

LEADERSHIP IN CHALLENGING TIMES:



**Assaults on the Public Interest through Abuses in American
Jurisprudence
*Ailments, Pain Relievers, and Cures***

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*Directors Roundtable and National Law Journal Honorarium
March 29, 2006*

┆ Prologue

After nearly 40 years of experience in the legal profession, it's a good time to reflect on where we are today in American jurisprudence. Our legal profession, a favorite and frequent target of critics, is much maligned and largely unfairly so, in my view. When you look around at who has rolled up his or her sleeves in furtherance of the public interest, in our communities, in civic, charitable, religious, governmental and philanthropic pursuits, very often the "do-gooder" is a lawyer or a lawyer's spouse. Those of us in the legal profession should be proud of that.

Yet, there's a cancer spreading across America adversely impacting the long term interests of our legal profession and more importantly, our system of jurisprudence and the well-being of America. Our society is languishing in litigiousness. In fact, the United States has the distinction of being the most litigious country in the world with one lawyer per every 300 citizens. Higher pursuits have been sacrificed in counterproductive judicial and other legal proceedings, too often spawned by an avaricious plaintiffs' bar in hot pursuit of their next class action or other target. The broad public interest suffers in so many ways, begging for relief . . . in the form of civil justice reform, the topic I've chosen to address with you this morning.

┆ Civil Justice Reform

Civil justice reform is, and should be, an important focus on the national agenda for lawmakers and legal practitioners alike. The plaintiffs' bar is abusing our civil justice system, resulting in adverse impacts on the public interest that are causing broad grassroots and bipartisan attention. Lawsuits are being filed against companies on frivolous or marginal grounds. Class actions force large settlements, and individual suits raise concerns of excessive damage awards. Too often, class lawsuits do not arise out of an intent to remedy wrongs, but rather an intent to exact or extort settlement monies. Defendants succumb to settlements not because they

are guilty of proximate wrongdoing, but because they want to avoid the costs of litigation, the risks of large judgments, and the risk of bad press even more harmful to customer and investor relations than the settlement payoffs. Far truer today than in his day and certainly prophetic are the words of Oliver Wendell Holmes, Jr.: “Lawyers spend a great deal of their time shoveling smoke.”

While I make no apologies for picking on the avaricious plaintiffs’ bar, and with all due respect to well-intentioned friends in the defense bar, the fact is . . . they too profit from this ailing system of American jurisprudence. When the plaintiffs’ bar pounds on the front doors of corporate America, the defense bar (with the able assistance of inside counsel) swarms in the back door . . . trial lawyers from both camps profit.

Indeed, civil lawsuits against corporate entities can and do serve legitimate purposes and some grass-roots consumer outrage is warranted. The corporate community shares some blame for compromising principles of integrity and good governance. SOX at an estimated compliance cost of approximately \$1 million per billion* of annual revenue may be unduly expensive and unduly burdensome.¹ In fact, at a recent roundtable of chief information officers, there was a chorus of consensus that SOX compliance and cost/benefit shortfalls have been their “biggest headaches;”² but even so, SOX has heightened awareness and should deter improper conduct. What is of paramount concern today is the fact that money, primarily in the form of legal fees for plaintiffs’ counsel, is the primary driver of litigation, subjecting the system to abuse. In the immortal words of Benjamin Franklin: “A countryman (or corporation) between two lawyers is like a fish between two cats.”

To be sure, some reform is underway. However, the need for wider recognition and responsive action in the face of the growing momentum of such harmful practices is compelling. Lawsuit abuse is bad for businesses, employees,

* More for small cap companies.

stockholders, consumers, and the nation's ability to compete in the world marketplace. Taxpayers bear the costs of clogged courts and justice suffers. "Due process of law" has become "overdue process of law." What are needed are effective protocols at the federal and state levels. The legal system requires certain evidentiary process and proof, and such requirements have to be enforced in order to maintain stringent standards barring frivolous lawsuits that compensate plaintiffs regardless of liability or actual degree of injury. The current liability system places excessive burdens on responsible defendants, including pharmaceutical companies, the healthcare delivery system, science and technology companies, manufacturers, professionals and others. Simply stated . . . better oversight by judges and legislation to assure adequate public interest safeguards are needed.³

I'd be remiss if I did not mention another unhealthy ailment afflicting our public interest--one that deserves an address in and of itself. In fact, former Solicitor General Ted Olson spoke on this subject as the luncheon speaker a year ago in Washington, D.C. at a day's symposium on the "Erosion of the Attorney-Client Privilege"* held by the Atlantic Legal Foundation, which I have served as Chairman for the past eight years or so. The attorney-client privilege and work product doctrine have been under siege. These bulwarks of American jurisprudence need to be protected. Too often waivers forced upon defendants by the government, in civil as well as criminal proceedings, put information in the hands of the plaintiffs' bar, which then uses it to exact extortionate settlements. Entities are deemed to have waived their attorney-client work product privilege vis-à-vis third parties when they produce documents in the course of agency investigations. Fortunately, some courts have recognized this erosion and have ruled that such privileges are not waived when documents are given to the SEC, for example, in the course of its fraud

