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Tort Reform Past, Present and Future: Solving Old Problems and Dealing with "New Style" Litigation


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TORT REFORM PAST, PRESENT AND FUTURE: SOLVING OLD PROBLEMS AND DEALING WITH “NEW STYLE” LITIGATION

Victor E. Schwartz, Mark A. Behrens, Leah Lorber[†]

I. INTRODUCTION	238
II. TORT REFORM PAST: A FOCUS ON A FEW KEY ISSUES	241
III. TORT REFORM PRESENT: OLD AND NEW CHALLENGES	244
A. <i>Replicating Victories In Additional Jurisdictions</i>	244
B. <i>Combating Judicial Nullification</i>	245
1. <i>What Is Judicial Nullification?</i>	246
2. <i>Why Is Judicial Nullification Bad Policy?</i>	250
a. <i>Legislatures Are Well-Suited To Develop Broad Public Policy</i>	250
b. <i>The "Reception Statutes"</i>	252
3. <i>What Can Be Done?</i>	253
a. <i>Election Of Judges</i>	253
b. <i>Recognition Of The Separation Of Powers</i>	253
c. <i>Federal Legislation</i>	254

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IV. TORT REFORM FUTURE: NEW STYLE LITIGATION	254
A. "Big Government" Lawsuits.....	255
1. Tobacco Litigation: The Birth Of "Big Government" Lawsuits.....	255
2. The Proliferation Of "Big Government" Lawsuits: Who Will Be Next?	257
3. What Can Be Done?	259
a. Legislation To Ensure Fairness In Litigation	259
b. Legislation To Require Open And Competitive Bid- ding.....	260
c. Legislation To Protect The Right To Appeal.....	261
B. New Style Class Actions	261
1. Class Action Certification As A Powerful Litigation Tactic.....	262
a. The Coercive Effects Of Unrestrained Class Action Litigation	262
b. Plaintiffs' Lawyers "Game The System" In State Courts.....	264
2. What Can Be Done?	266
V. CONCLUSION.....	268

I. INTRODUCTION

Years from now, people may look back on January 1, 2000 as just another date on the calendar. In the area of liability law, however, the date actually may provide a meaningful, though somewhat blurry, delineation point marking the start of some brand new civil justice reform battles. Here is what we see on the horizon as "tort reformers."

First, efforts to achieve "traditional" tort reform measures will continue, mostly at the state level, but also at the federal level. These efforts will include attempts to address the problem of excessive punitive damages awards and arbitrary noneconomic damages awards, laws providing for the fair apportionment of liability, and curbs on "long-tail" liability for old products and services, among other reforms.

Second, efforts will be made to preserve legislative independence in the development of tort law rules. In the late 1990's, trial lawyer groups began a coordinated effort to challenge state tort reform legislation in state courts, hoping to find judges who would nullify the legislation. The plaintiffs' bar had successes in a minority of states that could be characterized as "low hanging fruit."

For example, in 1999, the Supreme Court of Ohio in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*¹ narrowly overturned Ohio's 1996 civil justice reform statute.² But, for many years leading up to that decision the Ohio Supreme Court had been unfriendly to Ohio tort reform. The court struck down numerous tort reform statutes, including a ten-year statute of repose for improvements to real property,³ a statute requiring periodic payments of future damages awards in medical malpractice actions,⁴ a \$200,000 limit on general damages in health care liability actions,⁵ a "collateral source" reform statute,⁶ a special statute of limitations for diethylstilbestrol ("DES")-related injuries,⁷ and a statute requiring courts to determine the size of punitive damages awards.⁸

Kentucky is another example. In *Williams v. Wilson*,⁹ the Kentucky Supreme Court invalidated a punitive damages statute that simply required plaintiffs to show that the defendant acted with "flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct [would] result in human death or bodily harm" before punitive damages could be imposed.¹⁰ According to the Kentucky Supreme Court, certain sections of the Kentucky Constitution "work in tandem" to form a constitutional "right" known as the "jural rights" doctrine.¹¹ The court said that this court-invented "right" prohibited the legislature from enacting legislation that might limit the remedies available to plaintiffs under the common law.¹²

On numerous earlier occasions, however, the Kentucky Su-

1. 715 N.E.2d 1062 (Ohio 1999).

2. *Id.* at 1102.

3. *Brenneman v. R.M.I. Co.*, 639 N.E.2d 425, 430 (Ohio 1994).

4. *Galayda v. Lake Hosp. Sys., Inc.*, 644 N.E.2d 298, 301 (Ohio 1995), *reconsideration denied*, 644 N.E.2d 1389 (Ohio 1995), *cert. denied sub nom. Damian v. Galayda*, 516 U.S. 810 (1995).

5. *Morris v. Savoy*, 576 N.E.2d 765, 771 (Ohio 1991).

6. *Sorrell v. Thevenir*, 633 N.E.2d 504, 513 (Ohio 1994).

7. *Burgess v. Eli Lilly & Co.*, 609 N.E.2d 140, 141 (Ohio 1993).

8. *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 401 (Ohio 1994), *reconsideration denied*, 644 N.E.2d 1389 (Ohio 1995), *cert. denied*, 516 U.S. 809 (1995).

9. 972 S.W.2d 260 (Ky. 1998).

10. *Id.*

11. *Id.* at 265-69.

12. *Id.* at 269. See also Note, M. Scott McIntyre, *The Future of Kentucky's Punitive Damages Statute and Jural Rights Jurisprudence: A Call For Separation of Powers*, 88 K.Y. L.J. 719 (2000) (arguing that the Kentucky Supreme Court's expansive interpretation of the jural rights doctrine usurps the legislature's proper role in developing broad public policy).

preme Court had nullified Kentucky tort reform legislation. For example, the court declared unconstitutional a five-year statute of repose for health care liability actions,¹³ a statute allowing the admission of evidence of collateral source payments in personal injury actions,¹⁴ a seven-year statute of repose for improvements to real property,¹⁵ and a five-year statute of repose for real property improvements which predated the seven-year statute of repose that was found to be unconstitutional.¹⁶

In all likelihood, the trial bar's success in striking down state tort reform legislation has crested; the low hanging fruit has been picked. Defendants should fare better in the future, because most state courts give meaning to the well-established principle that legislative enactments come with a "presumption of constitutionality" and should be respected. Furthermore, most courts appreciate the basic fact that Government works best when there is mutual respect and cooperation between the legislative and judicial branches.¹⁷ Nevertheless, the "see-saw" battle for the preservation of state tort law is likely to continue.

Importantly, tort reformers also must focus on new problems facing the civil justice system. These include the partnering between governments and contingency fee lawyers to sue private, legal industries, as well as the increasing use of the class action as a weapon to force lucrative settlements out of defendants.

This article will discuss each of these problems and offer some solutions developed by experienced lawmakers. First, it will summarize recent successful tort reform efforts by forward-thinking lawmakers.¹⁸ Next, it will address the growing problem of judicial nullification of state tort law, which, unless checked through appropriate measures, violates the separation of powers principle and threatens to undo much of the good that legislators have accom-

13. *McCollum v. Sisters of Charity of Nazareth Health Corp.*, 799 S.W.2d 15, 17 (Ky. 1990).

14. *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 574 (Ky. 1995).

15. *Perkins v. N.E. Log Homes*, 808 S.W.2d 809, 817 (Ky. 1991).

16. *Tabler v. Wallace*, 704 S.W.2d 179, 183 (Ky. 1985), *cert. denied*, 479 U.S. 822 (1986).

17. As United States Supreme Court Justice Jackson noted so eloquently many years ago: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

18. *Infra* Part II.

plished.¹⁹ Finally, it will discuss the development of so-called “Big Government” lawsuits against various industries and the “new style” class action litigation – efforts to regulate, tax, and control private, lawful businesses through litigation.²⁰ These “21st Century” problems threaten our system of representative government and the fundamental concept of “equal justice for all.”

II. TORT REFORM PAST: A FOCUS ON A FEW KEY ISSUES

For more than a decade, civil justice reform efforts have focused on a few key areas: punitive damages, products liability, health care liability, volunteer liability, and federal civil justice and products liability reform.²¹

Many of these efforts have met with success at the state level. For example, thirty states and the District of Columbia have raised the burden of proof for obtaining punitive damages to “clear and convincing evidence.”²² Other states have enacted statutory limits to help guard against excessive punitive damages overkill.²³ Further, a

19. *Infra* Part III.

20. *Infra* Part IV.

21. See American Tort Reform Association, <<http://www.atra.org>> (visited on June 5, 2000) for a summary of these efforts.

