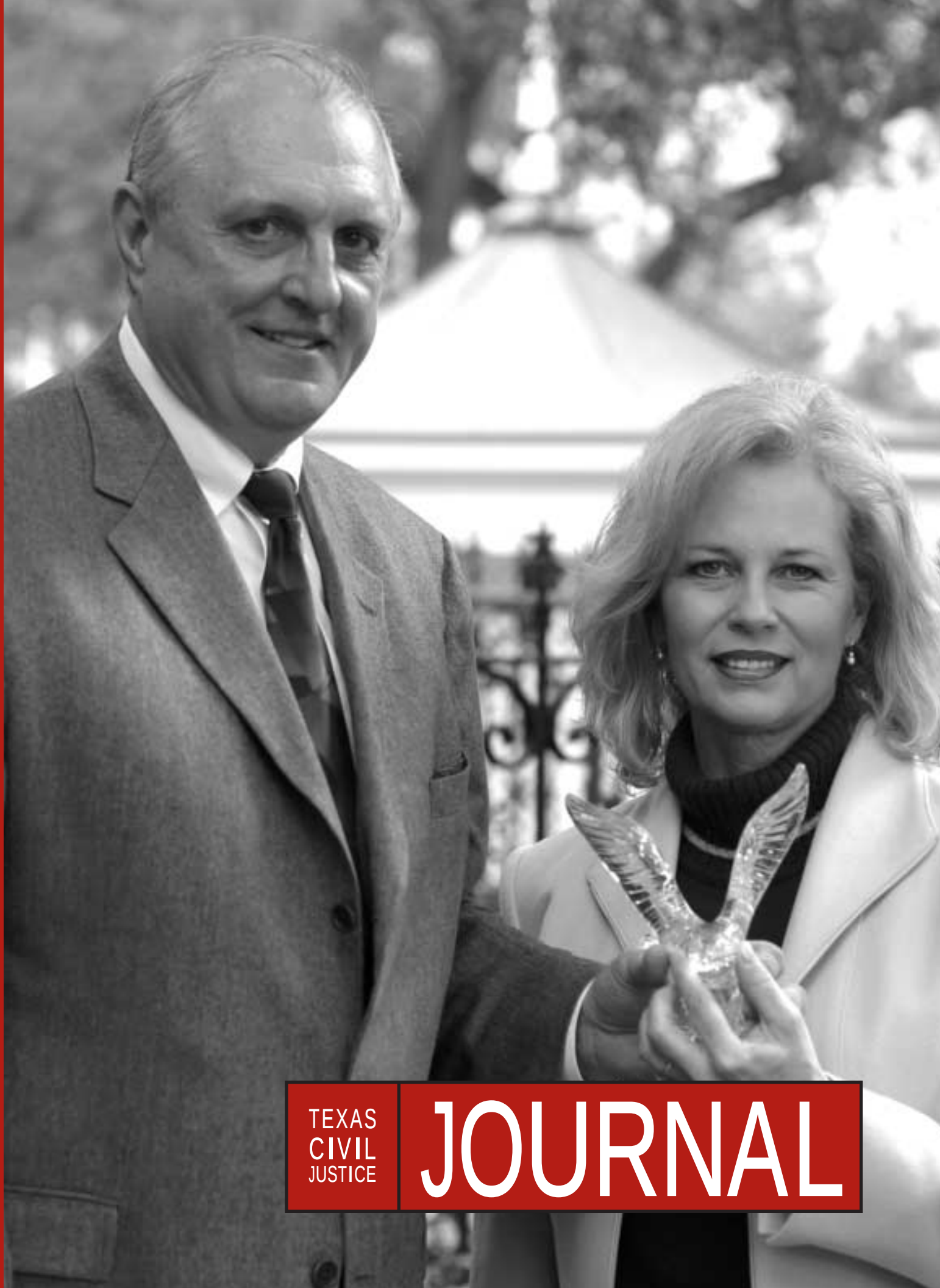

TEXAS CIVIL JUSTICE LEAGUE | LEADING THE FIGHT FOR TORT REFORM SINCE 1986

TEXAS CIVIL JUSTICE JOURNAL

WINTER 2004

This issue:

On the cover:

Robert L. Looney, TCJL executive committee member and president of the Texas Oil and Gas Association, presents First Lady Anita Perry a Civil Justice Appreciation Award at the Governor's Mansion recognizing her efforts to pass Proposition 12. For more news and photos of TCJL's Seventeenth Annual Meeting, see page 4.

Texas Civil Justice League
Leading the Fight for Tort Reform Since 1986

The Texas Civil Justice Journal is published quarterly by the Texas Civil Justice League. Since 1986, the Texas Civil Justice League has led the fight to create a strong business climate by restoring fairness and stability to the civil justice system.