* A valuable CD of the proceedings is available at modest cost from the Atlantic Legal Foundation located at 60 East 42nd Street, Suite 2102, New York, New York 10165, *also available at* www.atlanticlegal.org.

investigations.⁴ According to yesterday's Compliance Week report, the U.S. sentencing commission is considering relaxing the rule that makes waiving the privilege a factor in determining whether a business under investigation is "cooperative" and deserves leniency.⁵

┆ Defining the Problem – Ailments Afflicting the Public Interest

The American tort liability system is the most expensive in the world, with total costs more than double the average of other industrialized nations. A recent study conducted by Tillinghast-Towers Perrin found that the U.S. tort system cost \$260 billion in 2004, which translates to \$900 per U.S. Citizen.⁶ This is almost a \$30 billion jump from 2003,⁷ and the study projects that costs will rise to \$315 billion by 2007, outpacing the expansion of the overall economy. According to a 2004 Business Roundtable survey, 24% of CEOs cited litigation costs as their company's greatest cost pressure.⁸ Major socially responsible companies have been forced into bankruptcy or are at risk. Class action plaintiffs receive less than 50 cents on every dollar actually awarded to them. The rest goes to cover administrative costs and attorneys fees, causing analysts at the prestigious RAND Institute in Santa Monica to conclude that class actions are frequently irrational and fail to accomplish the stated goals of such litigation.⁹ Class action abuses threaten our economic health and hurt consumers and businesses.

Another issue of concern is excessive damage awards in individual cases. In the recent infamous Vioxx case (August 2005), the jury awarded the individual plaintiff \$253.4 million, finding pharmaceutical company Merck & Co. negligent in the marketing and design of Vioxx and therefore liable for the death of plaintiff's husband who took Vioxx. \$229 million was the amount of punitive damages with \$24 million for mental anguish and loss of companionship. Because Texas law places caps on punitive damages to twice the amount of economic damages, the

damage award is likely to be cut to less than \$30 million, but still a staggering sum. This decision caused Merck's stock to fall 7.7%, erasing \$5.2 billion in market value. One cannot help but wonder whether this is just another battle between sound science and the plaintiffs' bar. Merck plans to appeal the decision, claiming its legal strategy will remain "based in sound science."¹⁰ Merck believes that unqualified expert testimony was allowed in its case—i.e., expert testimony not grounded in science. Many such prevailing but unfounded suits against pharmaceutical companies undermine public health and drive up insurance premiums and other business costs.

As an aside, the Atlantic Legal Foundation has been the progenitor changing American jurisprudence by combating junk science in the courts. Indeed, the trilogy of cases decided by the United States Supreme Court beginning with the famous Daubert case¹¹ followed by the Joiner¹² and Kumho Tire¹³ cases are all predicated on briefs submitted by the Atlantic Legal Foundation on behalf of a cadre of Nobel laureates who serve in a stable of amici for the Foundation. As a result, sound science is now fostered in federal and many state courtrooms across the United States. In most courts, plaintiffs can no longer retain so-called experts to testify on any given specious theory that might support the gravamen of their cases. Expert scientific or technological testimony must be peer reviewed and based upon an accepted methodology, viz. sound science, pursuant to a Daubert hearing before such testimony is allowed through the gate and into the courtroom.

So what lies ahead for Merck? Estimates of Merck's liability after the initial Vioxx decision range from \$4 billion to \$55 billion. With nearly 10,000 state and federal Vioxx-related lawsuits pending across the country, it has set aside a huge reserve to fight off these lawsuits.¹⁴ If Merck loses these cases, experts predict it will open the floodgates for more lawsuits and could force drug companies to settle or risk bankruptcy; and with it the carnage of lost jobs, lost tax revenues, investor losses,

diminution of competition, and the handicapping of these American businesses with higher costs of doing business, higher insurance premiums and consequentially higher prices for goods and services. Is this really in the public interest? The Natchez Democrat Editorial Board has recognized Mississippi's tort reform results, especially from the caps placed on medical malpractice damage awards. The state's insurance companies announced a 5% decrease in rates for the upcoming year along with a 10% refund on premiums from the current year.¹⁵

Much emphasis should be placed on public policy concerns in such cases. To be sure, the media reports bolster the public policy principle that it is irresponsible for companies to make profits by endangering lives. This public point of view should be balanced, however, with the fact that this type of litigation against pharmaceutical companies and other R&D companies can not only do irreparable damage to the defendant, or even put them out of business, but may inhibit other companies from the research and development of painkillers, other more crucial drugs, and life saving or serving products. Is this in the public interest?

