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Opinion: Tort Reform Now

Greedy lawyers abuse the system to milk American business dry.

by Gary Witzenburg (2005-05-23)

More from Gary Witzenburg

The American civil justice system fundamentally changed in the 1960s and '70s, when social activism led to legal activism, litigation became a means to achieve "public good," and lawyers morphed themselves into champions of the "little guy." Before then, lawsuits were viewed as conflicts between private parties to be avoided whenever possible. Before then, it was considered unethical for attorneys to seek suits instead of fair and equitable settlements.

"It is unprofessional for a lawyer to volunteer advice to bring a lawsuit," stated Canon 28 of the American Bar Association (ABA) Canons of Professional Ethics of 1936. "It is disreputable...to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients."

Contrast that with today's environment, where young American men and women flock to the country's flourishing lawyer farms in hopes of striking it rich; where freshly-minted graduates desperately seek someone, anyone, to sue just to make a living; where every other TV ad is another law firm brazenly trolling for victims: "Have you been injured in a fall or an accident? Have you suffered medical malpractice? You may have a right to collect money! We'll get you more than the other guys! You pay nothing unless we win! Call Lee Free!"

We all have a fair sense of how profoundly runaway litigation has affected all American business, including U.S. automakers, which are much easier and more convenient targets than competitors based overseas. The cost of defending and settling many thousands of suits, and paying those that are ultimately lost, has become truly enormous. No one inside GM, Ford, or Chrysler wants to put a public price tag on it, but we have to assume it adds several hundred dollars to the cost of every vehicle. And it has driven a number of suppliers into bankruptcy (Federal Mogul comes to mind) and some completely out of business.

Not to suggest that those who have suffered injury or a fatality as a result of someone's carelessness or incompetence should not be fairly compensated. Or that companies that make and distribute genuinely unsafe products should not be punished...severely, if they did so knowingly. Of course they should. But we're discussing the unfortunate evolution of America 's lawsuit industry into a multi-billion dollar business that benefits primarily itself while bankrupting businesses, hobbling America 's economy and killing thousands of jobs every day.

The problems of class

The runaway proliferation of class action suits began in 1966 when a new federal rule allowed all individuals sharing a common attribute - use of a particular product, for example - to be automatically deemed to have joined a "class" unless they had expressly withdrawn from it. This, of course, has vastly increasing the sizes of classes and, therefore, awards.

Then the floodgates were thrown wide open in 1976 when the ABA relaxed its rules on advertising and the Supreme Court upheld the "right" of attorneys to advertise like any other business. In just the three years between 1997 and 2000, U.S. businesses saw a 300-percent increase in federal class actions and an incomprehensible 1000-percent spike in state class actions filed against them.

The ability to file class actions in state courts has enabled rampant "forum shopping."

"Plaintiff's lawyers game the system in their search for courts with the most sympathetic judges and juries...the most lax rules of evidence, the most plaintiff-friendly procedural rules, and the most limited examination of attorney's fees," wrote John W. Wootton of Mayer, Brown, Rowe & Maw, LLP, in his 2004 Washington Legal Foundation paper How We Lost Our Way: The Road To Civil Justice Reform. "As a result, certain 'magnet courts' have become the favored venues for class attorneys...." And the many thousands of suits overwhelming these courts have resulted in just a tiny percentage being heard, forcing defendants to settle most out of court regardless of their merit.

Another way in which lawyers have abused the system is by filing multiple repetitive suits. After Firestone announced its tire recall in August, 2000, the onslaught of overlapping suits began within hours, and in days Ford and Firestone had been named in about 100 class actions. "Some firms filed multiple cases in different jurisdictions," one attorney says. "Plaintiffs' lawyers competed with other plaintiffs' lawyers to be the first to file. The vast majority alleged the same thing - damages related to tires - on behalf of the same people: all tire owners in the country. Having 100 different class actions filed in different courts serves no legitimate purpose, and it gives the plaintiffs' lawyers repeated opportunities, multiple bites of the same apple. You file ten cases, determine which judge you like best, then push that case. It also harasses defendants by multiplying the costs of litigation.

"If multiple cases are filed in federal court, they can be consolidated for pre-trial purposes. You only go through discovery once. You can get class certification heard one time. If 100 cases are filed in state courts, the defendant needs to re-litigate them over and over and over again. This drives up the cost to where many defendants find it's much cheaper to settle than defend them. And we've seen plenty of situations where plaintiffs' lawyers basically trip over each other to sell out the class so they can be first to settle and collect their fees."

The scope

"Jackpot justice has saddled America with the most expensive tort system in the world, costing $246 billion a year - or 2.23 percent of GDP," wrote former Michigan Governor John Engler, now president of the National Association of Manufacturers, and Dan Pero, president of NAM's newly founded American Justice Partnership in a January 28, 2005 *Washington Times* commentary. "Our lawsuit-happy culture is a growing disadvantage for U.S. businesses that must compete in a global marketplace...[and] a drag on our entire economy except for the trial lawyers industry, which rakes in $40 billion annually - more than Microsoft or Intel and nearly double Coca-Cola revenues.... More than 16 million lawsuits are filed annually in state courts - one about every two seconds. The judicial systems in certain...jurisdictions are so far out of balance it is almost impossible for corporate defendants to get a fair trial. And these jurisdictions have become magnets for lawsuits from other areas around the country.

"The average U.S. family of four pays a "tort tax" of $3380 a year in higher prices, insurance rates and health-care costs. When U.S. businesses incur the price of an unfair liability system, it is eventually passed on to all Americans when they pay more for nearly everything they buy, take home smaller paychecks from their employers and earn less as shareholders. The cost of frivolous lawsuits also discourages companies from hiring more people and launching new ventures."

