
Volume 51
Issue 2 *Winter 2001: Symposium - The
Changing Landscape of the Practice, Financing
and Ethics of Civil Litigation in the Wake of the
Tobacco Wars*

Article 15

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Recommended Citation

Michael L. Rustad, *Smoke Signals from Private Attorneys General in Mega Social Policy Cases*, 51 DePaul L. Rev. 511 (2001)

Available at: <https://via.library.depaul.edu/law-review/vol51/iss2/15>

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SMOKE SIGNALS FROM PRIVATE ATTORNEYS GENERAL IN MEGA SOCIAL POLICY CASES

*Michael L. Rustad**

INTRODUCTION

The film, *Erin Brockovich*, depicts the true story of a young woman who helped to launch a toxic torts lawsuit that ultimately resulted in a \$333 million class action settlement against a California utility for polluting the local water supply.¹ Legal crusaders, like the real-life Erin Brockovich, protect the public by uncovering corporate conduct that threatens the community. William Prosser described torts as “a body of law which is directed toward the compensation of individuals rather than the public for losses which they have suffered.”² The articles in this panel provide empirical evidence that tort law is increasingly a private law subject with a public vision. Tort law is increasingly an institution of social control and public policy, expanding from its traditional role of compensation and reducing the cost of accidents. Tort law, like sunlight, acts as a disinfectant by exposing hidden threats to the public welfare not detected by public authorities.³ The articles in this Symposium reflect the reality that tort law has been transformed from compensating private individuals to private law that empowers often disadvantaged individuals with a public purpose.⁴ Mass torts are effectively the only compensation system in a society without a national safety net.⁵ The tobacco litigation is a touchstone of tort law’s

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1. Charles Laurence, *Crusader in High Heels*, THE MIRROR, April 5, 2000, at 22-23.

2. W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 5 (5th ed. 1984).

3. This phrase adapts LOUIS BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT 92 (1971).

4. JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES 1 (1995) (noting that courts in the post-World War II period “held out the prospect of empowerment through the courts of the disadvantaged”).

5. Diane P. Wood, *Commentary on The Futures Problem*, by Geoffrey C. Hazard, Jr., 148 U. PA. L. REV. 1933, 1940 (2000) (noting that the United States has no national safety net providing medical or health services to the victims of tobacco and other dangerous products such as in Europe).

expanding social and public policy role. The tobacco reimbursement lawsuits resulted in the largest reallocation of the costs of wrongdoing in Anglo-American history. The states retained private law firms to fund and litigate tobacco lawsuits in multiple states. The private law firms that were hired by the states in the tobacco litigation had the expertise, experience, and financial means necessary to recover billions of dollars spent to reallocate the health costs of smoking-related illnesses.

"Tobacco use is the single leading cause of preventable death in the United States."⁶ The tobacco industry did not pay damages to a single smoking victim in four decades of litigation. Congress required that cigarette packages warn consumers of cigarettes' risk to smokers by the mid-1960s.⁷ However, the United States Supreme Court held in *Cipollone v. Liggett Group, Inc.* that a common law tort claim based on failure to warn was preempted.⁸ The Court's interpretation of the Supremacy Clause eliminated the possibility of failure to warn product liability cases against Big Tobacco. The practical effect of the states' reimbursement lawsuits was to overcome the preemption hurdle in *Cipollone*, which precluded most products liability claims brought by individuals. Another obstacle to tobacco product liability was the refusal of federal courts to certify class action lawsuits.⁹ The tobacco settlement "was the result of nearly two years of litigation brought by forty-six Attorneys General in what were called the 'Medicaid cases,' wherein the states sued the tobacco companies for the health care injury inflicted by tobacco consumption."¹⁰ The tobacco settlement resulted in one of the largest settlements in Anglo-American legal history and presents an opportunity to examine the past, present, and future of social policy torts in general.

II. HENSLER'S RESEARCH AGENDA FOR SOCIAL POLICY TORTS

Deborah Hensler's article entitled *The New Social Policy Torts* is a research agenda combining social science and doctrine.¹¹ Hensler's

6. CDC, DHHS, *Cigarette Smoking-Attributable Mortality and Years of Potential Life Lost-United States*, 42 *Morbidity and Mortality Weekly Report* 33, 645-49 (1993).

7. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 508 (1992).

8. *Id.* at 517.

9. *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996)(declining to certify a Fed. R. Civ. P. 23(b)(3)(D) class action).

10. Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors, and Public Policy*, 26 *AM. J.L. & MED.* 187, 188 (2000).

11. Deborah Hensler, *The New Social Policy Torts: Litigation as a Legislative Strategy; Some Preliminary Thoughts on a New Research Project*, 51 *DEPAUL L. REV.* 493 (2001) (Paper presented at the Seventh Annual Clifford Symposium on Tort Law and Social Policy: Smoke

study of social policy torts has profound implications for understanding the expanding social impact of the tobacco settlement. The settlement was the first time that the tobacco industry paid a single dollar to the victims of tobacco, their families, or the state. Prior to the reimbursement lawsuits, government regulators, and legislators were unable or unwilling to tackle Big Tobacco, despite serious threats to the public health. The state's decision to deputize private law firms to fund and conduct the tobacco litigation would be an excellent case study for social and policy. The states lacked the resources to take on the powerful tobacco industry and redress harm caused to millions of Americans. The tobacco settlement shaped public policy by reallocating the financial burden of caring for tobacco smokers, and increasing the accountability of the industry in its marketing practices.

Professor Hensler's article is a research proposal for an empirical study of the role of public and private litigation in shaping social policy. She asks whether it is appropriate for social policy torts to be "entrusted to entrepreneurial private lawyers?"¹² Social policy torts have been criticized as "a form of regulation through litigation in that attorneys general not only seek payments for government programs that help those who have been injured but also seek changes in the business practices of the industries being sued."¹³ Professor Hensler's article proposes a social policy analysis of the role of tobacco litigation and other complex cases that have social ends, "social policy" torts.¹⁴ The tobacco litigation has inspired new private/public partnerships in handgun, lead paint, and managed care litigation. She asks whether it is good public policy to entrust changes in industry practice to private litigants.¹⁵ "Should legislatures validate the results of privately negotiated lawsuit settlements?"¹⁶ Is it good social policy to permit private litigators to receive large fees from such litigation?¹⁷ Her article is a grant proposal for a RAND Institute for Civil Justice¹⁸ study funded

Signals: The Changing Landscape of the Practice, Financing, and Ethics of Civil Litigation in the Wake of the Tobacco Wars).

12. *Id.*

13. Ruth Gastel, *The Liability System*, ILLINOIS INSURANCE ISSUES UPDATE (July 2001).

14. Hensler, *supra* note 11, at 496.

15. *Id.* at 496.

16. *Id.* at 495.

17. *Id.*

18. The Institute for Civil Justice is an independent research program within RAND. The Institute's mission is to help make the civil justice system more efficient and more equitable by supplying government and private decision-makers and the public with results of objective, empirically based, analytic research . . . I CJ research is supported by pooled grants from corporations, trade and professional associations, and individuals; by government grants and contacts; and by private foundations. The Institute disseminates its work widely to the legal, business, and

by the Smith-Richardson Foundation. The proposal compares and contrasts new social policy tort actions to traditional social impact litigation and traditional class actions.¹⁹

The social impact of law is a critical research question that was first suggested by Dean Roscoe Pound in his theory of social interests and the law.²⁰ Professor Francis Bohlen observed that “the twentieth century has brought an increasing realization of the fact that the interests of society in general may be involved in disputes in which the parties are private litigants.”²¹ Social policy torts serve the public interest to the extent that they reallocate the financial burden of caring for tobacco smokers, increase the accountability of health maintenance organizations, and eliminate defective products or risky practices from the marketplace. It is not surprising that corporate wrongdoers oppose social policy torts.

William L. Prosser, in his classic treatise, observed that “perhaps more than any other branch of the law, the law of torts is a battleground of social theory.”²² Today’s battleground is on the appropriate role of private litigation in shaping public and social policy. Tort law not only performs the manifest function of “alleviating the plight of the injured,” it also fulfills the latent function of “furthering the cause of social justice.”²³ In the last few decades, it is tort law, rather than regulators, that has uncovered dangerous products or practices. As Justice Harlan Stone once stated: “The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.”²⁴ Professor Hensler proposes a case study analysis of diverse cases, including: the class action filed by black customers against Denny’s restaurant,²⁵ bus riders who charged the Los Angeles Metropolitan Transit Authority with discrimination,²⁶ black employees who sued Texaco for discriminatory employment practices,²⁷ a suit brought challenging New York

research communities, and to the general public.” RAND Institute for Civil Justice, *available at* <http://www.rand.org/icj/about> (visited September 27, 2001).

19. *Id.* at 4.

20. Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343 (1915).

21. Francis H. Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725 (1937).

22. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 14 (3rd ed. 1964).

23. JOHN G. FLEMING, *AN INTRODUCTION TO THE LAW OF TORTS* 1 (1967).

24. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946) (Stone, J., concurring).

25. Hensler, *supra* note 11, at 504 (citing *Ridgeway v. Flagstar Corp.*, Nos. C 93-20202 JW, C 93-20208 JW (N.D. Cal. 1994)).

26. *Id.* (citing *Bus Riders Union v. Los Angeles Metropolitan Transit Authority*, 1994).

