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Impact of Product Liability Issues on Innovation

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jects, particularly those with a therapeutic objective, from the distraction, the time and expense needed to defend civil court actions.

UNITED STATES SPEAKER

Michael J. Wagner[†]

First, thanks for having me. My firm was involved in the first constitutional challenge to that statute. As you can imagine, it was pretty controversial. In 1983, one of my partners sought to withhold documents from disclosure in litigation for precisely the kind we just heard Bruce talking about, documents related to classic peer review, analysis of performance of a research trial, analysis of performance of physicians within the context of their licensure and their work.

The suit involved a very well-financed, influential and creative plaintiff's lawyer. We have elected judges whose campaigns require replenishment every ten years or eight years. One of those plaintiff's lawyers brought it to one of the judges and said this statute is unconstitutional, and we are being deprived of our due process rights to know what the hospital said about the performance of this particular group of doctors. To my partner's unpleasant surprise the judge agreed that it was unconstitutional, prompting us to take it up for an appeal to the Illinois Supreme Court, where we succeeded in having the ruling reversed and the statute was upheld.²⁴

Why is that important here? Well, if innovation means anything, it means that the physicians, for example, who are the clinical investigators in research trials, can innovate in a way that allows them to be critical of not just the medication under consideration but also of the performance of each other in the way they administer it and the way they develop it. So that is classic peer review and very important for our purposes today. It remains a vital statute in Illinois, but it is under siege every year.²⁵ You will see some cases,

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²⁴ *Jenkins v. Wu*, 468 N.E.2d 1162 (Ill. Sup. Ct. 1984).

²⁵ *See, e.g., Ardisana v. Northwest Community Hosp., Inc.*, 795 N.E.2d 964 (Ill. App. Ct. 1st Dist. 2003) (involving a partially successful challenge to a portion of the Medical Studies

the Barry case being one, the Chicago trust case that Bruce cited, in which there are efforts to chip away at that statute.²⁶ But at the end of the day, it still remains that for peer review deliberations of a committee primarily.²⁷ It is not simply as occurred in, I believe, the Barry case, where one physician wrote a letter to the department chair that was deemed not to fall within the scope of peer review because there wasn't already a convened peer review deliberation.²⁸

So that gives you an idea of the creativity of plaintiffs' lawyers using their enterprising skills to make this less effective. So as a Chicago based trial lawyer and litigator who regularly represents pharmaceutical companies and manufacturers of other products, we are delighted to have the statute when it is available to be applied, but unfortunately, it is pretty narrow in its application for most product liability.

With that in mind, I would like to segue over to product liability in particular and to provide a non-economist's view of the impact of liability on innovation. There are plenty of specialists in this area, and I can refer you to those who have written very eloquently on the economic impact, but I want to provide a U.S. litigator's perspective based on the impact it has had on my clients and on perhaps clients of yours over the past 25 years since I have been doing this.

First, it is important to keep in mind the mentality that manufacturers must have. For anybody who misses the fire side cartoons as I did, I had to bring this one back. Every manufacturer I know has felt, at some point, like poor Hal in this cartoon. This falls into the category of only in America. This is a slide that I pulled off of the internet a couple of years ago. Notice the title there is "Big Class Action." Now, no plaintiff's lawyer worth his salt will ever have a web site called "Small Class Action." You have got to have a big class action. Like the term complex litigator, who wants to be called a simple litigator, but I digress. Have your case evaluated by a lawyer. When I showed this to my partners in other jurisdictions – and we have partners who meet in our disputes practice a couple times a year – they just shake their head in dismay that where else but America could you have legalized solicitation?

These aren't products out on the fringe. We are talking about batteries for iPods. They are not limiting themselves to products actions. They have got labor actions in there, welding rods. Of course, there are a number of pharmaceuticals in there since they are the easy target and deep pocket.

So let's take a look at the problem. Then we will analyze a few facts and figures.

Act).

²⁶ *Berry v. West Suburban Hosp. Med. Ctr.*, 788 N.E.2d 75 (Ill. App. Ct. 1st Dist. 2003).

