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**“THE IMPACT THAT IT HAS HAD IS  
BETWEEN PEOPLE’S EARS:”<sup>1</sup>**

**TORT REFORM, MASS CULTURE, AND  
PLAINTIFFS’ LAWYERS**

*Stephen Daniels\**  
*Joanne Martin*

INTRODUCTION

Tort reform, it now seems, is a permanent fixture of the political agenda. Nearly ten years ago, the title of a *National Law Journal* front-page story was already characterizing it as “The Hundred Years’ (Tort) War.”<sup>2</sup> While the reformers are, of course, seeking sympathetic rule-makers and favorable rule changes, they also want to affect the way in which the media, intellectuals, key elites, and ultimately the public at large think about the civil justice system. Consequently, this “war” has always been waged on multiple fronts, in legislatures, in the courts, in elections, in the worlds of various elites, including academe, and in the world of public perception. More than just the formal legal changes it seeks, tort reform has always been about altering the cultural environment surrounding civil litigation — e.g., what is perceived as an injury; whether and whom to blame for an injury; what to do about it; and even how to respond to what others (especially plaintiffs and their lawyers) do with regard to naming and blaming. The best evidence of this is found in the various public relations campaigns used by the reform interests since at least the 1970s to persuade people that the reformers’ vision of civil litigation is the true rendition, and should guide both policy-makers and ordinary people (especially if they serve on a jury).

Tort reform’s vision of civil litigation is a part of contemporary American mass culture, competing with other images of the legal system for acceptance. It is an all too familiar vision of a system gone terribly and dangerously wrong. The vision’s basic or unifying theme is the idea of a system run amok, for which “we all pay the price.” It is

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1. Comment of a Houston, Texas plaintiffs’ lawyer; see Methodological Appendix, *infra*.  
2. Andrew Blum, *The Hundred Years’ (Tort) War*, NAT’L L. J., Oct. 15, 1990, at 1.

a vision full of evocative metaphors and threatening images. It describes a system where, among other things, the number of personal injury suits is significantly higher than in the past (the litigation explosion); where more people bring lawsuits than should (frivolous lawsuits); where the size of awards is increasing faster than inflation (skyrocketing awards); where the size of most awards is excessive (outrageous awards); where the logic of verdicts and awards is capricious (the lawsuit lottery); where the cost of lawsuits is too high and the delays too great (a wasteful, inefficient system); where there is no longer a fair balance between the injured person and the defendant (exploiting "deep pockets"); and ultimately a system where the cost to society is unacceptably high ("we all pay the price").

The vision is complex, including a set of reasons or causes for the system gone wrong that are also familiar: people can sue without risk, paying the lawyer only if they win (reflecting a lack of personal responsibility); people think they can make a lot of money (greed and getting something for nothing); laws make it too easy to sue (a lack of fairness); people know the insurance company will pay (greed combined with a lack of fairness); people believe that anyone suffering an injury should be compensated regardless of fault (again, the lack of fairness combined with a lack of responsibility); and lawyers are looking for big contingency fees (more greed).

Not merely a description with an accompanying set of causes for the system's failings, this vision is also an evaluation of civil litigation based on the consequences of a system run amok. These consequences, in combination with an extreme fear of litigation, are serious and threatening to potential defendants. Among the most widely bemoaned consequences are doctors and hospitals withdrawing services, especially obstetricians turning away expectant mothers (e.g., the lawsuit crisis is bad for babies); the increasing cost of products and services is going up (the "tort tax"); the disappearance of essential products and services (e.g., no more childhood vaccines); increasing taxes (state and local governments are a vulnerable deep pocket); disappearing state and local government services (e.g., playgrounds closed because of crippling lawsuits); and the loss of jobs (e.g., businesses must change to deal with the fear or threat of lawsuits). As a result of such dire consequences, the civil justice system needs change and people should, indeed must, support those changes.

In constructing this vision and persuading the public of its veracity (and in turn persuading them of the need for change), tort reform draws on the power of shared American cultural ideals for its basic

themes and evaluative standards.<sup>3</sup> Specifically, tort reform draws from what political scientist Deborah Stone calls the “motherhood issues” that dominate American policy discourse: equity, efficiency, security, and liberty.<sup>4</sup> Stone labels them “motherhood issues” because everyone supports such ideas when they are stated abstractly,<sup>5</sup> which is why interest groups use them to attract support for their proposals. These shared ideals are mixed with popular notions regarding the legal system to construct a believable and damning vision of a system run amok for which “we all pay the price.” The result may be a reshaping of what Robert Hayden calls our “common sense” regarding the civil justice system — our underlying cultural assumptions about the way in which things work — in the interest of a set of political goals.<sup>6</sup> We are interested in that vision which, through the means used to persuade people of its veracity, has become a part of American mass culture. One need only think of the symbolic value of a cup of coffee from McDonalds in constructing this believable and damning vision of civil litigation in many people’s minds.

Parts II and III of this article discuss tort reform’s vision of civil litigation as mass culture, with special attention to that vision’s construction and marketing. We are, however, interested in more than just these matters. Equally important is the impact that such a vision — as mass culture — may have and what it may mean for the future of civil litigation. Parts IV and V explore the possible future through the eyes and experiences of plaintiffs’ lawyers, one of the reformers’ primary targets. Because they are the civil justice system’s gatekeepers,<sup>7</sup> their perceptions of and responses to that vision will have an important influence on the future of civil litigation. This exploration draws from our own research in Texas, which is outlined in the Methodological Appendix to this article. Among the issues we are investigating is the impact of tort reform on the practices of these lawyers. They fervently believe that the tort reform public relations campaigns have been very successful, profoundly effecting the cultural environ-

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3. See Robert Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony and the Great American Liability Insurance Famine of 1986*, 11 *STUD. L. POL. & SOC’Y* 95 (1991).

4. DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* 37 (1997).

5. *Id.* at 12.

6. *Supra* note 3, at 7; see also STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* (1995).

7. See HERBERT JACOB, *LAW AND POLITICS IN THE UNITED STATES* 123 (1986); Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeeper in the Civil Justice System*, 81 *JUDICATURE* 22 (1997); Joanne Martin & Stephen Daniels, *Access Denied: Tort Reform is Closing the Courthouse Door*, *TRIAL* 26 (1997).

ment surrounding civil litigation, and therefore their practices.<sup>8</sup> In a recent survey we found that 90.9 percent of Texas Plaintiffs lawyers believe that these campaigns have had a negative (25.9 percent) or strongly negative (65.0 percent) effect on their practices.<sup>9</sup> The real world indicator of that success, these lawyers say, is the effect on juries. One prominent plaintiffs' lawyer that we interviewed commented:

The biggest problem I've seen is the effect on the juries. Tort reform, you can say it's a legislative agenda . . . and you can look at it from a statutory standpoint . . . . But what I see as the most severe impact is right over there, when you go to pick a jury. And juries have gotten mean, real mean. They've been convinced that everything in their lives, from heart attacks to hemorrhoids, is because of a system that is out of control. And when you have a tort reform advocate on the jury panel and you're asking questions, all you have to do is listen to the phraseology. It's all the same: too many frivolous lawsuits, outrageous jury awards, greedy trial lawyers. The guy is repeating the mantra.<sup>10</sup>

A San Antonio lawyer makes a direct connection between the public relations campaigns and jury verdicts:

There's an organization called Texans Against Lawsuit Abuse which has been very, very proactive in regard to attacking the tort system. They have done a very effective job in doing that . . . . Many jurors have just bought the propaganda put out by the insurance industry that the cost of all these verdicts is driving jobs to Mexico and Taiwan. You know, your job is next, so you better do something about it. That's the subtle message . . . . But right now, the climate is such, at least in this community, that jurors are not enamored with personal injury plaintiffs or personal injury lawyers. So, verdicts are low.

Whether the reformers' efforts to lobby the public mind have been, in fact, this successful is unclear,<sup>11</sup> but plaintiffs' lawyers work every-

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8. See Joseph Calve, *Poured Out*, TEX. LAW., Dec. 16, 1996 at 1.

9. See Methodological Appendix, *infra*.

10. See Methodological Appendix, *infra*. A Houston defense attorney came to the same conclusion: "[Insurance companies are] betting on juries not liking people or not liking the tort, as opposed to really determining liability and really determining, you know, what fair damages are. And they're winning on those a lot." TEX. DEP'T OF INSUR. SELECTED QUOTATIONS FROM FOCUS GROUP SESSIONS, <http://www.tdi.state.tx.us/commish/ctortqu.html> at 38 (1998) (visited May 14, 1999). Another Houston defense attorney stated: "[t]here's no doubt from my practice that the enactment of the statutes doesn't have nearly the effect that juror attitudes do." *Id.* at 56. Also see Valerie Hans, *Business on Trial: The Civil Jury and Corporate Responsibility*, 50-78 (2000).

11. A recent experimental study of juror judgments in tort cases found that the strongest predictor of juror liability decisions was a juror's general beliefs about "whether plaintiffs generally receive too much or too little in a lawsuit." Shari S. Diamond, Michael J. Saks & Stephan Landsman, *Juror Judgments About Liability and Damages: Sources of Variability and Ways to*

day on the basis of their own “common sense” notions of the way things supposedly work, and they believe the public relations campaigns have been far too successful. We examine this lawyer “common sense” for what it may suggest about the possible future of civil litigation in the wake of tort reform and its public relations campaigns. Again, what these lawyers do on the basis of their “common sense” is important because they function as gatekeepers to the civil justice system.<sup>12</sup> Plaintiffs’ lawyers provide meaningful access for injured people to the remedies allowed under the law. If plaintiffs’ lawyers react to their perceptions of tort reform’s efforts by altering their practices, the amount and nature of access to law and its remedies may be altered as well, thereby changing the geography of civil litigation.

## II. TORT REFORM AND MASS CULTURE

### A. Popular Culture and Mass Culture

In characterizing tort reform as more than the formal legal changes sought by its advocates, we purposely use “mass culture” rather than “popular culture” as our framework. Both concepts deal with people’s ideas about the world around them, their place in that world, and how that world operates. In the literature on these two “cultures,” however, some commentators argue that there is a crucial difference between them. That difference is important in examining tort reform.<sup>13</sup> It concerns where particular ideas about the world around us origi-

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*Increase Consistency*, 48 DEPAUL L. REV. 301, 309 (1998). Jurors who believed plaintiffs generally receive too much were likely to find for the defendant and those who believed plaintiffs generally receive too little were likely to find for the plaintiff. “The relative success of this variable in predicting juror liability verdicts may reflect the success of efforts in persuading some members of the public that a litigation explosion is burdening the civil justice system with suits by undeserving plaintiffs.” *Id.* Other studies have also found a relationship between juror attitudes regarding the civil justice system and juror decisions in civil cases. See Edith Green, Jane Goodman & Elizabeth Loftus, *Jurors’ Attitudes About Civil Litigation and the Size of Damage Awards*, 40 AM. UNIV. L. REV. 805 (1991); Valerie Hans & William Lofquist, *Jurors’ Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 L. & SOC’Y REV. 85 (1992); HANS, *supra* note 10, at 22-49.

None of these studies attempted to test directly the possible connection between attitudes and the tort reform public relations campaigns. At least one older study did look at a public relations campaign similar to the current ones and found an effect on jurors. That study tested the influence on jurors of insurance company magazine advertisements complaining of what were characterized as ridiculously high jury verdicts. This work found that “even a single exposure to one of these ads can dramatically lower the amount of award a juror is willing to give.” Specifically, jurors awarded less for pain and suffering. See Elizabeth Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A. J. 69 (1979).

12. See *supra* note 7. Also see Greg Winter, “Jury Awards Soar as Lawsuits Decline on Defective Goods,” *New York Times*, January 30, 2001 at A1, C4.

13. See e.g., MICHAEL KAMMEN, *AMERICAN CULTURE AMERICAN TASTES: SOCIAL CHANGE AND THE 20TH CENTURY* (1999); DOMINIC STRINATI, *AN INTRODUCTION TO THEORIES OF POPU-*

nate, how they are disseminated, and for what purpose. With popular culture, these ideas emerge from below as a part of everyday life and will vary as the conditions of everyday life vary. Popular culture is, C.W.E. Bigsby writes, "so much a part of our daily existence that it is all but invisible. But, like other invisible forces, it loses none of its potency thereby . . . . In large part it defines the texture if not the fabric of our environment."<sup>14</sup> Barbara Yngvesson gives a good sense of the idea of law as popular culture. She argues that law is invented in local or community settings, and "that it is only as 'popular' culture, as local 'common' sense that informs the ways people view and act upon the world, that any sense can be made of law."<sup>15</sup> Similarly, Lawrence Friedman views legal culture as local, "[e]very society, every country, every community has a legal culture . . . . This does not mean, of course, that everybody in a community shares the same ideas. There are many subcultures."<sup>16</sup>

Mass culture is something different. In a recent book devoted in part to sorting out the differences between mass and popular culture in the American context, historian Michael Kammen argues that mass culture is "nonregional [sic], highly standardized, and completely commercial,"<sup>17</sup> and it is imposed from above rather than emanating from below.<sup>18</sup> Mass culture has been a defining characteristic of American society over the past few decades, and advertising — "the artificial creation of wants" — is the engine of mass culture.<sup>19</sup> Advertising treats people as passive receptors of information geared toward convincing (or manipulating) them to consume in particular ways. People are "led to believe that a major need would go unfulfilled or that a person would be socially retrograde without possessing a certain product or mode of entertainment."<sup>20</sup> Kammen ties the rise of mass culture

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POPULAR CULTURE (1995); *APPROACHES TO POPULAR CULTURE* (C.W.E. Bigsby ed., 1976) [hereinafter *APPROACHES*].