27. *Id.* at 14 (citing *Roberts v. Texaco Inc.*, No. 94 Civ. 2015 (S.D. N.Y. 1997)).

state school financing,²⁸ and law suits brought by inmates of correctional institutions.²⁹ Professor Hensler proposes an empirical study of a broad spectrum of cases in which ordinary citizens used class actions to bring about social change.³⁰ Her sample “include[s] suits for monetary and policy remedies, public and private defendants, and public and private plaintiffs’ attorneys.”³¹

Most of the case studies selected by Professor Hensler are ones in which there is a positive social impact, such as eliminating discrimination in the workplace, restaurant industry, or mass transit system. A more complete empirical study would also closely study the seamy side of social political torts, such as class actions resulting in coupon settlements. Class action lawsuits may be subject to abusive practices, especially in so-called “coupon settlements” in which the class members receive only a small discount if they purchase additional products or services from the defendant seller. While the class members collect a pittance, the plaintiffs’ attorneys may receive millions of dollars. Such self-serving deals do nothing to vindicate the rights of consumers. Economic loss cases, not personal injury litigation, have produced some of the largest and most controversial settlements. Purely economic loss cases include the Ford Motor ignition switch litigation,³² the polybutylene pipe litigation,³³ the Miracle Ear litigation,³⁴ and the GMC pickup cases.³⁵ I would also encourage Professor Hensler to compare some of the traditional mass torts to the recent diet drug class action, the fenfluramine or Redux litigation. Finally, mass torts are frequently transnational. Future study may focus on the differences between the United States and Canada where courts are more liberal in the certification of mass tort claims.³⁶ The controversy over the Hague convention is a larger debate about the appropriate role that social policy debates will play in a global economy. One issue, not in the proposal, is how the Hague Convention, which was adopted by the Special Commission of the Hague Conference in October 1999,

28. *Id.* (citing Abby Goodnough, *New York City is Shortchanged in School Aid*, *State Judge Rules*, N.Y. TIMES, Jan. 11, 2001, at A1, A22).

29. *Id.*

30. Hensler, *supra* note 11, at 504.

31. *Id.*

32. *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332 (D.N.J. 1997).

33. *Nat'l Property Investors VIII v. Shell Oil Co.*, 917 F. Supp. 324 (D.N.J. 1995).

34. *Martin v. Dahlberg, Inc.*, 156 F.R.D. 207 (N.D. Cal. 1994).

35. *In re GMC Pick-Up Truck Fuel Tanks*, 846 F. Supp. 330 (E.D. Pa. 1983), *aff'd* 55 F.3d 768 (3rd Cir. 1993).

36. *See, e.g.*, Elaine Massock et al., *Recent Developments in International Torts & Insurance Law & Practice*, 34 TORT & INS. L.J. 519, 534-36 (1999).

will impact mass torts.³⁷ It would be useful to study why social policy torts have evolved faster in the United States than in countries with a more developed safety net, such as Sweden or West Germany. The proposed Hague Convention will cover all civil/commercial actions other than family law, wills, trusts, insolvency, and admiralty. Article 10 of the Convention enforces jurisdiction in the “place where the tort occurred or injury [was] sustained.”³⁸ Article 3 provides for jurisdiction in the defendant’s forum, which for corporations is the place of incorporation or chief place of business.³⁹ Article 23 provides that enforcing courts will enforce a final judgment of an original foreign court.⁴⁰

The Hague Convention will only enforce judgments for non-compensatory damages, such as punitive, multiple, or exemplary damages “to the extent . . . similar or comparable damages” could have been recognized in enforcing courts.⁴¹ The Hague Convention permits enforcing courts to reduce judgments that are “grossly excessive.”⁴² Legal academics, as well as plaintiffs’ attorneys, will be interested in knowing more about the transborder nature of mass torts.

A. *Empirical Study of Private Attorneys General*

Deborah Hensler’s article is a critical examination of the entrepreneurial role of the trial lawyer in litigating and funding social policy torts. The private attorney general’s role in American jurisprudence was first articulated in *Associated Industries v. Ickes*.⁴³ The legal system of the private attorney general in future litigation undertaken by other private/public alliances will be undermined if legislatures or courts eliminate social policy torts in the future. Judge Jerome Frank used the term “private attorney general” to refer to “any person, official or not,” who brought a proceeding “even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private attorney generals.”⁴⁴ The private attorney general is a “powerful engine of public policy.”⁴⁵ Private at-

37. See generally, Edward C.Y. Lau, *Update on the Hague Convention on the Recognition and Enforcement of Foreign Judgments*, 6 ANN. SURV. INT’L & COMP. L. 13 (Spring 2000).

38. Draft Hague Convention on Jurisdiction and the Recognition and Enforcement of Foreign Civil Judgments (October 2000) at Art. 10.

39. *Id.* at Art. 3.

40. *Id.* at Art. 23.

41. *Id.* at Art. 33.1.

42. *Id.* at Art. 33.2.

43. 134 F.2d 694 (2d Cir. 1943).

44. *Id.* at 704.

45. Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 LAW & CONTEMP. PROBS. 179, 179 (1998).

torneys, acting as private attorneys general under the contingency fee system, made this historic tobacco settlement possible.

The private attorney general's role uses private enforcement to advance the public interest in an efficient manner that is responsive to market forces. The tobacco settlement is only the most recent manifestation of the private attorney general's role in tort litigation. It was private attorneys general, not regulators, who uncovered "smoking gun documents" of an industry-wide conspiracy to conceal the risks of asbestos exposure.⁴⁶ It was the fruits of the asbestos litigation that made it possible to underwrite the tobacco litigation. In this case, the private attorneys general uncovered internal documents that exposed tobacco industry lies about addiction and nicotine manipulation, which led to the tobacco settlement.⁴⁷ The private attorney general plays a valuable role that cannot exist without the contingency fee system.

Given that the states lack the financial and legal resources to litigate against the powerful tobacco companies, the trial lawyer's role has a continuing vitality. Private attorneys, acting as private attorneys general under the contingency fee system, made the historic tobacco settlement possible. The private attorneys general led to the only successful outcome in a tobacco case in four decades of litigation. Government regulators and legislators have been unable or unwilling to tackle Big Tobacco despite serious threats to public health. The private attorney's role is particularly necessary when litigating against powerful corporate actors.

The tobacco litigation is the most recent example of common law's ability to evolve to meet the needs of each age. As a nineteenth century New York court noted: "It is the peculiar merit of the common law that its principles are so flexible and expansive as to comprehend any new wrong that may be developed by the inexhaustible resources of human depravity."⁴⁸ It is not within the rational interest of an attorney to undertake future litigation against powerful corporate actors, such as the tobacco industry, if there is a swirl of uncertainty over enforcement of contingency fee agreements with the states.

46. See *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 403 (5th Cir. 1986) (holding that in the asbestos litigation "punitive damages reward individuals who serve as 'private attorneys general' in bringing wrongdoers to account.").

47. Henry Weinstein & Myron Levin, *Tobacco Companies Flood Internet with Documents Litigation. 27 Million Pages are Posted to Deflect Critics. Charges They're Hiding Damaging Information*, L.A. TIMES, Feb. 28, 1998, at A1.

48. *Johnson v. Girdwood*, 58 N.Y. St. Rep. 338 (1894).

My hypothesis is that the social policy role of the private attorney general will be critically needed in the new millennium. Since the tobacco settlement, private attorneys general continue to uncover dangerous corporate practices. Private attorneys general, not government regulators, discovered that Firestone Tires mounted on Ford Explorers caused hundreds of rollover accidents due to tread separation. Private litigants, pursuing the public interest, learned that Firestone had recalled this model of tire in other countries without informing the National Highway Traffic Safety Administration (NHTSA) of the great danger that the tires posed to American drivers. The NHTSA based its recall of 6.5 million tires on information provided by plaintiff's counsel, rather than in-house government investigators.

The private attorney general's role uses private enforcement to advance the public interest in an efficient manner that is responsive to market-forces. "The MSA was the result of nearly two years of litigation brought by forty-six attorneys general in what were called the Medicaid cases, wherein the states sued the tobacco company for the health care injury inflicted by tobacco consumption."⁴⁹ Private law firms developed and executed the winning strategy against the tobacco industry.

The theory that the public interest is advanced by lawsuits brought by private attorneys is not confined to tort law. A large number of federal statutes, such as the Clean Water Act, Sherman Anti-Trust Act, and Federal Trade Commission Act, provide for attorneys fees to be awarded to private litigants as a reward for serving the public interest in bringing suit.⁵⁰ The rubric under which all the definitions for the private attorneys general fall is the emphasis on private action for the public interest. It is only the possibility of private attorneys general receiving a contingency fee that permits lawsuits to be brought to vindicate the public interest. Tort remedies permit social control of wrongdoers without an overly cumbersome state bureaucracy.⁵¹

The private attorneys general played a critical role in asbestos litigation. It was private attorneys general, not regulators, who uncovered

49. Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors, and Public Policy*, 26 AM. J.L. & MED. 187, 188 (2000).

50. Dual governmental and private enforcement is provided for in the Sherman Act, 15 U.S.C. 1-2 (1997), the Clayton Act, 15 U.S.C. 18 (1997), and the Robinson-Patnam Anti-Discrimination Act, 15 U.S.C. 13-13b (1997); see generally Thomas Koeing & Michael Rustad, *Crimtorts as Corporate Just Deserts*, 31 U. MICH. J.L. REF. 289 (1998).