²⁷ *Chicago Trust Co. v. Cook County Hosp.*, 698 N.E.2d 641 (Ill. App. Ct. 1st Dist. 1998).

²⁸ *Berry*, 788 N.E.2d at 77.

While I am not an economist, I can read the numbers and see the impact it is having on my clients and want to share those with you. As I focus, for a few minutes, on what ought to be the proper product liability, I will offer a few editorial comments, and invite yours, while discussing the mismatch that I see and have seen for 25 years between where the law is and where the facts are with the objectives of what ought to be and where the reality is for our clients. I then want to suggest two or three very simple humble areas for reform that I think are workable but not yet in place in the states.

Well, let's take a look at the view – a look at the problem from the view of the industry folks. We are just three hours away from Detroit, so I thought it appropriate to draw upon an auto industry voice here for Mr. LaSorda, who speaks from many years of experience and paying many millions of dollars in legal fees. I want to talk a little bit later about self-critical evaluation and what it could be in this country, and what it is not, and why this type of an observation, I think, is really reflective of a critical need to be able to criticize within the scope of manufacturing processes if we are going to have true innovation.

There was a survey done of Oklahoma business leaders recently that reflected a surprisingly high number, higher than I even expected of respondents who said that they had already decided against developing new products or services in order to avoid liability lawsuits.²⁹ Now, it is a smaller state, a smaller group, not the biggest state in the U.S, but it gives you a flavor for how real this is, and Oklahoma is not perceived as being an unfriendly business state, unlike Alabama and a few others.³⁰

I do quite a bit of work with pharmaceutical companies and food companies, and so this particular perspective struck me. FDA also never weighs in on liability issues. If you are involved in litigation and wonder why FDA doesn't stand behind products, it is already approved. They never do that.³¹ There is a regulation on point.³² You can't get any FDA advisory committee member to step forward, and you understand why; they don't want to have these people who have devoted their lives to important research end up

²⁹ THE STATE CHAMBER, SURVEY: LEGAL CLIMATE HURTING JOB GROWTH (2006), available at http://www.okstatechamber.com/file_upload/SurveyPressRelease21606.pdf (last visited Nov. 4, 2006).

³⁰ See YING HUANG, ROBERT E. MCCORMICK & LAWRENCE J. MCQUILLAN, PACIFIC RESEARCH INSTITUTE, ECONOMIC FREEDOM INDEX: 2004 (2004), http://www.pacificresearch.org/pub/sab/entrep/2004/econ_freedom/index.html (last visited Nov. 4, 2006) (ranking Oklahoma as the nineteenth best state for business freedom).

³¹ See Daniel Troy, *FDA Involvement in Product Liability Lawsuits*, UPDATE, Jan./Feb. 2003 (discussing the FDA's usual role in product liability cases).

³² TOWERS PERRIN, TILLINGHAST, U.S. TORT COSTS AND CROSS-BORDER PERSPECTIVES: 2005 UPDATE (2005), available at http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200603/2005_Tort.pdf (last visited Nov. 4, 2006).

spending all their time in product liability cases. At the same time, I wish there were more public statements taking the form of this one that we could actually put to use in litigation.

Some facts and figures: Tower, Perrin, Tillinghast has given out very recently a report on the cost of the U.S. tort system; this is box car numbers, big numbers, but \$260 billion dollars is the cost of this system. Obviously, that's nearly 886 per person, quite high, and this to me is the one that my partners will say I thought it was bad in the states. I didn't know it was this bad; that there is a higher percentage of the GDP dedicated to this particular system of justice than that in any other developed country.³³ And it is not exactly on the downside.

Empirical evidence, both personal and otherwise – I represented a number of companies, and if you all have here, I would welcome your input on this one way or the other – but as recently as last month a client of mine ended up taking a plant that had employed 575 people, and now it is down to 70 people, solely because of a single spate of around 15 to 20 lawsuits that have made it much more difficult for them to produce the product they used to produce. It is not high tech. It is a food product that happens to be associated with some food born illness in a particular Government study that was not well financed, and we think it was misguided, but that created a lot of pressure on the company to make some important decisions. The market pressure, coupled with the publicity, ended up in a very sad state of employment for that community. My own personal experience also indicates that there is now a great reluctance to engage in, let alone to document, any in-depth self-critical analysis among major manufacturers, unless they do it strictly in the context of an attorney-client privilege. And why is that? Because they don't want to be hoisted by their own petard, just like Mr. LaSorda said from Daimler Chrysler.