Former staff counsel to the Senate Committee investigating the infamous Watergate break-in, Terry Lenzner, Chairman of Investigative Group International, undertook an in-depth investigation and study within the past few years in which he uncovered extensive collusion between short sellers and the plaintiffs' bar . . . a saprophytic relationship in which one fuels and nurtures the interest of the other. Short sellers may drive the price of a stock down creating an opportunity for the plaintiffs' bar to swoop in and sue for damages. Conversely, when a class action suit is filed, it often drives a company's stock price down, thereby profiting short sellers. This is a wrongful assault on America and its system of jurisprudence. Mr. Lenzner has testified before a Congressional committee on this abusive activity. We have seen, as evidenced by recent press reports, some serious attention given by our Department of Justice to questionable, if not nefarious, activities by one or more of

the more notorious plaintiffs class actions firms. Even the specter of RICO has been raised.¹⁶

Another manifestation of such abuse is the harm suffered by corporations and their stockholders where there is a precipitous drop in stock prices. As reported in the Wall Street Journal, corporations paid \$9.6 billion (up from \$2.9 billion in 2004) to shareholders to settle securities class actions lawsuits last year.¹⁷ This includes, perhaps well deserved in these cases, the \$6.1 billion paid out by WorldCom Inc. but not the \$7.1 billion announced last year and not yet paid in the Enron Corp. fraud scandal. Yet even without them, the remaining \$3.5 billion in settlements was the highest ever. Overall, out of 124 class action settlements last year, nine were for over \$100 million, the most in any year since the study began in 1997.¹⁸ The median payout in 2005 was about \$7.5 million and only two law firms dominated class action litigation—Lerach Coughlin Stoia Geller Rudman & Robbins, and Milberg Weiss Bershad & Schulman.

┆ Pain Relievers & Cures . . . Remedies Available Now, and Prospective Remedies

┆ Remedies Available Now

Efforts to limit lawsuit abuse are underway. While excessive damages awards are prevalent, changes to remedies laws are growing. Over 30 states have passed caps on damages. California, a state that has fostered state court class action claims, adopted the Medical Injury Compensation Reform Act of 1975 (MICRA). The Act places restrictions on medical negligence cases by limiting non-economic damages to \$250,000, allowing evidence of collateral source payments, limiting attorney contingency fees, and giving the respondent the option to make periodic payments of future damages. Although insurance rates for practitioners in California have escalated 245% in the first 27 years since MICRA's passage in 1975, this compares

favorably with the 750% mind-numbing increase in most other states throughout the nation.¹⁹ After MICRA, patients kept a higher percentage of smaller judgments. In fact, MICRA's success at containing medical malpractice liability costs has caught the attention of President Bush, who has urged such legislation as a model for reform at the national level. Reformers have also pushed ahead on other fronts in California. In 2004, Proposition 64 "reformed" California's notorious "Unfair Competition Law,"²⁰ by eliminating a provision that allowed suits to be filed without a client and without establishing actual injury. Two appellate courts have already ruled that the proposition applies retroactively to all pending litigation.²¹

A landmark decision handed down by the Illinois Supreme Court in August of 2005 redefined its state law governing class actions and damage awards when it held that plaintiffs failed to prove that State Farm Mutual Insurance Company had breached its insurance policies or that plaintiffs were damaged by it.²² The court reversed a \$1 billion plus damage award, finding, among other things, that the expert testimony estimating damages was too speculative and had too great of a potential for inaccuracy, thereby failing to support a damages award, and in fact constituting "an arbitrary deprivation of property in violation of . . . due process rights."²³

The Class Action Fairness Act was signed into law in March of 2005. In addition to placing restrictions on settlement terms, the Act pushes some new class action cases from state to federal court; federal courts effectively now have original jurisdiction over the most pervasive class actions. Congress enacted the Act to reduce abuses of the class action device that harms class members, adversely affects interstate commerce, and undermines public respect for the judicial system. Congress found that class members often receive little or no benefit from the class actions while the class lawyers are awarded large fees. And because state courts can act in ways that demonstrate bias against out-of-state defendants, plaintiffs' use of

state courts to prosecute class actions has harmed defendants. By moving most large, interstate class actions into federal courts, it prevents trial lawyers from forum shopping among state courts notoriously friendly to the plaintiffs' bar.