For more information, contact the **Texas Civil Justice League,** 401 West 15th Street, Suite 975, Austin, Texas 78701, 512-320-0474, 512-474-4334 fax, *info@tcjl.com.*

MESSAGE from the President

Ralph Wayne is president of the Texas Civil Justice League and former chairman of the American Tort Reform Association. A former member of the Texas House of Representatives, he also served as the chief deputy comptroller for the State of Texas. In recent months, Wayne was invited to address meetings of the American Tort Reform Association in Las Vegas, American Trucking Associations in San Antonio, and the Washington State Liability Reform Coalition in Seattle.

Since 1986, the Texas Civil Justice League (TCJL) and its members have led the fight for lawsuit reform. When the 2003 Texas Legislature passed the most comprehensive tort reform bill in its history, it was the culmination of almost two decades of continuous and persistent effort by a broad-based coalition of businesses and health care providers. That coalition is the Texas Civil Justice League.

Now TCJL and its members face new threats from plaintiff's lawyers. Dozens of Texas employers are facing bankruptcy due to runaway asbestos litigation in plaintiff-friendly courtrooms from Beaumont to Dallas. That litigation has already cost Texas businesses more than $30 billion, and the lion's share of that money has gone into the pockets of plaintiff's lawyers.

Asbestos today, something new and more devastating to the economy tomorrow. The plaintiff's trial bar never goes away. In an increasingly global economy we can let Texas be the courthouse for the world, or we can stand up for fair and equal justice for defendants and plaintiffs alike. It really is that simple. Success comes at a price, and that price is a strong and viable TCJL.

With this issue of the quarterly Texas Civil Justice Journal and new monthly e-mail updates, TCJL expands its communications effort to bring members and interested parties more political analysis, issue updates, and research findings about state and national civil justice reform efforts.

Ralph Wayne

ASBESTOS COALITION
Moves Forward

With the national asbestos settlement stalled in Congress, states are once again taking the lead in controlling the massive costs of asbestos litigation. **Following the example set by the Texas Asbestos Consumers Coalition last spring, Minnesota, Ohio, and Louisiana are all considering legislation to put unimpaired asbestos claimants on inactive status until they actually develop an asbestos-related illness.**

State courts around the country have likewise continued to implement administrative methods, such as inactive dockets, for sidetracking unimpaired claims. Indeed, hundreds of asbestos defendants in Texas have asked the newly-appointed multi-district litigation panel (MDL), headed by Judge David Peeples of San Antonio, to consolidate all asbestos claims filed on or after September 1, 2003 in a single court. House Bill 4, the civil justice reform act passed by the Legislature last spring, created the MDL mechanism to handle complex products liability actions involving mass numbers of claimants.

The MDL approach is a promising development for future mass tort actions, but it does not address the hundreds of thousands of unimpaired asbestos claims pending in Texas courts across the state. In fact, Texas courts are home to more asbestos claims than any state in the country, partly because plaintiff's lawyers have hand-picked courts in which to file such claims and partly because of an unusual quirk in Texas law that equates alleged "exposure" to asbestos to "injury" from asbestos.

Asbestos plaintiffs' lawyers spent untold amounts of money and time last spring and summer to defeat Senate Bill 496, Senator Kyle Janek's (R-Houston) proposal to create an inactive docket for unimpaired asbestos claims. These lawyers, who have reaped billions of dollars in fees from a system that pays legitimately ill claimants pennies on the dollar while siphoning off most of the resources to claimants who are not sick, do not want to see Texas adopt objective medical criteria for determining when a person actually suffers from an asbestos-related illness.

If such criteria existed, between 80 and 90 percent of pending asbestos claims would go on a waiting list until the claimants were actually ill and required compensation. Moreover, **if objective medical criteria were in place, the relatively small number of claimants who are actually ill from cancer or other asbestos-related illnesses would have access to substantially greater compensation for their injuries.** The major plaintiffs' firms that represent mainly unimpaired claimants don't want to see this happen, either.

Plaintiffs' lawyers have attempted to characterize the asbestos crisis, which has already driven more than eighty U.S. businesses into bankruptcy, as simply an "insurance" problem. What they don't say is that liability insurance only pays about half of all asbestos claims; the remaining half comes out of businesses, most of which never manufactured asbestos. Moreover, insurance is rapidly running out. This means that tens of billions of dollars that might otherwise be available for investment or business expansion will instead go primarily into the pockets of plaintiffs' lawyers. Simply put, asbestos litigation threatens the viability of Texas' core manufacturing base. If nothing is done, all Texans will lose in terms of jobs, local tax bases, and economic opportunity.

We are confident that we will have another opportunity, either in a special session this spring or during the 2005 regular session, to make progress toward ending the specter of mass economic disruption from asbestos litigation. However, no solution that fails to apply objective medical criteria to pending claims will achieve such progress. Without pending cases, there is no bill worth the paper it's printed on.