The availability of insurance, it goes without saying that asbestos has become the poster child for this issue; good luck finding any insurer that will go near asbestos-containing products. We have one client who is simply a common carrier, a transporter of asbestos and had no role in the actual sale or distribution of the product, and yet, it is named in about 400 lawsuits. The premiums, of course, are sky rocketing where it can be obtained.

How many of you folks remember here in the states and in Canada this was an issue, the pertussis vaccine crisis of the mid 1980s, the DPT vaccine.³⁴ Well, in 1984, there was a program 20/20 aired, and in that program

³³ *Id.*

³⁴ See IMMUNIZATION SAFETY REVIEW COMMITTEE, IMMUNIZATION SAFETY REVIEW: THIMEROSAL – CONTAINING VACCINES AND NEURODEVELOPMENTAL DISORDERS 21 (2001) (discussing media coverage, including 20/20, covering neurological disorders in children who took the DPT vaccine).

there were some very sympathetic families like the one that Bruce just described.³⁵ These families had children who had been inoculated with pertussis or whooping cough vaccine, and within a matter of 72 hours or perhaps as much as a week several of these kids developed intractable seizures, and in a couple of cases encephalopathy or brain damage and were quite tragically and permanently brain injured.³⁶ Because of the temporal association between the inoculation with this vaccine and the onset of this permanent and catastrophic illness disease state, there was a great deal of sympathy and an outcry of publicity after the 20/20 program aired. Within a matter of months, there were hundreds of lawsuits filed.³⁷ At the time, there were quite a few manufacturers of the vaccine.³⁸ Why is the vaccine important? Because as recently as 100 years ago pertussis took the lives of one in three children in the underdeveloped countries of this world.³⁹ Afterwards, after the introduction of the vaccine, of course, it dropped dramatically.⁴⁰ So it is a real risk, and those states, after this program aired, began to scale back their support for pertussis vaccine, Idaho being one.⁴¹ There was an outbreak.⁴² In Maryland, there was actually a mini-outbreak there, so there clearly was a need for this vaccine.⁴³ But the liability problems became really quite daunting.⁴⁴ The client I represented in dozens and dozens of those cases ended up being the only one of the manufacturers left to be standing; everyone else pulled out.⁴⁵

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Vaccination Litigation: After Almost Killing the Childhood Vaccine Market, Trial Lawyers, Inc. Takes Another Stab at These Vital Medications*, TRIAL LAWYERS, INC. HEALTH CARE: CONDITION CRITICAL: THE LAWSUIT INDUSTRY'S EFFECT ON AMERICAN HEALTH 2005, 10 (2005), <http://www.triallawyersinc.com/TLI-HealthCare.pdf>.

³⁹ *See Whooping Cough, the DPT Vaccine, and Reducing Vaccine Reactions*, National Vaccine Information Center, <http://www.909shot.com/Diseases/whooping.htm> (last visited Nov. 4, 2006) (stating that whooping cough is still a problem in the developing countries, much like it was at the beginning of the 20th century throughout the entire world).

⁴⁰ John Clemens & Luis Jodar, *Introducing New Vaccines into Countries: Obstacles, Opportunities, and Complexities*, 11 NATURE MEDICINE SUPPLEMENT 4, S12 (2005), <http://www.nature.com/nm/journal/v11/n4s/pdf/nm1225.pdf>.

⁴¹ *See Adverse Events Associated with Childhood Vaccines: Evidence Bearing on Casualty*, The National Academies Press, 2 (1994), <http://fermat.nap.edu/books/0309048958/html/2.html> (last visited Nov. 4, 2006) (noting that childhood immunization programs were being faced with economic pressures following increased concern over the side effects of the pertussis vaccine in the early 1980s).