The changes made by the Act may be as to procedure and remedies, not substance, but in many circumstances, the practical protection for companies in federal courts, vis-a-vis more permissive state courts, can be quite significant. State courts often are more inclined to force settlements by allowing discovery demands which are so burdensome that corporate defendants willingly open their check books to avoid the burden. Corporate documents subject to discovery, particularly emails, because of advances in technology, are growing exponentially every year. Plaintiffs' attorneys know this and know how to take advantage of it. It is generally recognized by class action practitioners that federal judges are more likely to limit burdensome discovery initially to the class certification issue, less likely to certify a class and more likely to grant summary judgment for defendants, and that even plaintiffs who prevail will often obtain a smaller recovery than they would in a plaintiff-friendly state court. Trial lawyers are now expected to file more state-centered claims; especially in California where no procedure exists for appealing class certification before trial – a right that exists in federal court and many other states. Unable to appeal that determination to a higher court, businesses are pressured to settle. This usually begets modern day extortion aided and abetted by our sick system, now administering some relief, but the public interest patient is far from cured.

The public interest is also served by discouraging lawsuits against pharmaceutical companies where the real cause of any affliction is attributable to misuse of the drug by doctors or patients. Michigan passed a law in 1996 making drug suits difficult by shielding drugmakers from liability if the drug was approved by the FDA prior to being placed on the market. Similar "shield laws" exist in Utah, New Jersey,

Oregon, Colorado, and Arizona. Plaintiffs can win damages only if they prove a company withheld or misrepresented information about a drug or product that would cause the regulator to withhold or otherwise withdraw its approval. Such laws limiting liability fairly restrain the cost of doing business in industries that spend millions of dollars on research and go through rigorous screening. Do such constructs not serve the broad public interest? Such laws deserve serious consideration if not emulation. Regulators, of course, need to be careful and diligent to assure that standards are set at levels that fairly serve the broad public interest.

Another systematic ailment begging for relief is state alignment with the plaintiffs' bar. State attorneys general, under the banner of "consumer-protection," have brought numerous claims against corporations with the help of plaintiffs' lawyers. In such cases, national lawmaking is accomplished through interstate collaboration between networks of state governors, legislators, attorneys general, trial attorneys, and regulators.²⁴ This is bad precedent because even if the cases brought against companies appear weak as a matter of law, they may still win in the court of public opinion. Several states including Colorado, Texas, and Virginia, have passed laws prohibiting state attorneys general from hiring outside counsel to litigate on the state's behalf under contingency fee contracts, a systemic ailment begging for relief.

┆ **Prospective Remedies**

┆ **Fivolous Lawsuits**

Years ago during the administration of Bush 41, I served with then Vice President Quayle, Attorney General Barr, and Ted Olson, our recent former Solicitor General, on a special committee for Civil Justice Reform. With a mission to foster the broad public interest, we had developed a modification of the English rule through which under appropriate circumstances, plaintiffs would risk responsibility for defendant's

legal fees for having burdened the defendant with a frivolous filing. This effort unfortunately died on the vine with the installment of the Clinton Administration, which had a commonly recognized close affinity with the well-funded, highly proactive plaintiffs' bar. Today, this effort might be revived, with the passage of the Lawsuit Abuse Reduction Act of 2005 (LARA), H.R. 420, meant to "amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability."²⁵ The legislation is said to help further deter frivolous lawsuits by placing the cost of defending junk lawsuits on the lawyers who file them. It also aims to reduce forum shopping by limiting the filing of personal injury claims to venues where plaintiffs live or were injured, or the venue of the defendant's place of business.

▀ **Medical Malpractice Reform**

A malpractice liability reform bill, S. 354, is presently under consideration in the U.S. Senate. A companion bill, H.R.5, passed in the House. The bill is intended to "improve patient access to health care services and provide improved medical care by reducing the excessive burden the liability system places on the health care delivery system."²⁶ This legislation would regulate lawsuits for health care liability claims by, among other things, setting a 3-year statute of limitations, limiting non-economic damages to \$250,000, adopting the comparative negligence liability theory, limiting contingency fee arrangements, and limiting the amount and circumstances under which punitive damages can be awarded. Another similar bill has been introduced in the House, H.R. 3359, which is meant to "limit frivolous medical malpractice lawsuits, to reform the medical malpractice insurance business in order to reduce the cost of medical malpractice insurance, to enhance patient access to medical care, and for other purposes."²⁷

A Stanford University study reveals that California's liability reforms, if enacted across the nation, would save the health care system \$50 billion a year in defensive

medicine costs.²⁸ A correlation exists between states that have adopted caps on non-economic damages and lower insurance premiums and the critical recruitment and retention of medical practitioners. This demonstrates that some of the costs of the tort regime can be mitigated through reform.²⁹ An estimated \$50 billion per year, as I said, is spent on unnecessary test procedures designed only to guard doctors and hospitals against malpractice claims.³⁰ A recent report in the Quarterly Journal of Economics estimates that limiting unreasonable jury awards could cut healthcare costs by 5-9%, which would save \$70-126 billion in healthcare costs per year. Saving this money would lower the cost of healthcare coverage and permit an additional 2.4 – 4.3 million Americans to obtain medical insurance.³¹