14. *APPROACHES*, *supra* note 13, at vii.

15. Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 *YALE L. J.* 1690, 1691 (1989). Perhaps the best known example of this in the law and society literature with regard to civil litigation and the civil justice system is David Engel's legal ethnography of one rural Illinois county in the early 1980s; see David Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 *LAW & SOC'Y REV.* 551 (1984).

16. LAWRENCE FRIEDMAN, *AMERICAN LAW: AN INTRODUCTION* 21, 148-54 (2nd ed. 1998).

17. KAMMEN, *supra* note 13, at 18.

18. Similarly, Strinati argues that mass culture "is produced by mass production industrial techniques and is marketed for a profit to a mass public of consumers;" STRINATI, *supra* note 13, at 10. For him, "the main determinant of mass culture is the profit its production and marketing can make." *Id.* at 11.

19. KAMMEN, *supra* note 13, at 193; see also STRINATI, *supra* note 13, at 166-76.

20. STRINATI, *supra* note 13, at 167.

to changes in technology and in media, vehicles in the last part of the Twentieth Century that allow commercial interests to reach very large, broad audiences (both geographically and demographically) with standardized messages about mass produced products and services in order to make a profit.<sup>21</sup>

### B. *Mass Culture and the Politics of Ideas*

Tort reform is not simply a “product” being marketed, it is also a set of political goals that involve changing the civil justice system to favor particular interests. Mass culture and the importance of advertising fit comfortably with a somewhat parallel literature in political science that looks at advocacy advertising and agenda-setting in the public policy process. Elsewhere, we have drawn from this literature to explain the politics of tort reform and to argue that the public relations campaigns have been an important part of the effort to gain agenda-status for tort reform.<sup>22</sup> It is as an aspect of this political process to gain agenda-status that tort reform’s vision of civil litigation has become a part of contemporary American mass culture.

The study of agenda-setting is based on the idea, as John Kingdon says, that “[at] any time, important people in and around government could attend to a long list of problems . . . . Obviously, they pay attention to some potential problems and ignore others . . . . problems are . . . not entirely self-evident.”<sup>23</sup> Consequently, those wanting to get their issues and ideas on the agenda for governmental action, much like those marketing new products, must invest great effort and substantial resources in getting the attention of the public and important people in and around government, including the media. Successfully placing an issue on the policy agenda, in Kingdon’s view, “requires changing the way people think about that issue.”<sup>24</sup> The mission statement of Citizens Against Lawsuit Abuse, Los Angeles, a tort reform organization, provides an example of this idea: “Our mission is to educate the public on the effects of lawsuit abuse in order to create a climate for reform of our civil justice system . . . . We educate through commercials on television, radio and print ads, and by speaking to civic groups.”<sup>25</sup>

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21. KAMMEN, *supra* note 13, at 2-31.

22. See DANIELS & MARTIN, *supra* note 6, at 29-33.

23. JOHN KINGDON, *AGENDAS, ALTERNATIVES AND PUBLIC POLICIES*, 90 (2d ed. 1995).

24. *Id.* at 114-15.

25. *Citizens Against Lawsuit Abuse—Los Angeles*, <http://pages.prodigy.net/webco> (visited March 12, 2000).



At the core of this agenda-setting process, argues Deborah Stone, is the identification of "problems." Problems, she observes, "[a]re not given, out there in the world waiting for smart analysts to come along and define them correctly. They are created in the minds of citizens by other citizens, leaders, organizations, and governmental agencies, as an essential part of political maneuvering."<sup>26</sup> As a result, the process of gaining a place on the agenda is essentially "a struggle to control which images of the world govern policy."<sup>27</sup> This process has come to resemble the mass marketing of products by commercial interests.

David Ricci, in his insightful study of the rise of "think tanks," characterizes this type of struggle as the "politics of ideas."<sup>28</sup> Ideas and images, he notes, are aggressively marketed. Ricci describes this marketing as a "pervasive reality" controlling the format of ideas conveyed in the mass media. Ideas and images in the political realm are marketed just like products in the commercial realm. Citizens, like consumers, are treated as a passive audience receiving messages about the issues as they are defined by marketers. This process is performed through what Burdett Loomis calls a "new breed style" of lobbying that emphasizes advocacy advertising, grassroots and public relations techniques, mass media, and communications technologies. In other words, political interests are using some of the same mass marketing strategies to shape perceptions of problems and affect the agenda status of particular issues as businesses use to market their wares on a large scale.<sup>29</sup> This is the place where contemporary American politics and mass culture meet.<sup>30</sup>

Tort reform's public relations campaigns are about the politics of ideas. The vision of civil litigation found in those campaigns is a standardized, poll-tested image that has been aggressively marketed to a national audience since at least the 1970s. That audience has been treated as passive consumers for the "product" the reformers wish to

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26. DEBORAH STONE, *POLICY PARADOX AND POLITICAL REASON* 122 (1988).

27. *Id.* at 309. Or, to quote from the November 12, 1991 "Mission Statement and Overview" of the Manhattan Institute's Judicial Studies Program, "If, sometime during the present decade, a consensus emerges in favor of serious judicial reform (here meaning tort reform), it will be because millions of minds have been changed." *Id.* at 2 (On file with the authors).

28. DAVID M. RICCI, *THE TRANSFORMATION OF AMERICAN POLITICS: THE NEW WASHINGTON AND THE RISE OF THINK TANKS*, 182-207 (1993).

29. Burdett Loomis, *Organized Interests, Paid Advocacy, and the Scope of Conflict*, paper presented at the Annual Meeting of the Midwest Political Science Association, Chicago, IL, April 6-8, 1995 at 5, 10.

30. For a provocative analysis of this meeting in the context of the 1988 presidential election, see KATHLEEN HALL JAMIESON, *DIRTY POLITICS: DECEPTION, DISTRACTION AND DEMOCRACY* (1992).

sell. For instance, writing in 1979 about insurance industry advocacy advertisements, psychologist Elizabeth Loftus observed:

In response [to jury verdicts] several insurance companies have begun a curious advertising campaign . . . . These firms [such as St. Paul Insurance and Aetna] have spent at least \$10 million on print advertisements in such varied publications as *Time*, *Newsweek*, *The Wall Street Journal*, *Sports Illustrated*, *National Review*, and *New Republic*. For example, one ad of the St. Paul Insurance Company begins, "You really think it's the insurance company that's paying for all those large jury awards?" and goes on to answer that question, "We all do." Another reads, "When anything goes wrong with me . . . somebody is going to pay! They owe me!" Who is this somebody? "It's you!" the ads answers.<sup>31</sup>

This vision has continued to be aggressively marketed up to the present.<sup>32</sup>

### III. CONSTRUCTING AND MARKETING THE VISION OF CIVIL JUSTICE

#### A. *Constructing the Vision of Civil Litigation*

In constructing its vision of civil litigation, tort reform does not, as a number of commentators have shown,<sup>33</sup> rely on systematic, empirical investigation of the civil justice system and how that system works. The vision represents a triumph of marketing over reality. In fact, at the time when this vision may have been developed in the middle 1970s, little empirical research existed upon which to rely. The reformers' purpose, however, is not necessarily to construct a reasonably accurate vision of reality. This is not an academic exercise. They want to sell to the public, as well as to key elites, a vision of civil litigation that would serve a set of political goals. In order to accomplish this pur-

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31. Loftus, *Insurance*, *supra* note 11, at 69. For the discussion of a similar campaign in the mid 1980s, see Nutter, *The Fight for Civil Justice Reform*, *INSUR. REV.* 7 (1984). For a discussion of how advertisements disseminate ideological messages see WILLIAM O'BARR, *CULTURE AND THE AD: EXPLORING OTHERNESS IN THE WORLD OF ADVERTISING* (1994).

32. As recently as March 2000, the web site for Texans Against Lawsuit Abuse, for example, asks: "Why should you care about Lawsuit Abuse?" One of the reasons given is, "Even if you have never been sued, you pay for lawsuit abuse." Texans Against Lawsuit Abuse, <http://www.cala.com/tala2.html>, (visited March 12, 2000). The web site for Citizens Against Lawsuit Abuse-Los Angeles asserts that lawsuit abuse "makes victims of all Californians, since lawsuit abuse costs jobs and raises prices on goods and services, including health care; increase the cost of insurance; and results in fewer innovative products being developed." *Citizens Against Lawsuit Abuse-Los Angeles*, *supra* note 25, <http://www.cala.com> (visited March 12, 2000).

33. See e.g., DANIELS & MARTIN, *supra* note 6; Michael Saks, *Do We Really Know Anything about the Behavior of the Tort Litigation System — And Why Not?* 140 *UNIV. PA. L. REV.* 1147 (1992); Joseph Sanders & Craig Joyce, *Off to the Races: The 1980s Tort Crisis and the Law Reform Process*, 27 *HOUS. L. REV.* 207 (1990).

pose, tort reform borrows from certain popular notions regarding the way the system supposedly works — as reflected in opinion polls, typically done for insurance companies or trade groups — when constructing its description of civil litigation.<sup>34</sup> As standards for evaluating what is described, tort reform turns to the powerful American cultural ideals of equity, efficiency, security, and liberty (Stone's "motherhood issues"). The vision is a good one to the extent that it serves the reformers' goals, regardless of its empirical veracity.

In the middle 1980s, insurance trade groups, insurance companies, and other groups interested in reform began exploring public views towards civil litigation through national public opinion polling.<sup>35</sup> The polls done in the middle 1980s played an important role in the creation of the public relations campaigns and advertisements that appeared in the middle to late 1980s. In addition, these polls helped to lay the groundwork for what would come afterward. The surveys — done for the Insurance Information Institute, the All-Industry Research Council, the American Council of Life Insurance, and Aetna Insurance Company — were essentially marketing tools used to test the public's reaction to various characterizations of civil litigation that could then be effectively used in subsequent public relations campaigns. Polls conducted into the 1990s reinforced the effectiveness of the rhetorical construction of problems, causes, and consequences drawn from these earlier polls. However, the newer polls did not incorporate any significant changes or new directions. Consequently, we focus on the polls of the middle 1980s to discuss the construction of the vision of civil litigation which, through the public relations campaigns, has become a part of mass culture.

What do those polls say about civil litigation? They can be read to say that there are too many frivolous lawsuits,<sup>36</sup> and that there has

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34. In talking about the construction of advertisements, O'Barr argues that "[a]dvertisements do reflect social patterns and cultural values in significant ways. The accuracy of this reflection is due in part to the vast amount of research conducted about these patterns and values. The knowledge about consumers that advertisers have allows for a better articulation of advertising messages with consumer profiles." O'BARR, *supra* note 31, at 201. Similarly, in giving advice to candidates on different issues — including tort reform — Republican consultant Frank Luntz argued that: "[b]y interviewing thousands of Americans, we have found the words and phrases that create a photo album of ideas and visions . . . we have found the words and phrases that will move the American people." *Frank Luntz, LANGUAGE OF THE 21ST CENTURY* (1997) (on file with the authors).

35. There may have been earlier polls, but our research so far has not uncovered any.

36. Asked in a 1986 Cambridge Reports survey (done for the Insurance Information Institute) whether plaintiffs bringing civil liability lawsuits have a justified cause for doing so, only 21 percent responded that plaintiffs have cause more than half the time; 40 percent responded about half the time; and 31 percent responded less than half the time. *Roper Center at the University of Connecticut Public Opinion on Line*, accession number 0314173, available in LEXIS,

been a litigation explosion.<sup>37</sup> Civil litigation, the polls suggest, is unfair and favors plaintiffs at the expense of “deep pocket” defendants.<sup>38</sup> More generally, the polls can be read to say that awards made by juries to plaintiffs in personal injury lawsuits are excessive, that such awards are skyrocketing,<sup>39</sup> and that civil litigation is too costly.<sup>40</sup>

The polls of the middle 1980s seem to reflect a public that sees over-litigiousness, increasingly excessive awards, costs that are too high, and a civil justice system that is unfair. This is a system in need of change. According to the 1986 Harris and Associates survey done for Aetna Insurance Company, 77 percent of respondents agreed that some change is needed (43 percent minor change and 34 percent major change). Only 5 percent said no change is necessary.<sup>41</sup> That same survey explored the reasons or causes for this state of affairs. The survey asked respondents whether they thought each of a list of “possible

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<http://www.lexis.com> [hereinafter, PUBLIC OPINION ONLINE] In a 1986 Harris and Associates survey (done for Aetna Life & Casualty Insurance Company), 68 percent of the respondents agreed with the statement that more people bring lawsuits than should. PUBLIC OPINION ONLINE, accession number 0072651. Hans’ research, done in the 1990s, presents a similar picture. See HANS, *supra* note 10.