⁴² *Pertussis Testing in Idaho*, 8 IDAHO DISEASE BULLETIN 4, 2 (2002), http://www.healthandwelfare.idaho.gov/_Rainbow/Documents/health/2002%20December.pdf.

⁴³ *Pertussis Outbreaks – Massachusetts and Maryland, 1992*, 42 MORBIDITY AND MORTALITY WEEKLY REPORT 11, 197 (1993), <http://0-www.cdc.gov.mill1.sjlibrary.org/mmwr/PDF/wk/mm4211.pdf>.

⁴⁴ TRIAL LAWYERS, INC. HEALTH CARE, *supra* note 16.

⁴⁵ *Id.*

This alarmed, of course, the public health officials of the United States and Canada, and immediately, they began to look at other alternatives.⁴⁶ This resulted in Congress stepping in saying we are going to have not a no fault system but close to a no fault system in which people can bring an action under the National Childhood Vaccine Injury Compensation Act.⁴⁷ What would fund it? All of us would by the price we pay for the vaccine, which, of course, tripled in a matter of months.⁴⁸ That regimen is sort of like a black lung disease in the coal industry where if certain criteria are met, onset of encephalopathy within 72 hours without any other obvious cause, then there will be certain payments made, but the lawsuits remained for some years.⁴⁹

The footnote to all of this was that, lo and behold, the study done over in Britain triggered all of this concern from a scientific standpoint.⁵⁰ Eventually, they went back and took a closer look at the epidemiology and it turned out the right of association between brain damage, onset of encephalopathy and the vaccine was nowhere near as great as first thought.⁵¹ So tragically, quite a bit of production of the vaccine had been curtailed, but in the meantime, research showed there was really no reason to have the concern in the first place. Some plaintiffs' lawyers would disagree with me on that, but I think the science has shown that the manufacturers were better supported.

Who has not heard about the diet drug or Fen-phen litigation?⁵² We all know about this. One of our clients, Wyeth, the man in charge of that, Bill Rowain, I asked him for his input before, of course, putting his client's name up on the screen, and he points out one interesting fact that the reserves for damages are \$20 billion dollars or \$21 billion dollars actually right now in 2006.⁵³ In an e-mail that he sent me, he pointed out imagine the better uses to which we could have put the \$15.4 billion dollars we have already spent; this

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Paul Offit, *Vaccine History Shows Need to Update VICP Law*, THE HILL NEWS (2005), <http://www.hillnews.com/thehill/export/TheHill/News/Frontpage/111505/offit.html> (last visited Nov. 4, 2006).

⁴⁹ Wendy K. Mariner, *Update I. Legislative Report: The National Vaccine Injury Compensation Report*, HEALTH AFFAIRS, 255 (1992), <http://content.healthaffairs.org/cgi/reprint/11/1/255.pdf>.

⁵⁰ Margaret Ann Goetz, *Pertussis Vaccination and Serious Central Nervous System Disorders: Early Case Series Evidence and Public Reaction*, DRUGS AND DEVICES INFORMATION LINE, (1997), <http://www.hsph.harvard.edu/Organizations/DDIL/pertuss.html> (last visited Nov. 4, 2006).

⁵¹ Offit, *supra* note 26.

⁵² *Advancing the Rights of Patients*, Fen Phen Legal Resources.Com: A Newsletter from the National Law Firm of Lief, Cabraser, Heimann, and Bernstein, LLP (2006), <http://www.fen-phen-legal-resources.com> (last visited Nov. 3, 2006).

⁵³ *Appeals Court Does Rare Reversal in Diet-Drug Case*, PRIMARY PULMONARY HYPERTENSION NEWS (2006), <http://pph-net.org/news/pph-news-0133.htm> (last visited, Nov. 3, 2006).

\$21 billion dollars is just reserved, but they have actually spent on this litigation \$15.3 billion dollars. Obviously, as he points out, R & D capital expenditures, reinvestment would have been a nice place to put it. That's an awful lot of money compared to what they did spend, which was a tenth of the reserve and a seventh of what they have actually spent.