HOWDEN LEADS Texas Asbestos Consumers Coalition

ROBERT S. HOWDEN
Former senior advisor to Governor Rick Perry, has joined TCJL as coordinator of the Texas Asbestos Consumers Coalition.

Robert S. Howden, former senior advisor to Governor Rick Perry and executive director of the National Federation of Independent Business/Texas, has joined the Texas Civil Justice League (TCJL) as coordinator of the Texas Asbestos Consumers Coalition. Howden succeeds Ron C. Dipprey, TCJL executive committee member and president of the Texas Chemical Council. "Robert brings the knowledge and reputation to help the asbestos coalition achieve its goals," said Dipprey. "The coalition and its members look forward to working with him as the legislative process moves forward." Ralph Wayne, TCJL president, added, "Robert's experience and leadership will be an asset to the coalition as it confronts the challenges of passing meaningful asbestos litigation reform."

As senior advisor, Howden counseled Governor Perry on special needs for cities, businesses, and organizations throughout the state. He also advised the governor on several key issues, including economic issues where he oversaw the Governor's Task Force on Economic Growth chaired by Ross Perot Jr. Howden was the governor's official representative at hundred of events throughout the state, earning him the nickname, "Mayor of Texas."

Before joining the governor's staff, Howden was the executive director of the National Federation of Independent Business/Texas (NFIB) for more than ten years. In that position, he was political and legislative leader for more than 40,000 small business members. At NFIB, Howden worked on many important legislative issues, such as small business franchise tax exemption and defeating many anti-business legislative proposals. While at NIFB, he also served as a member of the Texas Civil Justice League Board of Directors. In 1999 Howden worked with then-Lieutenant Governor Perry to establish the Lieutenant Governor's Small Business Advisory Council.

Howden worked for Governor William P. Clements Jr. and the Texas Department of Commerce before joining NFIB. Before that he worked in advertising and communications in Austin and Dallas. An Austin native, Howden graduated from the University of Texas in 1983. He currently serves on the Texas Exes board and the University of Texas Athletic Foundation. Howden and his wife, Jana, have three children.

CHRISTIAN AND CRAYMER Author Asbestos Law Review Article

Dr. George S. Christian, TCJL's general counsel, and Dale Craymer, chief economist for the Texas Taxpayer and Research Association, authored "Texas Asbestos Litigation Reform: A Model for the States" in the Fall 2003 issue of the South Texas Law Review. For a reprint of the article, call 512-320-0474 or e-mail*info@tcjl.com*.

"Robert's experience and leadership will be an asset to the coalition as it confronts the challenges of passing meaningful asbestos litigation reform." —RALPH WAYNE, TCJL PRESIDENT

DEWHURST KEYNOTES
Seventeenth Annual Meeting

Lieutenant Governor David Dewhurst praised the Texas Civil Justice League as the "state's premier tort reform organization" during a luncheon keynote address at the Seventeenth Annual Meeting November 14, 2003. The luncheon also featured the premiere of "Tort Reform in Texas," a video presentation tracing TCJL's historic role in lawsuit and judicial reform.

The League recognized former Senator Bill Ratliff (R-Mt. Pleasant) and Representative Joe Nixon (R-Houston) as "Legislators of the Year" for their work on civil justice reform measures during the 78th Regular Session. Other individuals honored for their efforts to pass Proposition 12 included, Anita Perry, First Lady of Texas; Red McCombs, TCJL PAC chairman; Diane Davis, East Texans Against Lawsuit Abuse; Joe A. DaSilva, Texas Hospital Association; Dr. Louis J. Goodman, Texas Medical Association; and Bill Summer, Rio Grande Valley Citizens Against Lawsuit Abuse.

Earlier in the morning, TCJL members received issues briefings from Rob Roby, immediate past president of the Texas Association of Defense Counsel; Olan Brewer, Associated Research; Dr. George S. Christian, TCJL general counsel; and a Texas Asbestos Consumers Coalition panel discussion with Ron Dipprey, Texas Chemical Council; G. Edward Pickle, Shell Oil Company; and Kay Andrews, Brown McCarroll L.L.P.

(1) Lieutenant Governor David Dewhurst

(2) Dr. George S. Christian, TCJL general counsel, briefs members about upcoming issues.

"TORT REFORM IN TEXAS"
DVD Available

"Tort Reform in Texas" is a brief video presentation tracing TCJL's role in lawsuit and judicial reform. The program includes interviews with Grant Billingsley, Dr. George S. Christian, Ron C. Dipprey, Jerry B. "Nub" Donaldson, and Machree Gibson. To request a free DVD, call 512-320-0474 or e-mail *info@tcjl.com*.

(1) Shannon Ratliff accepts a Legislator of the Year Award on behalf of his brother, former State Senator Bill Ratliff (R-Mt. Pleasant).

(2) Dr. Louis J. Goodman, TCJL executive committee member and executive vice president and CEO of the Texas Medical Association, listens to a presentation during the Seventeenth Annual Meeting.