37. Asked in a 1986 Roper Organization survey (done for the All-Industry Research Advisory Council) whether the number of personal injury lawsuits is too high, 66 percent of respondents said yes. PUBLIC OPINION ONLINE, accession number 0151727. In the 1986 Harris survey, 59 percent of respondents agreed with the statement that personal injury lawsuits are increasing faster than the population. PUBLIC OPINION ONLINE, accession number 0072650.

38. Asked in a 1985 Roper Organization survey (done for the American Council of Life Insurance) about fairness, 48 percent of respondents said the system favored the injured person, 31 percent said it was fair to both sides, and only 5 percent said it favored the defendant. PUBLIC OPINION ONLINE, accession number 0126293. In that same survey, 76 percent of respondents agreed with the statement that a jury is more likely to award money to the injured plaintiff if the defendant is a large business rather than an individual. PUBLIC OPINION ONLINE, accession number 0126294.

39. Respondents in the 1986 Roper survey were asked if the size of awards and settlements is too large — 58 percent responded they were too large. In the same survey, 78 percent of respondents said awards are larger than in the past. PUBLIC OPINION ONLINE, accession number 0151728 and 0151725. Asked in a 1986 Cambridge survey if the amount awarded in civil liability suits is usually too high, too low, or about right, 55 percent of respondents said it was too high. PUBLIC OPINION ONLINE, accession number 0314178. A 1986 Harris survey asked if cash settlements have been excessive, about right, or not enough — 63 percent of respondents said it was excessive. PUBLIC OPINION ONLINE, accession number 0058239. In the 1986 Harris/Aetna survey, 45 percent of respondents said awards have been excessive, and 53 percent said the size of awards is increasing faster than inflation. PUBLIC OPINION ONLINE, accession number 0072653 and 0072652.

40. In the 1986 Harris/Aetna survey respondents were asked about this in terms of cost to litigants. When asked if they agreed with the statement that the cost to the individual taking legal action is reasonable, 49 percent disagreed. Harris also asked about the cost of civil litigation more generally, and 71 percent of respondents said the overall cost of lawsuits is too high. Another 57 percent said the system does not provide a timely resolution of disputes. PUBLIC OPINION ONLINE, accession number 0072646, 0072654 and 0072645.

41. PUBLIC OPINION ONLINE, accession number 0072648.

reasons for the rise in the overall cost of lawsuits” to society as a whole was a major reason, a minor reason, or not a reason. The percentage responding that each is a major reason is as follows:<sup>42</sup>

TABLE 1  
1986 HARRIS/AETNA SURVEY: MAJOR REASONS FOR RISE  
IN OVERALL COST OF LAWSUITS

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— People can sue without financial risk because they pay the lawyer only if they win	64%
— Increase in number of dangerous products	46%
— People think they can make a lot of money	79%
— Juries hand out awards that are too big	56%
— Laws which make it too easy to sue	55%
— Increase in number of people who understand their rights and pursue them	43%
— Insurance companies not settling fairly and promptly	60%
— Idea that anyone who suffers a personal injury should be able to get compensation	60%
— Reports in the media of multi-million dollar awards	72%
— Knowledge that defendants have insurance and insurance company will pay	64%

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A separate 1986 Harris survey asked whether “lawyers looking for big contingency fees are responsible for the big rise in liability cases,” and 80 percent of respondents agreed with that suggestion (56 percent very responsible and 24 percent somewhat responsible).<sup>43</sup>

The polls, then, reflect a public that sees the reasons for a civil justice system gone wrong as centering on greed, a lack of personal responsibility and honesty, and a system that not only allows greed, irresponsibility, and dishonesty to run rampant, but rewards and encourages such traits. What are the consequences of this public belief? Two Roper polls done for the All-Industry Research Council (one in 1986 and the other in 1987), asked the same set of questions about the harmful effects of the system gone wrong. Specifically, respondents

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42. PUBLIC OPINION ONLINE, accession numbers 0072655-0072664 inclusive.

43. PUBLIC OPINION ONLINE, accession number 0058240. In a 1986 Roper survey, respondents were asked to choose from a list the most important reason “why awards on personal lawsuits are larger than they were in the past.” The reason chosen most often as the most important (29 percent of respondents) — “lawyers sue for large amount to get more money for themselves.” PUBLIC OPINION ONLINE, accession number 0151726. Along the same lines, a 1986 Cambridge survey asked respondents if they would favor “a law that would limit the amount of money lawyers can receive from liability suits” to deal with increasing insurance costs, and 85 percent stated they would favor such a law. PUBLIC OPINION ONLINE, accession number 0314179.

were asked whether the fear and/or cost of lawsuits will cause any of the following things to occur:<sup>44</sup>

TABLE 2  
1986 AND 1987 ROPER/ALL-INDUSTRY SURVEYS:  
CONSEQUENCES OF A SYSTEM GONE WRONG

Consequence	1986	1987
— Doctors and hospitals will turn some patients away	64%	69%
— The cost of products and services will go up	64%	77%
— Taxes will go up for state and local governments	44%	62%
— Some state and local government services will be reduced	38%	51%
— Some useful products will be taken off the market	38%	58%

The percentage of respondents answering affirmatively rose for each item between 1986 and 1987, and 50 percent of respondents answered affirmatively for each item in 1987. As a result, these two polls seem to reflect a public that increasingly thinks, as the reformers would say, “we all pay the price” for a civil justice system gone wrong.

The vision of civil litigation emerging from these polls is the familiar one we outlined in our introduction. It is a believable vision for a mass audience because it is shaped around appeals to existing notions (whether or not they are factually accurate notions) in much the same way a product is marketed by shaping its appeal to existing attitudes.<sup>45</sup> The vision is a damning one because the civil justice system it portrays violates deeply held and shared values, the “motherhood issues.” Indeed, such values are implicitly built into the polls through the questions asked. This construction also helps make the vision — in terms of description, causes, and consequences — compelling and persuasive. Each of the “motherhood issues,” Stone says, “is associated with a general definition that is so much a part of our political culture that it appears to be common sense.”<sup>46</sup> Equity is defined as “treat likes alike.” Efficiency is “getting the most output for a given input.” Security is the “satisfaction of minimum human needs.” Liberty is the ability to “do as you wish as long as you do not harm others.”<sup>47</sup> Anything violating these values is likely to be seen in a very negative light.

Reformers use these values as the standards to evaluate civil litigation. Civil litigation is described as unfair, inefficient and costly in

44. Roper 1986, PUBLIC OPINION ONLINE, accession number 0151730; Roper 1987, PUBLIC OPINION ONLINE, accession number 0157507.

45. See O'BARR, *supra* note 31.

46. See STONE, *supra* note 4, at 37.

47. *Id.*

practice. The reasons or causes for this reflect unfairness and inefficiency, since greed, irresponsibility, and dishonesty are by definition unfair and inefficient. The consequences show a system that undermines everyone's security by making essential goods and services — even basic medical care — too costly or unavailable. The consequences also show a system that threatens liberty because the cost and/or fear of lawsuits prevents people and businesses from doing what they should be free to do, such as producing useful goods and services. The importance of these basic values in making the vision persuasive to a mass audience will become clearer in the discussion of the marketing of tort reform's vision of civil litigation.

### B. *Marketing the Vision of Civil Litigation*

As we noted earlier, there have been public relations campaigns since at least the 1970s, designed to shape the cultural environment surrounding civil litigation. Similar to a marketing campaign for a product or service, these campaigns are carefully designed, planned, and test-marketed by specialists. For instance, a 1988 article in the *St. Louis Business Journal* described the test marketing of an Aetna Insurance public relations campaign entitled "Lawsuit Abuse: Enough is Enough."<sup>48</sup> The campaign was developed for Aetna by Minz and Hoke, Inc., a Hartford, Connecticut, advertising agency. Similar to a product Aetna was planning to mass market, this campaign was first test-marketed in four different sites in different parts of the country: St. Louis, Missouri; Rochester, New York; New Orleans, Louisiana; and Denver, Colorado. This effort was a radio and newspaper campaign conducted between September and December of 1988, and according to an Aetna official was "designed to shift the tort reform battleground out of the courtroom and place it before the public."<sup>49</sup>

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48. Rick Desloge, *Aetna Tests 'Lawsuit Abuse' Campaign Here*, ST. LOUIS BUS. J., Oct. 31-Nov. 6, 1988, at 1.

49. *Id.* The story also provided a portion of the advertising copy for one of the St. Louis ads: Lawsuit abuse is out of control. While criminals are suing their victims, a tenth of our obstetricians no longer deliver babies. As many surgeons are refusing risky surgery. They're not afraid of the outcome. They're afraid of the lawsuits . . . . What's happening to us? When did we start looking at every accident, every mistake as just another easy shot at a quick buck?

*Id.* Similar advertising copy appeared in the Rochester, New York, *Democrat & Chronicle*.  
WHEN DO WE SAY ENOUGH IS ENOUGH?

Nearly every day you hear about playgrounds, parks and pools, even skating rinks, being threatened by crippling lawsuits.

One out of ten obstetricians no longer delivers babies. And some surgeons are cutting back risky surgery. They're not afraid of the outcome. They're afraid of the lawsuits.

As this example suggests, tort reform's vision has been marketed through a variety of media. The 1988 Aetna campaign involved daily newspapers and radio. The campaigns from the 1970s noted earlier used large circulation publications, primarily those read by opinion leaders. In the middle 1980s, there was an apparent shift in tactics to take the message beyond the opinion leaders and go directly to the general public. In 1986, the Insurance Information Institute (a major insurance trade group for whom Cambridge Reports did polling) announced a public relations campaign called the "Civil Justice Campaign" in a trade journal article entitled "We All Pay the Price: An Industry Effort to Reform Civil Justice."<sup>50</sup> The campaign had a \$6.5 million budget, with the stated purpose of reaching the general public with the industry's vision of civil litigation as a system in crisis, and accompanied by the industry's proposed solutions. The article stated that: "the property/casualty insurance industry is unifying behind a broad-based advertising campaign using network television, major newspapers and national news magazines to reach the general public."<sup>51</sup> The article estimated that the campaign would reach 90 percent of adults in the country.<sup>52</sup>

Built around the concept of the "Lawsuit Crisis," the campaign employed a series of eye-catching dramatic print advertisements intended to drive home the idea that "we all pay the price" for the system's failures. Advertisement titles included "The Lawsuit Crisis is Bad for Babies," "The Lawsuit Crisis is Penalizing High School Sports," and "Even the Clergy Can't Escape the Lawsuit Crisis." The imagery of the ads is also very important. Each advertisement appealed to one or more of the "motherhood issues," and each was clearly intended to convey a message that there are serious problems with civil litigation that negatively affect the everyday lives of ordinary Americans. Each advertisement includes a photograph superimposed on the print. The first ad depicts a helpless, newborn baby, the second, a forlorn high school football player, and the third, a worried clergyman. The print tells the reader of problems like too many lawsuits, high awards and consequences such as "[e]xpectant mothers have had to find new doctors," or "a lot of schools are thinking about

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What's happening to us? When did we start looking at every accident, every mistake as just another chance at a quick buck?

DEMOCRAT & CHRONICLE (Rochester, N.Y.), Oct. 14, 1988, at 12A. These two examples show the familiar vision of civil litigation as the one being marketed, one that clearly appeals to those "motherhood issues."

50. *We All Pay the Price: An Industry Effort to Reform Civil Justice*, INS. REV., (April 1986).