Asbestos exposure claims have also surged since 1995. A series of multimillion dollar damage awards to asbestos plaintiffs caused major companies to seek reorganization in bankruptcy court in 2000 and 2001.³² The media has focused intently over the past several months on Senator Arlen Specter's asbestos reform legislation. We've all seen the TV advertisements pandering for plaintiffs. Currently, there is no economic disincentive for these "mass filer" law firms to continue screening exposed workers and unloading thousands of unimpaired claims in the court system. A recent editorial in the Detroit News is illuminating:

The idea that anyone could sue a company because of possible exposure to injury – not an actual injury – is absurd. Yet it happens every day in America with the filing of bogus asbestos claims brought by unscrupulous lawyers looking to make a quick buck on the backs of the auto industry and other manufacturers.

What's worse, it appears that many of the diagnoses for asbestos-related diseases are bogus themselves. That's the finding of a Mississippi judge who dismissed more than 4,000 claims because the secondary doctors who read X-rays to support initial findings of cancer and other breathing problems

rubber-stamped most of the cases without properly reviewing them.

Clearly the fraud and abuse of the system call for a change which Congress can achieve with the passage of the \$140 billion asbestos relief fund³³

Similarly, a federal judge in Texas accused doctors and lawyers of legal and medical fraud, ruling that thousands of silicosis claims had been manufactured for money.³⁴ This ruling will have an impact on hundreds of thousands of asbestos and silica claims across the country. The Justice Department has commenced a criminal investigation and the Senate Commerce Committee has initiated a civil investigation of the plaintiffs' bar following reports of fabricated evidence and fraud. Asbestos lawsuits have already driven 77 American companies into bankruptcy. Yet, many victims are still waiting for compensation, while the payouts to people who have not shown any symptoms of being sick are notorious. Nearly 60% of the \$70 billion paid in settlements has gone to lawyers' fees and administrative costs.³⁵ Republican Senator Specter and Democratic Senator Leahy in promoting the reform legislation have said that if it is not approved, "the 'elephant mass' of asbestos litigation will just continue to grow to the enrichment of a few who have already profited well."³⁶ I agree with the good senators and the Business Roundtable that without passage of this legislation, the system will continue to jeopardize American businesses and fail asbestos victims who are most in need of relief, while enriching the plaintiffs' bar.

Asbestos and silicosis scams may be unraveling, but the trial bar simply moves on to other targets, such as lead paint, the soup du jour. In February 2006, a state court jury in Providence, Rhode Island found three companies liable for creating a "public nuisance" by selling lead paint many decades ago. The jury apparently heard no evidence about an injured party, nor were they

informed of a specific house or building that constituted the nuisance. The mere presence of lead paint was itself deemed a danger to public health, whether or not it was safely contained. Moreover, in finding liability, it was not necessary to prove that the companies in fact ever sold or manufactured paint in Rhode Island. The Motley Rice law firm put forth the legal reasoning and marketed its lead paint strategy to the state government, which agreed to pay the trial lawyers 16 2/3% of whatever settlement is reached. Indeed, as the Wall Street Journal exclaims:

The bizarre tort theory in Rhode Island is terrible news for the paint business and the thousands of people it employs, and it has potential ramifications for other industries that make lawful products that years later turn out to have health or safety problems. It also demonstrates once again that *'liability' in America has become completely untethered to either legal precedent or basic fairness.*³⁷

Congress should ensure that the system provides fairness to both victims and defendant companies, reduces transaction costs, preserves resources for the truly ill victims, and provides defendants with financial predictability. California has over 2,000 asbestos cases still pending in the northern part of the state. The San Francisco courts are said to be attracting forum-shopping litigators by “rapidly processing multiple cases without sufficient inquiry into the merits of each. . . .”³⁸ Legislatures in Georgia, Florida, Ohio and Texas have recently enacted reforms to restore some fairness and alleviate unwarranted congestion in state courts.³⁹

Securities class action settlement payouts may be nearing their peak, according to a study conducted at Cornerstone Research.⁴⁰ Many of the cases being settled today were filed after the stock-market downturn in 2000. It takes an average of 2-4 years for class action cases to be resolved; such lawsuits against U.S. companies fell 17% in 2005. The amount of investor losses also declined. Therefore, settlements in the

next few years may be much smaller, at least in the aggregate. Although, the pending \$7.1B Enron settlement, the \$2.4B settlement of the Nortel earnings-manipulation scandal and the \$1.6B AIG settlement imposed on AIG for accounting improprieties alleged by the SEC and New York officials, beg the question.