(3) Former State Senator and Bexar County Judge Cyndi Taylor Krier, now USAA's vice president of Texas Government Relations, takes notes during the Texas Asbestos Consumers Coalition panel discussion.

(4) Robert L. Looney, TCJL executive committee member and president of the Texas Oil and Gas Association, thanks Lieutenant Governor David Dewhurst after his keynote address.

(5) Looney presents State Representative Joe Nixon (R-Houston) a Legislator of the Year Award in recognition of his leadership on reform measures during the 78th Regular Session.

(6) Red McCombs receives a Civil Justice Appreciation Award. Other individuals and organizations honored for their efforts to pass Proposition 12 included, Anita Perry, First Lady of Texas; Diane Davis, East Texans Against Lawsuit Abuse; Joe A. DaSilva, Texas Hospital Association; Dr. Louis J. Goodman, Texas Medical Association; and Bill Summer, Rio Grande Valley Citizens Against Lawsuit Abuse.

TCJL TACKLES 2005
Legislative Issues

As litigation trends and tactics evolve, new areas of lawsuit abuse and "civil injustice" continue to appear. Texas is home to the wealthiest and most entrepreneurial plaintiff's bar in the world (not mention the largest number of individual plaintiff's lawyers), and just as soon as one avenue of abuse is shut down, the plaintiff's lawyers open up two more. That's why civil justice reform is an ongoing issue that can never be truly completed.

One disturbing type of litigation looming on the horizon involves obesity claims against food manufacturers, wholesalers, and retailers, such as so-called "fast food" chains. These claims, which began in California and on the East Coast, can be expected to migrate to Texas, if for no other reason than Texas is the second most-populous state in the country and fertile ground for signing up plaintiffs. The basic allegation in these claims is that people are not responsible for their own dietary habits, and that somebody else should pay because little Johnny will only eat burgers and fries.

The idea that individuals have no control over what they eat is of course patently ridiculous, but then so is the idea that asbestos claimants who aren't sick should be able to recover millions of dollars in damages from businesses that never even made the stuff. Moreover, this type of litigation could easily spread from fast food to other businesses related to the food and beverage industry: cattle raisers, corn farmers, soft drink manufacturers, beer and alcohol makers, and retailers who sell any product deemed to be "unhealthy," not to mention advertisers who come up with the slick commercials designed to hook unsuspecting and ignorant consumers into committing suicide by milkshake.

Joking aside, public health is serious business, and obesity is a serious public health problem. But turning the problem into a litigation sideshow, which in the end benefits only a few at the expense of the many, is not the way to solve it. Consequently, the Texas Civil Justice League (TCJL) is studying legislative proposals that will stop obesity litigation before it ever gets started. Hopefully, this will allow public policy makers to focus on the real problem and devote resources where they are most needed.

Another ongoing area of concern is workers' compensation and third party liability in the workers' compensation context. For many years TCJL has actively sought a comprehensive solution to the third party liability problem, rather than the piecemeal approaches sought by those who have attempted to outlaw indemnity provisions in construction contracts.

This solution involves adopting a statutory employer system in which the premises owner, general contractor, and subcontractor receive the protections of the exclusive remedy of workers' compensation, in return for assuring that every employee in the chain is covered. If such a statutory employer system, which is the law of the vast majority of states, were in place, the importance of indemnity agreements to managing third party liability would be significantly diminished.

TCJL is the only civil justice group in the state to have opposed prior efforts to abolish indemnity agreements. We will continue to do so until agreement on a total solution is reached. We hope that House and Senate interim committees currently studying the issue will propose a solution that enjoys the unified support of Texas business and industry.

TCJL will closely monitor the effect of House Bill 4 to assure that its provisions are properly implemented and effective. As House Bill 4 directs, the Texas Supreme Court recently adopted rules regarding class actions, offer of settlement, multi-district litigation, and subsequent remedial measures. The Court's efficient disposition of these rules bodes well for the asbestos legislation, which likewise directs the court to adopt rules implementing an inactive docket.

As preparation begins for the 2005 legislative session, TCJL lobbyists and staff will keep members and interested parties updated on these issues and developing political strategy.

2004-2005 TCJL
Program of Work

Asbestos and Mixed Dust Litigation Reform
Texas Asbestos Consumers Coalition
- Establish an inactive docket for unimpaired asbestos and mixed dust claims.

Judicial Selection
- Support merit selection of judges, especially appellate judges. Avoid the appearance of impropriety fostered by partisan elections and political contributions.

Anti-Indemnity Legislation

Bar Obesity Claims Against "Fast Food" Businesses

Contingency Fees
- Require contingency fees to meet certain statutory standards for fairness and conscionability.

Statutory Employer
- Adopt same exclusive remedy for worker's compensation third party claims as exist in forty-nine other states.