51. *Id.*

52. *Id.*



closing down their sports programs," or "[r]eligious leaders are becoming reluctant to counsel their congregations."<sup>53</sup> These advertisements appeared in the Sunday magazine sections of major newspapers across the country, as well as in *Readers Digest*, *Time*, and *Newsweek*.<sup>54</sup>

There were and continue to be other multi-faceted campaigns similar to this one. In 1987, Aetna Insurance started its own national public relations campaign entitled "Speaking Out for Civil Justice Reform."<sup>55</sup> The campaign involved an eight-part series of advertisements that appeared in a number of mass-circulation publications along with a direct mail campaign to opinion leaders. The campaign was built upon the 1986 poll done for Aetna by Harris and Associates,<sup>56</sup> and it appears to be a textbook example of drawing from Stone's "motherhood issues." The first ad is "Justice for all?" and opens complaining of a very familiar horror story: "When a woman riding in an automobile spills hot coffee on her lap, then sues the restaurant where she bought the coffee, something is wrong."<sup>57</sup> The ad continues by summarizing the issues addressed by the other seven ads:

Our civil justice system was created to balance individual rights with society's needs. But it has strayed from this objective. It used to provide an efficient way for the injured to be compensated. Now, too often, it is intolerably slow — and costly. It used to make judgments primarily based on fault. Now, too often, it makes judgments based on who can pay when something goes wrong. And the system used to compensate people fairly when they were injured by someone else's wrongful act. Now, too often, it can hand out big awards that have no logical relationship to the injuries suffered.<sup>58</sup>

We can also see in this summary the results of the 1986 Harris poll done for Aetna.

The second ad is "55 cents on the dollar," and it focuses on efficiency.

[55 cents] That's how much typically reaches a victim in a personal lawsuit . . . . Where does that 45 cents go? To the lawyers on both sides. For legal expenses on both sides, for court costs . . . . And this terrible measure of waste doesn't even take into account the cost of

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53. *Id.* at 58-59.

54. The "Civil Justice Campaign" also included press and speaker kits, and "insurance agents and company personnel [were] being asked to participate in the campaign by placing additional advertisements in their local media to generate community interest." *Id.* at 59.

55. See Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 *LAW & CONTEMP. PROBS.* 269 (1989) (displaying copies of all the advertisements used in this campaign and where they appeared).

56. See *supra* notes 36-37, 39-42.

57. DANIELS, *supra* note 55, at 288.

58. *Id.*

the defendants' and plaintiffs' time . . . . There is a groundswell of support for reforms of our civil justice system in American today . . . . For everyone's sake, let's restore efficiency to our civil justice system.<sup>59</sup>

The third ad is "Life without risk," and it appeals to liberty and security. The ad opens by asking what it would be like to live in a world without risk, "in a country where the penalty for taking risks becomes so astronomical and unpredictable that people stop taking them?"<sup>60</sup> The answer the ad provides is a world where a manufacturer abandoned development of a home kidney dialysis unit, a world where only a single company continues making measles vaccine, and only one company continues making oral polio vaccine. The reason for such results is the fear and cost of lawsuits. "[W]ithout risk there would be no innovation, no challenge of new ideas, no development of new products. There would be fewer jobs. And there would be no progress."<sup>61</sup>

The fourth ad is "Golden Rule fails court test," and it appeals to equity and efficiency. Due to the way the system works, this ad portrays civil litigation as a corrupter of morals:

A man may have been honest and decent and fair his whole life, but let him rub up against our civil justice system the way it works today, and he may begin to change. People who would never think of trying to cash in on someone else's bad luck start wondering how they can cash in on their own . . . . We need to say 'no' to state laws which allow people to collect twice for the same injury. We need to assure that awards for pain and suffering are reasonable . . . . When nearly seven out of ten Americans say that a plaintiff should not be compensated twice for the same injury and that there should be limits on the amount awarded for pain and suffering, it is clearly time for change."<sup>62</sup>

The fifth ad is "Sue City, USA," and it appeals to security. The ad opens by stating:

"Of all the victims of the lawsuit crisis, none are more helpless than our towns and cities . . . . Parks, playgrounds and other recreational facilities are closed out of fear of high and unpredictable liability costs . . . . As taxpayers, we willingly give our money for better roads, police, and fire departments. But, more and more, this money goes to defend our towns and cities against lawsuits . . . . Remember, we *all* pay for the excessive costs and inequity in our present civil justice system."<sup>63</sup>

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59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. DANIELS, *supra* note 55, at 290.

The sixth ad is "Sue-icidal impulse," and it opens by stating: "[A] woman attempts suicide by locking herself in the trunk of her car. Upon changing her mind and (luckily) being found, she sues the car maker."<sup>64</sup> This ad deals with the need "to restore the principles of self-reliance and personal responsibility to our civil justice system."<sup>65</sup> The remaining two ads, "Meanwhile, the judge died" and "Responsibility Repealed," deal with delay and frivolous lawsuits.<sup>66</sup>

In 1990, the American Tort Reform Association (ATRA) embarked on a public relations campaign entitled "LAWSUIT ABUSE! Guess Who Picks Up the Tab." This campaign also draws on the "motherhood issues." According to the press release announcing the campaign, "[t]he centerpiece of the program is five full-cover posters — each highlighting a different problem created by continued abuses in the civil justice system . . . . Other items developed for the program include a pamphlet on tort reform, bumper stickers with the 'LAW-SUIT ABUSE!' logo, and newspaper ad fillers." The purpose of the campaign is: "to help all Americans understand the consequences of a legal system that encourages lawsuits and high awards."<sup>67</sup> The posters include one that "demonstrates the hidden 'tort tax' built into the price of such products as football helmets, ladders and childhood vaccines." Another poster depicts a pregnant woman unable to find maternity care, and a third shows the problems of schools and recreational facilities. "A fourth dramatizes our litigiousness through the bumper sticker that says 'Go Ahead. Hit Me (I Need the Money).'" The last poster deals with how tort reform assists community volunteers.<sup>68</sup> The idea was to place these materials in as many local settings as possible: "Our goal is to have these posters show up in office and public reception areas all across the country . . . and we want to encourage publications of all kinds" to use the ads.<sup>69</sup>

ATRA has consistently been involved in such activities throughout the 1990s, either directly or through local tort reform groups such as Citizens Against Lawsuit Abuse-Los Angeles, whose mission statement was quoted earlier. ATRA's 1998 website stated its mission as being "to bring greater fairness, predictability, and efficiency to the

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64. *Id.*

65. *Id.*

66. *Id.* at 291.

67. August 1990 letter to ATRA members from Martin Connor, ATRA president. It includes a copy of the August 22, 1990, press release, copies of the five posters/ads, and a form to order the communications kit which has the posters/ads, brochures, and bumper stickers. (On file with the authors).

68. *Id.*, at press release.

69. *Id.*

civil justice system through public education and legislative reform.”<sup>70</sup> ATRA achieves this goal by coordinating and supporting the activities of state tort reform groups, by keeping its members informed and mobilizing them for action, by serving as the national voice of the tort reform movement, and “[b]y changing the public’s attitude about civil litigation. ATRA prepares educational materials which carry its message directly to the public. It has created a communications ‘tool kit’ for use by local grassroots coalitions interested in fighting lawsuit abuse.”<sup>71</sup>

Examples of local group activity include an aggressive media campaign by Citizens Against Lawsuit Abuse in South Texas in early 1992, which moved to Houston by the middle of the 1990s.<sup>72</sup> In 1992, more than twenty thousand “LAWSUIT ABUSE! Guess Who Picks Up the Tab” posters began appearing on New York Transit Authority subway trains, buses, and stations.<sup>73</sup> Posters also appeared on Chicago Transit Authority buses and trains. The tort reform vision of civil litigation and its consequences has also been disseminated locally by other Citizens Against Lawsuit Abuse (CALA) and similar groups in different parts of the country through the 1990s, often with the help of ATRA. For instance, the CALA-Los Angeles website cites its first goal as being “[t]o educate the public on the direct costs of lawsuit abuse to consumers, taxpayers and the State of California.”<sup>74</sup> These groups will use television, radio, newspapers, billboards, and now websites. They provide speakers to community groups and will send a steady stream of letters to the editors of local newspapers and op-ed pieces.<sup>75</sup> Per-

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70. ATRA’s Mission Statement & General Information, <http://www.atra.org> (visited March 31, 1998).

71. *Id.* (emphasis in original)

72. Ward Tisdale, *Local Lawyers Go on Offensive*, VALLEY MORNING STAR, (Harlingen, Tex.) Apr. 27, 1992 at A2; George Flynn, *Jury Awards Becoming ‘More Sensible Locally*, HOUS. CHRON. Jul. 9, 1995 at A29.

73. Letter of March 2, 1992 from Bert Bauman, President of the New York State Trial Lawyers Association, to the N.Y. L. J. (March 2, 1992) regarding posters (on file with the authors); see also *supra* note 70.

74. See *supra* note 25.

75. For instance, a member of the Board of Governors of Texans for Lawsuit Reform wrote an op-ed piece in the *Houston Chronicle* in late 1997; see Paul Howell, *Tort Reform Cut Liability Rates, So Why All the Gripping?*, HOUS. CHRON., Nov. 10, 1997, at A25. In the summer of 1999, the *San Antonio Express-News* published two collections of letters on tort reform. See *Focus: Lawsuits and Justice*, letters to the editor, SAN ANTONIO EXPRESS-NEWS, Jul. 22, 1999, (a collection of letters written in the wake of a \$4.9 billion dollar award against General Motors), <http://www.expressnews.com/pantheon/editorial/letters/2204blawsuitfocus0722nz.shtml>. (visited July 22, 1999); *Focus: Lawsuit Abuse*, letters to the editor, SAN ANTONIO EXPRESS-NEWS, (Jun. 22, 1999) (a collection of letters written in response to June 7, 1999 article in *San Antonio Express-News* by William Glaberson, “State Shedding Reputation as Lawsuit Capital”), <http://www.expressnews.com/pantheon/editorial/letters/21focuslawsuit0621nz.shtml>, (visited June 22, 1999).

haps more than anything else, these local groups keep the tort reform message and its vision of civil litigation alive through a constant stream of low-level, market maintenance activities.

Finally, we also must note the meeting of the marketing of the tort reform vision with marketing for partisan political purposes. Tort reform, or “common sense legal reform,” was one of ten items on the Republican Party’s marketing vehicle for the 1994 congressional elections, also known as the “Contract With America.” In the book outlining the contract, the chapter on legal reform begins by presenting a familiar vision: “Isn’t it time to clean up the court system? Frivolous lawsuits and outlandish damage awards make a mockery of our civil justice system. Americans spend an estimated \$300 billion a year in needlessly higher prices for products and services as a result of excessive legal costs.”<sup>76</sup>

The examples discussed in this section are illustrations of the extent and nature of the tort reform public relations campaigns. These excerpts are enough to show why we argue that tort reform’s vision of civil litigation has become a part of contemporary American mass culture. The key issue that remains to be addressed is what affects this public relations activity has had over the past twenty-five or more years. In the next two sections we will explore the possible impact of these campaigns on the future of civil litigation by examining the “common sense” notions of Texas plaintiffs’ lawyers regarding tort reform and what they are doing in light of that “common sense.”

#### IV. “THE BEST TORT REFORM IS THE 12 OF YOU [JURORS]:”<sup>77</sup> LAWYER PERCEPTIONS

##### A. *The Link Between Mass Culture and Civil Litigation: Juries*

As we noted in our introduction, Texas plaintiffs’ lawyers fervently believe that tort reform’s public relations campaigns have had a profound effect on the cultural environment surrounding civil litigation.<sup>78</sup> The “common sense” view of these lawyers is that juries have

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76. NEWT GINGRICH, DICK ARMEY, ET. AL., *CONTRACT WITH AMERICA*, 143 (Ed Gillespie and Bob Schellhas eds., 1994).

77. Attorney Richard Joseph, representing basketball star Charles Barkley as the defendant in a personal injury suit, (quoted in Ron Nissimov, *Plaintiff’s Motives Attacked as Trial in Barkley Suit Begins*, HOUS. CHRON., August 4, 1999, <http://www.chron.com/content/story.html/metropolitan/310734>, (visited August 5, 1999).) The entire quote is: “‘What used to be the American dream has turned into the American scheme,’ Richard Joseph told jurors in state District Judge Dale Wainwright’s court. ‘The best tort reform is the 12 of you (jurors).’” *Id.*

78. As one interviewed lawyer characterized it, “they’ve done a great job of poisoning the jury pool and creating massive misinformation.” This lawyer is not alone in coming to this conclusion. A Lubbock judge/mediator, in the Texas Department of Insurance study, also spoke in terms of

changed as a result of those campaigns. In our survey, for instance, 84.2 percent of all respondents stated their view that juries today are less likely to decide for the plaintiff in a personal injury suit than five years ago; 70.8 percent said juries are less likely to award economic damages; and 89.4 percent said juries are less likely to award non-economic damages.

Plaintiffs' lawyers see a causal connection between the public relations campaigns and the changing landscape of jury verdicts. They are not alone in holding such a view. A defense lawyer we interviewed told us that jurors

[h]ave heard about tort reform because there's been a lot of heavy advertising by business groups – I mean advertising statewide . . . radio advertising. So they're aware of it, and of course part of that being aware of it is the "insurance crisis". . . . Most of the people who are going to take the time and come down and serve on a jury are going to have insurance . . . and they know they are paying. I think it affects them.