51. DAN B. DOBBS, *HANDBOOK OF THE LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* 205 (1973).

“smoking gun documents” of an industry wide conspiracy to conceal the risks of asbestos exposure.⁵²

In the tobacco settlement, the states contracted with private law firms to fund the litigation and assume all of the risks. Before the states joined forces with the private attorneys general, the tobacco companies had *de facto* immunity from lawsuits.⁵³ When the states contracted with private law firms, the tobacco industry had been sued hundreds of times without ever paying damages because during the first four decades of tobacco litigation, Big Tobacco won every case. The states hired private law firms to conduct the tobacco litigation because it was in their economic interest. Before the tobacco settlement, the states lacked the resources to take on the powerful tobacco industry and to redress the harm the industry caused its citizens:

In this great city, the greatest city of our country, they sit on boards, they go to their churches and synagogues, they are respected members of the community, and every day they go to work. And, eighty-two percent of the people who start smoking are younger than the age of eighteen—they do not dispute that—and sixty-seven percent are below the age of sixteen. And every day they get them, and they knew by their own documents that they intentionally went after them.⁵⁴

The tobacco settlement entered into by the states was a historic moment in which the trial lawyers, in their role as private attorneys general, joined forces with state attorneys general to serve the public interest. This latest development in using private enforcement to advance the public interest in an efficient manner is responsive to market forces. The tobacco litigation exemplifies the operation of the private attorney general in controlling corporate misconduct.

The private attorneys general, in the tobacco litigation, provided the expertise and resources necessary to compensate the states for the cost of reimbursing non-paying patients who were victimized by chronic tobacco-related illnesses. The tobacco litigation uncovered numerous “smoking gun” documents, which revealed an industry-

52. See *Jackson v. Johns-Manville Sales Corp.*, 781 F. 2d 394, 403 (5th Cir. 1986) (holding that in the asbestos litigation “punitive damages reward individuals who serve as ‘private attorneys general’ in bringing wrongdoers to account”).

53. Mitchell L. Lothrop, *Tobacco-Related Litigation: How It May Impact the World's Insurance Industry*, 3 *CONN. INS. L.J.* 305, 308 (1997) (noting that “the tobacco industry had won virtually every case it tried. Juries were not sympathetic to habitual smokers and the tobacco manufacturers spent huge sums in the defense of smoking and health cases. The defense was extremely well organized and carefully coordinated throughout the country.”).

54. Michael Ciresi, *Panel Discussion: The Tobacco Litigation and Attorneys' Fees*, 67 *FORDHAM L. REV.* 2827, 2837 (1999).

wide conspiracy to market the only consumer product unsafe for any use.

The latent function, or the hidden face, of tort law is its public role of addressing corporate misconduct without requiring a rigid government bureaucracy. Private tort litigants serve the public interest by uncovering dangerous products and practices. The injury costs of tobacco are a great economic hardship to the states. The injuries inflicted by tobacco have ripple effects on families, communities, and medical institutions.

Unlike the private attorneys general, government regulators and legislators have been unable or unwilling to tackle Big Tobacco despite serious threats to the public health. Tort law shapes public policy by reallocating the financial burden of caring for tobacco smokers and increasing the accountability of health maintenance organizations (HMOs). The private attorney general's role is particularly needed when litigating against powerful corporate actors. A century ago, private attorneys general filed lawsuits to vindicate a public concern involving railroads, streetcar companies, and utilities.

Trial attorneys, acting as private attorneys general, have uncovered numerous "smoking gun" documents unmasking corporate culpability. The treasure chest that funded the tobacco litigation was based in large part on successful asbestos cases. Private attorneys general, not state regulators, uncovered evidence of the industry's failure to warn workers and consumers of the hazards of asbestos dust. An industry-wide cover-up of the deadly consequences of unprotected exposure to asbestos dust, which destroyed the health of hundreds of thousands of American workers, was unmasked in asbestos products liability cases.

Johns-Manville Corporation, for example, had definite knowledge as early as the 1930s of the deadly consequences of unprotected exposure to asbestos dust, but had a corporate policy of not informing employees when x-rays taken by company doctors revealed clear evidence of asbestosis.⁵⁵ Johns-Manville executives claimed that this policy was motivated by concern for employees so they "[could] live and work in peace and the company [could] benefit by their many years of experience."⁵⁶ The asbestos industry lulled government regulators into complacency for decades with false assurances that their products posed no health hazards.⁵⁷

55. *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 250 (Fla. Dist. Ct. App. 1984).

56. *Id.*

57. *Prudential Ins. Co. v. U.S. Gypsum Co.*, 828 F. Supp. 287 (D.N.J. 1993).

Private attorneys general have been particularly effective in protecting the health and safety of women. Dangerously defective products that have been taken off the market or modified after tort litigation include the Dalkon Shield, Copper-7 intrauterine devices associated with reproductive injuries, high absorbency tampons linked to toxic shock syndrome, oral contraceptives that caused kidney failures, and silicone-gel breast implants with high rupture rates.

In the field of medical malpractice, torts provide female patients with remedies for mismanaged childbirth, sexual exploitation by medical personnel, botched cosmetic surgeries, and the failure of providers to obtain informed consent.⁵⁸ All Americans are safer as a result of private attorneys general whose medical malpractice lawsuits led to liability limiting policies, such as post-surgery sponge and instrument counts, greater screening of affiliating physicians, and improved protocols for emergency room treatment.⁵⁹ Elderly and disabled residents of nursing homes have benefited from the contingency fee system, which provides the means to obtain legal representation to redress neglect and substandard treatment by profit seeking corporate chains.⁶⁰

Without private law firms assuming these risks, the courthouse doors will be permanently closed to the states on complex matters, such as future litigation against the tobacco industry, managed care, and hand gun manufacturers. The whole point of contingent fee agreements with the private attorneys is to reallocate the risk of paying substantial litigation costs and having no recovery. The death of the contingent fee system in complex litigation will result in *de facto* immunity for rogue industries, such as the tobacco industry, because state legislatures are unlikely to appropriate the tens of millions of dollars necessary to litigate against exceedingly powerful corporate wrongdoers.

58. Medical malpractice is a cause of action arising out of an injury or death caused by the negligence of a medical care provider. Medical malpractice considers prevailing standards of care in a given medical specialty. The level of care, skill, and treatment must also take into account surrounding circumstances. See, e.g., FLA. STAT. ch. 766.102 (2000).

59. Michael L. Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters,"* 47 RUTGERS L. REV. 975, 1021 (1995).

60. "The contingent fee arrangement does not encourage lawyers to accept nonmeritorious cases with a low probability of winning just because the possible recovery is large." Stephen K. Dietz et al., "The Medical Malpractice Legal System." REP. SEC. COMM. MALPRAC. (Washington, D.C.) U.S. DEPART. OF HEALTH, EDUC. AND WELFARE, 87, 154, January 16, 1973.

Professor Hensler's article proposes to study the role of public and private litigation in shaping social policy.⁶¹ Her proposed research project posits three principal research questions:

[1] Are these new [social policy] suits genuine attempts to seek social reforms that have been thwarted by the legislative process? Or, are the cases simply entrepreneurial litigation in new clothes? . . .

[2] [D]o the new social policy torts violate fundamental democratic norms of representation and accountability? Are representation and accountability issues raised by the new suits substantively different from or more severe than those raised by other representative litigation, such that they cannot be dealt with by current procedural rules and judicial doctrine . . . ? When litigation is used as a legislative strategy, does the public accord the resultant policies the same degree of legitimacy as they accord statutes enacted by popularly elected legislatures? . . . [and]

[3] [I]f, the new social policy torts threaten important values, what are the appropriate policy responses . . . Should we restrict or eliminate these types of suits entirely?⁶²

B. Financing Social Policy Torts

Professor Hensler's study focuses on the funding of social policy torts and its implications for a democratic society. The contingency fee system has long been a form of democracy in action for injured plaintiffs unable to afford retainers or hourly fees. Contingent fee contracts "are the basic means by which [personal injury] litigation is conducted." It is a well established feature of our civil litigation system that the contingency fee is the "poor man's key to the courthouse." The use of contingency fee agreements by states in partnership with private attorneys in social policy torts is a more recent development. The contingency fee agreements in the tobacco litigation was the only practical way that the states could make a powerful industry accountable without the risky business of paying millions of dollars in per diem fees or special retainers. In the case of the tobacco litigation, the contingency fee was the key to the courthouse for the states. The whole point of the contingency fee formula was to permit the states to litigate without special appropriations. The continuing vitality of the contingency fee system in future cases is a public policy issue of profound importance. The tobacco cases were brought against an industry that employed "scorched earth" like tactics designed to intimidate or bankrupt plaintiffs' counsel. One of the outside counsel described the tobacco defense team:

61. Hensler, *supra* note 11, at 502.

62. Hensler, *supra* note 11, at 502-03.

And they had the most powerful law firms in the country representing them, good law firms, outstanding lawyers. In our case, thirty law firms, 600 lawyers, being paid every single day at \$500 an hour, \$550 an hour, \$450 an hour, whatever. Every month their bills went out. They said in court under oath that they spent over \$100 million just producing the privileged documents in our case. RJR said it spent over \$95 million producing its document index. Who did that money go to? In defending their right—and they have a right to have that type of defense . . . But how are you going to take them on? Who is going to take them on?⁶³

The unique partnership of state attorneys general and private law firms resulted in a multistate settlement of all of the participating states' lawsuits against the industry.⁶⁴ The legal and financial resources of private law firms created the leverage necessary to bring the tobacco industry to the bargaining table.