House Bill 4 Clean-Up
- Make necessary clean-up changes to House Bill 4, particularly in the area of settlement credits (restore defendant option for dollar-for-dollar or percentage credit).

THE SEVEN MYTHS of Highly Effective Plaintiff's Lawyers

by Steven B. Hantler
Assistant General Counsel, DaimlerChrysler
Address to the 2003 Republican Attorneys General Association

It is an honor to be with a group devoted to the Constitution and our free enterprise system.

It's important to remember that these two systems reinforce one another. **THE CONSTITUTION PROVIDES THE FRAMEWORK OF OUR RIGHTS AND RESPONSIBILITIES AS CITIZENS.** The free market system operates within that system to guide our role as consumers and producers of personal and social wealth.

It's all too easy to forget, in the midst of blazing headlines about the undeniable misdeeds of a handful of corporations, that profits remain the lifeblood of our free enterprise system. Yet with a broad brush, plaintiff's lawyers and their surrogates are busy painting all businesses as inherently suspect just for seeking profits. Behind this assault on corporate America is a threat to our free enterprise system—and even the rule of law itself.

Before I explain these assertions, let me first draw attention to the ironic fact that those who very publicly portray their indignation about corporate misdeeds choose not to recognize a money scandal that is all around them.

I am talking about places that one legal observer calls "magic jurisdictions," places that the American Tort Reform Association less politely calls "judicial hellholes." These are jurisdictions, this legal observer says:

[W]here the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're popul[ists]. They've got large populations of voters who are in on the deal, they're getting their place in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out of the door with that amount of money . . . The cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is.

The legal observer is none other than Dick Scruggs, one of the most successful plaintiff's lawyers in the country and we should all thank him for his candor.

To understand how America has become beholden to these judicial hellholes, we have to look beyond the $2 million car paint jobs and cups of spilled coffee. We have to look to the deeper currents of American culture in which lawsuits have become our society's principal domestic drama, just as Westerns once were.

Just as the sheriff was always the good guy, legal thrillers are invariably told from the plaintiffs' perspective. In all of them—A Civil Action, The Rainmaker, and The Practice—the story reaches the denouement when the courageous trial attorney in the person of John Travolta, young Matt Damon, or fiery Dylan McDermott, hammers the rail and tells the jury a great wrong has been done. Somebody has got to pay.

Our culture—saturated in the drama of the law—is in danger of forsaking the rule of law. To understand why this is, we need to get behind the sound stage and address seven fictions the trial bar uses to change our culture and exploit the law. These are "The Seven Myths of Highly Effective Plaintiff's Lawyers."

MYTH NO. 1

THE 1ST MYTH IS THAT CORPORATIONS PUT PROFITS AHEAD OF SAFETY AND HONESTY, AND LARGE DAMAGE AWARDS ARE THE ONLY WAY TO GET CORPORATIONS TO ACT RESPONSIBLY.

When Kip Viscusi at Harvard Law School studied the impact of punitive damages on safety, he found that juries award punitive damages so randomly and in such unpredictable amounts that there is no linkage between a firm's conduct and expected damages. In short, he found that punitive damages do not deter wrongful conduct.

Still, every plaintiff's lawyer wants to hammer on that rail with theatrical indignation, accusing a company of endangering a human life to scrimp on, say, an 85-cent part, and demanding a huge punitive damage award to "send a message" to the company's head office.

The truth is that most corporations care deeply about the safety of their customers. That is the only way to do business in the modern world.

I know this is true of the auto industry. The plaintiff's lawyers often claim that auto companies knowingly place defective products into the marketplace. Yet Ford executives drive Fords, General Motors executives drive GM cars, and I drive a Chrysler 300M. These are the very same vehicles that our spouses and children ride in every day. To suggest that we knowingly place defective vehicles into the marketplace is not only wrong, it is insulting.

But do profits and costs enter into our manufacturing decisions? You bet they do.

This is made out by the trial bar to sound heinous, as if we were risking lives on the altar of profits.

The truth is that we could make a vehicle impervious to just about any kind of accident. In fact, such a vehicle is available. It is called an Abrams tank—it weighs close to 70 tons, and costs more than $4 million. I don't believe the government is offering zero percent financing or generous rebates on Abrams tanks.

In any event, the public does not want tanks. It will only pay for cars that offer "reasonable safety" based on U.S. government standards: in other words, the safety that the public can afford. This necessarily forces auto companies to make the same kind of cost-benefit analysis consumers make when they choose between large cars and smaller, less expensive cars.

The really tough safety decisions automakers have to make are not between cost and safety. The tough decisions often come from weighing the hazards and benefits of a given technology. For example, in the auto industry laminated side window glazing can reduce ejection in certain accidents, but it may also increase head and neck injuries in others. These are the tough decisions.

Moreover, what a company learns about safety is often used against it. If a company improves a product, it is not applauded for acting on the basis of new knowledge. Instead, it is exposed to the charge that the company should have made that improvement earlier.