Vioxx is another recent highly publicized example, Mark Lanier's case with \$253 million dollars in one suit. I think this week there was a split verdict, two verdicts, one in favor of the defendant, one in favor of the plaintiff; just this past week – I think it was Wednesday – of \$4.5 million dollars.⁵⁴ Compare that, of course, to the \$4.1 billion dollars that America had in its R & D to spend compared to what it now has reserved at \$50 billion dollars,⁵⁵ so it is running at about a 10 to 1 ratio what they are reserving for these costs versus R & D.

That says it all in my opinion in terms of innovation opportunities for these important companies. There is a purpose for product liability. I am not coming at this from just one side, but we would all agree going back. There is a place for and well thought out law to make a difference. The problem is the damages exposure has now gone so far off the deep end and that not only is there an incentive to stop making products altogether, but the incentives have become so skewed that the exit altogether from the market option becomes more attractive.

Of course, as we saw with the vaccine, for example, price increases are the short-term solution. There are some assumptions that go into that, and that is pursuing improvements will increase the liability prospects and reduce exposure, and that exposure correlates with harm caused. In practice, it doesn't quite work out that way.

Let's take a couple of examples. In my experience, the self-evaluation problem is one of the least understood by legislators in this mix, and I will give you an example from a different scenario where the top researcher for a client of ours – this is all public information – wrote on a budget in 1968 some comments about where the budget was going to go for research that next year. It was well intended. He wanted to have more funds for a particular arm of research being done. Of course, that document became producible

⁵⁴ See generally Diedra Henderson, *Jury Awards Another \$9 million in Vioxx Lawsuit*, BOSTON GLOBE, Apr. 12, 2006, at D1 (Describing how John McDarby was awarded \$4.5 million in damages, but Thomas Cona was only reimbursed for the costs of his Vioxx prescription; the jury found Merck failed to warn about the cardiovascular risks associated with Vioxx).

⁵⁵ See generally *Browning-Ferris Indus. V. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) (Observing that "as recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was \$ 250,000" but, [s]ince then, awards more than 30 times as high have been sustained on appeal").

in 1986, twenty years later, when litigation involving children's injuries arose, and this gentleman, who is now well into his retirement, well into his 70s, became almost attached to the hip with me and other lawyers around the country. Why? Because he was getting depositions until he was 85 on that one comment on the budget in 1966. If there were a self-critical evaluation privilege – by that I mean within the mounds of fair commentary on where a company ought to be criticizing its own resource allocation performance, pros and cons of products for innovative opportunities, basically applying the scientific method of critical analysis without fear of litigation consequences, I dare say that this man would have had a better retirement in Florida playing golf than he had as it turned out.

There has been empirical research to show as recently as last year that there is very little connection between the harm caused and product liability costs that are incurred.⁵⁶ Over half of the total costs go to the administration of the process and to lawyers' fees.⁵⁷ Compensation for pecuniary losses, actual financial costs, not pain and suffering, not the intangible non-economic component is just 22 percent of that total.⁵⁸

This slide is in a way mislabeled. I wouldn't call it just incentives to settle meritorious cases but also incentives to settle meretricious cases, specious cases as well, and why do I say that? Because the defense costs, for example, for a company like Wyeth, one of the aid developers of pharmaceutical production, makers of Advil and other over the counter products as well have become so insurmountable that it affects share price.⁵⁹ It affects R & D allocations,⁶⁰ and it just makes it at some point where they have got a bet the company situation on their hands.⁶¹ That company has 60,000 lawsuits right now facing it. They are in a bet the company situation; so therefore, they are fighting these things on several fronts and with a very impressive proactive strategy. And they are on the cutting edge doing things that other companies

⁵⁶ See generally *Facts About Tort Liability and its Impact on Consumers*, AMERICAN TORT REFORM ASS'N, 2005, available at http://www.atra.org/wrap/files.cgi/7963_howtortreform.html (describing the extreme costs of the US tort system as it amounts to the equivalent of \$845 for a family of four).