In the tobacco litigation, the private attorneys were retained only because the states lacked the financial resources and the expertise to pursue their health reimbursement claims. The contingency fee agreement has long been accepted in our civil justice system as the only practical means of financing complex litigation, such as the high-risk tobacco litigation. "In its pure form, the contingency fee is a pre-filing contractual agreement setting the attorney's fee as a percentage of the recovery."⁶⁵ Professor Hensler describes how private lawyers reap huge profits from social policy cases.⁶⁶ Trial lawyers like Richard Scruggs are attacked for enriching themselves through frivolous lawsuits.⁶⁷ An advertisement entitled "Smoke" charges that these trial lawyers are behind new legislation that would give HMO patients a right to sue their medical insurer. The announcer states: "Laws that make trial lawyers rich by drowning the courts with new lawsuits, but could cost almost two million Americans their health insurance . . . they call that patient protection. But you know who they're really protecting."⁶⁸ An HMO advocacy group broadcasted a television

63. Michael Ciresi, *Panel Discussion: The Tobacco Litigation & Attorneys' Fees*, 67 *FORDHAM L. REV.* 2827, 2837 (1999).

64. *Bet-The-Company-Litigation*, NAT'L L.J., July 30, 2001, at B14 (discussing new private attorney general lawsuits that resulted in tobacco settlement); see also Daniel Kruger, *Few Obstacles Remain for States to Receive Tobacco Settlement Funds*, THE BOND BUYERS, June 30, 1999, at 4.

65. Janet Cooper Alexander, *Contingent Fees and Class Actions*, 47 *DEPAUL L. REV.* 347 (1997).

66. Hensler, *supra* note 11, at 501-02.

67. Robert Dreyfuss, *Bill of Wrongs: The First Thing We Do, Let's Kill All the Lawsuits*, AMERICAN PROSPECT, Sept. 10, 2001, at 10 (describing criticism of Richard Scruggs and other trial lawyers litigating against tobacco and other mass tort actions).

68. *AAHP Launches New Television Campaign*, PUB. REL. NEWSWIRE (Jan. 25, 1999).

commercial that portrayed trial lawyers as sharks: "America's richest trial lawyers are circling—and your health plan is the bait: call Congress today."⁶⁹

The flip side of the large attorneys' fees is the high risk in social policy cases. A complete study of fees in mega cases will examine losses, as well as wins. When the states retained private attorneys, Big Tobacco had never lost a case. The contingency fee system is based on a "no win—no pay principle," and the attorney's fee is proportional to the outcome.⁷⁰ The law firms retained by the states risked millions of dollars, and each assumed the risk of bankruptcy when they agreed to litigate against Big Tobacco. The outside private counsel not only expended millions of dollars and years of effort to bring about the settlement, it had opportunity costs as well, because they were precluded from taking on other less-risky cases. Robert Montgomery, lead plaintiffs' counsel in the Florida tobacco litigation, recalled his reservations about agreeing to file a case against the seemingly unbeatable tobacco industry:

I said, "Fred, wait a minute. You want me to be a member of a team? You know, there are 800 cases that have been tried against tobacco and none of them have ever been won. And you are asking me to risk whatever it takes - you tell me" - which in my mind personally was over \$1 million or \$2 million - "to take on an industry that has never been taken on before, and then we are going to have a trial team? Tobacco has never lost a case." I said, "Are you out of your mind to call me and ask me?"⁷¹

The tobacco settlement was precedent setting because it was the first time that the tobacco industry compensated the victims of tobacco, their families, or the state. Prior to the tobacco settlement, Big Tobacco enjoyed a "limited immunity . . . from . . . regulation," both from administrative agencies and the legislatures.⁷² The state attorneys general were able to file suit because private counsel assumed the cost of prosecuting these cases. The whole point of contingent fee agreements is to remove from the client's shoulders the risk of being out-of-pocket for attorney's fees upon a zero recovery. Instead, the *lawyer* assumes that risk and is compensated for it by charging what is, in retrospect, a premium rate.⁷³

69. David Wallis, *Some Lawyers Try to Make Nice*, N.Y. TIMES, Nov. 28, 1999, at 3.

70. Alexander, *supra* note 65, at 347-48.

71. Daniel Capra et al., *Panel Discussion: The Tobacco Litigation & Attorneys' Fees*, 67 FORDHAM L. REV. 2827, 2833-34 (1999).

72. Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale & Use of Tobacco*, 8 STAN. L. & POL. REV. 63 (1997).

73. GEOFFREY C. HAZARD, *THE LAW OF LAWYERING* 8-15 (2001).

The tobacco case study is not the only social policy tort in which trial lawyers risk the law firm's financial future. The 1997 film, *A Civil Action*, relates the ordeal of several families who sued two Fortune 500 corporations because their predecessor companies dumped industrial solvents into the Woburn, Massachusetts water supply. The movie, based on a 1996 book, depicts the tragedy of families needlessly losing children to leukemia due to environmental polluters. The movie also highlighted the suffering inflicted by the legal process upon those who sought redress.⁷⁴

A Civil Action is based on the real case of toxic torts, *Anderson v. W.R. Grace*,⁷⁵ in which eight Massachusetts families sued W.R. Grace and Beatrice Foods for alleged contamination of the Woburn groundwater with chemicals, including trichloroethylene and tetrachloroethylene.⁷⁶ The Woburn plaintiffs sought to hold both successor corporations liable for the environmental pollution that occurred over many decades. The film documented how the Woburn families experienced difficulty in finding a law firm willing to take on their case.⁷⁷ Finally, one very small firm could not refuse the families' pleas, a decision that led to its bankruptcy.⁷⁸

The film accurately portrays the great financial and personal risks that trial lawyers who underwrite social policy lawsuits face. The jury found W.R. Grace liable for environmental pollution and Beatrice Foods not liable for tainting the water supply.⁷⁹ On appeal, the trial verdict was reversed and remanded. In 1986, the Woburn litigants agreed to settle the case against W.R. Grace for approximately \$8 million rather than face a retrial on all the issues. While \$8 million seems like a great deal of money, the litigation expenses were so high that the eight families received only a small fraction of the settlement.⁸⁰ The plaintiffs' law firm filed for bankruptcy in the wake of the settlement.⁸¹ Because of this deliberate campaign to belittle tort plaintiffs and their lawsuits, realistic-sounding stories illustrating lawsuit abuse

74. The film was based upon JONATHAN HAAR, *A CIVIL ACTION* (1996).

75. 628 F. Supp. 1219 (D. Mass. 1986).

76. *Id.* at 1222.

77. *American Film Digs Up Toxic Dirt*, FINANCIAL EXPRESS, Feb. 15, 1999.

78. *Id.*

79. Joan Vennoch, *Jan Schlichtmann: Lawyer on Crusade*, THE BOSTON GLOBE, July 11, 1989, at 25; see also Michael Weisskopf, *Toxic Waste Settlement Reached; Massachusetts Case Expected to Spur Thousands of Similar Suits*, THE WASHINGTON POST, Sept. 23, 1986, at A3.

80. Sharon Begley, *A Lawsuit Toxic to Justice*, NEWSWEEK, Oct. 2, 1995, at 89 (noting that the settlement in the Woburn tainted water supply did not adequately cover plaintiffs' losses).

81. Beverly Beckham, *The Giants Lean on Schlichtmann*, THE BOSTON HERALD, Aug. 7, 2001, at 25.

have become "urban legends."⁸² Public relations experts concoct many of these tort tales by selective distortion of the facts of real cases. The general public has an unfavorable impression of injured plaintiffs that stems from a carefully orchestrated campaign to portray civil litigants as greedy, stupid, or fringe lunatics. Professor Hensler's study has the potential of unveiling such myths. The typical social policy tort action involves protracted litigation. Plaintiffs typically incur human costs in stress, dislocation, employment disruption, and lost time. Americans are rarely informed that attorneys willing to pursue social policy torts incur substantial risks.

The tobacco industry employed tactics to intimidate or bankrupt plaintiffs' counsel, which may be the reason that the tobacco industry won eight hundred cases in four decades. One of the plaintiff's lawyers described how the tobacco industry won in a war of attrition against plaintiffs' counsel.

RJR had a memorandum at a conference they had, and the lawyer—it was Shook Hardy, I think it was—was asked, "How in the world do you win these cases?" He said, "Let me tell you something. I take a page out of Patton's book. It's not that we spend all of our money; we make the other son-of-a-bitch spend all of theirs, and that's how we win the lawsuits."⁸³

Like the plaintiffs in *A Civil Action*, the victims of big tobacco faced great difficulties even in the initial task of finding a lawyer willing to cover the up-front costs of pursuing a complex case. The actual toxic tort case portrayed in the film cost millions of dollars to pursue, leading to financial, as well as emotional ruin for plaintiffs' attorneys. The tobacco litigation had the potential of costing billions of dollars, but in the four decades of tobacco litigation, plaintiffs found it difficult to find representation.