Finally, in today's environment, good corporations are slammed for succeeding as if all success was like that of Enron or WorldCom. This is the Ralph Nader line. Mr. Nader and his colleagues once served a useful purpose in heightening the awareness of both consumers and producers on safety. After forty years, however, Mr. Nader still speaks of a "corporate plutocracy" that is "moving on all fronts to advance narrow profit motives at the expense of civic values." This is the language of the past, and of zealotry and conspiracy theory; language that, if it still lurks anywhere else in our society, lives only in the lesser movies of Oliver Stone.

The Naderites, however, are not irrelevant. They serve as a Greek chorus, distorting the culture and providing ideological cover for the trial bar.

MYTH NO. 2

THE 2ND MYTH IS THAT THE SO-CALLED "LIABILITY CRISIS" IS AN INVENTION OF CORPORATIONS TO LIMIT THEIR LIABILITY FOR WRONGDOING.

In the face of the everyday experience of businesses, legislators, lawyers, and judges, the plaintiff's bar claims that there is no legal crisis. The plaintiff's bar also claims that punitive damages, which are central to the crisis, are in fact fairly uncommon and relatively low.

Much of their evidence rests on a flawed study from the Association of Trial Lawyers of America, or ATLA, which was based on incomplete information. Even its author conceded that there is no comprehensive data about punitive damages awards available. The truth is to know the real extent of punitive damage awards in America one would need access to thousands of paper files in thousands of county courthouse basements.

The impacts of lawsuits, however, can be measured. They can be measured in terms of the destruction of national wealth.

A Tillinghast Towers-Perrin study reveals the U.S. tort system cost $205 billion in 2001. This amounts to $721 for every man, woman and child in the country and is an astonishing 14 percent increase in tort costs since 2000. The President's Council of Economic Advisors also reported that the cost of lawsuits is "far more than enough money to solve Social Security's long-term financing crisis."

Putting this in terms that every American family would appreciate, our annual tort costs would pay for more than three months of groceries, six months of utility payments, or eight months of health care costs for all of those families.

Or consider that just the costs of asbestos litigation could reach $200 billion – more than the California Northridge earthquake, Hurricane Andrew and September 11th terrorist attacks combined. The costs are not only national, they are international. Tort costs are so high that they are beginning to affect the willingness of exporters to do business in the United States. The Austrians have a wonderful cognate—Nordamerika-Risiko—that reflects the need for excessively high premiums to cover insurance in the United States. America is acquiring an international reputation as a legal backwater.

Nowhere, however, does lawsuit abuse inflict more harm than in the area of medical care. According to Jury Verdict Research, Inc., more than half of all medical malpractice jury awards today top $1 million, and the average jury award has increased to $3.5 million. Excessive damages and unwarranted lawsuits drive doctors out of practice and raise the costs of health care through out-of-pocket payments, insurance premiums, and taxes.

The U.S. Department of Health and Human Services reports that Americans are at risk of not being able to find a doctor when they need one. In some states, the cost of malpractice for delivering a baby heaps another $2,000 on the bill that a mother must pay to obstetricians.

One finding in the HHS report is truly staggering: if reasonable limits were placed on non-economic damages in medical malpractice cases, there would be enough money to pay for a Medicare prescription drug benefit plan and help uninsured Americans obtain health coverage.

Yet ATLA maintains that there is no tort crisis.

MYTH NO. 3

THE 3RD MYTH IS THAT PUNITIVE DAMAGES ARE RARELY AWARDED OR ARE ALWAYS REDUCED ON APPEAL.

This is a strange assertion. If awards were so rare, why would plaintiff's lawyers waste their time pleading them in every case? Why would they fight hammer and tong to stop legislation placing reasonable limits on punitive awards?

You know the answer: settlement leverage. To borrow a Las Vegas analogy, the "heavy dice" effect of punitive damages, especially in "magic jurisdictions," coerces many defendants to settle. As Yale Law School Professor George Priest has observed, "the availability of unlimited punitive damages affects 95 percent to 98 percent of cases that settle out of court prior to trial. It is obvious and indisputable that a punitive damage claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process, increasing the likelihood of litigation."

And what about those defendants that don't settle, and lose an eye-popping verdict at trial? In the new world of billion-dollar verdicts, oppressive bonding requirements may deprive a defendant of its right to appeal.

MYTH NO. 4

THE 4TH MYTH IS THAT CLASS ACTION LAWSUITS SERVE THE PUBLIC GOOD BY MARRYING EFFICIENCY WITH JUSTICE.

U.S. class action law underwent a radical transformation in 1966 when Rule 23 was revised to reverse the "opt in" provision to one requiring class members to "opt out." As a result of this one change, countless thousands have been conscripted into class actions, often unknowingly, and sometimes even held in suits against their will.