⁵⁷ See generally *id.* (describing how the US tort system is inefficient as it returns less than \$.50 on the dollar and less than \$.22 for actual economic loss to the claimants).

⁵⁸ *Id.*

⁵⁹ See generally Ted Frank, American Enterprise Institutes Panel Discussion, the \$253 Million Vioxx Verdict: What does it mean? (Sept 9, 2005) (discussing how the drop in Merck's share price after the verdict amounted to a reduction of billions of dollars from the economy).

⁶⁰ See generally Mark Trumbull, *Putting Limits on Liability*, CHRISTIAN SCI. MONITOR, June 11, 1992, at 8 (explaining how certain manufacturing companies are forced to spend seven times more on product liability costs than on research and development of new products).

⁶¹ *Id.*

I think will learn from. But there is always that risk of a run away jury, and, folks, that can include the specter of punitive damages.

In a previous life, I was a reporter for the Associated Press, so my friends tell me I am zero for two on careers of public esteem. But there is no question that you see the PR impact play out in litigation as well and have consequences. The Dow Corning bankruptcy is one good example where there was tremendous publicity and quite a bit of sympathetic coverage of women who had some significant injuries.⁶² The question is: Was there a causal connection? Quite a few court-appointed experts and scientists have said that it looks fairly clear that it wasn't the case; that there was a connection.⁶³ I had not been in those cases and can't offer any more insights on that.

Wyeth acquired the company of American Home Products, AHP, which owns A. H. Robbins, and for those of us who remember another mass tort debacle for companies is the Dalcon Shield, and, of course, there was a tremendous impact on share price there.⁶⁴

The contrary incentive is, of course, to reduce liability. I would submit that companies don't need to have this much incentive from the system. There is overkill, and that good scientists with R & D budgets that will allow them to do good work without the fear of having every document they write become Exhibit 1 in litigation, that those are the ways to approach this, and not in the ways that we have gone.

Clearly, the FDA previously on the sidelines has now become much more concerned about the unclear and complicated warnings on pharmaceuticals.⁶⁵ For those of us, and those of you, who have watched the television advertisements on pharmaceutical products, it never ceases to amaze me how far that has come. Just ten years ago it was unthinkable to have television advertising, but they still try to work in the adverse affects because the FDA is making clear there must be balance.⁶⁶ There are some hell holes in this coun-

⁶² See generally Jeannie Keever & Mike Tolson, *Silicon's Long Legal Battle Yields Cash, Few Answers*, HOUSTON CHRONICLE, June 13, 2004, at 37 (describing extent of publicity).

⁶³ See, e.g., Glenn Swogger, *Breast Implant Controversy Reflects Love-Hate Relationship with Science*, AUGUSTA CHRONICLE, Feb. 17, 1997, at A5 (explaining how major research studies have shown little or no relationship between silicone and autoimmune disease).

⁶⁴ See generally Rhonda Cook, *Georgia Bill Seeks to Cap Medical Malpractice Damage Awards*, ATL. J. & CONST., Feb 12, 2003 (discussing the Dalcon Shield birth control litigation of the 1970s).

⁶⁵ See Judyth Pendell, *The Adverse Side Effects of Pharmaceutical Litigation*, AEI – BROOKINGS JOINT CENTER FOR REGULATORY STUDIES, Sept 1989, at 5 available at <http://www.aei-brookings.org/admin/authorpdfs/page.php?id=293> (noting that according to FDA Commissioner Dr. Mark McClellan, “[s]o long as the product developers we work with are facing an environment in which any adverse outcome can result in a major lawsuit, we may get labels written for lawyers, not doctors and patients”).

⁶⁶ See generally *id.* at 5 (explaining how warnings should convey risk and are tools for allowing doctors to help patients and that they should not be risk management tools to avoid

try; ATRA, the American Tort Reform Association, has identified a number of them, and I can cite several of them from personal experience.⁶⁷ More on that in a minute. Windfall damages, of course, are well publicized.

Self-critical evaluation we talked about, and then there are personal responsibility issues that if we step back and ask ourselves, where is that going in this country and where is causation?