He called the campaigns his "the silent helper," and said: [when I] "was trying cases for the City of Fort Worth . . . . They (jurors) are sitting there going . . . this is our tax money . . . I never said that, but it's right there." Similarly, a Dallas business principal interviewed as a part of a 1998 Texas Department of Insurance study on the impact of tort reform commented: "Well, I think a big part of it is the education of the jurors. You know, I spoke about the movement, Citizens Against Lawsuit Abuse. I think that has . . . my feeling, anyway, is that that has helped educate jurors to where they can associate big awards to the price of their car insurance."<sup>79</sup>

It is important to note that this problem is not viewed as unique to Texas. The problem is considered national in scope by plaintiffs' lawyers. For instance, writing in *Trial* for a national audience on the topic of "juror bias," plaintiffs' lawyers James Gilbert, Stuart Ollanik, and David Wenner (all non-Texans) commented about "an environment charged with 'tort reform' rhetoric, where potential jurors come to court already influenced by deliberate propaganda aimed at discrediting plaintiffs and their lawyers."<sup>80</sup> The problem is considered to be so serious that the Association of Trial Lawyers of America has been conducting seminars across the country since the Spring of 1997 on "overcoming juror bias." For instance, the brochure for an April 1999

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"poisoning:" "I think the propaganda associated with tort reform and the poisoning of the jury panels had an effect on bringing things [jury verdicts] down." *Supra* note 10, at 29.

79. *Supra* note 10, at 55.

80. James Gilbert, Stuart Ollanik, & David Wenner, *Overcoming Juror Bias in Voir Dire*, *TRIAL* 42 (Jul. 1997).

seminar — “New Frontiers in Overcoming Juror Bias” — listed a presentation entitled “Identifying Juror Attitudes and Biases and Dealing with Them.” Topics for this presentation included: “attitudes and beliefs that are prevalent among jurors regardless of where they live;” “accountability and personal responsibility;” “who’s on trial;” “stuff happens;” and “defense attributions.” Among the other presentations were: “Handling Juror Attitudes During Voir Dire;” “Combating Juror Attitudes During Opening Statement;” and “Addressing Juror Attitudes During Final Argument.”<sup>81</sup>

Changes in jury verdicts, real or perceived, reverberate throughout the civil litigation process and may affect lawyers’ practices in a variety of ways. Local jury verdicts play an important role for plaintiffs’ lawyers, as well as for defense lawyers and insurance adjusters, in establishing the context in which the vast majority of matters are settled by fixing the “going rates.”<sup>82</sup> Each of the participants in this process follow verdicts carefully in the jurisdictions in which they work, and most regularly read one or more of the local jury verdict reporters available in Texas. For instance, in our survey of Texas plaintiffs’ lawyers, we asked how many regularly read a local jury verdict reporter — 61.5 percent. In addition, 75.5 percent of respondents said that local jury verdicts are having a negative (35.2 percent) or strongly negative (40.0 percent) effect on their practices.

Most plaintiffs’ lawyers adjust their practices to what they believe juries are saying with verdicts, particularly through their selection and handling of cases. For instance, one Texas plaintiffs’ lawyer said the following regarding soft tissue injury cases:

I read the trial reports all the time and the truth is . . . the juries are so . . . they start of with a presumption that the plaintiff’s gold-

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81. Brochure on file with the authors. See HANS, *supra* note 10, at 50-78 for a discussion of these juror attitudes.

82. This idea is usually associated with the work of Marc Galanter and what he calls the “radiating effects of courts.” Professor Galanter argues that even though jury verdicts resolve only a small proportion of all civil disputes, they have a symbolic value and impact that extends well beyond their frequency. They transmit signals about cases that contribute

a background of norms and procedures against which negotiations and regulation in both private and governmental settings takes place. This contribution includes, but is not exhausted by, communication to prospective litigants of what might transpire if one of them sought a judicial resolution. Courts communicate not only the rules that would govern adjudication of the dispute, but also possible remedies and estimates of the difficulty, certainty, and costs of securing particular outcomes.

See Marc Galanter, *The Radiating Effects of Courts*, in *EMPIRICAL THEORIES ABOUT COURTS*, 121 (Keith Boyum and Lynn Mather eds., 1983). See also Marc Galanter, *Jury Shadows: Reflections on the Civil Jury and the Litigation Explosion*, paper presented at the 1986 Warren Conference on Advocacy in the United States. For a discussion of jury verdicts and “going rates” see DANIELS AND MARTIN, *supra* note 6, at 62-68.

digging . . . Most of them are getting zero verdicts. So, yeah, I hear about them in the trial reports. I read them all the time. That's why I don't really want to go trial on a soft tissue case.

Defense lawyers and insurance adjusters also adjust their practices to what they believe juries are saying. For instance, the defense lawyer we quoted earlier in this section said that the insurance companies who hire him are now taking the position that "we ain't paying nothing . . . they are real tight with the money . . . because juries are real tight now."

Plaintiffs' lawyers believe the reformers have been so successful with the public relations campaigns that jury awards have changed for the worse. In the survey, 89.4 percent of respondents said that in their experience, juries are making lower awards than five years ago in cases with comparable injuries. An experienced San Antonio lawyer summarizes things as follows: "We start with the jury box and we start with the suspicion, and it's hard to get a good verdict for a deserving victim. So very, very hard . . . [in the past] we felt a warmth in the jury box, whereas now we feel like it's a refrigerator."<sup>83</sup>

This is the "common sense" that guides many Texas plaintiffs' lawyers, and it has something to tell us about how these lawyers, the gatekeepers to the civil justice system, view the immediate future of civil litigation. What they do on the basis of that "common sense" may also tell us something about the longer-term. In writing elsewhere about these lawyers, we noted that

[t]he law's practical meaning depends on the extent to which injured people can make it work for them, which typically requires access to a lawyer's services. That need, however, does not guarantee that lawyers will be available to handle a particular legal matter . . . lawyers make choices about the markets – legal and geographic – in which they will work . . . on the basis of whether they believe they

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83. Despite the strong feelings among many plaintiffs' lawyers about the reformers' success, there was an alternative explanation for worsening jury verdicts. For a minority of the lawyers interviewed, the vision is more complex and partially the fault of plaintiffs' lawyers themselves. Mentioned most often are lawyer advertising and direct mail solicitation, issues that are controversial within the plaintiffs' bar itself. For instance, with regard to direct mail solicitation a respected San Antonio plaintiffs' lawyer had a very strong reaction: "I think that is one of the things that has hurt the plaintiffs' bar even more than tort reform — because the jurors know about this kind of thing and they think that plaintiffs' lawyers are scum-balls. Unfortunately, probably about one-third of them are." A Houston judge/mediator from the Texas Department of Insurance study also emphasized this issue:

Every time I talk to jurors after a case is over, and in many juries during voir dire, the lawyer — the public's distrust toward the legal profession is very high. And when you start talking to them it's the advertising. They find it demeaning, they think people are encouraging lawsuits that are without merit, and they very much don't like it. And that was happening before tort reform.

*Supra* note 10, at 33.



can practice profitably in those markets. As a result, the possibility of making law work may depend on whether a set of lawyers believes that a profit can be made providing a particular service in a given locale.<sup>84</sup>

What plaintiffs' lawyers do in response to this "common sense" will help determine whether, and for whom the law will work in practice, thereby shaping that future.

*B. The Locus of Impact: "The Bread and Butter" Lawyers*

Among the lawyers we interviewed, there is a widely shared conclusion that the impact of the reformers' public relations campaigns has fallen the heaviest on the typical plaintiffs' lawyers, the ones handling "bread and butter" cases (simple cases of lower value), rather than the lawyers handling larger, more complex matters. A medical malpractice specialist said of the "bread and butter" lawyers: "I think they [the reformers] are killing them." The practices of these lawyers, who make up the bulk of the plaintiffs' bar, tend to be modest and very localized. These lawyers will be the focus of our discussion for the remainder of the article.

We define "bread and butter" lawyers as those respondents to our survey who have at least five years experience as a plaintiffs' lawyer, and for whom the average value of the contingency fee cases they handled over the twelve months prior to the survey is at or below the median value for all respondents who have at least five years experience as a plaintiffs' lawyer. That median value is a modest \$32,750; the twenty-fifth percentile is \$12,000; the seventy-fifth percentile is \$250,000; and only 10 percent of the respondents reported an average value for their cases of one million dollars or more. Of the 220 lawyers who fit into this "bread and butter" category, 76.3 percent described the geographic scope of their practice as local, covering the county in which their principle office is located and adjacent counties. Another 21.5 percent of lawyers within this category described their practice as regional, and only 2.3 percent described their practice as statewide.<sup>85</sup>

The worsening fortunes of "bread and butter" lawyers can be seen in the reported change in the average value of their contingency fee cases compared to five years. Of the 220 "bread and butter" lawyers,

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84. Stephen Daniels & Joanne Martin, *It's Darwinism — Survival of the Fittest: How Markets and Reputations Shape the Way in Which Plaintiffs' Lawyers Obtain Clients*, 21 J.L. & POL'Y 377, 377 (1999). Also see WINTER, *supra* note 12.

85. A regional practice is one for which a substantial number of cases come from one or more Texas counties not adjacent to the one in which the principle office is located. A statewide practice is one for which a substantial number of cases come from all over Texas, or from other states, mostly from lawyer referrals.

10.9 percent report no change in the average value; 15.6 percent report a higher value, and 73.5 percent report a lower value. Lower case values mean that profitability becomes problematic. These lawyers are the primary gatekeepers for the frequently occurring, smaller injury cases, and their ability to provide access to the law and its remedies depends on their ability to remain profitable. Equally important, these attorneys are also the primary gatekeepers for more substantial cases handled by specialists. The specialists get most of their cases on referral from the “bread and butter” lawyers. In other words, the “bread and butter” lawyers form the base of the food chain, and what happens to them can have very real ripple effects throughout the plaintiffs’ bar.<sup>86</sup>

“Bread and butter” lawyers respond primarily to an environment of attitudes — what the tort reform public relations campaigns seek to influence — more than an environment of formal rules. Juries reflect this type of environment.<sup>87</sup> The common view among these lawyers is that plaintiffs are winning “bread and butter” cases less often, and that they are getting less money when they do, especially for non-economic damages (i.e., pain and suffering). These damages are needed if the lawyer is to make a profit.<sup>88</sup> In the survey, 88.3 percent of “bread and butter” lawyers said juries are less likely to decide for the plaintiff in personal injury cases than five years ago; 82.7 percent said juries are less likely to award economic damages; 93.0 percent said juries are less likely to award non-economic damages; and 94.4 percent said juries are making lower awards than five years ago in cases with comparable injuries.

The reason most often given for these perceived changes is the public relations campaigns. The following is a typical response:

I mean, when I look at these jury verdict reports, and I see that a jury found the defendant was in a car wreck — 100 percent negli-

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86. *Supra* note 84.

87. Lawyers with more substantial or specialized practices did indicate that tort reform has affected their practices, but few say that the reformers’ effort to change minds and its link to jury verdicts has been a direct problem for them. To the extent the heavy-hitters are affected by tort reform, it seems to be more a matter of very specific legal changes that are aimed at a particular practice area or a key rule or procedure. For instance, a very successful lawyer said the following when asked how tort reform would affect his firm: “because of the fact, at least in the railroad end of it, that we have a statewide practice, venue [where a case can be filed] has been very important to us . . . that was changed [in 1995] in such a way that its going to drastically affect my business. It takes me out of counties that I’ve practiced in now for 26 years.” Successful lawyers point to the “ripple effects” of the problems faced by the “bread and butter” lawyers, especially the loss of referrals from the “bread and butter” lawyers. *See also* DANIELS & MARTIN, *supra* note 84, at 395.

88. *See* CALVE, *supra* note 8.

gent, the defendant ran a stop sign and hurt somebody, and they award \$6,742 in property damages to the plaintiff and they award \$1,192.50 in medical bills, zero pain and suffering, zero mental anguish, zero disability, zero physical impairment, you know, whatever. I look at that like, good God, what have we come to? . . . They didn't give a shit, you know. There are people on juries who say, "I couldn't award anything for pain and mental anguish . . . So, that's the biggest problem I see, it's just in attitudes.

A struggling lawyer from Houston said the following about "bread and butter" cases and non-economic damages:

It's going to be a full third of every jury that just quite frankly will tell you, "I don't believe that pain and suffering exists. I don't believe that it's anything that's payable, even if the law says it is" . . . . These days, after tort reform and everything that has happened with respect to the state of mind of juries with reference to minor cases . . . cases that used to be payable are no longer payable cases. Those are all gone.