Class-action impresario Bill Lerach quipped that **"I have the greatest practice of law in the world…I have no clients."** This is, indeed, clientless law. A Florida judge wrote of one lawsuit that it **"appears to be the class litigation equivalent of the 'squeegee boys' who used to frequent major urban intersections and who would run up to a stopped car, splash soapy water on its perfectly clean windshield and expect payment for the uninvited service of wiping it off."**

Not only do class actions often address specious "injuries," they often cheat the very clients they purport to serve, leaving them with near-worthless coupons but netting the lawyers millions. For example, in a class action against Carnival Cruise Lines, for the alleged inflation of port charges, former passengers received coupons worth $25 to $55 to be used for a future cruise, or redeemed for cash at 15 to 20 percent of face value. The class action plaintiffs' counsel were set to receive $5 million in attorney fees as part of the settlement.

Another class action settlement arose from allegations that Ralph Lauren inflated the suggested retail price on its Polo line at outlet stores. The take? Plaintiffs' lawyers walked away with $675,000 in fees. Their clients—the actual customers—can apply for 10 percent-off coupons (assuming they still have receipts from purchases made between July 15, 1991, and January 10, 2000).

There is some good news. Judges are now starting to reject these suits and their aims. The bad news, however, is that it only takes one judge to bring a defendant to its knees. This is because class actions can thrive in a relatively small number of jurisdictions—many of them small, rural and remote from the social consequences of bankrupting verdicts.

Consider rural Madison County, Illinois. More class action lawsuits have been filed per capita in Madison, where juries are known to be generous, than in any other county in the United States. Two recent verdicts from Madison County jurors came in at $250 million and $10 billion.

Clearly, something is drawing plaintiff's lawyers to this court like bees to honey. A hint of that "something" might be found in the contributions made to the political campaigns of local judges. The personal injury bar contributes more than 75 percent of the estimated $800,000 given to local judges' political campaigns. According to the Manhattan Institute's Center for Legal Policy, there was a projected 3,650 percent increase in class-action filings in this one Illinois circuit court over a four-year period.

MYTH NO. 5

THE 5TH MYTH IS THAT LITIGATION PROTECTS CONSUMERS WHEN REGULATORS FAIL TO ACT.

In the federal regulatory process, safety policy is developed by a balanced, expert-led investigation of risks. Federal auto safety investigators and scientists want to know all the pertinent facts affecting vehicle safety. In the tort process, where the stakes are the titanic profits of the blame industry, the investigative process is anything but scientific.

The legal system deliberately blinds itself to many pertinent facts through arcane and discriminatory rules of evidence. In twenty-nine states, for example, juries are not allowed to hear that an injured plaintiff failed to wear a seatbelt. Incredibly, the fact that the driver at fault was drunk or drove through a red light is not admissible in many courts.

Juries should know these facts. They should also know about the initiatives voluntarily taken by the auto industry. Consider one initiative, right-hand outside mirrors. They were not required by any federal standard. The same is true of anti-lock brakes, side air bags, built-in child seats, adjustable pedals so small occupants can sit farther back, seat-belt devices to take the slack out of the belt in the case of a severe crash, or load-limiting seatbelts that stretch when the forces on an occupant begin to exceed the level where broken ribs can occur.

None of these features and driver assists was required by any regulatory directive. The car companies offered these items because customers appreciate them, and because it was the right thing to do.

While auto companies are making this progress, developments in the courtroom impede safety. On the basis of courtroom polemics, juries with no technical expertise are asked to render verdicts that, in effect, set new national safety standards. For example, regulators can determine that a given vehicle part is safe. Twelve juries can find that part to be safe. But if the 13th jury finds it defective, and reinforces that decision with an eye-popping verdict, that 13th jury sweeps away the methodical deliberations of the other juries and federal regulators alike.

Regulators, on the other hand, do not dictate design in this way. They seek one result—safety.

Between 1966, when the Motor Vehicle Safety Act was signed, to 1990, about 250,000 lives were saved because of federal safety programs. Over a half million additional lives were saved because of public safety campaigns and advances made by the auto industry. Nevertheless, some personal injury lawyers and their surrogates believe that they "know better." Former Labor Secretary Robert Reich was correct when he said that "[t]he era of big government may be over, but the era of regulation through litigation has just begun."

This era of regulation through litigation began with the marriage of attorneys general, bound by oath to the Constitution, and plaintiff's lawyers bound by their devotion to the pursuit of profit. This is matrimony of the unholiest sort.

The hiring of private lawyers to do the public's business is the only public process in which billions of dollars in services can be contracted with a small number of individuals, without any oversight, standards, or accountability—just the Attorney General's assurance that he or she has picked the best lawyer. Even then, these sweetheart deals sometimes fall apart, as romances do, ending in bitter lawsuits against the states for more settlement money.

Such practices should be of great concern to more than just American business. They should concern every one of us because we are in danger of becoming a nation not of laws, but of jurors.