You have heard of the Bridges of Madison County; I call this the judges of Madison County. About five hours south of where I practice, six hours south in Madison County there is more than four times the average of Illinois. A \$10 million-dollar price victory versus Phillip Morris was overturned,⁶⁸ but the plaintiff lawyers in that case I am sure will fight another day. This is a very small county. Yet, it has 298 class actions over the course of just several years.⁶⁹ Largely because of places like Madison County, you have the Class Action Fairness Act that was enacted last year.⁷⁰ It is a good start. The data on this slide shows that.

If you would like these slides as well, I would be happy to e-mail them to you, so please feel free to give me your e-mail. I am running short on time. I got the sign, but a couple of thoughts here on punitive damages.

Speaking of progress made, a State Farm case and the other cases related to it have brought some much needed due process constraints on some of these run away verdicts.⁷¹ The punch line here is if the ratio of punitive damages to compensatory begins to eek above 5, 7, 10, thereabouts, then it is going to create greater problems for plaintiffs to sustain in the category of pigs get fat but hogs get slaughtered. And that's an important rule of thumb that I have seen play out since the State Farm case came down.

There are some state law restrictions, but many states, including Illinois, have had constitutional challenges to those statutes.⁷² A great success story in

lawsuits).

⁶⁷ See, e.g., *Judicial Hellholes 2005*, AMERICAN TORT REFORM ASSOC., 2005, available at <http://www.atra.org/reports/hellholes/report.pdf> (describing West Virginia, South Florida and Madison County, Il. as examples of hell holes).

⁶⁸ See generally *id.* at 20 (describing how a lawsuit was brought against not just Phillip Morris, but also the local convenience store operators who sell cigarettes).

⁶⁹ See *id.* at 21 (describing how the week prior to the Class Action Fairness Act being passed, lawyers filed at least 34 class actions).

⁷⁰ See generally Barbara L. Jones, *Study Reports Act Serves its Purpose: Moving Class Actions*, DAILY RECORD (K.C., MO.), Oct. 25, 2006 (reporting that purpose of Class Action Fairness Act is to shift litigation from state to federal court).

⁷¹ See, e.g., *Avery v. State Farm Mut. Auto. Ins. Co.*, 26 Ill. 2d 100 (Ill. 2005) (explaining that a state trial judge should not have granted nationwide class action treatment).

⁷² See generally, Lisa M. Bass, *The Class Action Fairness Act: What's Fair About It*, AMERICAN U. BUS. L. BRIEF, Fall 2005, at 23–25 (describing how CAFA may undermine the Supreme Court's decision in *Erie v. Tompkins* because it allows Congress to declare specific procedural rules of common law).

this country is Home Depot.⁷³ Co-founder Bernie Marcus said he didn't think he could have performed Home Depot today if he were facing the same liability scenario that exists.⁷⁴

And a no good deed goes unpunished. I have talked a little bit about self-critical analysis, and I recently litigated this in two or three states, and you find even where there are states that have precedent that support the right of companies to evaluate shortcomings in their programs, not just a right but a duty now under Sarbanes-Oxley,⁷⁵ that Sarbanes-Oxley and self-critical analysis case law are going to have a train wreck pretty soon.⁷⁶ Companies have to engage in this process. If they don't, they will face significant exposures, and yet, a client of mine that hired one major accounting firm to analyze problems in his process found that document was immediately sought in litigation and is now going to be Exhibit 1 in our trial next month.

It astonishes people from outside this country that seat belt laws still exist; that the failure of people to use seat belts despite statutes remains inadmissible.⁷⁷ Likewise, intoxication evidence often is inadmissible.⁷⁸

Our time is up. There are a few other slides here that talk about other issues. I would like to fast forward, though, to two areas as I wrap up. These are both areas that I think we can focus. I don't think it is realistic to expect massive sweeping reform at any one time. It was tried in Illinois in 1996 when the planets were aligned; you had a Republican assembly, a Republican Senate, a Republican governor, and within six months, you had this sweeping tort reform bill, caps on damages, you name it.⁷⁹

The case that I just cited, the best was a 4-3 decision overturning that statute on constitutional grounds. Therefore, you have to look at smaller steps. One of those I think is to bring Daubert, the federal standard for gate-

⁷³ See, e.g., Brian Grow, *Home Depot: Thinking Outside of the Box*, BUS. WK., October 25, 2004, at http://www.businessweek.com/magazine/content/04_43/b3905090_mz017.htm (Explaining how Home Depot was ranked #22 on Business Week's best-performing large public companies in 2004).