"Bread and butter" practices tend to be built upon the frequently occurring, lower-value car wreck cases. In the survey, the median percentage of caseload for these lawyers comprised of car wreck cases is 50 percent. Such lawyers depend on a reasonable return on these cases, including non-economic damages, for cash flow and for survival.<sup>89</sup> In the words of an Austin lawyer: "the kinds of cases I have, the 'bread and butter,' so to speak, day-in and day-out cases are auto accidents. They pay the bills and carry me between big cases . . . [which] tend to be death cases."<sup>90</sup> Many lawyers say they are not getting a good return on these cases, especially when it comes to non-economic damages. "The cases aren't . . . don't settle for what they used to," said one lawyer in a frequently heard complaint. With this sentiment in mind, we asked lawyers in our survey what the current (1999) multiplier used by insurance companies to settle cases is, and what the multiplier was five years ago. The median multiplier in 1999 given by respondents was 1.5 times specials (economic damages like medical expenses, auto repairs, etc.), and the median figure for five

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89. The importance of car wreck cases for many lawyers is evident in the fear a Fort Worth lawyer expressed, as did others, about the possible introduction of no-fault automobile insurance: "If I didn't have car wrecks, and no-fault would substantially do away with all but the larger car wrecks, I'm out of here." Similarly, an Austin lawyer stated that: "[t]he next shoe to possibly drop is no-fault auto insurance . . . . And that would put me out of business probably." See DANIELS & MARTIN, *supra* note 84, at 396.

90. Similarly, a San Antonio lawyer stated that:

Auto basically covers overhead and the bigger cases are where . . . that's the wrong way to put it . . . the products cases, the serious, you know, real serious, like death cases, that's where the big money I guess comes in. But primarily auto helps to, at this point in time anyway, keep the ball rolling, keeps the salaries paid and that sort of thing.

years was 3.0 times.<sup>91</sup> A smaller multiplier means, of course, lower settlements and less income. This can quickly put a lawyer's practice in financial jeopardy. A Fort Worth lawyer whose practice relies heavily on car wreck cases summarized the situation bluntly: "Without cash flow coming in you can't pay your bills and you can't fund your cases . . . we are in a brutal process of some [lawyers] being weeded out — and I may be one of them."

Non-economic damages, of course, are one of the targets of the reformers. These damages are of vital importance to the "bread and butter" lawyers because they can make the difference between earning a profit on a typical case or failing to realize any gain. Without some amount of non-economic damages on these low-value cases, the lawyer may not be able to recover enough to pay the client's bills, collect all or even most of the fee, and recoup his or her out-of-pocket expenses (the lawyers almost always front the case's costs). Short-changing the client is not something most lawyers want to do in what is a very competitive market for clients, a market in which the primary way of attracting new business is still through word-of-mouth client referrals.<sup>92</sup> In fact, a number of lawyers said that they would, and have, cut their fee in order to not short-change the client.<sup>93</sup>

Jury verdict data from two of the sites in which lawyers were interviewed — San Antonio and Austin — show that lawyers' "common sense" about jury verdicts in car wreck cases, including non-economic damages, may not be off-target. Tables 3A and 3B present data from these two counties on verdicts from 1983 to 1998. Both tables give some indication of why plaintiffs' lawyers may believe the public relations campaigns have been successful, especially when the patterns in verdicts from 1983-85 to 1988-90 are compared to those from 1988-90 to 1993-95. With the exception of the win rate in 1993-95, all of the patterns after 1988-90, in both counties, are downward. Median awards for car wreck cases are lower, although they have never been high. The percentage of successful car wreck cases that received non-economic damages dropped dramatically, from a pattern in which the

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91. In the survey, 72.6 percent of "bread and butter" lawyers said the pre-trial settlements in their typical case had decreased significantly in the past five years, and another 18.6 percent said their pre-trial settlements had decreased somewhat.

92. See DANIELS & MARTIN, *supra* note 84, at 383.

93. As one lawyer described the problem:

So what you end up doing ultimately, bearing in mind that you can threaten to sue them but you know in your heart of hearts that's probably not going to do much good, so what you do is you go ahead and either compromise your fee or talk to the health-care providers to get them to lower their bill. Well, what does that do? It takes away money that you would normally have to finance other cases.

vast majority of winning cases included these damages to one in which few cases included such damages. In addition, the amount awarded for non-economic damages in those cases also dropped significantly. In other words, during the middle 1990s, plaintiffs' lawyers in these counties could expect to receive less money in their car wreck cases, receive non-economic damages far less often, and receive less in the small number of cases that included non-economic damages. The patterns for the late 1990s remained bleak in Bexar County, Texas, while apparently brightening somewhat in Travis County. Nevertheless, the situation is a tough one for lawyers working on tight financial margins and tenuous cash flows.<sup>94</sup>

The impact of such patterns in verdicts (and hence the possible impact of the public relations campaigns) extends even farther, the lawyers argue, because these new patterns set the going rates for negotiating the settlements that will resolve most of the claims. Plaintiffs' lawyers said over and over again that in their experience insurance companies have changed the way in which they were handling settlements, especially for the "bread and butter" carwreck cases. Reading the same messages in the verdicts, insurance adjusters have toughened their stance and are offering much less money to claimants. In the survey, 92.1 percent of "bread and butter" lawyers said current settlement valuations by insurance companies are having a negative (19.5 percent) or strongly negative (72.6 percent) effect on their practices. According to one Houston lawyer, "[t]he insurance companies will say, let me show you these Blue Sheets [the local jury verdict reporter] and what they show." Another lawyer said, "I think it [the tort reform rhetoric] does have an effect on the amount of settlements . . . . Some of the insurance companies are just going to be hard-headed . . . they're going to try to low-ball you."<sup>95</sup> A Dallas lawyer told us "that two years ago, the average per case was \$1,100 more for the routine

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94. In Bexar County, the win rate for car wreck cases declined in 1997-99 as did the median jury award. Non-economic damages were awarded more often than in 1993-95, but not at the rate at which they were awarded in the 1980s. Regardless of the frequency with which they were awarded, the size of the median non-economic award continued to decline in 1997-98. In Travis County, lawyers won most of their car wreck cases in 1997-98, at a rate much higher than in the 1980s. The size of the median award, however, continued to decline. Non-economic damages were awarded more frequently, although still less often than in the 1980s; and while the median non-economic award increased, it is still not that high. One might conclude that juries are changing once again in Travis County, this time becoming more pro-plaintiff. More likely we are seeing evidence of plaintiffs' lawyers in Travis County becoming more careful and selective in their choices of cases to take to trial.

95. In the same vein, a Rio Grande Valley defense attorney in the Texas Department of Insurance study said, with regard to insurance adjusters: "I think their attitudes have gotten more strident, more willing to tell people, you know, 'Here is what I have got. Take it or leave it.'" *Supra* note 10, at 40.

TABLE 3A  
BEXAR COUNTY, TX  
CARWRECK VERDICTS: 1983-98 (98\$)

	1983-85	1988-90	1993-95	1997-98
Number of Cases	134	200	184	157
Win Rate	51.5%	53.5%	60.3%	50.3%
Median Award	\$16,418	\$23,790	\$15,575	\$6,582
% Wins with Non-Economic Damages	68.1%	67.3%	17.1%	48.1%
	(47)	(72)	(19)	(38)
Median Non-Econ Award	\$15,000	\$13,125	\$7,350	\$6,252

TABLE 3B  
TRAVIS COUNTY, TX  
CARWRECK VERDICTS: 1983-1998 (98\$)

	1983-85	1988-90	1993-95	1997-98
Number of Cases	69	54	21	21
Win Rate	62.3%	66.7%	42.9%	81.0%
Median Award	\$15,750	\$23,174	\$8,160	\$6,716
% Wins with Non-Economic Damages	83.7%	91.7%	33.3%	58.7%
	(36)	(33)	(3)	(10)
Median Non-Econ Award	\$6,795	\$8,890	<div style="border-left: 1px solid black; border-right: 1px solid black; padding: 2px; display: inline-block;">           \$735, \$4,200, \$7,075         </div>	\$19,372

\* since there are only three awards, each award is listed

auto cases. That's pretty significant when you're doing small cases to begin with."

With this hardheaded approach to damages also comes a much tougher style of negotiation. Rather than negotiating with plaintiffs' lawyers to any degree, insurance companies are telling them to go ahead and try their cases. A Dallas lawyer said with regard to his car wreck cases: "The insurance industry . . . they fight you with everything . . . if you've got \$5,000 in medical, they'll make an offer of \$7,000. You can't settle things like that. You just wind up needing money, the doctors don't get paid, you don't get paid. So they are forcing you to file suit."<sup>96</sup> This prolongs the process of bringing a matter to some conclusion and makes the process much more expensive and risky for the plaintiffs' lawyer who must, usually, front all of the expenses involved. If the case goes to trial and the lawyer loses, then there is no fee and no reimbursement for expenses.

96. A Houston lawyer told us that: "My first three or four years in practice, I didn't try any cases. This year, I've already tried seven . . . [Q: Insurance companies not settling?] Right, right."

Again, what we have described is “bread and butter” lawyers’ “common sense” with regard to civil litigation in Texas. Many of these lawyers are experiencing a very tough time, and there are a variety of possible explanations for their plight — including such self-inflicted wounds as aggressive lawyer advertising. Nonetheless, tort reform public relations campaigns is how these lawyers most often explain the reason for their plight, a conclusion often reinforced by the plaintiffs’ lawyers’ professional organizations. Whether those campaigns have actually been, in fact, so successful remains an open question, but the reformers have succeeded — perhaps unintentionally — in convincing plaintiffs’ lawyers. Perhaps much of tort reform’s impact is between lawyers’ ears. Nevertheless, if the lawyers’ “common sense” is reasonably accurate, then we may be seeing something of the immediate future of civil litigation, a shift away from plaintiffs in personal injury suits and towards defendants. Many plaintiffs’ lawyers and defense lawyers as well, talk in terms of a pendulum when they speak of the immediate past and future of civil litigation — a process that moves back and forth over time, favoring one side and then the other. The pendulum is swinging to the defense side. In the next section we will look at how the “bread and butter” lawyers in Texas have reacted to what they see as an altered environment.

#### V. REACTIONS TO AN ALTERED ENVIRONMENT: “I SEE THE HANDWRITING ON THE WALL”<sup>97</sup>

What have “bread and butter” lawyers done in reaction to what they see as an altered, harsher environment? There appear to be at least five general reactions: leaving the practice area, downsizing, more careful screening of cases and clients, changing the way in which cases are handled, and diversifying the mix of business. Together these reactions suggest changes in the nature of the plaintiff’s practice. The changes may, in turn, give some indication for the future of civil litigation.

##### A. *Leaving the Practice Area*

Some lawyers, in response to the altered environment, have simply gone out of business or substantially re-oriented their practices away from a primary concern with plaintiffs’ cases taken on a contingency fee basis.<sup>98</sup> A number of the lawyers we interviewed spoke of others

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97. Remark of a struggling lawyer in San Antonio.

98. A small number of lawyers to whom a survey was sent contacted us to say that they no longer do plaintiffs’ work.

who had folded-up their legal practice or re-oriented. For instance, a Fort Worth defense lawyer told us about a plaintiffs' lawyer who was forced to close-up shop: "I just heard about another one over here today that is a competent lawyer. He's ethical. He works hard for his clients and he's closing his office because he can't meet his overhead."<sup>99</sup>

Some lawyers have completely re-oriented their careers or practices in the face of tort reform. One lawyer spoke of a former employee who tried opening his own plaintiffs' practice. The practice failed and the lawyer took a job with a state agency. Another lawyer dissolved his long-standing firm: "We decided to do that . . . simply because there were too many . . . a lot of uncertainties about tort reform." This lawyer then began trying to establish himself primarily as a mediator. Other lawyers, such as one in San Antonio, worry about the future: "Well, I question whether or not I'll even be practicing in this area of law in five years."<sup>100</sup>

### *B. Downsizing*

Downsizing is more common, and similar to lawyers leaving the practice area, it diminishes the available supply of legal services for potential litigants. Downsizing limits what lawyers can do with their practices. Many "bread and butter" lawyers can maintain their modest practices so long as they keep a decent cash flow and cover their overhead with the settlements (that include non-economic damages) they receive on low-value cases. The changed environment (juries awarding less and insurance companies playing hardball) is making such a scenario less possible. As a result, lawyers are reducing the size of their operations in order to cut overhead. In the survey, 43.4 percent of the "bread and butter" lawyers said their support staff is smaller now than five years ago, 36.6 percent said it was larger, and 20.0 percent reported no change.