22. ALA. CODE § 6-11-20 (1999); ALASKA STAT. § 09.17.020 (Michie 1999); CAL. CIV. CODE § 3294(a) (West 1999); FLA. STAT. Ch. 768.73 (1998); GA. CODE ANN. § 51-12-5.1 (1999); IOWA CODE ANN. § 668A.1 (West 1998); KAN. STAT. ANN. § 60-3701(c) (1998); KY. REV. STAT. ANN. § 411.184(2) (1998); MINN. STAT. ANN. § 549.20 (West Supp. 1998); MISS. CODE ANN. § 11-1-65(1)(a) (Supp. 1999); MONT. CODE ANN. § 27-1-221(5) (2000); NEV. REV. STAT. ANN. § 42-005(1) (Michie 1996); N.J. STAT. ANN. § 2A:15-5.12(a) (West 2000); N.C. GEN. STAT. 10-15(b) (1999); N.D. CENT. CODE § 32-03.2-11(5) (Supp. 1999); OHIO REV. CODE ANN. § 2307.80(A) (Banks-Baldwin/West Supp. 2000); OKLA. STAT. ANN. TIT. 23, § 9.1(D) (West Supp. 1998); OR. REV. STAT. § 18.537 (1997); S.C. CODE ANN. § 15-33-135 (West Supp. 1999); S.D. CODIFIED LAWS ANN. § 21-1-4.1 (Michie 1987); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a) (West 1997); UTAH CODE ANN. § 78-18-1(1)(a) (1996); *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675 (Ariz. 1986); *Jonathan Woodner, Co. v. Breden*, 665 A.2d 929, 938 (D.C. 1995), *cert. denied*, 519 U.S. 1148 (1997); *Masaki v. Gen. Motors Corp.*, 780 P.2d 566, 575 (Haw. 1989); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 362-63 (Ind. 1982); *Tuttel v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985); *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 656 (Md. 1992); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 458 (Wis. 1980); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. 1996). One state, Colorado, requires proof “beyond a reasonable doubt” in punitive damages cases. COLO. REV. STAT. § 13-25-127(2) (1987).

23. ALA. CODE § 6-11-21 (1999); ALASKA STAT. 58 § 9.17.020(f)-(h) (Michie 1999); COLO. REV. STAT. § 13-21-102(1)(a) (1998); CONN. GEN. STAT. § 52-240a (1999); FLA. STAT. ANN. § 768.73(1)(b) (West Supp. 2000); IND. CODE ANN. § 34-

large number of states have enacted statutes of repose to deal with the drain on resources and competitive threat to American jobs caused by "long tail" liability involving old products.²⁴ Many states have enacted aggregate limits on medical malpractice awards and limits on noneconomic damages to contain medical liability premiums.²⁵ Roughly two-thirds of the states have abolished or modified joint liability to provide for a fairer apportionment of fault.²⁶

There also has been some incremental success at the federal level. Two product liability reform proposals have become law.²⁷

51-3-4 (West 1999); KAN. STAT. ANN. § 60-3701 (1998); N.J. STAT. ANN. § 2A:15-5.14 (West Supp. 2000); N.C. GEN. STAT. § 1D-25 (1999); N.D. CENT. CODE § 32.03.2-11(4) (1999); OKLA. STAT. ANN. Tit. 23 § 9.1 (West Supp. 1998); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (West 1999); VA. CODE ANN. § 8.01-38.1 (1999).

24. ARK. CODE ANN. § 16-116-105(c) (Michie 1987); COLO. REV. STAT. ANN. §13-80-107(1)(b) (West 1997); COLO. REV. STAT. ANN. §13-21-403(3) (West 1997); CONN. GEN. STAT. § 52-577 (1991); FLA. STAT. ANN. § 95.031(b) (West Supp. 2000); GA. CODE ANN. § 51-1-11(b)(2) (Supp. 1999); IDAHO CODE § 6-1403(2) (1998); 735 ILL. COM. STAT. ANN. 5/13-213(b) (West Supp. 2000); IND. CODE ANN. § 34-20-3-1(b) (West 1999); IOWA CODE ANN. § 614.1(2A) (West Supp. 2000); KAN. STAT. ANN. § 60-3303 (1994) KY. REV. STAT. ANN. § 411.310(1) (Michie 1992); MICH. STAT. ANN. § 27A.5805(9) (1999); MINN. STAT. § 604.03 (West 1998); NEB. REV. STAT. ANN. § 25-224 (Michie 1995); N.C. GEN. STAT. § 1-50(a)(6) (1999); OR. REV. STAT. § 30.905(1) (1988); TENN. CODE ANN. § 29-28-103(a) (Supp. 1999); TEX. CIV. PRAC. & REM. CODE ANN. § 16.012(b) (West Supp. 2000); WASH. REV. CODE ANN. § 7.72.060(1) (West 1992).

25. For limits on noneconomic damages in medical malpractice actions, see LA. REV. STAT. ANN. § 40:1299.42 (West 1992); MASS. GEN. LAWS ANN. Ch. 231, § 60H (West Supp. 2000); MICH. COMP. LAWS ANN. § 600.1483 (Law Co-op 1999); MONT. CODE ANN. § 25-9-411 (1999); NEB. REV. STAT. ANN. § 44-2825 (Michie 1995); N.D. CENT. CODE § 32-42-01 (1996); S.D. CODIFIED LAWS § 21-3-11 (Supp. 2000); UTAH CODE ANN. § 78-14-7.1 (1996); W.VA. CODE § 57-7B-8 (Michie 1996); WIS. STAT. ANN. § 893.55 (West 1997). For aggregate limits on medical malpractice awards, N.M. STAT. ANN. § 4-5-6 (Michie 1999); VA. CODE ANN. § 8.01-581.15 (Michie 1999).

26. VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* app. b (3d ed. 1994 & Supp. 1999).

27. In addition to the reforms discussed in this article, a comprehensive product liability reform bill cleared both the House and Senate in the 104th Congress, but was vetoed by President Clinton in May of 1996. That legislation, among other reforms, capped punitive damage awards at the greater of two times the plaintiff's compensatory damages award or \$250,000; abolished joint liability for noneconomic damages; limited the liability of product sellers to their own negligence or failure to comply with an express warranty; established a complete defense to liability if the principal cause of an accident was the claimant's abuse of alcohol or illicit drugs; reduced a defendant's liability to the extent the plaintiff's harm was due to the misuse or alteration of a product; and set a fifteen-year time limit (statute of repose) on litigation involving workplace durable goods (e.g., machine tools). H.R. Conf. Rep. No. 481, 104th Cong., 2d Sess. (1996).

The General Aviation Revitalization Act of 1994 (GARA)²⁸ established an eighteen-year statute of repose for general aviation aircraft used for noncommercial purposes. It reversed the general aviation industry's path toward extinction. As a result of GARA, the general aviation industry is now booming.²⁹ The other law, the Biomaterials Access Assurance Act of 1998,³⁰ helped avoid a serious public health crisis by ensuring the availability of lifesaving and life-enhancing implantable medical devices, such as pacemakers, heart valves, and hip and knee joints.³¹ The supply of those devices had been critically threatened after suppliers made a business judgment to exit the medical device market in order to avoid legal costs which accompanied their successful defense of meritless product liability claims.³² The biomaterials law encourages those suppliers to reenter the market by allowing them to obtain early dismissal, without extensive discovery or other legal costs, in certain tort suits involving finished medical implants.³³

Congress has twice enacted comprehensive private securities litigation reform legislation. The Private Securities Litigation Reform Act of 1995³⁴ placed limits on the conduct of private lawsuits under the Securities Act of 1933 and the Securities Exchange Act of 1934 in federal court. The Securities Litigation Uniform Standards Act of 1998³⁵ made federal courts the sole venue for most securities class action fraud lawsuits involving fifty or more parties.

The Year 2000 Readiness and Responsibility Act ("Y2K Act") established procedures and legal standards for lawsuits stemming from Year 2000 computer date-related failures.³⁶ An earlier statute, the Year 2000 Information and Readiness Disclosure Act,³⁷ gave companies certain protections regarding Year 2000 statements.

The Aviation Medical Assistance Act of 1998³⁸ gave liability

28. Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101(1995)).

29. Geoffrey A. Campbell, *Study: Business Booms After Tort Reform Enacted*, ABA J., Jan. 1996, at 28 ("The light aircraft industry is taking off as reduced liability encourages technological innovation").

30. Pub. L. No. 105-230, 112 Stat. 1519 (1998).

31. S. Rep. No. 32, 105th Cong., 1st Sess. 58-60 (1997).

32. H.R. Rep. No. 549, 105th Cong., 2d Sess. (1998).

33. *Id.*

34. Pub. L. No. 104-67, 109 Stat. 737 (1995).

35. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227.

36. "Y2K Act," PUB. L. NO. 106-37, 106 Stat. 185 (1999).

37. Pub. L. No. 105-271, 112 Stat. 2386 (1998).

38. Pub. L. No. 105-170, 112 Stat. 47 (1998).

protections to individuals and air carriers, which provide or attempt to provide assistance during in flight medical emergencies.

Volunteer Protection Act of 1997³⁹ provided limited immunity for volunteers acting on behalf of a nonprofit organization, created a national standard of punitive damages liability for volunteers, and abolished joint liability for noneconomic damages in tort actions involving volunteers.

The Amtrak Reform and Accountability Act of 1997⁴⁰ created a federal standard for punitive damages awards in tort cases brought against Amtrak by its passengers and capped Amtrak's tort liability at \$200 million per rail accident.

The Aviation Disaster Family Assistance Act of 1996⁴¹ limited unsolicited contacts by lawyers and insurance company representatives with airline crash victims or their families.

The Federally Supported Health Centers Assistance Act of 1995⁴² extended Federal Tort Claims Act coverage to community, migrant, and homeless health centers.

The Bill Emerson Good Samaritan Food Donation Act of 1996⁴³ provided limited tort immunity to encourage the donation of food and grocery products to nonprofit organizations for distribution to needy individuals.

III. TORT REFORM PRESENT: OLD AND NEW CHALLENGES

Civil justice reform proponents must be prepared to repeat their past successes and respond to constitutional challenges to state tort reform legislation in state courts.