C. *The Uses of Social Policy Torts*

Professor Hensler's central research question is whether social policy torts are undemocratic in bypassing the legislature. The other side of the question is the impact on democratic values when companies are able to pollute water, market defective products, or discriminate against employees without being accountable. The film *A Civil Action* did not depict the aftermath of the litigation when W.R. Grace completely revamped its environmental policies. The community of

82. JAN HAROLD BRUNVAND, *THE MEXICAN PET: MORE "NEW" URBAN LEGENDS AND SOME OLD FAVORITES* 9 (1986)(urban legends are true-sounding but utterly false stories that pass from person to person even in this modern day).

83. Capra, *supra* note 71, at 2834.

Woburn and the Environmental Protection Agency has commended W.R. Grace for its social responsibility.⁸⁴ The lesson from *A Civil Action* is that social policy torts empower ordinary Americans to address the concerns of the community. Toxic tort cases, such as that in *A Civil Action*, have resulted in a safer environment for all citizens. The Environmental Protection Agency (EPA) and W.R. Grace worked cooperatively in cleaning up contaminated ground water. The purpose of the tort system is, quite simply, to make the wrongdoer accountable for damages inflicted or injuries caused, whether by malfeasance, misfeasance, or nonfeasance.⁸⁵

In tobacco reimbursement cases, the private law firms were litigating against a "tenacious, unyielding and well-financed" tobacco industry that had the resources to resist indisputable evidence for "one of the few medical certainties of our time: Cigarettes kill."⁸⁶ "Juries were not sympathetic to habitual smokers and the tobacco manufacturers spent huge sums in the defense of smoking and health cases."⁸⁷ In state tobacco cases, private attorneys underwrote all of the expenses and assumed all of the risk in litigating against an industry that previously was beyond the reach of the law.

The whole point of social policy torts is to permit ordinary citizens to change corporate practices. Today municipalities are suing handgun manufacturers to recoup the public health and other costs arising from the negligent marketing of these weapons.⁸⁸ State attorneys general are joining forces with private attorneys in prosecuting handgun distribution cases in New Orleans, Atlanta, and Newark, arguing that manufacturers should be held accountable for marketing practices that make it inevitable that many will become the instrumentalities of urban crimes.⁸⁹

Rhode Island's attorney general has retained a prominent South Carolina plaintiffs' law firm to prosecute lead paint manufacturers for marketing a product that can produce mental retardation in children.⁹⁰ The plaintiffs contend that areas with weak gun control regu-

84. JONATHAN HAAR, *A CIVIL ACTION* (1996).

85. W.R. Grace recently filed for bankruptcy as a result of its liability for paying asbestos claims.

86. CYNTHIA CROSSEN, *TAINTED TRUTH: THE MANIPULATION OF FACT IN AMERICA* 66 (1996)

87. Mitchell L. Lathrop, *Tobacco-Related Litigation: How It May Impact the World's Insurance Industry*, 3 CONN. INS. L.J. 305, 308 (1997)(examining role of the Tobacco Industry Research Committee in resisting mainstream scientific research).

88. See also Joel Stashenko, *Court Rules Manufacturers Not Liable for Gun Deaths, Injuries*, THE CHARLESTON GAZETTE, April 27, 2001, at P5A.

89. *Id.*

90. *Id.*

lations are provided with more weapons than the local market can absorb, knowing that the surplus will be resold through illegal channels.⁹¹ Plaintiffs' attorneys in these public/private lawsuits are paid for their work through contingency fees. These firms do not receive money unless the state collects a judgment. If the plaintiffs do win, the payment to the private law firms can be enormous.⁹²

There is remarkably little empirical research on the social impact of the tobacco litigation, handgun cases, or other social policy cases. Before legislatures eliminate this new species of lawsuit, careful empirical study is required. State tort reform statutes were hastily enacted on the basis of remarkably little empirical study. In my research on products liability, I have found unanticipated negative consequences to women, workers, and consumers, as the result of tort reform without careful empirical study.⁹³ Restricting patients' rights through tort reform has not lowered medical bills. Indiana's 1975 Medical Malpractice Reform Act capped all damages at \$500,000 and eliminated punitive damages to lower malpractice outlays.⁹⁴

Yet, the mean payment for larger malpractice claims in Indiana turned out to be substantially higher than in Michigan and Ohio, neighboring states that did not enact tort reforms such as caps on recovery.⁹⁵ A recent empirical study of Texas insurance rates concluded that the promised savings from tort reforms have not materialized.⁹⁶ The future of social policy torts is in doubt because of the success of the tort reform movement in convincing state legislatures to limit tort rights and remedies. A recent study concludes that these tort reform groups

[c]laim to speak for average Americans and represent themselves as grassroots citizens groups determined to protect consumer interests. But their tax filings and funding sources indicate that they actually represent major corporations and industries seeking to escape liability for the harm they cause consumers—whether it be from defec-

91. James Bone, *Court Rules Gunmakers Not Responsible for Criminal Use of Weapon*, THE TIMES, Apr. 28, 2001, at 18.

92. John Helyar, *They're Ba-a-ack!*, FORTUNE, June 26, 2000, at 222.

93. Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673 (1996).

94. *Id.* at 729.

95. See, e.g., William P. Gronfein and Eleanor D. Kinney, *Controlling Large Malpractice Claims: The Unexpected Impact Of Damages Caps*, 16 HEALTH POLITICS POLICY & LAW 441, 447-48 (1991).

96. A 1999 Study by the Consumer Federation of America found that the promised consumer savings from Texas tort reforms failed to materialize. J. Robert Hunter, *Texas Tort Reform's Incredible Shrinking "Savings,"* (1999).

tive products, medical malpractice, securities scams, insurance fraud, employment discrimination or environmental pollution.⁹⁷

The policy decision to change our tort system by eliminating future partnerships between public authorities and trial lawyers needs to be based upon careful empirical study, not anecdotal evidence. Deborah Hensler's research hypotheses address many issues of great importance to legislators who must weigh the costs and benefits of social policy torts.

III. THE IMPACT OF MEGA CASES ON PROCEDURE

Professor Richard Marcus examines the role "of complex litigation as the sparkplug of modern procedural developments."⁹⁸ He begins his article with a typology of complex litigation of cases in the fields of (1) commercial litigation; (2) public law litigation; and (3) mass torts.⁹⁹ Professor Marcus highlights an interpretation about the character of modern law by my former teacher, Professor Abram Chayes.¹⁰⁰ In his 1976 article, Chayes observed that "the dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies."¹⁰¹

I would update Chayes' thesis by arguing that tort litigation increasingly vindicates an ever-changing spectrum of consumer rights. The attitudes explored in the movie *Erin Brockovich* reflect important social changes, which have occurred in the last three decades. Consumers feel that they have rights that can be vindicated by the tort system. Tort law plays an educative function in empowering ordinary Americans. The private attorney general role like any other legal institution can be improved, but the tort reformers do not take an even-handed approach in analyzing its strengths and shortcomings.

Professor Marcus describes the impact of what he calls mega cases on procedure. He begins with a typology of mega cases that have evolved in the past half-century.¹⁰² The first generation of mega cases was the large-scale commercial litigation cases arising out of private

97. Carl Deal and Joanne Doroshov, *The CALA Files: The Secret Campaign By Big Tobacco And Other Major Industries To Take Away Your Rights*, (New York: The Center for Justice and Democracy and Public Citizen, N.Y., 2000).

98. Richard L. Marcus, *Reassessing the Magnetic Pull of Mega Cases on Procedure*, 51 DEPAUL L. REV. 457 (2001).

99. *Id.* at 458-64.

100. *Id.* at 473.

101. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

102. Marcus, *supra* note 98, at 459-60.

antitrust cases in the 1950s. The 1954 case of *Brown v. Board of Education*¹⁰³ was emblematic of public law litigation, the second wave of mega cases.¹⁰⁴ Marcus devotes the remainder of his article to mass torts, the third wave of mega cases. The first mass tort case of consequence was the MER/29.¹⁰⁵ The MER/29 case qualifies as the first mega case in the field of mass torts that shaped both substantive products liability law, as well as the procedures for litigating punitive damages.

Punitive damages in products liability were first judicially recognized in the mid-1960s in the infamous MER/29 scandal. Richardson-Merrell's concealment of the numerous dangerous side effects of this anti-cholesterol drug led juries to award the first punitive damages for a defective product.¹⁰⁶ MER/29 was thought to reduce the risk of heart attacks and strokes.¹⁰⁷ Richardson-Merrell began animal testing of MER/29 in 1957.¹⁰⁸ All of the laboratory rats that ingested MER/29 suffered immediate abnormal blood changes.¹⁰⁹ Richardson-Merrell had evidence of a profile of developing danger, which was made even clearer after a second rat study uncovered abnormal blood changes caused by MER/29.¹¹⁰

An extended test of MER/29 was conducted on laboratory monkeys in early 1959.¹¹¹ The technicians observed that the monkeys were falling off the exercise bars because the drug blinded them. The scientist directing the study ordered a Richardson-Merrell laboratory technician "to falsify a chart of this test by recording false body weights for the monkeys."¹¹² When the lab technician protested, a Richardson-Merrell official told her: "You do as he tells you and be quiet."¹¹³ The MER/29 records were further altered, showing ersatz positive results long after the monkeys were killed. Richardson-Merrell produced a brochure for the medical community, employing the falsified test results and excising any reference to the high correlation between MER/

103. 349 U.S. 294 (1955).

