Super. Ct., Oct. 4, 2002).
133. See *Boeken v. Philip Morris Inc.*, No. BC 226593 (L.A. Super. Ct., June 6, 2001).
134. See Mike McKee, *Court Chops More off \$3 Billion Award in Philip Morris Case*, RECORDER, Sept. 22, 2004, available at <<http://www.law.com/>> (last visited Mar. 7, 2005); Dan Ackman, *In L.A., Smoker Gets \$28 Billion, Er, Million*, FORBES.COM, Dec. 19, 2002, at <http://www.forbes.com/2002/12/19/cx_da_1219topnews.html> (last visited Mar. 7, 2005).
135. See Penni Crabtree, *\$4.1 Million Awarded in Retail Ephedra Case*, SAN DIEGO UNION-TRIB., Aug. 26, 2004, at C1.
136. *Id.*
137. See DANIEL KLERMAN, AMERICAN TORT REFORM ASSOCIATION, A LOOK AT CALIFORNIA JURIES: PARTICIPATION, SHORTCOMINGS, AND RECOMMENDATIONS (2002); Robert D. Crockett & Jonathan M. Jenkins, *Taking It to the Bank*, L.A. LAW., Sept. 2001, at 47, 49.
138. *Judge Compares Milberg Weiss Case to the Squeegee Man*, *supra* note 104; cases are listed