A. *Replicating Victories In Additional Jurisdictions*

While significant progress has been made in a number of areas, this progress has not been uniform. Many states still lack limits on punitive and noneconomic damages. Many states continue to permit unrestrained joint ("deep pocket") liability. Many states also continue to allow defendants to be sued for injuries allegedly caused by very old products. Tort reform proponents must work to replicate the successes of the 1980s and 1990s in the remaining

39. Pub. L. No. 105-19, 111 Stat. 218 (1997).

40. Pub. L. No. 105-134, 111 Stat. 2570 (1997).

41. Pub. L. No. 104-264, 110 Stat. 3213 (1996).

42. Pub. L. No. 104-73, 109 Stat. 777 (1995).

43. Pub. L. No. 104-210, 110 Stat. 3012 (1996).

states.⁴⁴

While legislatures will be the most likely focus of these efforts, the courts should not be overlooked. It is possible to achieve favorable developments in the law by judicial decision. For example, a number of states have adopted punitive damages reforms by judicial decision, from raising the burden of proof to clear and convincing evidence⁴⁵ to requiring a showing of “actual malice” by the defendant⁴⁶ to requiring “bifurcation” of punitive damages trials.⁴⁷ Similarly, some states have abolished joint liability through judicial decision.⁴⁸

B. Combating Judicial Nullification

Tort reform proponents also must deal with a growing new problem which threatens the civil justice reforms that have already been enacted, and may prevent future reforms from being effective. The problem is judicial nullification of state tort law.⁴⁹ Plaintiffs’ bar scholars have hailed this activity as one of the most significant occurrences in tort law from the plaintiffs’ perspective in the past fifty years.⁵⁰

44. See, e.g., Victor E. Schwartz, et al., *Reining In Punitive Damages “Run Wild”*: *Proposals For Reform By Courts And Legislatures*, 65 BROOK. L. REV. 1003 (1999).

45. See, e.g., *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 681 (Ariz. 1986); *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 937 (D.C. 1995), *cert. denied*, 519 U.S. 1148 (1997); *Masaki v. Gen. Motors Corp.*, 780 P.2d 566, 567 (Haw. 1989); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 349 (Ind. 1982); *Tuttel v. Raymond*, 494 A.2d 1353, 1353 (Me. 1985); *Owens-Illinois v. Zenobia*, 601 A.2d 633, 635 (Md. 1992); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 897 (Tenn. 1992); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 458 (Wis. 1980); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. 1996).

46. *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 652 (Md. 1992); *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 936 (D.C. 1995), *cert. denied*, 519 U.S. 1148 (1997).

47. *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex. 1994); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992).

48. *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992); *Prudential Life Ins. Co. v. Moody*, 696 S.W.2d 503, 504 (Ky. 1985); *Brown v. Keill*, 580 P.2d 867, 874 (Kan. 1978).

49. Victor E. Schwartz, et al., *Mutual Respect and Cooperation Among Co-Equal Branches of Government: A Sound Solution to the Tort Tug of War Between State Courts and State Legislatures*, ___ W. VA. L. REV. ___ (forthcoming 2000).

50. Jeffrey Robert White, *Top 10 in Torts: Evolution in the Common Law*, 32 TRIAL 50 (July 1996).

1. What Is Judicial Nullification?

Judicial nullification takes place when state courts use state constitutional provisions to overturn legislative decisions about civil justice reform in situations where there was a clear, rational public policy basis for the legislation.⁵¹ This practice hampers past tort reform efforts by undoing the good that legislators have worked to accomplish, and creates precedents that courts in the future can use to nullify a wide range of state legislation.

The tactic of judicial nullification was developed by the plaintiffs' bar as a response to successful state tort reform efforts. The Association of Trial Lawyers of America ("ATLA"), the primary advocacy organization of the contingency fee personal injury bar, has launched a nationwide effort to persuade state courts to nullify state tort reform legislation, using state constitutional provisions as a means of persuasion. While still a minority position, a large number of state courts have embraced the trial bar's arguments.⁵² There are now over ninety state court decisions striking down state tort reform laws.⁵³

Judicial nullification relies on the growing willingness of some state courts to substitute their own views of proper tort law for that of state legislators. Plaintiffs' lawyers further "game" the legal system by relying on obscure state constitutional provisions that have little historical explanation and no counterpart in the United States Constitution.⁵⁴ This allows plaintiffs' lawyers and activist courts to offer their own explanations to fill in the gaps in the historical record. Indeed, former ATLA President Mark Mandell has bragged that a brief written by ATLA and argued by Harvard Law Professor Laurence Tribe resulted in an Indiana health care liability statute being overturned based on a state constitutional provision "that was previously regarded as toothless."⁵⁵

By relying solely on state constitutional provisions, contingency

51. See, e.g., *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1072 (Ohio 1999); *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1079 (Ill. 1997).

52. Victor E. Schwartz, et al., *Who Should Make America's Tort Law: Courts or Legislators?* [hereinafter *Courts or Legislators?*] (Wash. Legal Found. Feb. 1997).

53. William Glaberson, *State Courts Sweeping Away Laws Curbing Suits for Injury*, N.Y. TIMES, July 16, 1999, at A1.

54. Victor E. Schwartz, et al., *Stamping Out Tort Reform: State Courts Lack Proper Respect for Legislative Judgments*, LEGAL TIMES, Feb. 10, 1997, at S34.

55. *Two More State Supreme Courts Strike Down Tort Reforms*, LIAB. WEEK, July 19, 1999, at 7.

fee lawyers are able to preclude any appeal of an adverse decision to the United States Supreme Court – there is no federal issue. Contingency fee lawyers use this strategy because they know that the United States Supreme Court, in constitutional challenges under the Fourteenth Amendment,⁵⁶ has made clear distinctions between situations in which a legislature violated a person’s fundamental rights and situations in which a legislature made an economic policy decision. Except in a highly discredited period in the Supreme Court’s history known as “the *Lochner* era,”⁵⁷ which occurred around the mid-1930s, the Supreme Court has shown appropriate deference to legislative policy judgments, even where the Justices might not have personally agreed with the legislature’s action.⁵⁸

Fortunately, most state courts have followed the lead of the United States Supreme Court and have rejected invitations to issue decisions that ignore the legislative role in developing liability law. By almost a two-to-one margin, state supreme courts across the country have sustained rational state legislative efforts to formulate state liability law.⁵⁹

On the other hand, a number of state courts have embraced ATLA’s arguments. For example, in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*,⁶⁰ the Supreme Court of Ohio narrowly overturned Ohio’s 1996 civil justice reform statute. *Sheward* is remarkable for a number of reasons.⁶¹

56. U.S. CONST. amend. XIV.

57. In *Lochner v. New York*, 198 U.S. 45 (1905), the Court invalidated a New York law that limited the number of hours bakers could work. Justice Holmes argued in his dissent that courts should respect economic legislation that is rationally related to a legitimate policy goal. He wrote:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law.

Id. at 75 (emphasis added).

58. Victor E. Schwartz, et al., *Federalism and Federal Liability Reform: The United States Constitution Supports Reform*, 36 HARV. J. ON LEGIS. 269 (1999) (discussing a century of congressional enactments changing state liability law and the cases holding the statutes constitutional).

59. Schwartz, *supra* note 58.

60. 715 N.E.2d 1062 (Ohio 1999).

61. See generally Comment, *State Tort Reform – Ohio Supreme Court Strikes Down State General Assembly’s Tort Reform Initiative*. – *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 113 HARV. L. REV. 804, 804-09 (Jan. 2000) [hereinafter *Sheward*].

First, there was not a live case or controversy before the court. Rather, the Ohio Association of Trial Lawyers ("OATL"), along with others, bypassed traditional jurisdictional procedures and notions of standing and filed an *original action* with the Ohio Supreme Court.⁶² A primary basis for OATL action was securing, through petitions for writs of mandamus and prohibition, a ruling blocking lower courts' implementation of the civil justice reform law.⁶³ OATL claimed that the tort reform law would cut into its members' contingency fee recoveries and make it harder for OATL to recruit members!⁶⁴

Next, in order to justify permitting OATL to pursue the action despite obvious questions of standing, Justice Resnick, writing for a 4-3 majority, invented a new judicial doctrine to help OATL out of its standing problem.⁶⁵ Specifically, the majority concluded that OATL's challenge was a matter "of such a high order of public concern as to justify allowing this action as a public action."⁶⁶ Now, in Ohio, any public interest group can conceivably file a direct action with the Ohio Supreme Court to challenge the constitutionality of virtually any legislation that may affect its members. This aspect of the majority's opinion was heavily criticized by the dissenting members of the court, led by Justice Stratton, who noted that, "[t]he majority's acceptance of this case means that we have created a whole new arena of jurisdiction – 'advisory opinions on the constitutionality of a statute challenged by a special interest group.'"⁶⁷

The majority's holding with respect to the substance of the legislation was equally shocking. The court up-ended the doctrine of separation of powers and the notion of mutual respect between the legislature and the courts. Without so much as a passing reference to the need to preserve legislative independence in creating liability law, the court broadly declared tort law to be within the exclusive domain of the judiciary.⁶⁸

Comment] (explaining how the court used the separation of powers doctrine and the state constitution's "one-subject rule" to declare the reform act as unconstitutional).

62. *Sheward*, 715 N.E.2d at 1068.

63. *Id.* at 1068-69.

64. *Id.* at 1084.

65. *Sheward* Comment, *supra* note 61, at 805.

66. *Sheward*, 715 N.E.2d at 1084.

67. *State ex. rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1122 (Ohio 1999) (Stratton, J., dissenting).

68. *Id.* at 1085-86.