104. Marcus, *supra* note 98, at 461.

105. *Id.* at 463.

106. *Ostopowitz v. Richardson-Merrell, Inc.*, No. 587 9/63 (N.Y. Sup. Ct., Nov. 7, 1966) cited in Michael L. Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 18, 88-89 (1992).

107. The Mer/29 vignette is drawn from *Toole v. Richardson-Merrell, Inc.*, 60 Cal. Rptr. 398, 403 (Ct. App. 1967).

108. *Id.* at 404.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 404.

113. *Toole*, 60 Cal. Rptr. at 404.

29 and abnormal blood conditions.¹¹⁴ The company submitted wholly fictitious body and organ weights and blood tests for dead rats to fool the Food and Drug Administration (FDA) into believing that the test animals had survived.¹¹⁵

The FDA reviewers informed Richardson-Merrell that its new drug application was incomplete and ordered an additional two-year study of rats and a three-month study of dogs.¹¹⁶ Nine out of the ten rats in the study soon developed eye opacities from the effects of MER/29. Richardson-Merrell concealed the severity of the problem by reporting that eight out of the twenty rats that took MER/29 developed mild inflammation of the eye.¹¹⁷ The company's examination of the rats was conclusive: twenty-five out of thirty-six rats developed opacities as a result of ingesting MER/29.¹¹⁸ Richardson-Merrell completed its study of dogs in February of 1960. One dog in the test group suffered total blindness from the drug, and the results of these tests were withheld from the FDA.¹¹⁹

The misinformed FDA granted Richardson-Merrell's application to market MER/29, and the drug was launched onto the market with an unprecedented promotional and advertising campaign.¹²⁰ Doctors were provided with more promotional literature on MER/29 than they had received for any previous medical product. Richardson-Merrell's brochures claimed that "MER/29 was . . . virtually nontoxic and remarkably free from side effects even on prolonged clinical use."¹²¹

Two months after the drug was approved, the FDA received an unsolicited whistle-blowing letter from Dr. Loretta Fox, a Richardson-Merrell scientist.¹²² Dr. Fox reported that in her experiments with MER/29 and rats, she had personally observed corneal eye opacities caused by the drug.¹²³ The FDA passed the scientist's letter on to Richardson-Merrell and solicited its comments.¹²⁴ Richardson-Merrell's top officials told a different story. The head of the company's toxicology department responded that MER/29 was used on thousands of rats and only one group showed any eye changes.¹²⁵ The

114. *Id.*

115. *Id.*

116. *Id.* at 405.

117. *Id.*

118. *Toole*, 60 Cal. Rptr. at 405.

119. *Id.*

120. *Id.* at 406.

121. *Id.*

122. *Id.*

123. *Id.* at 405.

124. *Toole*, 60 Cal. Rptr. at 405.

125. *Id.*

Richardson-Merrell memorandum to the FDA falsely asserted: "We have no evidence from our experience or from the literature that MER/29 would in itself, produce such changes."¹²⁶ Yet, Richardson-Merrell's pathologist further tested the long-term effects of MER/29 and found that the laboratory rats were blinded by low, as well as high dosages of MER/29.

Richardson-Merrell received the first adverse reaction reports from humans taking MER/29 as early as January of 1961.¹²⁷ A patient complained of a film over his eyes after using MER/29 for a short period.¹²⁸ The highest officials of Richardson-Merrell were told of eye lesions in humans, as well as in animals, yet it continued to claim that there were no adverse reactions from the drug.¹²⁹ A field report submitted to the company documented that a doctor taking MER/29 suffered eyesight deterioration from the drug. Still, physicians continued to be told by sales representatives that MER/29 was a proven drug and there was no question of its efficacy or of its safety.¹³⁰

The pharmaceutical company had received more than fifty reports of thinning hair from persons taking MER/29 by March of 1961.¹³¹ Richardson-Merrell's Vice President made a corporate decision not to inform the sales department about adverse reaction reports because of a concern that the test data would "discourage efforts in promoting sale of the drug."¹³² The Mayo Clinic reported two case studies of patients developing cataracts, suffering hair loss, and experiencing skin irritation after taking MER/29 by late 1961.¹³³ A Richardson-Merrell official telephoned the FDA in late 1961, reading a proposed reassurance letter that the company hoped to send to the medical profession.¹³⁴ The misleading letter gave an anemic warning of the then known side effects of "skin trouble, falling hair and cataracts, but advis[ed] doctors that they could continue use of the drug."¹³⁵

FDA officials met with Richardson-Merrell's President in November of 1961.¹³⁶ The FDA concluded that MER/29 should be immediately recalled from the market.¹³⁷ Richardson-Merrell was reluctant

126. *Id.* at 405-06.

127. *Id.* at 406.

128. *Id.* at 406.

129. *Id.*

130. *Toole*, 40 Cal. Rptr. at 406.

131. *Id.* at 406.

132. *Id.* at 407.

133. *Id.* at 407.

134. *Id.* at 416.

135. *Id.*

136. *Toole*, 60 Cal. Rptr. at 408.

137. *Id.* at 408.

to suspend sales even after the FDA seized its records and uncovered the misreported research findings.¹³⁸ MER/29 was administered to approximately 400,000 consumers, injuring at least 50,000 patients in its short time on the market.¹³⁹ Consumers developed serious problems after using the drug for periods of less than three months.¹⁴⁰ The Vice President of Richardson-Merrell argued that MER/29 was the “biggest and most important drug in Richardson-Merrell history . . . and vowed to defend it at every step.”¹⁴¹

A New York jury awarded \$100,000 in punitive damages based upon evidence that Richardson-Merrell lied to the FDA, the medical profession, and consumers about the safety of MER/29.¹⁴² The Second Circuit reversed, observing that there was the potential for abuse in awarding punitive damages because the New York litigation was the first of some seventy-five similar cases to be litigated. The court’s concern about overkill proved to be unfounded because the MER/29 disaster resulted in only three punitive damage awards.¹⁴³ Company founder William Merrell and several other Richardson-Merrell executives were fined for submitting false animal data to the FDA, but served no prison time. The impact of the successful MER/29 litigation was monumental as this was the first case in the history of product liability that a company was assessed punitive damages for marketing a dangerously defective product.¹⁴⁴

Before the development of mega cases in mass tort actions, many plaintiffs went uncompensated. Hundreds of plaintiffs were injured in mass torts involving railways, streetcars, steamboats, and other instrumentalities but there was no procedural mechanism for trying a mass tort. Since the MER/29 cases, mass torts have transformed tort law’s common law foundation. The history of tort law demonstrates a progressive recognition of societal, as well as individual interests.¹⁴⁵ Cases involving Dalkon Shield,¹⁴⁶ Copper-7,¹⁴⁷ breast implant litiga-

138. Paul Rheingold, *The MER/29 Story – An Issuance of Successful Mass Disaster Litigation*, CAL. L. REV. 56 (1968).

139. *Id.*

140. *Id.*

141. *Id.*

142. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967)(reversing punitive damages award).

143. The same evidence led the California court to affirm a \$500,000 punitive damages award in *Toole v. Richardson-Merrell, Inc.*, 251 Cal.App.2d 689, 60 Cal. Rptr. 398 (1967).

144. David Lauter, *Justice Dept. Investigating Lilly's Marketing of Oraflex*, NAT'L L.J., at 3.

145. ROSCOE POUND, *MY PHILOSOPHY OF LAW* 249 (1941).

146. See, e.g., Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 213 (2001).

147. See, e.g., *Hill v. Searle Lab*, 884 F.2d 1064 (8th Cir. 1989).

tion,¹⁴⁸ Phen-Fen litigation,¹⁴⁹ and other medical product cases have vindicated the rights of women. Marcus is correct in observing that mass torts are largely a development of the past three decades.

With the coming of the industrial revolution, tort law shifted to industrial accident law. Today, the emphasis has shifted to mega cases or social policy torts. Before there were mega cases, there was mega death from mass disasters, such as railroad or industrial accidents. The law of torts entered the negligence era “around the turn of the nineteenth century as turnpikes and burgeoning industry were vastly accelerating the pulse of activity and confronting society with an accident problem of hitherto unprecedented dimensions.”¹⁵⁰ Negligence was a system of compensation for accidents associated with new dangers associated with industrialization.¹⁵¹ Under this new regime, “intentional injuries whether direct or indirect, were grouped as a distinct field of intentional torts” while negligence provided remedies for the victims of accidents.¹⁵²

The first recorded train wreck with passenger fatalities occurred two years later in 1833.¹⁵³ Forty-six passengers were crushed or drowned to death when a train ran through an open drawbridge in Norwalk, Connecticut, in 1853.¹⁵⁴ Perhaps the most shocking accident occurred on July 17, 1856 in Camp Hill, Pennsylvania, when two Northern Penn trains crashed head-on. Sixty-six church children bound for a picnic died in the flaming wreckage.¹⁵⁵ A boiler explosion on a Mississippi River steamboat near Memphis killed 1,547 people on April 27, 1865.¹⁵⁶ The “legal delinquency” in each of these cases was fatal negligence by the common carrier, not a desire to hurt anyone. Negligence law, in no small part, was railway, streetcar, and steamboat accident law. The nineteenth century law reporters did not report

148. See, e.g., *In re Dow Corning Corp.*, 1995 WL 495978 (Bankr. E.D. Mich. Aug. 5, 1995) (giving a brief history of breast implant litigation).