For instance, one downsizing lawyer said the following about his staff: "[its] been going down . . . I mean as a matter of economics, I mean the personal injury field is not as lucrative as it used to be. The cases aren't . . . don't settle for what they used to . . . We've done a lot of automation . . . we're trying to work smarter instead of harder with a lot less people." Another lawyer commented: "about a year ago

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99. We had interviewed that lawyer six months earlier.

100. A Lubbock defense lawyer in the Texas Department of Insurance study observed that "I think, you know, you have less [sic] plaintiffs' lawyers. You have people who were plaintiffs' lawyers who are now doing, you know, family law or transactional or joining the defense firms or doing something other than predominantly plaintiffs' work." *Supra* note 10, at 35.



I had another lawyer working for me and a full-time investigator and an insurance adjuster working for me . . . now I have two paralegals on half-time duty . . . to reduce overhead." In an attempt to reduce overhead and free-up resources to fund their cases, an Austin lawyer and his partner are selling their building.<sup>101</sup> Similarly, a fourth lawyer, whose practice is on the edge of collapse, said: "I see the handwriting on the wall . . . I don't have a law clerk anymore . . . used to have a law clerk. I have one guy working for me now. I used to have two."

### C. *Screening Cases and Clients*

Greater attention to screening is the third reaction to the altered environment by "bread and butter" lawyers. Since juries and insurance companies are tougher, a number of lawyers commented that they need to be more careful in the cases they choose. In the survey, 57.4 percent of "bread and butter" lawyers said they are signing-up a smaller percentage of callers as clients than five years ago, only 10.9 percent reported a larger percentage, and 31.7 percent reported no change. As one lawyer simply put it: "we're getting increasingly selective because the process of taking a case to court is getting enormously expensive . . . I front all the costs and if we lose, I eat the costs." Lawyers are less willing to take cases with relatively low damages and primarily soft tissue injury. When lawyers in our survey were asked if they would take a car wreck case with only soft tissue injuries worth \$3,000 and minimal property damage if the liability appeared to run to another party who was adequately insured, 89.1 percent of "bread and butter" lawyers said they would have taken the case five years ago, while 56.3 percent said they would take it today (using a simple difference of proportions test this difference is significant at the .00 level). A San Antonio lawyer gives some idea as to the reason for this change:

Low impact, soft tissue cases, we're very selective with because the insurance companies are not paying for those cases as well as juries are not giving money for those cases . . . in today's climate, if someone goes in with that type of case, they're automatically cast out as a person that's only there for the money, regardless of the injury . . .

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101. The lawyer stated as follows:

It's very difficult to run your business . . . Costs keep going up and up and up . . . and the insurance companies keep getting harder and harder and harder . . . to keep our cost down and compete on a lean and mean basis, we are trying to sell our building and we're going to lease . . . to help us keep our costs down and use that money to finance some of these other cases that we might have coming in.

there's a very good chance that you're just not going to be able to achieve your full fee as per the contract.<sup>102</sup>

Exit and downsizing diminish the available supply of legal services. The supply is further diminished in the efforts of these lawyers to stay financially solvent. As a result, the client with a small, but legitimate claim may not be able to find a competent attorney, or have his or her claim successfully settled.<sup>103</sup>

Lawyers are also being more careful in screening the larger cases that may come into their offices, the ones that can make the difference between a break-even financial year and a good one. A lawyer who occasionally handles both medical malpractice and simple products liability cases described his approach to screening in the current climate:

[For medical malpractice] we have a nurse and several doctors that we have available to us on a contract basis . . . . They screen every case that comes into the office. Especially in the medical negligence cases, we go through two or three different screenings to make sure that they are the type of case that will be cost effective and in the end will yield a positive result. On the products cases, we have a better feel but even there we've got to be very careful. We have to have a very serious injury for both cases, but for products cases that's one of the very first requirements. For example, I don't take . . . let's say an aerosol can that is defective and explodes and blows away somebody's finger. That's not worth taking unless it's a little girl or small child. But if its an adult, its just not cost effective . . . . You have to realize that in today's climate every case that you take, there's a 95 percent chance it will have to be tried to a jury. Our philosophy is we never take a case for settlement purposes because that's a good way to lose a lot of money, lose your time and to have a very unhappy client at the end.

This is a lawyer who appears to have been well trained by the altered environment. In an effort to lessen his risk, this lawyer is limiting the supply of legal services he will offer. However, the cases that he decides to take are likely to be stronger and have a better chance of success.

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102. Another lawyer noted: "[t]here was a time in my practice where my policy was that if it was clear liability and if there was any insurance that I would take any car wreck case . . . I don't take any of those low-impact car wreck cases with soft-tissue injuries." See also HANS, *supra* note 10.

103. A Houston judge/mediator in the Texas Department of Insurance study commented on this problem: "I think there'll always be people who have little causes of action, or marginal causes of action who can't get representation. There always have been those cases, and when the attitude of the public is like is it is today, it will be more difficult." *Supra* note 10, at 22. Also see WINTER, *supra* note 12.

In addition to paying more attention to the case, many lawyers also said they must now pay more attention to who they will take as a client. In the survey, “bread and butter” lawyers were asked if they would take the hypothetical \$3,000 soft tissue case described earlier if the client is unemployed; 53.5 percent said they would take the client today, while 71.3 percent would have taken the client five years ago. If the client had been a personal injury plaintiff in the past, 47.0 percent would take the client today, while 68.2 percent would have taken the client five years ago. If the client has a criminal record, 38.1 percent would take the client today, while 57.4 percent would have taken the client five years ago (using a simple difference of proportions test each of these differences is significant at the .00 level). A younger, successful Houston lawyer provided a very good explanation of why there is greater attention to screening clients:

We look for a client with no prior problems. It makes a good impression . . . those are the type of cases that we’ve gone there, tried, got verdicts. Because we found that people [jurors] — that as long as you don’t have somebody up there that has a lot of prior claims, and makes a good impression, is a working person that can come-off, you know, as an everyday person — they’ll award them some money . . . . What they [jurors] don’t want to see is Joe Blow who has a soft tissue back injury, but also had a soft tissue back injury two years ago, and four years ago, and doesn’t work and is unemployed, has three kids and is on welfare. And those are a lot of cases that get tried [and lose] . . . you see it week after week in our Blue Sheets [the local verdict reporter].

Other lawyers also emphasize the importance of screening clients. A young lawyer in San Antonio with a growing practice said: “I screen things harder now . . . more often than not it comes around to the idea that I want to be able to go into a courtroom with this person . . . . I’m looking at them as a jury would.” Here again are two lawyers who have been well trained by the new environment.<sup>104</sup>

#### *D. Handling Cases*

Along with a greater emphasis on more careful screening comes a greater sensitivity as to how the cases lawyers do accept are to be

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104. Not everyone is changing their approach to screening. Said one lawyer:

We probably should have a threshold but we don’t. I mean, some cases we take on because it’s . . . and again this sounds corny, but it’s just the right thing to do. Somebody is just, you know, crapped on by the insurance companies or whatever and maybe they don’t have the biggest case in the world but they need some help . . . . So sometimes we just do things because it’s the right thing to do . . . . We try to screen cases that way. If we can help . . . if we can make money for the client and still make a little money for ourselves, we’ll do it.

handled. Even what seems to be a relatively good “bread and butter” case may not be one worth taking to trial in light of a tough stance by the insurance companies in the current environment. Many lawyers spoke of what were once considered “slam dunk” cases, such as rear-end collisions, where the juries are now awarding minimal damages or finding for the defendant. Some lawyers are responding to this risk by using mediation more than they did in the past. In the survey, 49.5 percent of “bread and butter” lawyers reported that today they close a larger percentage of cases using mediation now than five years ago; 23.7 percent reported closing a smaller percentage; and 26.8 percent report no change. One lawyer who uses more mediation said: “I haven’t tried a case probably in two years . . . most of them go into mediation, they get settled there and the way this lawsuit abuse is . . . its hard when you go in there and you have a good cases and they pour you out [find for the defendant].” Mediation is also cheaper, meaning less of a problem for cash flow and overhead. According to another lawyer, mediation cases

are much less costly. You can do a mediation in a day whereas a jury trial might take four or five days. And then with your prep time added in on a jury trial, you’re looking at ten days. So one day versus ten days looks a lot better, especially when you are looking at a contingency fee and probably the case has only a certain value anyway [meaning more would be spent going to trial then extra money would gained by winning].

This lawyer especially likes mediation for clients with problems that jurors might dislike. His view of mediation in such situations is “tempered by having been to court a bunch of times and knowing what local juries here will do and how I think a particular client would affect a local jury.”

Having given more attention to screening, there are also lawyers who want to take cases to trial. Litigating modest cases in the new environment is seen as a market of opportunity by some lawyers. These lawyers are building their, typically new, practices on actually trying “bread and butter” cases. Such lawyers see an opportunity where others see problems, and they are exploiting the opportunity. These lawyers are more likely to be younger lawyers. In the survey, 24.7 percent of “bread and butter” lawyers said they are closing a larger percentage of their cases by verdict. These lawyers have a median of ten and a half years practicing plaintiffs’ law (the mean is 12.4 years). An almost equal number, 23.8 percent, of “bread and butter” lawyers said they are closing a smaller percentage of their cases by verdict. These lawyers have a median of fifteen years practicing plaintiffs’ law (the mean is 17.3 years). The younger lawyers have an advan-

tage because they do not need to change a practice of many years in order to deal with an altered environment. These lawyers look at the current post-tort reform environment with fresh eyes because it is the only environment they have known.

One younger Houston lawyer is developing a specialization in litigating low to modest-value cases that other "bread and butter" lawyers do not want to handle. As he views the market:

There are plaintiffs' lawyers that may not want to get into litigation. The gentleman who was just here talking to me is a friend from law school. He'll take a case until he has to file suit on it. Once he files suit, he sends it to us. A lot of lawyers are like that. They don't want that. They want to see if they can flip them with the insurance company and get them done . . . if it involves anything more, they will get rid of them. We have a ton of referring lawyers just like that.

Another young Houston lawyer is pursuing a similar strategy:

We're smart enough, I think, because we've tried a lot of cases, to know when a case should settle . . . Tort reform has helped our business in the sense that the solo practitioner, who could usually work up a herniated disc case or a soft tissue case, and get it done and settle it in the claims stage, now can't do that. So these people are referring us cases right-off the bat . . . we're getting more cases early on from those people because of tort reform, because they can't afford to work it up.

Both of these lawyers emphasize that a major reason for their success is the care they put into screening both cases and clients. While this fact may mean less access for those with questionable cases or personal histories, it does mean that the quality of access for those cases that are taken is likely to be higher.

### *E. Diversifying the Mix of Business*

Diversifying a practice's mix of business or finding new substantive markets for contingency fee work is another response to the altered environment. This response may further diminish the supply of legal services for some injured people, while expanding the supply for others. Most of the "bread and butter" lawyers we interviewed indicated that they are diversifying their practices in one way or another. In the survey, 46.9 percent of "bread and butter" lawyers said they are handling less contingency fee work than five years ago; only 11.5 percent said they are handling more; and 41.6 percent report no change. Due to the problems with car wreck cases, "bread and butter" lawyers need to find alternative methods, other than downsizing, to deal with overhead (45.4 percent of "bread and butter" lawyers said they are handling fewer car wreck cases than five years ago). Diversification is

not something a lawyer does as a result of a new opportunity. Rather, diversification is often a result of necessity and involves moving to what are perceived as safer markets. One lawyer told us: "I know how to practice criminal law. I know how to do divorces. I don't want to do them, but to be a lawyer you might still have to. And I think a lot of personal injury lawyers are coming to that conclusion." Another lawyer said: "The fact is that a lot of the plaintiffs' bar . . . are really trying to diversify in other areas because the handwriting is on the wall." This lawyer is now also practicing family law and criminal law.

For some lawyers, diversifying means returning to a more mixed practice, something they had in the past and moved beyond when they decided to concentrate almost exclusively on plaintiffs' work. One lawyer stated that

in the future I see us diversifying into another type of law like family law or commercial litigation . . . you know, kind of when I started this . . . I was a general practitioner. I did about anything that came in the door that made money. I see us doing that in the future.

For some younger lawyers, there is simply an assumption that they may need something in addition to plaintiffs' work to help cover the overhead on a regular basis. Again, these lawyers do not face the prospect of having to change a practice of many years. A younger San Antonio lawyer makes such an assumption:

Economically, the way I perceive the practice of law for me, is I can't count on PI — because it may settle tomorrow, it may settle next year. So I've got to have an economic base to live . . . we've tried to basically maintain the office cash flow from wills, divorces, bankruptcy and then continue with the PI as much as we can. My goal is to get as many PI cases as I can possibly get . . . we live, we pay our bills and heat from the hourly work. Then, hopefully, PI will come in that will help put us over the edge.