- at Lerach's firms' website, under "Prominent Cases," at <<http://www.lerachlaw.com>> (last visited Mar. 7, 2005) (listing *In re* NASDAQ Market-Makers Antitrust Litig., MDL 1023 (S.D.N.Y.) (\$1.027 billion); *In re* American Continental Corp./Lincoln Savings & Loan Sec. Litig., MDL 834 (D. Ariz.) (\$1 billion); *Cordova v. Liggett Group, Inc., et al.*, No. 651824 (Cal. Super. Ct., San Diego County), and *People v. Philip Morris, Inc., et al.*, No. 980864 (Cal. Super. Ct., San Francisco County) (\$26 billion); *In re* Exxon Valdez, No. A89 095 Civ. (D. Alaska), and *In re* Exxon Valdez Oil Spill Litig., 3 AN 89 2533 (Alaska Super. Ct., 3d Jud. Dist.) (\$5 billion); *In re*: The Prudential Insurance Company of America Sales Practices Litigation, 962 F. Supp. 450 (D. N.J. 1997) (\$1.2 billion)).
139. See *In re* Diet Drugs (*Phentermine / Fenfluramine / Dexfenfluramine*) Products Liability Litigation, MDL No. 1203 (E.D. Pa. Feb. 5, 1998) (ordering Elizabeth J. Cabraser lead counsel); *Top 100 Lawyers*, CALIF. DAILY J., Sept. 30, 2002, at <http://www.lieffcabraser.net/ejc_top_100.htm> (last visited Mar. 7, 2005); *Dow Chemical's Hatch?*, RECORDER, July 9, 1998, available at <<http://www.lieffcabraser.com/news1998.htm>> (last visited Mar. 7, 2005).
140. See 222 F.R.D. at 142.
141. See Bullock, *supra* note 132; Boeken, *supra* note 133.
142. See <<http://www.girardikeese.com/>> (last visited Mar. 7, 2005) ("We have successfully recovered over \$1 billion against the largest companies in the world . . ."); Kathleen Sharp, "Erin Brockovich": The Real Story, SALON.COM, Apr. 14, 2001, at <<http://archive.salon.com/ent/feature/2000/04/14/sharp/index.html>> (last visited Mar. 7, 2005).
143. See The Miller Law Firm, Thomas E. Miller Senior Partner, at <http://www.constructiondefects.com/fi_profiles.asp> (last visited Mar. 7, 2005) ("Since 1981, Miller has exclusively represented homeowners associations in construction defects and land subsidence claims. A pioneer in his field, he has recovered over \$350 million for his association clients including 75 settlements and verdicts over \$1 million.").
144. See Press Release, *supra* note 116; Donahue, *supra* note 116; *California State Treasurer's Office*, *supra* note 116.
145. *California Statewide Races 97-98*, *supra* note 23; *Political Spending 2002*, *supra* note 23.
146. See *Trial Lawyer Campaign Spending Update*, *supra* note 24.
147. See Jeff Chorney, *Arnold's Agenda*, RECORDER, June 16, 2003, available at <<http://www.law.com/>> (last visited Mar. 7, 2005).
148. Daniel Weintraub, *It's Not Perfect, But Workers' Comp Deal Works*, OAKLAND TRIB., Apr. 20, 2004, at Op-Ed.
149. See Excerpts of Governor Schwarzenegger's Remarks at Workers' Compensation Bill Signing, Apr. 19, 2004, available at <<http://www.governor.ca.gov/>> (last visited Mar. 6, 2005).
150. See 2004 Cal. Legis. Serv. Ch. 34 (S.B. 899) (West); CAL. LABOR CODE § 139.48 (West 2005); Weintraub, *supra* note 148.
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155. See Victor E. Schwartz et al., *New California Law Grants State 75% of Punitive Damage Award*, Washington Legal Foundation Legal Opinion Letter, Sept. 3, 2004, available at <<http://www.wlf.org/upload/090304LOLSchwartz.pdf>> (last visited Mar. 7, 2005).
156. See Political Spending 2002, *supra* note 23; *Governor Signs Bill Adopting Court Budget Reform, Giving State Share of Punitive Damages*, METROPOLITAN (L.A.) NEWS ENTERPRISE, Aug. 18, 2004, at 1, available at <<http://www.metnews.com/articles/2004/bill081804.htm>> (last visited Mar. 7, 2005); Schwartz et al., *supra* note 155, at 2.
157. See *id.*
158. See Olson, *supra* note 26.
159. Statement of John Sullivan, President, Consumer Attorneys of California (Mar. 3, 2005).
160. Website of the California Secretary of State, *supra* note 113.
161. *Id.*
162. See Said, *supra* note 29, at C1.
163. See Justin Scheck, *Another Appeal Court Says Prop 64 Retroactive*, RECORDER, Feb. 11, 2005.
164. See Anderson & Martin, *supra* note 33, at 1-2.
165. See *id.* at 39-40.
166. See Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005); see also Stephanie Mencimer, *Backlog or Backfire?*, AM. PROSPECT ONLINE, Feb. 16, 2005, available at <<http://www.prospect.org/>> (last visited Mar. 7, 2005).
167. *Compare* Blue Chip Stamps v. Superior Court, 18 Cal.3d 381 (1976) (determining that a grant of class certification is not a final order and not appealable, only challengeable with a writ of mandamus), with 28 U.S.C. § 1292(f) (2005) (providing for interlocutory appeal of class certifications in federal court), and Ill. S. Ct. R. 307(a)(8) (2005) (same for Illinois courts).
168. See Lester Brickman et al., MANHATTAN INSTITUTE RESEARCH MEMORANDUM (1994).
169. See Walter Olson, *Loser Pays Overview*, POINTOFLAW.COM, May 21, 2004, at <<http://www.pointoflaw.com/loserpays/overview.php>> (last visited Mar. 7, 2005).
170. Stas. 1975, 2nd Ex. Sess., c. 1.
171. See Trial Lawyers, Inc., *supra* note 57, at 12.
172. See Press Release, *President Discusses Medical Liability Reform*, Jan. 5, 2005, at <<http://www.whitehouse.gov/news/releases/2005/01/20050105-4.html>> (last visited Mar. 7, 2005).
173. See NICHOLAS M. PACE ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, CAPPING NON-ECONOMIC AWARDS IN MEDICAL MALPRACTICE TRIALS: CALIFORNIA JURY VERDICTS UNDER MICRA xvii (2004).
174. See *id.*
175. 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) [hereinafter NAIC Profitability Index].
176. Pace et al., *supra* note 173, at 38, fig. 4-2.
177. *Id.* at 20-21.
178. *Id.* at 38, fig. 4-2.
179. *Id.* at 39, tab. 4-1; Curtis E. Harris, *Limits in MICRA Tort Reform Felt Mostly by Lawyers—Not Patients*, at <<http://www.ama-assn.org/amednews/2005/01/17/edlt0117.htm#1>> (last visited Mar. 7, 2005) ("Based on my calculations, the average net capped award received by 97% of the patients reported was reduced by only 7.5%, and in most cases even less than that.").
180. Pace et al., *supra* note 173, at 36, fig. 4-1.

Graphs

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Changes in U.S. Tort Costs and GDP, 1950-2003. See U.S. TORT COSTS: 2004, *supra* note 1, at 13, app. 1A.

Trial Lawyers, Inc. 2003 U.S. Revenues vs. Select High-Margin California Businesses. For the calculation of Trial Lawyers, Inc. revenues, see *supra* note 1. The five companies selected for comparison are the largest California companies in the Fortune 500 that also meet high-margin, high-growth screens—given Trial Lawyers, Inc.'s high growth

Other Resources

California

Civil Justice Association of California

John H. Sullivan, President
www.cjac.org, (916) 443-4900

California Citizens Against Lawsuit Abuse

www.cala.com

Pacific Research Institute

Sally C. Pipes, President and CEO
www.pacificresearch.org, (415) 989-0833

National

Manhattan Institute Center for Legal Policy

James R. Copland, Director
Peter W. Huber, Senior Fellow
Walter K. Olson, Senior Fellow
www.manhattan-institute.org/clp, (212) 599-7000