MYTH NO. 6

THE 6TH MYTH IS CLOSEST TO MY EVERYDAY PRACTICE: THE MYTH THAT CORPORATIONS SETTLE LAWSUITS TO COVER UP THEIR WRONGDOING.

I don't need to spend a lot of time responding to this Myth. Dick Scruggs actually provides the best response and his candid comments bear repeating:

"The trial lawyers have established relationships with the judges that are elected… They've got large populations of voters who are in on the deal…and it's almost impossible to get a fair trial if you're a defendant in some of these places."

This, of course, causes some corporations to settle lawsuits for which they have a meritorious defense. Another factor that contributes to an uneven playing field in many courtrooms is the trial bar's ongoing campaign to demonize profits. Especially in closing arguments, the trial bar seems to equate profits or success with wrongdoing. And, judging by the eye-popping verdicts in some jurisdictions, many trial lawyers could earn an Academy Award for their performances.

The truth is that profits are the lifeblood of our economy and produce social wealth and benefits. To cite an example from an industry different from my own, consider General Electric, which under its previous chairman boosted its profits by 650 percent. Can any intelligent person debate the immense social wealth and benefits created by GE during the Jack Welch years?

GE's prosperity not only creates jobs and funds pension and health care plans, it also allows its employees to give more to their communities. To name just one example, GE engineers volunteer to raise the standards of a Cincinnati school, a school that once sent 5 percent of its students to college and now sends 60 percent of them to higher education. Fifty-five thousand GE people from all over the

world volunteer their time. Former CEO Jack Welch puts it like this: "A corporation's role in society, first and foremost, is to win, to be successful, to be profitable, to grow. Because when you do that, you pay taxes. You have people who are not scared, hanging on. They give back to their community."

MYTH NO. 7

THE 7TH AND FINAL MYTH OF HIGHLY EFFECTIVE PLAINTIFF'S LAWYERS IS THAT LIKE DAVID-AGAINST-GOLIATH, THE TRIAL LAWYERS ARE OUTGUNNED BY POWERFUL AND RESOURCEFUL CORPORATIONS.

This is the most cherished trial lawyer myth, perpetuated in countless movies—that there are a few Robin Hoods out there struggling against the armed might of the powerful Sheriff. It deserves to be said that Robin Hood didn't fly around Sherwood Forest in a Gulfstream IV or V, own mansions, private golf courses or a losing baseball team.

Robin Hood, after all, gave to the poor. Six trial lawyers and their firms took more than $5 billion as fees for their firms from tobacco litigation, monies that many believe belong in state treasuries for health care and education. Indeed, some of these erstwhile Robin Hoods, like Peter Angelos, are seeking to take even more. Angelos sued the State of Maryland for 25 percent of the state's $4.4 billion share of the tobacco settlement.

Examined closely, the trial bar looks less like a tender shepherd boy with a slingshot and more like a band of Goliaths with flamethrowers.

The point here is not that they are very rich men. They are. The point is that their law firms are even richer with the depth and agility to field an army of well-paid experts, legal strategists, private detectives, jury consultants and top public relations people. Against such enterprises, even the largest corporations can be intimidated.

In exposing these myths, I don't mean to suggest that there is no need for a strong system of torts. I do mean to suggest that our system is wildly out of balance.

It is out of balance because the outcomes we used to joke about are becoming reality. Consider that no less a scholar than Harvard Law School Professor Larry Tribe is presaging a movement to grant 13th Amendment protections to cats, dogs, mice, and chimpanzees. Nowhere, Mr. Tribe notes, does it state in the U.S. Constitution that only humans are covered. "Nonhuman animals certainly can be given standing," he says.

Lawyers used to joke that someday people would sue fast food restaurants. Now lawsuits are proliferating against fast-food chains for making people obese. This is a ridiculous, imbalanced system, but it is no joke.

As I said at the beginning of my talk, the basis of the civil justice crisis emerges from culture. That our culture has changed is undeniable. Neighbors have an argument. Years ago, they would have worked it out over the backyard fence. What do they do now? The New American Way—they sue. Someone likes McDonald's food too much. What do they do? They sue. Parents are upset over an umpire's call. What do they do? They sue.

I am fifty years old and I have been practicing law since 1978. My generation is now leading this country, and not a day goes by that I don't worry about what we are teaching our kids.

This came home to me a few years ago when my son and I were driving in the car and couldn't reach an agreement on whether we would go to McDonald's or Taco Bell. He suggested that we call someone named Ted to settle our dispute. Ted? I asked him who that was. He pointed to a billboard we were approaching, advertising a plaintiff's firm with the toll-free number of 1-800-CALL-TED.

I laughed then, but I worry now. I can see that this is truly a struggle to make it clear to the next generation what real justice looks like. This is a struggle for the hearts and minds of the American people. This is a struggle to tell our story.

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