┆ Prognosis & Opportunity

The policies underlying tort litigation have been subverted, as meritless class actions weaken the deterrent effect of legitimate claims. We need to limit the tort system to redress bonafide wrongs by those who fairly bear responsibility. Spiraling caseloads and the high costs of litigation impose a burdensome tax on free enterprise and the public in America that handicap American businesses in the global marketplace, adversely impact the creation and duration of higher technology jobs in America, harm investors and generally disserve the broad public interest. While many policy leaders in America are unduly influenced by the well-heeled, well-funded, politically proactive plaintiffs' bar, others have come to realize that the ailments inflicted by these systematic abuses, nourished and perpetuated by the trial bar, require real remedies in the public interest. In the immortal words of Abraham Lincoln: "What kills a skunk is the publicity it gives itself." Progress has been made. More is needed. Real progress needs more than endless discussion or Congressional debate. Reforms need to be enacted – procedural, remedial, and substantive rules of law, with teeth . . . wisdom teeth. Responsible reform will help the U.S. remain a leader in the global economy.

Although our nation still has far to go, early results are promising. One route to reform is to revisit our substantive rules of law and make more stringent the elements needed to be proved for successful claims. A major tort reform proposal signed into law in the last decade is the 1998 Securities Litigation Uniform Standards Act, which limits securities class actions to cases where there is an

allegation of misrepresentation or omission “in connection with the purchase or sale of a security.” On March 21, 2006, the U.S. Supreme Court held that this law applies only to the actual purchase or sale of a security, and customers who simply hold onto their shares allegedly as a result of a fraudulent misrepresentation cannot sue.⁴¹

Especially helpful is the U.S. Supreme Court’s decision in the securities fraud class action against Dura Pharmaceuticals Inc., decided on April 19, 2005. The Court held that an inflated stock purchase price cannot by itself constitute or proximately cause the relevant economic loss needed to allege and prove “loss causation.”⁴² Plaintiffs now have the burden of proving that defendants’ allegedly false and misleading statements were the proximate cause of the plaintiffs’ economic losses by showing that the subsequent price decline is attributable to fraud rather than extraneous factors. If the market price later declines, factors other than the alleged fraud (such as general market conditions, different developments in the issuer’s business or recent news about other companies in the industry) might have caused the decline. The decision will likely reduce case loads and damage awards, and sends a clear message to trial courts that proving loss causation is the plaintiff’s burden. The Court recognized that allowing a plaintiff to forgo giving any indication (in the complaint) of the economic loss and proximate cause, would bring about the very sort of harm the securities statutes seek to avoid..., namely the abusive practice of filing lawsuits with only a faint hope that discovery might lead to some plausible cause of action. Securities laws were not intended to provide investors with broad insurance against market losses, but rather to protect them against those economic losses that misrepresentations actually cause. This decision definitely treats one symptom of our nation’s infection and is the right step toward curing it.

Another approach is to place remedies limitations on claims. Most of the remedies limitation proposals have focused on the following topics: 1) Limits on the

recovery of non economic damages; 2) abolition of the collateral source rule; 3) limits on punitive damages; 4) recovery of defense attorney's fees from plaintiffs; 5) abolition of joint and several liability; 6) periodic payments of judgments; and 7) limits on plaintiff's attorney contingent fee rates (percentages).

For example, in the area of damage awards, where states do not have caps on certain types of damages, they can take away the power of juries to award unwarranted damages, or in the alternative, require showing of actual malice, intentional wrongdoing or gross negligence for large damage awards. Governor Schwarzenegger, in his efforts to give California a fresh start by sweeping away lawsuit abuse, attempted to reform punitive damages in the state by proposing that as much as 75% of all punitive damage awards go to the state, rather than to claimants or their attorneys—the theory being that punitive damages should deter egregious conduct rather than compensate injury.⁴³ With all due respect to the Governor's good intentions, this would be bad policy because it would align the State's economic interests with the plaintiffs' bar and exacerbate the abuse. A better proposal is for punitive damages to be awarded with limitations only once for every "single act or omission," which prevents multiple juries from punishing the same conduct more than once. A higher standard of proof (beyond reasonable doubt) for punitive damages should also be considered.

Another suggestion for halting lawsuit abuse would be for each state to eliminate the doctrine of 'joint and several liability' which holds the defendant with the deepest pockets liable for the entire amount of the award, as it is unfair and encourages frivolous lawsuits. In fact, the Florida State House Committee approved a measure in January of 2006 to eliminate the doctrine of joint and several liability, and the Florida Senate Judiciary Committee passed a joint and several liability reform bill last week. To confront the issue of forum shopping, states can limit the jurisdiction of local courts to business activities occurring in their own states and

give manufacturers who face multi-state litigants the right to choose to be tried in the state where the manufacturer is located.

Eighteenth century British lawyer, writer, statesman and philosopher Edmund Burke was surely correct when he noted in Parliament just before the American Revolution that Americans are a “litigious lot.” Indeed, it seems to be ingrained in our culture. There is nothing wrong with litigating genuine disputes in an effective and orderly legal system – one that protects parties through fair dispute resolution in a forum not predisposed to favoring well-heeled plaintiffs’ lawyers bent on exacting or extorting settlements from corporate defendants with, or without, the capacity to deal with unduly burdensome discovery demands . . . electronic and otherwise.