The majority then went on to hold that Ohio's tort reform statute violated the "one-subject rule" of the Ohio Constitution, which prohibits unrelated subjects from being bundled in a single statute.⁶⁹ Even though the statute was plainly focused on the "diverse, but single, subject of tort reform,"⁷⁰ that was not enough for the members of the court who were bent on overturning the law. They held that the legislation focused on "laws pertaining to tort and other civil actions," and was therefore too broad to fit within Ohio's "one-subject" rule.⁷¹ In so doing, the court made no attempt to sever those portions that it deemed "unrelated" to tort reform.⁷² Finally, by relying solely on the Ohio Constitution, the Ohio Supreme Court was able to preclude any appeal to the United States Supreme Court.

Unfortunately, the Ohio Supreme Court was not the first state court to usurp the authority of the state legislature to contribute to the development of tort law. In December of 1997, the Illinois Supreme Court overturned a comprehensive 1995 Illinois tort reform statute in its entirety, holding that it violated the Illinois Constitution.⁷³ In *Best v. Taylor Machine Works*,⁷⁴ a majority of the Illinois court held that, as a threshold matter, provisions of Illinois's tort reform statute limiting noneconomic damages⁷⁵ and providing for access to a tort claimant's medical records were unconstitutional.⁷⁶ The majority opinion, written by Justice McMorrow, also declared unconstitutional a provision of the law that abolished joint liability.⁷⁷ This was the first time *any* court had overturned a modification of that doctrine.⁷⁸ The court next held that the narrow provi-

69. *Id.* at 1097-1102.

70. *Id.* at 1126 (Stratton, J., dissenting).

71. *Id.* at 1100.

72. *Id.* at 1101-02.

73. J.V. Schwan, *State Courts Blur The Lines Separating Powers*, CHI. TRIB., Sept. 22, 1999, at 19. From the beginning of statehood, the Illinois General Assembly had repealed or modified the common law of torts on many occasions without having its work nullified by Illinois courts. Victor E. Schwartz, et al., *Illinois Tort Law: A Rich History of Cooperation and Respect Between the Courts and the Legislature*, 28 LOY. U. CHI. L.J. 745, 750-60 (1997).

74. 689 N.E.2d 1057 (Ill. 1997).

75. *Id.* at 1064, 1076-78.

76. *Id.* at 1064, 1089-1100.

77. *Id.* at 1064, 1084-89, 100-06.

78. *Church v. Rawson Drug & Sundry Co.*, 842 P.2d 1355, 1361 (Ariz. Ct. App. 1992) (statute abolishing joint liability in tort actions held constitutional); *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 332-33 (Minn. 1990) (statutory limit on municipal joint liability not unconstitutional); *Evangelatos v. Superior Ct.*, 753

sions upon which it had ruled were “core provisions” so inextricably linked to each other, as well as to unrelated product liability reforms in the legislation, and so “essential to the passage of the Act” that no one section in the multi-section statute could be severed and saved.⁷⁹ Accordingly, the legislation was declared unconstitutional “*in toto*.”⁸⁰

In one broad sweep, the court’s overreaching opinion in *Best* ignored the fundamental separation of powers principle upon which our entire system of government is based. In a strong dissent, Justice Miller wrote:

Today’s decision represents a substantial departure from our precedent on the respective roles of the legislative and judicial branches in shaping the law of this state. Stripped to its essence, the majority’s mode of analysis simply constitutes an attempt to overrule, by judicial fiat, the considered judgment of the legislature.⁸¹

2. *Why Is Judicial Nullification Bad Policy?*

Many of the decisions overturning tort reform statutes, such as those in Ohio and Illinois discussed above, have been premised on the assumption that state courts have a fundamental and exclusive right to make state tort law. As discussed below, these decisions ignore both sound policy considerations and legal history.

a. Legislatures Are Well-Suited To Develop Broad Public Policy

Decisions overturning tort law rules overlook the fact that legislatures have certain tools that make them uniquely well situated to reach fully informed decisions about the need for broad public policy changes in the law. This is particularly important in the area of liability law, because the impacts go far beyond who should win a particular case.⁸²

P.2d 585, 593 (Cal. 1988) (Fair Responsibility Act, which abolished joint liability for noneconomic damages, held constitutional). Some state supreme courts have even abolished joint liability by judicial decision. *Brown v. Keill*, 580 P.2d 867, 874 (Kan. 1978); *Prudential Life Ins. Co. v. Moody*, 696 S.W.2d 503, 504 (Ky. 1985); *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992).

79. *Best*, 689 N.E.2d at 1104.

80. *Id.* (emphasis in original).

81. *Id.* at 1113 (Miller, J., dissenting in part and concurring in part).

82. PETER W. HUBER, *THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); WALTER OLSON, *THE LITIGATION EXPLOSION* 178-79, 188, 199 (1991).

Legislatures, not courts, are best equipped to decide broad and complex public policy problems, such as civil justice reform issues. Through the hearing process, legislatures can collect information from a wide and diverse range of sources to help them decide whether the law should be changed and, if so, what kind of change should be made. They make decisions in the open, with public input, and must be sensitive to the wishes of the electorate.⁸³ Changes in the law are made prospectively, so people have fair notice about new rights and responsibilities. As the United States Supreme Court noted in a landmark decision regarding punitive damages, “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive *fair notice*...of the conduct that will subject him to [liability]....”⁸⁴

Judges, on the other hand, have no mechanism for determining whether the status quo should be changed to benefit the public at large. Charged with the duty to decide “cases and controversies,”⁸⁵ courts make decisions on the basis of a limited set of facts in an individual lawsuit. This “input” is often colored by the arguments of opposing counsel, who are seeking to serve purely private interests. Judges are not typically accountable to the general public and, oftentimes, little publicity is afforded their decisions.⁸⁶

Moreover, judges make law retroactively. When they decide a case against a defendant, they impose liability for, or even punish, behavior that took place before they made their decision. Notice and fairness problems would be created if judges are allowed to make sudden and significant changes in the law and then hold defendants responsible for actions that took place before the judge changed the law. Instead, the role of the judiciary is and has been to take existing law and apply it to the controversy at issue, chang-

83. See generally *Smith v. Cutter Biological, Inc.*, 823 P.2d 717, 736 (Haw. 1991) (Moon, J., concurring in part and dissenting in part) (disagreeing with the majority’s application of “market share liability” to a blood products case, because “[t]here are too many unanswered questions of social, economic, and legal import, which only the legislature, with its investigative powers and procedures, can determine.”).

84. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (emphasis added).

85. U.S. CONST. art. III, § 2, cl. 1.

86. *Berger v. Supreme Court of Ohio*, 598 F. Supp. 69, 76 (S.D. Ohio 1984), (upholding a judicial canon restricting a judicial candidate’s campaign activities, the trial court noted that “[t]he very purpose of the judicial function makes inappropriate the same kind of particularized pledges and predetermined commitments that mark campaigns for legislative and executive office. *A judge acts on individual cases, not broad programs*”) (emphasis added).

ing it incrementally where needed to ensure justice is served.

b. The "Reception Statutes"

The legislature's role as primary policymaker is a matter of history as well as of logic. More than 200 years ago, when colonies and territories became states, one of the first acts of state legislatures was to "receive" the Common Law of England as of a certain date so it could be used as a basis for a state's tort law.⁸⁷ In the same legislation, called a "reception statute," state legislators *delegated* to state courts the authority to develop the English Common Law in accordance with the "public policy" of the state. These long-forgotten statutes were the basic vehicle through which legislative power was vested in state judiciaries.⁸⁸

Early state legislatures delegated the task of developing tort law to state judiciaries, because the legislatures did not have the time

87. ALA. CODE § 1-3-1 (West 1999); ALASKA STAT. § 01.10.010 (Michie 1999); ARIZ. REV. STAT. ANN. § 1-201 (West 1999); ARK. CODE ANN. § 1-2-119 (Michie 1999); CAL. CIV. CODE § 22.2 (West 1999); COLO. REV. STAT. ANN. § 2-4-211 (West 2000); DEL. CONST. SCHEDULE § 18 (West 1999); D.C. CODE ANN. § 49-301 (1997); FLA. STAT. ANN. § 2.01 (West 1999); GA. CODE ANN. § 1-1-10(c)(1) (Michie 1999); HAW. REV. STAT. ANN. § 1-1 (West 1999); IDAHO CODE § 73-116 (West 1999); 5 ILL. COMP. STAT. ANN. [ILCS] 50/1 (West 1999); IND. STAT. ANN. § 1-1-2-1 (West 1999); KAN. STAT. ANN. § 77-109 (West 1999); KY. REV. STAT. ANN. § 233 (Michie 1998); ME. REV. STAT. ANN. TIT. 10, § 3 (West 1999); MD. CONST. DECL. OF RIGHTS ART. 5(a) (Michie Butterworth 1995); MASS. CONST. ANN. Pt. 2, Ch. 6, Art. 6 [§ 97] (West 1999); MICH. CONST. ART. III, § 7 (West 1999); MO. REV. STAT. § 1.010 (West 1999); MONT. CODE ANN. § 1-1-109 (1999); NEW JERSEY § 49-101 (Michie 1998); NEV. REV. STAT. ANN. § 1.030 (West 1999); NEB. REV. STAT. ANN. CONST. ART. XI, § 1, ¶ 3; N.M. STAT. ANN. § 38-1-3 (West 1999); N.Y. [LAW] ART. 1, § 14 (McKinney 1998); N.Y. [LAW] § 4 (McKinney 1998); N.C. GEN. STAT. § 4-1 (1999); OKLA. STAT. ANN. TIT. 12, § 2 (West 2000); OR. CONST. ART. 18, § 7 (West 1999); 42 PA. CONS. STAT. ANN. § 1503(A), (C) (West 1981); R.I. GEN. LAWS § 43-3-1 (1999); S.C. CODE ANN. § 14-1-50 (Law Co-op 1999); S.D. CODIFIED LAWS § 1-1-24 (West 1999); TENN. CONST. ART. XI, § 1 (West 1996); TEX. CIV. PRAC. & REM. CODE § 5.001 (West 1999); UTAH CODE ANN. § 68-3-1 (1996); VT. STAT. ANN. § 271 (West 1999); VA. CODE § 1-10 (1995); VA. CODE § 1-11 (1995); WASH. CODE ANN. § 4.04.010 (West 1999); W. VA. CODE § 2-1-1, § 56-3-1 (West 1999); WIS. STAT. ANN. § 13 (West Supp. 1999); WYO. STAT. ANN. § 8-1-101 (West 1999). Ohio repealed its reception statute in 1806. *Drake v. Rogers*, 13 Ohio St. 21 (1861). North Dakota repealed its reception statute in 1978. N.D. CONST. TRANSITION SCHED. §§ 1 to 25 (Michie 1999). When Minnesota was created as a territory, it received the laws of Wisconsin, including the common law, but later, repealed the laws of Wisconsin in favor of its own law. *Cashman v. Hedberg*, 10 N.W.2d 388, 390 (Minn. 1943). Louisiana is a "code," not a common law, state. *King v. Cancienne*, 316 So. 2d 366, 367 (La. 1975).