American Justice Partnership

Dan Pero, President
www.americanjusticepartnership.com, (517) 371-5256

American Legislative Exchange Council

Civil Justice Task Force
Kristin Armshaw, Director
www.alec.org, (202) 466-3800

American Tort Reform Association

Sherman Joyce, President
Victor E. Schwartz, General Counsel
www.atra.org, (202) 682-1163

Common Good

Philip K. Howard, Founder and Chairman
www.cgood.org, (212) 576-2700

Federalist Society for Law and Public Policy Studies

Leonard Leo, Executive Vice President
www.fed-soc.org, (202) 822-8138

National Association of Manufacturers

John Engler, President
www.nam.org, (202) 637-3000

RAND Institute for Civil Justice

Robert T. Reville, Director
www.rand.org/icj, (310) 451-6979

U.S. Chamber of Commerce Institute for Legal Reform

Lisa A. Rickard, President
www.legalreformnow.com, (202) 463-5724

Washington Legal Foundation

Daniel J. Popeo, Chairman and General Counsel
www.wlf.org, (202) 588-0302

Other Individual Experts

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Richard A. Epstein, University of Chicago Law School
(773) 702-9563

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(203) 432-1630

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(617) 496-0019

and presumed profitability—as defined by the following criteria: (1) ten-year revenue growth exceeds 10 percent per year; and (2) either the current profit margin exceeds 10 percent or the current price-earnings ratio exceeds 20 (the latter for companies with a currently bad business cycle but high market expectations). Revenues for each company are for 2003, as reported by *Fortune* magazine, *The 2004 Fortune 500*, FORTUNE (Apr. 5, 2004), available at <<http://www.fortune.com/fortune/fortune500>> (last visited Mar. 3, 2005).

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California Has More Lawyers than the Biggest (Non-U.S.) G-7 Economies . . . The number of California lawyers in 2004 comes from the American Bar Association, *National Lawyer Population by State*, at <<http://www.abanet.org/marketresearch/2004nbrolawyersbystate.pdf>> (last visited Mar. 3, 2005) (measuring 2004 resident and active attorneys). For information on the California gross state product estimate, see *supra* note 3. International lawyer numbers are derived from the number of lawyers per 1,000 population, see *Snapshot of America*, U.S. NEWS & WORLD REP., June 28, 2004, at 40 (citing Frank B. Cross, *America the Adversarial*, VA. L. REV. 189, 198 (2003)), and country populations from THE WORLD FACTBOOK 2004, *supra* note 3, which is also the basis for international gross domestic product figures (purchasing power parity, 2003).

. . . *And Far More Lawyers per Capita.* International lawyers per capita are taken from *Snapshot of America*, *id.*, and California lawyers per capita from the American Bar Association, *id.* (2003 figures, listing the number of California lawyers as 134,468); and U.S. Census Bureau, at <<http://quickfacts.census.gov/qfd/states/06000.html>> (last visited Mar. 3, 2005) (estimating California's 2003 population at 35,484,453).

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California Jury Verdicts Have Exploded Since the Mid-1990s. Mean verdicts are calculated based on Bureau of Justice Statistics surveys for both 1996 and 2001. See discussion and citations *supra* note 5.

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California's Construction of New Homes Has Lagged Its Demand . . . Annual State and Metro Building Permits (1998-2004), National Association of Home Builders (2004), at <<http://www.nahb.org/>> (last viewed Mar. 3, 2005) (combined single-family and multi-family figures). The cumulative shortfall is calculated based on an assumed need of 230,000 units annually, see THE ECONOMIC BENEFITS OF HOUSING IN CALIFORNIA, SACRAMENTO REGIONAL RESEARCH INSTITUTE 23 (2004)(citing California Department of Finance).

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Securities Class Action Filings, 1996-2004. See CORNERSTONE RESEARCH, SECURITIES CLASS ACTION CASE FILINGS, 2004: A YEAR IN REVIEW 13, exh. 12 (2005).

Securities Class Action Settlements, 1996-2003. See LAURA E. SIMMONS & ELLEN M. RYAN, CORNERSTONE RESEARCH, POST REFORM-ACT SECURITIES LAWSUITS: SETTLEMENTS REPORTED THROUGH DECEMBER 2003 16, fig. 16 (2004).

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Public Pension Funds Have Increasingly Begun to Lead Securities Class Action Litigation. See Skalak & Dooley, *supra* note 112, at 2.

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California Taxpayers Are Paying a Steep Price for CalPERS's Mismanagement. See Archie & McQuillan, *supra* note 119.

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California Medical Malpractice Premiums Have Grown Much More Slowly than Those in the Rest of the U.S. NAIC Profitability Index, *supra* note 175.

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