⁷⁴ Bernie Marcus, Opinion, *America's Litigation Crisis*, CENTER FOR INDIVIDUAL FREEDOM, Sept. 15, 2004, at http://www.cfif.org/htdocs/freedomline/current/guest_commentary/american_litigation_crisis.htm.

⁷⁵ Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357 (2003); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of the U.S.C.A.).

⁷⁶ See Brickey, *supra* note 53.

⁷⁷ Tori. R. A. Kricken, *The Viability of "The Seatbelt Defense" in Wyoming – Implications of and Issues Surrounding Wyoming Statute § 31-5-1402(F)*, 5 WYO. L. REV. 133, 167-168 (2005).

⁷⁸ See, e.g., *Englehart v. Jeep Corp.*, 122 Ariz. 256 (Ariz. Sup. Ct. 1979) (noting that holding evidence of motorist's intoxication was admissible *only* to show that an accident was caused by reckless driving).

⁷⁹ *Limitations on Recovery of Non-Economic Damages*, 735 ILL. COMP. STAT. 5/2-1115.1 (1995).

keeper roles for judges in federal court, to the state courts. Very few states have adopted *Daubert*.⁸⁰ Second is to make cost shifting really meaningful. In this country, in most states, the cost of litigation is never shifted in traditional product liability cases. When I sat on an ABA Task Force on civil justice reform, we actually –

DR. KING: You better wind up pretty soon.

MR. ROBINSON: I am going to overrule the timekeeper, Henry. We have lots of time.

DR. KING: You are not going to overrule anyone.

MR. ROBINSON: It is only 4:17. We started a bit early, and I think this is very important what Michael is telling us, so let's let him finish, please.

MR. WAGNER: Well, I will make it quick. The bottom line is that we proposed a cost-shifting mechanism that would put expert witness fees into that process and make it so that when an offer was made and rejected by plaintiffs, then plaintiffs who did not get a good result, a better result than the offer, will be required to pay the expert costs. We actually persuaded plaintiffs' lawyers to go along with this in committee, but when the ABA House of Delegates dominated by plaintiffs' lawyers got their hands on it, it was basically dead on arrival. I would like to see that revisited some time.

To wrap up, I think to borrow a term from the warranty language, product liability laws, Michael, are not fit for their intended purpose here in the states and comprehensive reform is required. If there is reform, hopefully, we won't have these things looking at us on our tombstone.

So thank you.

DISCUSSION FOLLOWING THE PRESENTATIONS OF BRUCE A. THOMAS, QC AND MICHAEL J. WAGNER

MR. ROBINSON: Thank you very much. That was excellent. I am going to set another precedent, partial precedent and not let Henry ask the first question only because I already put this question out to Michael earlier – sorry – to Bruce earlier. I would be very interested to hear, Bruce, your views, if any, on the fact that we now have contingent fees permitted in certain circumstances in class actions and what certain circumstances might do to product liability litigation in Ontario and Canada in the near future?

MR. THOMAS: Let me answer it in this way. First, the largest punitive damage award in Canada is \$1 million dollars. Secondly, in terms of personal injuries, our Supreme Court of Canada in 1978 capped the general damages, that's the pain and suffering damages at \$100,000, and with inflation, that

⁸⁰ See Stephen Mahle, *The Impact of Daubert v. Merrell Dow Pharmaceuticals, Inc., on Expert Testimony with Applications to*, THE FLORIDA BAR JOURNAL, March, 1999, at 36 (discussing how nineteen states had adopted *Daubert*).