149. *McCue v. Norwich Pharmacal Co.*, 453 F.2d 1033 (1st Cir. 1972); see generally, Caren A. Crisanti, *Product Liability of Prescription Diet Drug Cocktail, Fen-Phen: A Hard Combination to Swallow*, 15 J. CONTEMP. HEALTH L. & POL'Y 207 (1998).

150. JOHN G. FLEMING, *AN INTRODUCTION TO THE LAW OF TORTS* 4 (1967).

151. PROSSER AND KEETON *ON THE LAW OF TORTS* 28, 161 (5th ed. 1988) (“Intentional injuries, whether direct or indirect, began to be grouped as a distinct field of liability, and negligence remained as the main basis for unintended torts. Negligence thus developed into the dominant cause of action for accidental injury in this nation today.”).

152. *Id.*

153. THOMAS H. KOENIG & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* 30 (2001).

154. *Id.*

155. *Id.*

156. *Id.*

mega cases because there was no mechanism for citizens to recover for mass disasters.¹⁵⁷

Negligence evolved to compensate the victims of accidents caused by common carriers and industrial corporations that failed to use reasonable care to protect the public.¹⁵⁸ Courts held that it was negligent, for example, to fail to blow a whistle at a railway crossing or to negligently operate a train.¹⁵⁹ “The modern law of torts must be laid at the door of the industrial revolution, whose machines had a marvelous capacity for smashing the human body.”¹⁶⁰ The heyday of the negligence era was between 1850 and 1910 when courts recognized liability-limiting doctrines, such as contributory negligence and the assumption of risk.¹⁶¹ American society had mass injury and death long before the tort law and law of civil procedure developed mechanisms for adjudicating the mega case.

Professor Marcus contends that complex litigation has been the principal change agent since “the adoption of the Federal Rules of Civil Procedure.”¹⁶² He contends that “big cases prompt procedural changes, and in turn, those procedural changes, produce more big cases.”¹⁶³ However, he argues that tobacco litigation “has been a dud in terms of procedural innovation.”¹⁶⁴ Professor Marcus hypothesizes that “the presumed connection between megalitigation and procedural innovation may be epochal rather than eternal.”¹⁶⁵

The tobacco litigation has resulted in innovations of the substantive area of the law. The tobacco settlement provides remedies for prospective harms, rather than solely redressing past injuries as in the

157. THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 30 (2001).

158. Negligence is an act or omission by which the defendant fails to exercise the due care of a reasonable person in the circumstances.

159. WILLIAM L. PROSSER, THE BORDERLAND OF TORT AND CONTRACT, SELECTED TOPICS ON THE LAW OF TORTS 411 (1953). Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967); see also THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 12 (2001) (noting that “[n]egligence was a byproduct of the social, economic, political, and technological changes that accompanied large-scale industrialization”).

160. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 467 (2d ed. 1986).

161. Knowledge of the risk is critical to a finding that the plaintiff knowingly and voluntarily assumed it. *Cincinnati, N.O. & T.P.R. Co. v. Thompson*, 236 F. 1, 9 (6th Cir. 1916). In order for there to be assumption of risk, there must be knowledge and apprehension of the specific risk and a voluntary choice to assume it. When the defense was originally conceived, the workers only choice was to assume the risk of workplace hazard or lose their job.

162. Marcus, *supra* note 98, at 457.

163. *Id.*

164. *Id.* at 458.

165. *Id.*

typical tort action.¹⁶⁶ The tobacco litigation is also path breaking in its remedy, which is designed to re-socialize the American public about the dangers of smoking. The settlement is also unique because it compensates the states, rather than the direct victims of tobacco-related illnesses.

My hypothesis is that the Big Bang in tort law would be the synergistic impact of procedural changes and a simultaneous expansion of substantive rights and remedies. The procedural reforms of the Rules of Civil Procedure made it possible for trial lawyers to discover "smoking gun" documents exclusively in the possession of manufacturers and other defendants. The pro-plaintiff expansion of substantive tort law combined with liberal discovery and other procedural reforms made mega cases possible.

The principal path of American tort law following World War II has been an expansion of substantive rights and remedies, making social policy and mega cases possible. Prior to the 1960s, manufacturers were shielded from liability by the doctrine of privity and other barriers to recovery. A manufacturer was not liable for injuries caused by defective products unless they joined in the making of a contract with a consumer.¹⁶⁷ Absent a direct contractual link, there was no manufacturer liability to an injured consumer.

Medical malpractice has also emerged as a viable field since the mid-1960s.¹⁶⁸ Today, medical malpractice remedies punish negligent nursing home chains, dishonest insurance companies, and irresponsible health care entities that damage the public welfare through indifference or to increase corporate profits. The contemporary anti-tort law campaign arose as a response to the expansion of tort rights in the post World War II era. Prior to the 1940s, defendants had few worries about product liability because privity of contract stymied most cases against national manufacturers.¹⁶⁹ Doctors were seldom sued for malpractice because of charitable immunities and the difficulty of finding

166. Paul LeBel, *Beginning the Endgame: The Search For an Injury Compensation System Alternative to Tort Liability for Tobacco-Related Harms*, 24 N. KY. L. REV. 457, 470-71 (1997).

167. *Winterbottom v. Wright*, 152 Eng. Rep. 402, 403-04 (1842).

168. See Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 715 (1996); see also Michael L. Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters,"* 47 RUTGERS L. REV. 975, 1046-47 (1995) (noting that health care institutions were immune from tort liability prior to the 1960s because of charitable or government immunity and other barriers to patient recovery).

169. Under the doctrine of privity, there must be a direct contractual relationship between the injured party and the company responsible for the injury. See, e.g., *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1962) (proposing strict liability for the injuries caused by defective products).

doctors to testify against other doctors. The abolition of many immunities and defenses, the adoption of "strict liability," and an "emerging concern about toxic exposures and a broader-based rise in claims consciousness on the part of the public," led to an increase in awards.¹⁷⁰

Premises liability emerged as a distinct cause of action in the 1970s.¹⁷¹ The development of premises liability permitted the victims of crimes to file lawsuits for unsafe conditions in shopping malls, apartment buildings, and residential property. Hotels and motels across the country have improved security after guests who were robbed, raped, or murdered by intruders filed liability lawsuits.¹⁷²

The MGM Grand Hotel fire of 1980 killed eighty-five and injured another five hundred guests.¹⁷³ Three thousand claims were filed against the hotel for its inadequate sprinkler and alarm system.¹⁷⁴ After these lawsuits, the MGM Grand was rebuilt with improved state-of-the-art ventilation, a new sprinkler system, and carefully monitored alarms.¹⁷⁵ The expansion of rights and remedies in the post World War II period has now reversed itself, primarily because of the efforts of the tort reform movement.

Professor Marcus next develops a typology of mega cases, which have evolved since World War II. Large-scale commercial litigation, public law litigation, and mass torts have been the three major doctrinal developments.¹⁷⁶ Marcus argues that mass torts have been the most prominent sort of mega litigation.¹⁷⁷ The earliest procedural changes occurred in the field of commercial or business litigation.¹⁷⁸ Corporate wrongdoing was a principal impetus to procedural rules on multidistrict transfer and consolidation.¹⁷⁹ In the last quarter century, mass torts have played a critically important role in procedural reform.

170. Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 *STANFORD L. REV.* 853 (1992).

171. Premises liability historically depended upon the status of the entrant. Trespassers were owed the lowest level of care, whereas invitees were owed the highest duty of care. Licensees were accorded a middle level standard of care. Since 1970, the status categories have gradually been replaced by a standard of care that depends upon the circumstances.

172. *See, e.g., King v. Trans-Sterling, Inc.*, No. A219783 (Dist. Ct. of Clark Cty. Nev. 1985).

173. *In re MGM Grand Hotel Fire Litigation*, 660 F. Supp. 522 (D. Nev. 1987); *see also* Michael Hirsley, *2 Suits Filed in Hotel Disaster*, *CHICAGO TRIBUNE*, Jan. 6, 1987, at 4.

174. *The Law MGM Grand Fears*, *BUS. WK.*, Apr. 6, 1981, at 115.

175. *ASSOCIATION OF TRIAL LAWYERS OF AMERICA, CASES THAT MADE A DIFFERENCE* 15 (1993).

176. Marcus, *supra* note 98, at 459-64.

177. *Id.* at 463.

178. *Id.*

179. *Id.* at 464-65.

Marcus notes that corporate defendants have made it expensive to bring mega cases through tactics such as “dump truck” discovery.¹⁸⁰ Discovery reform is particularly urgent in the age of the Internet. The new information technologies make it easy to destroy or alter evidence with a click of the mouse or through the creative use of the delete key. A corporation’s intentional deletion of incriminating e-mail may create liability for the tort of spoliation.¹⁸¹ In New Jersey, a court imposed a \$1 million sanction to punish a company’s failure to preserve key documents in litigation.¹⁸² The tort of spoliation and concomitant punitive damages is an efficient deterrent against destroying or modifying electronic “smoking guns.” However, new discovery reforms are needed to permit individuals and institutions to vindicate their rights in an online environment. The next wave of mega cases is likely to reflect the shift of our economy from durable goods to an information-based networked economy.