88. Kent Greenwalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 648-50 (1987).

(or perhaps the inclination) to formulate an extensive “tort code.” They faced more extensive and pressing tasks, including the formulation of the basic principles for a “new society,” such as a criminal code. As many “reception statutes” made clear, however, what the legislature delegated, it could *retrieve at any time*.

Because legislatures are the best equipped to decide complex public policy issues, activist judges should not believe that they “know best” and substitute their own ideas of how things should be. Civil justice reform laws were instituted after much careful study and debate by legislators. They should not be overturned just because judges disagree with their public policy underpinnings.

3. *What Can Be Done?*

a. *Election Of Judges*

For years, contingency fee lawyers have understood that judicial selection is an important factor in the overall legal reform debate. They heavily support judicial elections. Businesses should do the same. They should identify and support qualified candidates for the state judiciary.

While no one should ever expect a particular outcome from a court, the public has a right to expect a balanced judiciary that is appropriately deferential to the perspectives of other elected leaders, including state legislators and governors. This is true with respect to both tort reform and other key areas of public policy.

b. *Recognition Of The Separation Of Powers*

The American Legislative Exchange Council (“ALEC”), the nation’s largest bipartisan individual membership association of state legislators, numbering over 3,000 members, has proposed a model “Separation of Powers Act” to serve as a reminder to courts and the public that, as a matter of history and logic, the power to decide tort law is both a legislative right and a responsibility.⁸⁹ The model legislation reaffirms the right of legislatures to abrogate or alter the common law. It reminds courts and the public that the power to decide state tort law was originally vested in legislatures, then delegated to courts, and that legislatures were clear about their right to retrieve that power. ALEC’s model Act demonstrates

89. American Legislative Exchange Council, <<http://www.alec.org>> (last visited on June 5, 2000).

that legislatures that repeal or modify common law causes of action are following a practice engaged in by state legislatures from the earliest days of this country's history.

The ALEC model Act is a meaningful start to resolving the battle between state courts and legislatures and for moving toward cooperation between these key branches of state government.

c. Federal Legislation

Although most tort reform successes have occurred at the state level, the need for federal legislation to complement state tort reform efforts is worth mentioning, because it represents one more way of addressing the problem of judicial activism in liability law. In particular, federal legislation may be the most direct way of responding on a national level to the problem of judicial nullification of state tort law.

The Supremacy Clause in the United States Constitution⁹⁰ assures that federal liability reform legislation cannot be attacked under state constitutions. If constitutional attacks are to be launched against federal reform laws, they must be grounded in the United States Constitution. For almost a century, the United States Supreme Court has repeatedly upheld federal legislation altering state tort law.⁹¹ While Congress is not likely to "federalize" the entire civil justice system, federal legislation may provide some hope for states that would not otherwise have any means of addressing the problem of unfair tort liability.

IV. TORT REFORM FUTURE: NEW STYLE LITIGATION

At the turn of the millennium, both public attorneys general and private contingency fee personal injury lawyers have launched "new style" lawsuits that threaten to dramatically alter the landscape for tort litigation in the future. Former Secretary of Labor Robert Reich has observed: "[T]he era of big government may be over, but the era of regulation through litigation has just begun."⁹²

Prominent plaintiffs' lawyer John Coale has described how these lawsuits work.⁹³ First, private contingency fee lawyers seek to

90. U.S. CONST. art VI, cl.2.

91. Schwartz, et al., *supra* note 44.

92. Robert B. Reich, *Regulation is out, Litigation is in*, USA TODAY, Feb. 11, 1999, at A15.

93. John Coale, *The Public Policy Implications of Lawsuits Against Unpopular De-*

vilify potential defendants through massive public relations campaigns. Then they seek to convince their political allies to conduct hearings and take the issue “to the public” as ammunition to make the potential defendant even more unpopular. After the target has been sufficiently vilified and the well of public opinion has been poisoned against it, then the lawyers file a lawsuit.

This process has been deemed useful in both the so-called “Big Government” lawsuits against various industries and in the “new style” class action litigation. Almost any industry could become a target – unless the laws are applied unequally (i.e., against unpopular defendants), violating the bedrock principle of “equal justice under law.”

A. “Big Government” Lawsuits

Both federal and state attorneys general are seeking to regulate lawful industries by marshaling the powerful forces of the government and the wiles of entrepreneurial private plaintiffs’ lawyers in orchestrated high-stakes lawsuits. These “Big Government” lawsuits are typically aided by activist courts that abandon fundamental tort principles and issue legal rulings that “stack the deck” in favor of the government plaintiffs.⁹⁴

When companies are targeted by this so-called “bet the industry” litigation, they have been forced to capitulate to government demands rather than vindicate their lawful business practices. As a result, they are unable to obtain appellate review of questionable legal rulings. These rulings remain on the books as precedent for use against future tort defendants.

1. *Tobacco Litigation: The Birth Of “Big Government” Lawsuits*

The state attorneys general Medicaid recoupment litigation against the tobacco industry was the genesis of the Big Government lawsuit trend. In the tobacco litigation, the partnership between state governments and private personal injury lawyers was unprecedented, powerful—and lucrative. Ultimately, the litigation resulted in an historic global settlement that included \$246 billion in dam-

defendants: Guns, Tobacco, Alcohol and What Else, presentation before The Federalist Society for Law and Public Policy (Nov. 11, 1999).

94. Victor E. Schwartz & Leah Lorber, *Regulation Through Litigation Has Just Begun: What You Can Do To Stop It*, NAT’L LEGAL CTR. FOR THE PUB. INTEREST, Nov. 1999, at 9-14 [hereinafter “Regulation by Litigation”].

ages and \$8.2 billion in fees so far for the private attorneys—most of whom worked on a contingent fee basis.⁹⁵

State officials secretly entered into contingency fee contracts with private personal injury lawyers. On behalf of the states, these personal injury lawyers filed numerous coordinated lawsuits against the tobacco industry, asserting a new and untried theory of recovery: that the governments had an *independent* cause of action to recoup Medicaid monies paid on behalf of people allegedly injured by smoking tobacco products. This was a novel departure from existing law. The principle of subrogation, under which third parties may be able to recover damages incident to injuries to another, makes the third party's claim secondary to the rights of the injured person himself. The third party has no independent right of recovery.⁹⁶

Under this new theory of recovery, therefore, the states argued that they were not subject to the same affirmative defenses—or even the same fundamental tort principles—as the individual smokers themselves. Some states persuaded their legislatures to pass legislation allowing the state plaintiffs to use these novel legal arguments. This happened in Florida, Vermont and Maryland.⁹⁷

Other states were able to persuade activist courts to “see things their way” and jettison fundamental legal principles. For example, one lower federal court in Texas took an obscure legal doctrine known as the “quasi-sovereign” doctrine and extended it in a new and unprecedented way, giving the state “super-plaintiff” status.⁹⁸ The state had greater power than the smoker himself. First, the doctrine eliminated the powerful assumption of risk defense.⁹⁹ Second, it permitted the state to use statistical evidence to establish causation, allowing the state to hurdle the basic requirement of

95. Elaine McArdle, *Trial Lawyers, AGs Creating a New Branch of Government*, LAWYERS WEEKLY USA, July 12, 1999, at 3.

96. ARTHUR LARSON, 2 LARSON'S WORKERS' COMPENSATION, DESK EDITION §75:00 (Matthew Bender ed., 1999). See also Victor E. Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort Law*, 8 CORNELL J.L. & PUB. POL'Y. 421 (1999).

97. FLA. STAT. ANN. § 409.910 (West 1998); 1998 VT. LAWS P.A. 142 (H. 749), codified in part at VT. STAT. ANN. Tit. 33, §§ 1904, 1911 (1999); MD. CODE ANN., HEALTH-GEN. § 15-120 (1998). See generally Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law*, 22 S. ILL. U. L.J. 601 (1998) (commenting that under Florida's Third-Party Liability Act, a tobacco company may be liable to the state if the smoker is a medicaid recipient).