The practice of this lawyer is about one-third hourly work and two-thirds plaintiffs' work. Even some of the high volume practices in the state are diversifying into safer, cash flow-oriented areas. A Dallas-area high volume practitioner, for instance, recently added bankruptcy to his practice. For him, handling bankruptcy is about steady cash flow.

Lawyers who diversify, for the most part, want to move into non-contingency fee areas which mean little or no real litigation, and a relatively steady income stream, like simple divorces, wills, and bankruptcies, or any other matters that can be automated and handled by legal secretaries or paralegals.<sup>105</sup> There are some other lawyers, how-

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105. For instance, in the survey 20.4 percent of "bread and butter" lawyers said they are handling more domestic relations matters than five years ago; only 7.2 percent said fewer.

ever, who are looking into new market niches for contingency fee work as a way of reacting to the altered environment. These are niches that seem to be immune to the effects of the tort reform public relations campaigns. One substantive market that lawyers have begun to exploit is nursing home cases. While not a high volume area, nursing home cases are an area where juries are, apparently, willing to side with the plaintiffs and award substantial damages where there is serious injury or death.<sup>106</sup> According to one lawyer who now regularly handles a number of such cases as the moneymaker for his modest firm:

[T]he nursing home cases seem to be one area of personal injury work that really strikes a more responsive chord with our local community, a lot more, all of them . . . . The verdicts have gone up substantially for elderly people compared to what its been in the past . . . . We thought that might be true after we worked on a couple of them . . . . We thought there's got to be more of these cases out there.

Other lawyers are handling modest commercial litigation cases on a contingency fee with some success. One lawyer stated: "I'm doing some of that . . . just as a kind of a hedge against what might be happening in the PI business." The reason for moving into this particular market can be seen in the following comment:

Commercial cases . . . those are easier cases than plaintiffs' personal injury . . . . We do it on a contingency fee basis. They are easier because instead of standing up there and saying my client has suffered greatly . . . and try to paint the picture . . . you just write some numbers on a blackboard and say this \$4 million . . . . And for some reason, people don't think those plaintiffs are scumbags. They don't think business plaintiffs are scumbags. They just think they have been wronged in a business deal. They have no problem with Southwestern Bell suing Greater Atlantic Bell. They don't like Alexander Bell and his wife suing for an injury . . . . It's a weird play out there right now.

Similar to nursing home cases, this is an area of opportunity in the new climate because juries will award money to plaintiffs, and the lawyers can take the cases on a contingency fee. Those cases bring a different set of clients and issues into the system, potentially charting out some new directions for civil litigation. The lawyers who find and exploit these opportunities tend to do quite well because tort reform and its attendant public relations campaigns have not focused on this area.

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106. Only 8.7 percent of the "bread and butter" lawyers reported handling any nursing home cases at all five years ago, while 21.7 percent reported handling at least some nursing home cases currently.

As plaintiffs' lawyers view the situation, the tort reformers' political efforts at lobbying the public mind have been very successful in altering the cultural environment surrounding civil litigation. This altered environment, in turn, is having a serious impact on "bread and butter" lawyers and their clients. Two of the lawyers interviewed — one older lawyer whose practice did not survive, and one younger lawyer with a thriving practice — each offered similar characterizations of what the future may be like for plaintiffs' lawyers. The older lawyer commented on the increasing pressure among lawyers trying to make a living in the "bread and butter" market in which the number of what are now "good cases" is smaller than in the past, and the settlements and verdicts are less for those "good cases." This lawyer characterized the situation as "a brutal process of some lawyers being weeded out" in the competition of this altered environment. The younger, thriving lawyer was more vivid in his characterization: "Its Darwinism — survival of the fittest." Tort reform may reduce the number of plaintiffs' lawyers able to survive handling cases of low to modest value, however those who do survive are likely to be very good at succeeding in the altered environment. This scenario suggests a smaller, but more proficient plaintiffs' bar.

## VI. CONCLUSION

Tort reform has always been as much about altering the cultural environment surrounding civil litigation as it has been about the formal rules. The tort reform movement, for at least the past twenty-five years, has tried to accomplish this goal through the constant use of public relations campaigns. The movement's image of civil litigation as a system gone terribly wrong, and where "we all pay the price," has been aggressively marketed to a mass audience as if it were a product that consumers were being forced to purchase. That vision, as a result, has become a part of contemporary American mass culture. As we noted in the introduction, one need only think of the widely recognized image of a cup of coffee from McDonalds as a summary statement of that vision. What does this image mean for the future of civil litigation?

In the short-term, if we look at the situation through the eyes of a Texas plaintiffs' lawyer, the future of civil litigation is likely to be relatively unkind to plaintiffs in personal injury cases. However, such a situation presumes that the recent past was a significantly kinder time (which is questionable). Plaintiffs' verdicts will be difficult to achieve and the awards will be smaller than in the past. Consequently, insurance companies will continue to take a hard line on settlements. In



order to survive financially, plaintiffs' lawyers will need to adjust their practices to this environment, and a number of them may not survive. Younger lawyers may avoid the field all together. With fewer lawyers practicing in the field, and given the ways in which those still trying to practice are responding to this environment — downsizing, diversifying to include non-contingency fee work, and screening cases and clients more stringently — access to the law's remedies for some injured people is likely to be diminished. However, for other potential clients access to the law may increase and improve in quality as new market niches are explored.

The longer-term effect is more difficult to see, especially whether the pendulum will start swinging the other direction. Those lawyers who survive and prosper will need a finely tuned ability to find good cases and good clients, and then be able to successfully try those cases if necessary. While there may be fewer personal injury cases actually taken by lawyers, or fewer cases of a particular type, there may be a higher percentage of cases going to a trial. Statistics from the annual Texas Judicial Council Reports show, for instance, that the number of filings for car wreck cases has declined every year since 1995 (from 22,234 in 1995 to 19,192 in 1998, the most recent year for which figures are available) while the state's population has steadily increased.<sup>107</sup> The percentage of those filings disposed of by a jury trial, however, increased each year, from 2.7 percent in 1995 to 4.6 percent in 1998.

Plaintiffs' lawyers may, perhaps, become more specialized as they search for profitable niches. This area is where the greatest influence on civil litigation is likely to occur, since these lawyers are the gatekeepers. Given the plaintiffs' lawyers view of the success of tort reform's public relations campaigns, lawyers may begin exploring areas for contingency fee work that have gone largely untouched by those campaigns — such as commercial or business cases — and moving away from others. Statistics from the annual Texas Judicial Council Reports show that filings for accounts, contracts, and notes increased each year, from 18,679 in 1995 to 20,006 in 1998.<sup>108</sup> These types of cases serve a different clientele, require different types of expertise, require a different type of firm, and perhaps different tactics for handling such cases. It is the plaintiffs' lawyers exploration of new market

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107. TEXAS JUDICIAL COUNCIL, TEXAS JUDICIAL SYSTEM ANNUAL REPORT: STATE FISCAL YEAR 1995; TEXAS JUDICIAL SYSTEM ANNUAL REPORT: STATE FISCAL YEAR 1996; TEXAS JUDICIAL SYSTEM ANNUAL REPORT: STATE FISCAL YEAR 1997; and TEXAS JUDICIAL SYSTEM ANNUAL REPORT: STATE FISCAL YEAR 1998. Filings for other personal injury cases also declined each year from 1995 to 1998 from 26,448 in 1995 to 17,742 in 1998.

108. *Id.*

opportunities that will reshape the geography of civil litigation in the future.

## METHODOLOGICAL APPENDIX

This paper relies upon three sets of data we have previously collected:

*A. Interviews with Texas Plaintiffs' Lawyers*

We have conducted in-depth interviews with ninety-six plaintiffs' lawyers in Texas over the past several years. Only thirteen lawyers whom we asked declined to give us an interview. Of the ninety six interviews, twenty-two are from Austin; twenty-eight are from the Dallas/Fort Worth area; twenty-one are from Houston; twenty-three are from San Antonio; and two are from small towns in East Texas. The four urban centers represent the largest concentrations of lawyers in the state, and we presume these areas also include the largest number of plaintiffs' lawyers.<sup>109</sup> We also interviewed a small number of non-plaintiffs' lawyers, defense lawyers and judges.

To create a pool of plaintiffs' lawyers to interview, we started with two lists. The first list was created through discussions with past and present officials of the Texas Trial Lawyers Association (TTLA). These lawyers were asked to identify lawyers that are recognized as leaders in the plaintiffs' bar, as well as a range of plaintiffs' lawyers with differing practices, abilities, and reputations. Where appropriate, these conversations were supplemented by similar discussions with leaders of local plaintiffs' lawyers groups. The second list is very different and it was created from the following published sources: Yellow Page directories, *Martindale-Hubbell*, *West's Legal Directory*, the *Texas Legal Directory*, and the *Texas Board of Legal Specialization Directory*. Where available, published jury verdict reporters were also used to identify lawyers. Names were then randomly chosen from these two lists. Additional subjects to interview were identified through a "snowballing" technique of asking lawyers interviewed for the names of others who would be worth interviewing (as we ask them, "the names of the good, the bad, and the ugly"). We used this disparate set of sources because our goal was to interview as wide an array of plaintiffs' lawyers as possible, not only the big, well-known names handling the newsworthy cases, and not just the members of plaintiffs' lawyers' organizations.

The attorneys interviewed devote a substantial proportion of their practices (50 percent or more, with a number as high as 90 percent) to

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109. See Cynthia Spanhel and Carol Cannon, *Statistical Profile of the State Bar of Texas* (1998-1999); State Bar of Texas Department of Research and Analysis, Austin, TX, <http://www.texasbar.com/barinfo/randa.htm>.

handling plaintiffs' cases for a contingency fee. The interviews were in-depth and semi-structured, lasting for an average of 1.5 hours. Transcripts of all interviews (with names and identifying information removed) are on file with the authors. In addition to their perceptions of tort reform and its impact on their practices, the lawyers were asked about their personal and professional background, their reasons for choosing a plaintiffs' practice, the nature of their practice, the nature of their clients, how their clients are obtained, their views on advertising and other ways of attracting clients, their firm or office organization, their approach to case screening and case resolution, case financing, and their professional or political activities.

We chose the state of Texas because it is a large, diverse state with more than one urban area and a sizeable and diverse plaintiffs' bar working within one set of legal rules. Texas is also a state that has been a target for the tort reform movement since the middle 1980s. Additionally, previous research we have done in Texas has allowed us to develop a range of contacts within the Texas bar that facilitated our ability to obtain interviews and other sources of information.

### *B. Survey of Texas Plaintiffs' Lawyers*

Based upon the results of those interviews, we conducted a mail survey of Texas plaintiffs' lawyers during the fall of 1999 into the winter of 2000. The survey was sent to 2,642 lawyers in Texas identified as likely plaintiffs' lawyers. These lawyers were chosen from a list of 5,284 provided by the Texas Trial Lawyers Association (TTLA). That list included current TTLA members, former TTLA members, and lawyers identified by TTLA as "prospects" — lawyers thought to be practicing at least some amount of plaintiffs' work who have never been TTLA members. While not an ideal source, the list represents the best available estimate of the population of Texas plaintiffs' lawyers. The State Bar of Texas does not have a listing of members that would specifically identify those practicing as plaintiffs' lawyers.

In order to achieve the broadest possible sample from this list, we organized all the lawyer (not firm) names first by zip code and then alphabetically within zip code. The zip code ordering ensures at least some degree of geographic dispersion, and the alphabetical ordering of lawyer names within zip codes ensures at least some degree of dispersion among firms. To select a sample, every other lawyer name was chosen. Each lawyer was sent a questionnaire, and those not responding within four weeks were sent another questionnaire as a follow-up. As of January 31, 2000, a total of 720 lawyers responded (27.3 percent), with 552 useable responses (20.9 percent). A useable response is

a lawyer who either currently, or in the past five years, devoted at least 25 percent of his or her practice to plaintiffs' work on a contingency fee basis. The confidence interval applicable to this number of returns from a population of 5,248, assuming no respondent or non-respondent bias, is plus or minus four for a question with two possible responses.

### C. Jury Verdict Data

A small amount of jury verdict data from San Antonio and from Austin are used in the paper. These data are taken from two local jury verdict reporters: *Soele's Trial Reporter* (Bexar) and the *Travis County Jury Verdict Reporter*.<sup>110</sup> While data are available from the other sites in which lawyers were interviewed, those sources are not as detailed as the data from San Antonio and from Austin. The data cover the years 1983-85, 1988-90 and 1993-95, and 1997-98 (the three-year time sequence is altered with 1997-98 so that the most recent data available can be included). The years are grouped for the purpose of this paper rather than used individually because the numbers of verdicts within key categories relevant to our discussion are sometimes very small for individual years. Every reported case is included in the years covered above.

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110. For a general description of jury verdict reporters and patterns in jury verdicts, see DANIELS & MARTIN, *supra* note 6, at 66-68.