IV. MCGOVERN’S ECONOMIC MODEL OF ASBESTOS CLAIMS

Twenty four million Americans are believed to have had physical contact with asbestos fibers from asbestos products between 1939 and 1980.¹⁸³ The number of asbestos-related products liability cases is now in the hundreds of thousands and still growing. Men were disproportionately victimized, being exposed to asbestos in the military, in shipyards, in mines, and in other places of male dominated employment. In the early asbestos cases, plaintiffs’ attorneys uncovered “smoking guns” that confirmed an industry wide practice of failing to warn workers of the known hazards of asbestos cases:

In 1935, Brown, corporate attorney for Johns-Manville and Sumner Simpson, the President of Raybestos-Manhattan, exchanged letters in which they agreed that it would be beneficial if no articles about asbestos would appear in the asbestos industry’s trade journal; that, in 1947, the Industrial Hygiene Foundation . . . failed to publish a study showing that 20 percent of the workers in two of their asbes-

180. Dump truck discovery is a tactic of responding to discovery requests by turning over hundreds of thousands of documents to the plaintiff. The relevant document may be hidden among irrelevant documents overwhelming the plaintiff. Dump truck discovery was depicted in the film, *A Civil Action*.

181. Spoliation of evidence is the deliberate destruction of, or the failure to preserve, essential evidence. *Employment Law Destruction of Hiring Documents Precludes Summary Judgment Second Circuit Decision Focuses on Missing Ballots Ranking Job Applicants*, N.J.L.J., May 21, 2001 (noting that destruction of e-mail documents may constitute spoliation although there is no case law on point).

182. *In re Prudential Insurance Co. of American Sales Practices Litigation*, 169 F.R.D. 598, 617 (D.N.J. 1997).

183. *Asbestos Makers Face Bankruptcy*, TOWNSVILLE BULLETIN, Aug. 16, 2001, at 23.

tos-textile factories had developed asbestosis . . . [and the companies] made efforts to suppress public knowledge of the link between asbestos exposure and the development of cancer.¹⁸⁴

In the first wave of asbestos cases, individual plaintiffs usually filed products liability actions on a failure to warn theory. Much of the increase in products liability litigation during the 1980s was attributable to asbestos litigation. The same “smoking gun” documents were introduced in thousands of similar cases. The role of the private attorney general in uncovering dangerous conduct was prominent in the first cases litigated in the late 1970s and early 1980s. The efficiency of the private attorney general institution with American tort law was epitomized by the first successful asbestos case. It was trial attorneys, not regulators, who uncovered definitive evidence that asbestos manufacturers deliberately concealed the danger of asbestos dust in order to protect the industry’s profits. By the early 1990s, the private attorney general role in asbestos litigation had grown very thin indeed as hundreds of thousands of similar cases were filed using the same “smoking gun” documents.

Professor Francis McGovern’s paper entitled *Economic Opportunities and Asbestos Claims Resolution Facilities*¹⁸⁵ closely examines a single social policy or mega case, the asbestos litigation. He describes a new model for adjudicating claims premised on a mass tort philosophy based upon probabilities rather than individual justice. In the traditional model, an attorney absorbs the costs of depositions, motions, pleadings, trial, and the post-verdict period. In my empirical study of punitive damages in product liability, I found that the costs could be quite considerable. There were cases in my sample in which plaintiffs’ attorneys fronted many millions of dollars. The routine product liability case may involve tens of thousands of dollars. Professor McGovern notes that the contingency fee attorney has a very low probability of recovering any money in the early years of litigation. McGovern explains that the expected return for a plaintiff’s attorney and his client in the first three years of traditional litigation is zero.¹⁸⁶ In the asbestos litigation, the typical plaintiff will either be deceased or in very poor health before receiving a verdict or settlement under the traditional model. The traditional model of case-by-case adjudication

184. PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* 242 (1985).

185. Francis McGovern, *Economic Opportunities and Asbestos Claims Resolution Facilities*, Paper presented at the Seventh Annual Clifford Symposium on Tort Law and Social Policy: Smoke Signals: The Changing Landscape of the Practice, Financing, and Ethics of Civil Litigation in the Wake of the Tobacco Wars, April 5, 2001 (paper on file with author).

186. *Id.* at 2.

gave way to the mass tort out of necessity. McGovern notes that the movement to a mass torts claim model was driven by “the sheer volume of cases and suits filed against defendants.”¹⁸⁷ He notes that the stakeholders in the asbestos litigation favored an expedited settlement method.¹⁸⁸ By the early 1990s, asbestos cases were clogging the courtrooms. I visited a federal court in Miami in 1989 and observed that an entire courtroom was devoted to asbestos cases. Asbestos products liability cases created a crisis in our court system as thousands of cases were filed based upon the same profile of danger and a similar pattern of injury. Judges sought innovative ways of reducing the cost of adjudicating asbestos claims. The crushing volume of asbestos cases led the defense bar to seek new methods of resolving asbestos claims.¹⁸⁹ The trial attorneys, judges, and claimants sought a way to settle claims quickly.

Professor McGovern compares the costs and returns for an attorney pursuing an asbestos claim under the traditional model to the return stream in a mass tort case involving single and multiple defendants. He begins with a formula that considers the present value of money and the discount rate.¹⁹⁰ It is striking how the traditional contingency fee approach provides such a heavy cost and virtually no prospect of return in the early years of litigation. In McGovern’s model, the early years in torts litigation represent high cost and no return. Tort lawyers are not only litigators, but sophisticated *de facto* banks under the traditional regime.

Professor McGovern demonstrates that the return stream for mass tort settlements is quite different. Plaintiffs and their attorneys have a much higher probability of an award and settlement in the early years. The model of the single defendant mass tort shows an immediate discounted settlement in the first year, whereas there is no revenue stream in the traditional torts model. The mass torts model uses the concept of economy of scale to reduce costs.¹⁹¹ The economy of scale permits a single trial attorney to settle “hundreds of claims” for essentially the same cost as a single claim under the individual justice model.

187. *Id.* at 3.

188. W. KIP VISCUSI, *REFORMING PRODUCT LIABILITY* 20 (1991)(arguing that the increase in product liability is attributed to the unique mass tort of asbestos).

189. McGovern, *supra* note 185.

190. The formula which McGovern calls the “plaintiff attorney economic model” computes the number of cases, individual, year, discount rate, return and cost. I assume that “Bijou” represents the probability of return and “Pi” is the probability of return although these terms are not defined. *Id.*

191. *Id.*

Professor McGovern describes the Asbestos Claims Facility Model as representing a third model in which a single plaintiff's attorney files hundreds of claims against multiple manufacturers.¹⁹² The asbestos claims market is a byproduct of the bankruptcy of many of the asbestos manufacturers.¹⁹³ The trust permits a single attorney to sue multiple defendants and obtain speedy recovery for hundreds, if not thousands of cases. His paper is a justification of the trust as an efficient method of processing claims. It is difficult to argue against the asbestos claim market as an efficient way of dealing with the asbestos litigation in the wake of widespread insolvency in the industry. The lesson of the asbestos cases is the capacity of tort law to evolve to meet changing societal demands. Tort lawyers developed a cost structure and method of processing claims that was efficient. Professor McGovern notes that when costs are factored, the claimant's attorney earns between \$4.50 and \$312.50 in the typical pleural claim. The revenues and profits of trial attorneys processing these claims do not appear too exorbitant.¹⁹⁴ The asbestos litigation illustrates the growing pains of a new legal institution developed to cope with mass torts with hundreds of thousands of victims.

V. CONCLUSION

The social policy torts, asbestos litigation, and other mega cases reflect tort law's remarkable quality of continually evolving to meet new social needs. The private attorney general is a valuable legal institution, which cannot function without the contingency fee system in mass tort cases. Corporate America favors curbing the use of private attorneys general in public interest litigation. George W. Bush signed a bill in 2000 limiting the authority of Texas' attorney general to retain private companies to aid in class action lawsuits.¹⁹⁵ The Interstate Class Action Jurisdiction of 1999 is the most recent in a series of bills proposing federal limits on consolidated lawsuits, products liability suits, medical malpractice awards, and punitive damages. The bill passed the House, but was not enacted by the Senate.¹⁹⁶ At the federal level, Congress is presently considering legislation to require all large class actions to be filed in federal court unless the plaintiffs are

192. *Id.*

193. *Id.*

194. McGovern, *supra* note 185.

195. *Id.*

196. Harvey Berkman, *Tort Reform Measure, Facing Stiff Opposition, Unlikely to Become Law*, NAT'L L.J., October 4, 1999, at A5.

residents of a single state.¹⁹⁷ This will have the effect of preventing class actions from being pursued in states chosen for their relatively pro-plaintiff courts. Before Congress and the states eliminate future private/public partnerships or cripple social torts, they should require tort reformers to produce solid empirical data rather than tort horror stories. Tort law's remarkable quality continually adapting old causes of action to new threats and dangers makes it an important institution of social control. A strong regime of social policy torts and mega torts ensures that not even multi-billion dollar industries such as Big Tobacco are beyond the reach of the law. Tort law is, as it has always been, forward-looking with the ability to confront new social problems and conditions.

197. See The Interstate Class Action Jurisdiction Act., H.R. 1875, 106th Cong. (1999).