98. *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 962 (E.D. Tex. 1997).

99. *Id.* at 965-67.

showing that a specific defendant caused a specific injury.¹⁰⁰ Third, it allowed the state to impose liability on the defendants as a group using market share data to apportion responsibility.¹⁰¹

These changes were a radical departure from traditional tort principles and “stacked the deck” in favor of the government plaintiffs. Enormous bonding requirements that the defendants would face on appeal—about 150 percent of the potential multibillion-dollar jury verdict—added to the states’ leverage. As a practical matter, the defendants were unable to obtain appellate review of the lower courts’ flawed legal decisions.¹⁰² These factors pushed the defendants into a massive settlement. As a result, the distorted legal principles necessary for the governments to succeed in the tobacco litigation are on the books and may be applied in the future against *any* defendant.

2. *The Proliferation Of “Big Government” Lawsuits: Who Will Be Next?*

During the tobacco litigation, most state attorneys general claimed that tobacco is the only product that causes disease when used as intended and that they had no plans to sue other industries. United States Attorney General Janet Reno was asked whether she intended to go after other industries, such as firearms, high-fat food, and alcohol. She answered that she was “not aware of any other industry” with the characteristics of tobacco. Less than six months later, however, the White House announced that the United States government intended to assist in “an all-out offensive on guns” through the prosecution of class actions against the fire-

100. *Id.* at 969.

101. *Id.*

102. In many states, a party must post a bond before appealing a final court judgment. This bond—often 150 percent of the judgment—is designed to protect a plaintiff who is successful at trial from being unable to enforce a judgment against an insolvent debtor after the case has been appealed. These bond laws were enacted at a time when a million dollar judgment was considered extraordinarily large. In the new world of billion dollar verdicts, they can easily deprive a defendant of his or her right to an appeal. The defendant, no matter how large, simply cannot afford to post a bond. This does a disservice to defendants and to society as a whole. If governments or personal injury lawyers in private cases are going to marshal their powerful resources to pursue novel legal theories against entire industries, it is critical that appellate courts have the opportunity to determine whether the parties were treated fairly and the changes in the law were necessary and well-founded. The distortion of legal principles necessary for the governments to succeed in these cases may be applied in the future against *any* defendant, not just an unpopular one.

arms industry."¹⁰³

The same thing is occurring at the state level. Despite the claims of most attorneys general during the tobacco litigation that tobacco was a "unique" situation, and that no lawsuits would be brought against other industries, local governments already have hired private attorneys to sue gun manufacturers in a large number of cities.¹⁰⁴ Rhode Island retained a well-known plaintiffs' firm to assist in an effort to hold former manufacturers of lead paint liable for government health-care costs.¹⁰⁵ Washington State and Missouri are reportedly considering similar actions.¹⁰⁶ Rhode Island's Attorney General even has suggested that "going after the latex rubber industry" by way of a Big Government lawsuit could recoup "a couple of billion dollars."¹⁰⁷ His suggestion illustrates the entrepreneurial spirit of government officials and their new ally, the contingency fee personal injury bar.

The list may not stop there. Part of the 1998 tobacco settlement included a payment of \$50 million into an enforcement fund to be used by the National Association of Attorneys General.¹⁰⁸ While this payment might not be used to fund litigation against other industries, it provides a strong incentive for state attorneys general to attempt to repeat their success with the tobacco settlement. In fact, in June 1999, fifty state attorneys general held a strategy session to discuss future targets.¹⁰⁹ Reports suggest that these targets could include HMOs, automobiles, chemicals, alcoholic beverages, pharmaceuticals, Internet providers, "Hollywood," video game makers, and even the dairy and fast food industries.

The strategy of the attorneys general to pick an industry and go after it through litigation – as opposed to through legislation –

103. Charles Babington, *Clinton Administration Plans "All-Out Offensive on Guns,"* OREGONIAN, Dec. 15, 1999, at A12. See also Jeff Reh, *Symposium: Social Issue Litigation and the Route Around Democracy*, 37 HARV. J. ON LEGIS. 515 (2000).

104. See generally Regulation by Litigation, *supra* note 97, at 12-15. (commenting that firearm manufacturer's liability under "negligent distribution" and "defective product" theories distorts basic tort fundamentals).

105. Rhode Island Department of Attorney General, <<http://www.riag.state.ri.us./press/Oct99/101399.html>> (last visited on June 5, 2000).

106. Robert A. Levy, *Turning Lead Into Gold*, LEGAL TIMES, Aug. 23, 1999, at 21.

107. Letter from Rhode Island Attorney General Sheldon Whitehouse to Idaho Attorney General Alan G. Lance, August 27, 1999.

108. Samuel Goldreich, *Small Farmers Stand Against Big Tobacco's Settlement; \$246 Billion Deal Burns Independent Growers*, WASH. TIMES, Apr. 26, 1999, at D11.

109. Mark Curriden, *Fresh Off Tobacco Success, State AGs Seek Next Battle; United Front Puts Businesses on the Defensive*, DALLAS MORNING NEWS, July 10, 1999, at 1A.

results in an end-run around representative government, and has resulted in the *de facto* creation of a fourth branch of government. The attorneys general of the states involved in the tobacco litigation “legislated” and “taxed” by achieving enormous settlements – and they did so with private personal injury lawyers working with them hand in hand.

If left unchecked, this alliance will no doubt continue, because these “new style” cases give executives a new revenue source without having to raise taxes. Big Government lawsuits also give executives the chance to achieve a regulatory objective that the majority of the electorate, as represented by their legislators, does not support.¹¹⁰ Robert Reich, who coined the phrase “regulation by litigation,” has sagely observed, “[t]he strategy may work, but at the cost of making our frail democracy even weaker...[t]his is faux legislation, which sacrifices democracy to the discretion of administration officials operating in secrecy.”¹¹¹

3. *What Can Be Done?*

A number of positive approaches have been developed to curb the proliferation of “Big Government” lawsuits.

a. *Legislation To Ensure Fairness In Litigation*

Federal legislation has been introduced to help restore a fundamental principle of law and eliminate the unbridled and unchecked power of governments to independently sue lawful industries.¹¹² The legislation, the “Litigation Fairness Act,” helps preserve the basic principle that an injured individual’s right to sue is primary and paramount.¹¹³ It helps ensure that the government

110. Walter K. Olson, *Plaintiffs Lawyers Take Aim at Democracy*, WALL ST. J., Mar. 21, 2000, at A26.

111. Robert B. Reich, *Don't Democrats Believe in Democracy?*, WALL ST. J., Jan. 12, 2000, at 22. See also Jonathan Turley, *Symposium: A Crisis in Faith: Tobacco and the Madisonian Democracy*, 387 HARV. J. ON LEGIS. 433 (2000); John Fund and Martin Morse Wooster, *The Dangers of Regulation Through Litigation*, Am. Tort Reform Ass’n, 2000.

112. Litigation Fairness Act of 1999, S. 1269, 106th Cong. (1999) (introduced by Senators Mitch McConnell (R-KY) and Orrin Hatch (R-UT)); Litigation Fairness Act of 1999, H.R. 2597, 106th Cong. (1999) (introduced by Representative Roger Wicker (R-MS)).

113. *Supra* note 116; see also William H. Pryor Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TULANE L. REV. 1885, 1916 (2000) (Alabama Attorney General calling for federal and state “Litigation Fairness” legislation).

shall not have a greater power than the injured individual merely because it bears an indirect economic harm as a result of that injury. ALEC has proposed model legislation based on these bills for use by the states.

b. Legislation To Require Open And Competitive Bidding

ALEC also has developed model legislation that should reduce the financial incentive for private personal injury lawyers to partner with state governments in attempts to distort the law to gain oppressive settlements. In the tobacco litigation, the private contingency fee lawyers who negotiated compensation of 25 percent or more of a state's recovery walked away with astronomical fees—some amounting to as much as \$105,022 per hour per lawyer.¹¹⁴ These fees serve as a powerful incentive for private personal injury lawyers to attempt to replicate their success by participating in similar Big Government lawsuits against other industries. As discussed above, this success hinged on the attorneys' ability to get courts and legislatures to agree to abandon fundamental legal principles in order to ease the way to success for the government plaintiffs.¹¹⁵

ALEC's model bill, "The Private Attorney Retention Sunshine Act," would remove much of the profit motive that led to the distortion of existing legal principles.¹¹⁶ The model Act would cap attorneys' fees at the equivalent of \$1,000 an hour and require private contingency fee lawyers to keep complete time and expense records. It also would ensure that states negotiate contracts for legal services in an open and competitive manner, and provides for at least one hearing if the contract is likely to result in more than \$1 million in attorneys' fees and expenses. Legislation based on this model Act was enacted into law in Texas and North Dakota in 1999¹¹⁷ and Kansas in 2000.¹¹⁸ It has been introduced in other states.¹¹⁹

114. Robert A. Levy, *The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza*, LEGAL TIMES, Feb. 1, 1999, at 27.

115. Victor E. Schwartz & Leah Lorber, *Secret Government Deals With Private Lawyers: Shining Light on an Unsound Trend*, LEADER'S PROD. LIAB. L. & STRATEGY, Feb. 2000, at 4.