Margaret Chase Smith once said: “One of the basic causes for all of the trouble in the world today is that people talk too much and think too little.” Well . . . I know I’ve talked too much, but I hope I’ve stimulated you to at least think a little. And even though thinking may be unfamiliar territory for some who may therefore get lost in thought, I know that such is not the case for this sophisticated audience. The time has come for action. The American public interest, as reflected in its system of jurisprudence, which distinguishes us from all other countries in the world, is ailing and in need of civil justice reform in our courts before we suffocate under the weight of counterproductive, unwarranted litigation that benefits a few litigators at the expense of us all. I close with a quote from the late Edward R. Murrow: “All I can hope to teach my son is to tell the truth and fear no man . . . The only thing that counts is the right to know, to speak, to think—that, and the sanctity of the courts. Otherwise it’s not America.” Thank you for your kind attention.

¹ To provide a representative sample of the Fortune 1000 clients, Charles River Associates requested survey data from each of the Big 4 firms, using a sample of 96 randomly selected clients from a firm's Fortune 1000 clients. From those samples, each firm was requested to provide detailed information related to 24 of the 96 firms originally selected. *Sarbanes-Oxley Section 404 Costs and Implementation Issues: Survey Update*, CRA International, Dec. 8, 2005.

² Laura Sullivan, "CIOs Bemoan Sarbanes-Oxley's 'Big Impact, Little Benefit'," *InformationWeek* news (March 17, 2006), at <http://www.informationweek.com/news/showArticle.jhtml?articleID=183700825>.

³ See Interview of William "Bill" Ide, "The National Legal Center Performs Another Public Service – Examining the Unintended Consequences of the Post-Scandal Reforms," *Metropolitan Corporate Counsel* Vol. 13, No. 7, at 34 (July 2005).

⁴ See, e.g., *In re Qwest Communications International, Inc. Securities Litigation*, D. Colo., Civil Case No. 01-cv-01451-REB-CBS (Consolidated), 2/2/06. In other circumstances in the past, the SEC has taken the position that when a company shares confidential and privileged information with its auditors, it waives any work product protection with respect to that information. A recent case in the Southern District of New York, *Merrill Lynch & Co., Inc. v. Allegheny Energy Inc.*, 2004 WL 2389822 (S.D.N.Y. Oct. 26, 2004) (No. 02 CIV. 7689 (HB)) does not support this notion. The court held that the production by Merrill Lynch of certain investigative reports to Deloitte & Touche did not result in a work product waiver... the reasoning being that when parties share a common interest, sharing work product should not result in a waiver. In this case, even though the auditor could, in some circumstances, be viewed as an adversary (because of its public function to independently ensure the accuracy of a company's financial reports), there was no tangible adversarial relationship.

⁵ Compliance Week, "Sentencing Panel Rethinks Waiver Policy," March 28, 2006, at Complianceweek.com.

⁶ Liam Plevin, "Math Divides Critics as Startling Toll of Torts is Added Up," *Wall Street Journal*, March 13, 2006.

⁷ *U.S. Tort Costs: 2003 Update*, Tillinghast-Towers Perrin, December 2003.

⁸ Business Roundtable Civil Justice Reform Coordinating Committee Meeting, Key Points on Legal Reform, June 4, 2004.

⁹ See, e.g., Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond 'It Just Ain't Worth It': Alternative Strategies for Damage Class Action Reform*, 64 *Law & Contemp. Probs.* 137 (2001) (funded by Rand Institute for Civil Justice).

¹⁰ See Del Jones, "Vioxx verdict of \$253M likely to prompt more suits," *USA Today*, Aug. 20, 2005.

¹¹ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

¹² *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

¹³ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

¹⁴ Jones, *supra* note 10; Heather Won Tesoriero, "Court Upholds Vioxx Class Action," *Wall Street Journal*, A3 (April 1, 2006).

¹⁵ Editorial, "Mississippi Tort Reform Finally Taking Effect," *Natchez Democrat* Editorial Board, Feb. 27, 2006.

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- ¹⁶ Two partners at Milberg Weiss Bershad Schulman LLP are under investigation for alleged illegal payments to plaintiffs in securities lawsuits, and there are talks of a RICO case against the firm itself. See Josh Gerstein, “U.S. Readies Case Against Milberg-Weiss,” New York Sun, Feb. 27, 2006.
- ¹⁷ Paul Davies, “Class Action Pay Settlements Soar,” The Wall Street Journal, Feb. 7, 2006.
- ¹⁸ *Id.*
- ¹⁹ *Cleaning House: Governor Swarzenegger looks to give California a fresh start by sweeping away lawsuit abuse*, A Report on the Lawsuit Industry in California, 2005 by Trial Lawyers Inc. California, available at <http://www.triallawyersinc.com/ca/print08.html>.
- ²⁰ Cal. Business and Professions Code Sec. 17200 *et seq.*
- ²¹ See *Branick v. Downey Savings & Loan Assoc.*, 24 Cal. Rptr. 3d 406 (Cal. App. 2005); *Benson v. Kwikset Corp.*, 24 Cal. Rptr. 3d 683 (Cal. App. 2005).
- ²² *Avery v. State Farm Mut. Auto Ins. Co.*, Ill. Sup. Ct. No. 91494 (Aug. 18, 2005).
- ²³ *Id.*
- ²⁴ Phil Carlton & Jocelyn Dyer, *The Newest New Federalism: The 50 States vs. Business*, State Capital Global Law Firm Group – Special Report to Business, available at <http://www.statecapitallaw.org/publications/newfederalism.htm>.
- ²⁵ This is the official title of the bill, otherwise known as the Lawsuit Abuse Reduction Act of 2005. The last action taken on this bill was on October 31, 2005, when it was received in the Senate and referred to the Committee on the Judiciary.
- ²⁶ This is the official title of the bill, otherwise known as the HEALTH Act of 2005. The last action taken on this bill was on February 17, 2005, when introductory remarks were made on the measure.
- ²⁷ This is the official title of the bill, otherwise known as the Medical Malpractice and Insurance Reform Act of 2005. The last action taken on this bill was on July 29, 2005, when it was referred to the Subcommittee on Health, for a period to be subsequently determined by the Chairman.
- ²⁸ Medical Liability Monitor’s annual rate survey. This survey is consistently cited by the U.S. General Accounting Office, Department of Health and Human Services, innumerable newspapers and trade journals and is regularly used to influence legislation in Congress and many state legislatures.
- ²⁹ H.R. Rep. No. 107-693, pt. 1, at 16 (2002) (quoting Dep’t of Health & Human Servs., *Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing Our Medical Liability System 12-13* (July 24, 2002)).
- ³⁰ Daniel Kessler & Mark McClellan, “Do Doctors Practice Defensive Medicine?”, *Quarterly Journal of Economics* 353, May 1996.
- ³¹ Daniel Kessler & Mark McClellan, “Do Doctors Practice Defensive Medicine?”, *Quarterly Journal of Economics* 353, May 1996, *cited in* *Addressing the New Healthcare Crisis: Reforming the Medical Litigation System to Improve the Quality of Healthcare*, U.S. Department of Health and Human Services, March 3, 2003 and *Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs By Fixing Our Medical Liability System*, July 24, 2002.
- ³² Lisa Girion, “Firms Hit Hard as Asbestos Claims Rise,” Los Angeles Times, Dec. 17, 2001.

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- 33 *Approve Asbestos Fund to Stop Lawsuit Abuse*, Editorial Opinion, Detroit News, Feb. 6, 2006.
- 34 Wade Goodwyn, “Silicosis Ruling Could Revamp Legal Landscape,” National Public Radio, March 8, 2006. Thousands of silicosis diagnoses that were manufactured for money were revealed before a congressional committee as medical experts and law professors tore apart the validity of national asbestos and silicosis litigation. The doctors refused to answer whether they would certify the accuracy of their diagnoses, claiming the Fifth Amendment. See Ann Knef, “West Virginia Doctors Take the 5th in Congressional Hearing over Asbestos and Silicosis Litigation,” West Virginia Record, March 10, 2006; “Silicosis Claim-Up,” Opinion, Wall Street Journal, March 13, 2006.
- 35 Editorial, *The Senate Fails on Asbestos*, The Chicago Tribune, Feb. 17, 2006.
- 36 Id.
- 37 Opinion, “The Motley Legal Crew,” The Wall Street Journal, at A14, Feb. 27, 2006 (emphasis added).
- 38 Trial Lawyers Inc. Report, *supra* note 19.
- 39 ABA Litigation News, January 2006 Vol.31, No.2 at p.6.
- 40 See Davies, *supra* note 17.
- 41 Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, No. 04-1371, 547 U.S. ____ (2006), 2006 WL 694137. The appellate decision is available at 395 F. 3d 25 (2d Cir. 2005).
- 42 Dura Pharm. v. Broudo, 544 U.S. 336 (2005).
- 43 Trial Lawyers Inc. Report, *supra* note 19. The Manhattan Institute has examined ‘Trial Lawyers, Inc.’ since 2003, causing the \$40 billion litigation industry to be called “a hulking Goliath, not the plucky David it fancies itself.” Deroy Murdock, Commentary, “Trial Lawyers Make America Sick,” Scripps Howard News Service, Feb. 28, 2006.