116. Kan. H.B. 2627 (signed by Governor on Apr. 20, 2000).

117. N.D. CENT. CODE § 54-12-08.1 (1999); TEXAS GOV'T CODE ANN. §§ 404.097, 2254.101-2254.109 (2000).

118. Kan. H.B. 2627 (signed by Governor on Apr. 20, 2000).

119. *E.g.*, Private Attorney Procurement Sunshine Act, 2000: Hearing on H.B. 1202 Before the Maryland House Commerce and Government Matters Committee

c. Legislation To Protect The Right To Appeal

ALEC has developed another proposal to address the problem of oppressive bonding requirements, the driving force behind the settlement of many dubious lawsuits. ALEC's "Model Appeal Bond Waiver Legislation" would limit the amount of the bond required in certain civil cases while still providing assurance that the defendant's funds will be available to satisfy the judgment after an appeal, if necessary.¹²⁰

Under the ALEC model legislation, state bond requirements would be waived for the amount of a punitive or exemplary damages award that exceeds \$1 million (\$100,000 for small businesses, or for good cause shown), if the party found liable seeks to stay enforcement of the judgment during the appeal. The full bond requirement would be reinstated if the plaintiff proves by a preponderance of the evidence that the party who obtained the waiver is purposely dissipating its assets or diverting its assets outside the jurisdiction of United States courts.

This legislation addresses the basic reason for the bonding rules. If there is no threat that a defendant will dissipate or divert its assets, sound public policy suggests that the defendant's right to appeal a case that is based on unsound principles of law or involves an exorbitant judgment should not be hampered. Legislation based on this model Act was enacted into law in Florida, Georgia, Kentucky, North Carolina, and Virginia in 2000.¹²¹

B. New Style Class Actions

Wealthy personal injury lawyers, who partnered with government officials in the "Big Government" tobacco litigation, saw firsthand the coercive effect of these massive coordinated lawsuits.

(testimony of Victor Schwartz on behalf of the American Legislative Exchange Council (Mar. 7, 2000), at www.alec.org/viewpage.cfm?id=871&versed=1223&xsectionid=5) (last visited July 20, 2000).

120. Model Appeal Bond Waiver Act, <www.alec.org/viewpage.cfm?id=864&xsectionid=9> (last visited July 20, 2000).

121. Fla. H.B. 1721 (enacted in 2000) (bond for punitive damages portion of judgment may not exceed \$100 million or 10 percent of defendant's net worth, whichever is less); GA. H.B. 1346 (enacted in 2000) (bond for punitive damages portion of judgment may not exceed \$25 million); Ky. S.B. 316 (enacted in 2000) (bond for punitive damages portion of judgment may not exceed \$100 million); N.C. S.B. 2 (enacted in 2000) (bond for punitive damages portion of judgment may not exceed \$25 million); VA. H.B. 1547 (enacted in 2000) (bond for punitive damages portion of judgment may not exceed \$25 million).

Now, they are seeking to bring private “new style” class action lawsuits to regulate entire industries.¹²² In the case of at least one industry, some contingency fee plaintiffs’ attorneys apparently may be seeking to manipulate defendants’ stock prices in order to achieve their goals.¹²³

1. *Class Action Certification As A Powerful Litigation Tactic*

The current class action system encourages litigation and provides few safeguards against abuse. Far too often, unrestrained class action litigation leaves defendants with no choice but to settle claims of little or no merit in order to avoid the enormous risks associated with defending a class action. Plaintiffs’ lawyers have learned how to manipulate the class action device to gain an unfair advantage in these high-stakes lawsuits.¹²⁴

a. *The Coercive Effects Of Unrestrained Class Action Litigation*

Getting a case certified for class treatment is often the key to success for plaintiffs’ counsel. Whether or not the lawsuit has merit, the certification of a nationwide or statewide class puts defendants in an inferior position.

First, class actions attract claimants in staggering numbers, even where the claimants would not otherwise have sued.¹²⁵ As one federal appeals court judge put it: “The drum beating that accompanies a well-publicized class action...may well attract excessive

122. The managed care industry is one such target. Eddie Curran, *A Class Action Prescription*, MOBILE REG., Dec. 30, 1999, at 10A.

123. E.g., Collin Levy, *Three Ways to Shake Down an HMO*, WALL ST. J., Jan. 3, 2000, at A19 (discussing how price of managed care stocks plummeted after plaintiffs’ attorney counseled stock analysts and institutional investors about the potentially disastrous effect that class action litigation could have on prices of managed care stocks); Milo Geyelin, *Lawyer Seeks Early HMO Settlement: Five More Suits Filed Against Health Insurers*, WALL ST. J. EUR., Nov. 25, 1999, at 11 (discussing HMO class action litigation and plaintiffs’ counsel discussions with analysts and institutional investors).

124. See generally Victor E. Schwartz, et al., *Symposium: Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483 (2000) [hereinafter Schwartz Class Actions].

125. E.g., Peter A. Drucker, *Class Certification and Mass Torts: Are ‘Immature’ Tort Claims Appropriate For Class Action Treatment?*, 29 SETON HALL L. REV. 213, 219 (1998); Barry F. McNeil & Beth L. Fanscal, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 490 (1996) [hereinafter “McNeil and Fanscal.”]

numbers of plaintiffs with weak to fanciful cases.”¹²⁶ A plaintiff in one mass tort case testified that he did not know whether he had a claim but “heard that they were getting up a suit,...so I wanted in on the party.”¹²⁷

Second, the certification of a class action places tremendous pressure on defendants to settle, regardless of the merits of the case. Judge Posner of the United States Seventh Circuit Court of Appeals has called these settlements “blackmail settlements.”¹²⁸ Other courts have referred to them as “legalized blackmail”¹²⁹ and “judicial blackmail.”¹³⁰ Judge Posner commented that certification of a class action, even one lacking in merit, forces defendants “to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability.”¹³¹ He further explained: “[Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.”¹³² The Judiciary Committee of the United States House of Representatives has similarly explained:

[T]he perverse result that companies that have committed no wrong find it necessary to pay ransom to plaintiffs’ lawyers because the risk of attempting to vindicate their rights through trial simply cannot be justified to their shareholders. Too frequently, corporate decision makers are confronted with the implacable arithmetic of the class action: even a meritless case with only a 5% chance of success at trial must be settled if the complaint claims hundreds of millions of dollars in damages.¹³³

Third, class treatment can severely hamper a defendant’s

126. *In re* “Agent Orange” Prod. Liab. Litig., 818 F.2d 145, 165 (2d Cir. 1987).

127. Bruce Nichols, *Steel Plant Lawsuit Lingers 9 Years*, DALLAS MORNING NEWS, Apr. 21, 1996, at 32A.

128. *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir.), cert. denied, 516 U.S. 867 (1995).

129. *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig., 55 F.3d 768, 784-85 (3d Cir.), cert. denied, 516 U.S. 824 (1995).

130. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

131. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1299.

132. *Id.* at 1298.

133. H.R. REP. 320, 106th Cong., 1st Sess., at 8 (Sept. 14, 1999) (citation omitted) [hereinafter “H.R. REP. 106-320”]. The Committee also explained: “[b]ecause the cases are brought on behalf of thousands (and sometimes millions) of claimants, the potential exposure for a defendant is enormous...[P]laintiffs’ counsel can use this potential exposure to coerce settlements that offer minimal benefits to the class members.” *Id.* at 10.

prospects at trial by “skewing trial outcomes.”¹³⁴ Evidence indicates that the aggregation of claims increases both the likelihood that the defendant will be found liable and the size of the damage award.¹³⁵ Defendants are much more likely to be found liable in cases with large numbers of plaintiffs than in cases involving one or just a few plaintiffs.¹³⁶ In addition, juries tend to treat all plaintiffs alike, regardless of their individual circumstances, so that the presence of one severely injured plaintiff will likely increase the damages awarded to all plaintiffs.¹³⁷

Given these effects, the U.S. Chamber of Commerce has described class certification as “the whole ball of wax.”¹³⁸ It is no surprise, then, that plaintiffs’ counsel seek out the most class action friendly jurisdictions possible for their lawsuits. In most instances, these are state courts.

b. Plaintiffs’ Lawyers “Game The System” In State Courts

Federal courts are required to perform a “rigorous analysis” of requests for class certification.¹³⁹ State courts, on the other hand, often take a “laissez-faire” attitude toward certifying statewide—or even nationwide—classes. Some states allow their courts to engage in so-called “drive-by class certifications,” where a class is conditionally certified at the request of plaintiffs’ counsel—even before defendants have been served with a complaint or given an opportunity to file an answer.¹⁴⁰ Courts in other states use certification standards so lax that almost every class certification motion is granted, even though it is apparent that the case cannot be tried to a jury under basic due process principles.¹⁴¹ In short, by filing in state courts, entrepreneurial plaintiffs’ lawyers can bypass the rigorous review given by federal judges and obtain certification of

134. *Castano*, 84 F.3d at 746.

135. *McNeil & Fanscal*, *supra* note 125, at 491.

136. *Id.*

137. *Id.*

138. Eddie Curran, *Critics Blast Alabama Judges’ ‘Drive By’ Rulings*, MOBILE REG., Dec. 28, 1999, at 9A.

139. *E.g.*, *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982) (requiring a “rigorous analysis” of the Rule 23 prerequisites); *Castano*, 84 F.3d at 740.

140. H.R. REP. 106-320, at 8.

141. *Compare Naef v. Masonite Corp.*, No. CV-94-4033 (Cir. Court, Mobile County, Ala.) (certifying nationwide class of persons alleging their house siding is defective), *with In re Masonite Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 426 (E.D. La. 1997) (rejecting class certification in action against same defendant involving identical legal issues because of due process problems).

questionable claims and approval of often outrageous settlements.

As a result, state class action filings have exploded in recent years. A survey of Fortune 500 companies found that from 1988 to 1998, class action filings against those companies increased by more than 1,000 percent in state court.¹⁴² A 1997 Rand Institute study affirmed that “class action activity has grown dramatically” and noted that the increase “has been concentrated in the state courts, as plaintiffs and defendants both see increased unwillingness among federal judges to certify or sustain certification of class actions.”¹⁴³ One state court judge certified almost as many class actions in one year as all 900 federal court judges combined.¹⁴⁴

Plaintiffs’ lawyers have learned how to manipulate the system to keep class actions before accommodating state court judges. They exploit loopholes in the requirements for federal diversity of citizenship jurisdiction and for removal of cases from state to federal court.

Federal law governing diversity of citizenship cases allows state law-based cases to proceed in federal courts on diversity grounds only when all plaintiffs are citizens of states different than all defendants—resulting in “complete diversity” among the parties.¹⁴⁵ In the class action context, this means that all the plaintiffs named in the caption of the lawsuit must be citizens of a different state than all the defendants. Congress has also historically imposed a monetary threshold—now \$75,000—for federal diversity claims.¹⁴⁶

Consistent with the general assumption that out-of-state defendants may fall victim to local prejudice in state courts, Congress also created a method for defendants to “remove” certain cases from state to federal courts. The general removal statute provides that any civil action brought in a state court of which United States

142. Federalist Society, *Analysis: Class Action Litigation – A Federalist Society Survey*, 1 CLASS ACTION WATCH 1, 5 (1999) [hereinafter “Class Action Watch”].

143. Deborah Hensler, et al., *Preliminary Results of the Rand Study of Class Action Litigation* 15 (May 1, 1997).

144. John B. Hendricks, Statement on Mass Torts and Class Actions before the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee on behalf of the U.S. Chamber of Commerce 9 (Mar. 5, 1998).

145. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

146. Diversity of Citizenship; Amount in Controversy; costs, 28 U.S.C. § 12 (1994). In class actions, the amount in controversy requirement normally is satisfied if each of the class members individually seeks damages in excess of the statutory minimum. *Zahn v. Int’l. Paper Co.*, 414 U.S. 291 (1973). Federal courts, however, are divided over *Zahn’s* breadth and vitality. H.R. REP. 106-320, *supra* note 132, at 6 n.10.

district courts have original jurisdiction (e.g., under the diversity-of-citizenship statute) may be removed by the defendant to federal court.¹⁴⁷ There are, however, time limits on removal.¹⁴⁸ A “diversity case” may not be removed more than one year after an action commences.¹⁴⁹

Plaintiffs’ lawyers use these rules—developed to provide for federal jurisdiction over lawsuits that are interstate in nature—to keep class action cases in state court. They may name irrelevant parties to the class action cases they file in order to “destroy diversity” and keep the case from qualifying for federal jurisdiction. They may recruit named plaintiffs from the same state in which a corporate defendant is headquartered to serve as a named representative of a class—even if most class members are from another state. Similarly, if in-state plaintiffs are named on the pleadings, plaintiffs’ attorneys will often sue a local manager, distributor or retailer of an out-of-state corporation in order to avoid complete diversity. After a year, however, these attorneys may drop these inessential diverse parties, since by then the time for removal of the case to federal court has lapsed.¹⁵⁰ In this way, plaintiffs’ lawyers are able to gain a powerful “edge” over class action defendants.

2. *What Can Be Done?*

The new style class action litigation depends in part on the ability of plaintiffs’ counsel to get and keep their cases before less-restrictive state courts. Legislation has been introduced at the federal level to address the problems created by state court adjudication of interstate class actions.¹⁵¹ The legislation would eliminate the federal jurisdiction loopholes exploited by plaintiffs’ counsel to keep their cases before state court judges; it *would not* limit the ability of anyone to file a class action or limit the amount someone could recover.

Specifically, the proposed federal “Class Action Fairness” legislation would amend the federal diversity jurisdiction statute to grant federal courts original jurisdiction to hear interstate class actions when any member of a class is a citizen of a state different than any defendant: a change from “complete diversity” to “mini-

147. Actions removable generally, 28 U.S.C. § 1441(a) (1994).

148. Procedure for removal, 28 U.S.C. § 1446(b) (1994).

149. *Id.*

150. H.R. REP. 106-320, *supra* note 133, at 7.

151. *Id.*

mal diversity.” This expanded jurisdiction would not include disputes that are: 1) *intrastate cases*—cases that are truly local in nature; 2) *limited scope cases*—cases involving fewer than 100 class members or where the aggregate amount in controversy is less than a set limit (\$1 million in the House bill and \$2 million in the Senate bill); and 3) *state action cases*—cases where the primary defendants are states or state officials, or other government entities against whom the district court may be foreclosed from ordering relief.¹⁵²

The proposed legislation also would amend the federal removal statute to allow large, interstate class actions to be removed to the federal courts. First, unnamed class members (plaintiffs) would be allowed to remove to federal court class actions in which their claims are being asserted.¹⁵³ Under current rules, only defendants are permitted to remove.¹⁵⁴ The legislation would allow unnamed class members to act if they are concerned the state court has not or will not protect their interests.

Second, parties could remove without the consent of any other party.¹⁵⁵ Current removal rules, which apply only to defendants, require the consent of all defendants to remove an action.¹⁵⁶ The proposed change would prevent plaintiffs’ lawyers from adding “sham” or “friendly” defendants to the case who can prevent other defendants from obtaining a more impartial federal forum for their claims.

Third, removal to federal court after one year would be available to *any* defendant, regardless of whether the defendant is a citizen of the state in which the action was brought.¹⁵⁷

Fourth, the current time bar to removal of class actions to federal court¹⁵⁸ would be eliminated, although the requirement that

152. Class Action Fairness Act of 1999, S. 353, 106th Cong. (1999) (introduced by Senators Charles Grassley (R-IA) and Herb Kohl (D-WI); Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106th Cong. (1999) (introduced by Representatives Bob Goodlatte (R-VA), Jim Moran (D-Va), Ed Bryant (R-TN), and Rick Boucher (D-Va)). See also Schwartz Class Actions, *supra* note 124; Victor E. Schwartz, et al., *Fair Federal Forums Should Decide Interstate Class Actions*, CLASS ACTION LITIG. (BNA), Vol. 1, No. 8, at 285, Aug. 11, 2000.

153. S. 353, § 4; H.R. 1875, § 4 (1999).

154. 28 U.S.C. § 1441(a) (1994).

155. S. 353, § 4; H.R. 1875, § 4 (1999).

156. 28 U.S.C. § 1441(a) (1994); *Chicago, Rock Island & Pac. Ry. Co. v. Martin*, 178 U.S. 245, 248 (1900); *Tri-Cities Newspapers, Inc. v. Tri-Cities Pressman & Assistants’ Local 349*, 427 F.2d 325, 326-27 (5th Cir. 1970).

157. S.353, § 4; H.R. 1875, § 4 (1999).

158. 28 U.S.C. § 1446(b) (1994).

removal occur after one year within thirty days of notice of grounds for removal would be retained.¹⁵⁹

V. CONCLUSION

The dawn of the new Century marks a time of greater complexity for advocates on both sides of the tort reform debate. Old battles over attempts by tort reformers to achieve greater balance and predictability in liability law will continue to be waged at the state and federal levels. The success of those efforts at the state level may hinge on the respect courts decide to give to legislative policymaking in the area of tort law. Overall, we predict that most courts will continue to respect the prerogative of legislatures to develop broad public policy tort law rules; most courts will not undo the good that legislators have worked hard to accomplish,

In addition to “traditional” efforts to achieve lasting and meaningful tort reform laws, tort reformers must address the new three-part strategy developed by the plaintiffs’ bar to bring complex “Big Government” and “new style” class action lawsuits against entire industries. The trial lawyers’ strategy is as follows. First, they vilify the target industry; second, they get their government allies to help; and, finally, they sue.

Business groups must recognize that the litigation world has changed and they must adapt. In general, corporate defendants have focused on defending lawsuits, the third element of the plaintiffs’ strategy, not on the powerful first two elements. By then, it may be too late to react. Businesses must become proactive in the new style litigation environment.

First, lawful industries must take part in public relations efforts to counter the efforts of the plaintiffs’ bar to vilify their actions. For example, in cases where the alleged wrongdoing occurred many years ago, such as in cases against former manufacturers of lead paint or of asbestos containing products, industries must engage in campaigns to explain that the time has long passed for imposing repeated punishment for behavior that has ceased. In general, such companies are working on new projects that improve our society. Nobody wins when these companies are forced into bankruptcy.

Second, business groups should support federal and state civil justice reform efforts, such as the legislation discussed in this arti-

159. H.R. REP. 106-320, *supra* note 133, at 12.

cle. Coordinated and well-considered efforts will go far to counteract the heavy political weight of the wealthy contingency fee personal injury bar.

Third, businesses and trade associations should consider working for reform in the courts through well-written and thoughtful *amicus curiae* briefs. When contingency fee lawyers urge courts to challenge the constitutionality of state tort reform or engage in regulation through litigation, solid *amicus curiae* briefs are needed in response. These briefs can signal to the court the importance of a particular case and draw the court's attention to broad public policy issues that may not be covered by the attorneys representing the private parties in the case.

The solutions proposed in this Article will not cure all the abuses of our legal system. Nevertheless, they provide a welcome start toward current civil justice reform goals and should be strongly supported.

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