A frank examination of the need for tort reform is presented in the excellent 2003 booklet *Trial Lawyers Inc., a Report on the Lawsuit Industry in America*, published by the Center for Legal Policy at the Manhattan Institute for Policy Research. "The lawsuit industry today is truly a behemoth," wrote Center Director James R. Copland in his introduction, "but - unlike major corporations in our regular market economy - it remains financially opaque." He concluded that the biggest differences between the lawsuit industry and most others are that it "is in a noncompetitive market and...its takings are necessarily zero-sum." In other words, it creates no wealth, just confiscates and redistributes it.

TLI calls the practice of "predatory litigation" a "racket designed to do little more than advance the incomes and interests of its members - everyone else be damned." Asbestos litigation alone, it points out, "has driven 67 companies [73 at last count, including Federal Mogul] bankrupt, including many that never made or installed asbestos, costing tens of thousands of jobs and soaking up billions of dollars in potential investment capital."

On medical malpractice, TLI says: "Trial Lawyers, Inc. often takes between 40 percent and 70 percent of the award for its fees and costs.... In 2002, a dozen states experienced medical emergencies because doctors and hospitals could no longer afford malpractice insurance. Women scrambled for doctors to deliver their babies, seriously injured patients had to be airlifted out of some locations because there were no practicing emergency-room physicians available, and hospitals closed maternity wards to protect themselves."

Part II to follow next week.

(Excerpted from April, 2005, Automotive Industries, www.ai-online.com)

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Opinion: Tort Reform Now, Part II

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ary Witzenburg (2005-06-03)

Excerpted from April, 2005, Automotive Industries, *www.ai-online.com*

On top of runaway health-care costs (at GM, some $1,500 per vehicle in 2004), which continue to explode at double-digit rates, higher labor rates, retiree pension costs and federal, state and local taxes and regulatory burdens, U.S. automakers shoulder increasingly heavy litigation costs not borne by any off-shore competitor. "We can't raise prices to accommodate these costs," one industry attorney says. "So we have to take them out of other priorities...wages, profit sharing, the number of jobs we can offer"...not to mention R&D, facility investment and product development.

While legal reforms in general must be attacked state by state, industry attorneys point to three priorities that can and must be dealt with at the federal level: class actions, asbestos litigation and medical malpractice . The first was addressed by the *Class Action Fairness Act of 2005* that passed both houses of Congress this February. This law: 1) closes the loophole that permitted forum shopping and the filing of overlapping cases and 2) enacts a Consumer Class Action Bill of Rights to protect consumers from abusive settlements, which (among other things) requires special scrutiny for settlements involving low-value coupons instead of cash.

How have asbestos cases impacted the auto industry? "Until about 1999," one OEM attorney says, "we were rarely named in asbestos litigation. Then in 2001, when asbestos bankruptcies skyrocketed, we started seeing a huge increase in cases against us because those other defendants weren't around any more. The principal theory is that mechanics have been exposed to asbestos by changing brake pads.... [but] recent research shows that 80 to 90 percent of all pending asbestos cases are fraudulent. The proposed compensation system [now before Congress] would establish clear medical criteria that would screen out fraudulent cases and free up more money for victims who have real injury."

Product liability looms

ATRA, the American Tort Reform Association (www.atra.org) is pushing for product liability reform, limits on punitive and non-economic damages, abolition of the rule of "joint and several liability" and more. Ted Boutrous, Jr., a partner at Los Angeles-based Gibson, Dunn and Crutcher, LLC and co-chair of the firm's appellate and constitutional law practice group, has been heavily involved in civil justice reform efforts his entire career. "Vehicles are made to be driven at rapid speeds," he says, "and everyone knows there's a possibility of an accident even when the vehicle has been built perfectly and every effort has been made to make it safe. It's a fact of life. Yet lawsuits are filed all the time, no matter what.

"One key problem is unlimited punitive and pain and suffering damages because they're totally unpredictable. Even though the Supreme Court has laid down due process guidelines, that doesn't protect a company from facing a massive verdict even in a case where they had built a very safe product and had prevailed many times. Ford, for example, has won 13 Explorer cases in a row, but that doesn't protect them from a verdict in an aberrational case. So there's this unpredictability -- when will there be liability and how much will it be? Even if a company does everything perfectly, when it's going to have repeat litigation just by the nature of its business, it has to invest in lawyers and legal fees for almost every case because it doesn't know which case is going to be the one that produces the huge verdict. That increases the cost tremendously for companies based in the United States."

"Punitive damages," originally intended to teach deep-pocket defendants expensive lessons for negligence, are awards over and above remuneration for medical expenses, loss of income, etc. "Pain and suffering" awards compensate injury victims for exactly those (highly sympathetic) intangibles. Both are unlimited in most jurisdictions.

What can the federal government do? "It could pass legislation putting limits on punitive damages, limiting the size of awards," Boutrous says, "and tighten up liability standards for awarding them. When there's a dispute where reasonable people can disagree on whether the product was dangerous or safe, to punish a company under those circumstances is extremely unfair. In other areas of law where government imposes punishment, it's always done within statutory limits because deciding the proper punishment is a classic example of what legislatures are supposed to do."

Boutrous agrees that the rule of "joint and several liability," which allows a manufacturer to be fleeced if it's found even minimally responsible, is another area badly needing reform. "In many cases," he says, "you have situations where it's undisputed that some other driver was drunk or driving recklessly and caused the accident, but the plaintiffs sue the manufacturer saying that, in retrospect, it could have made some part a little differently."

What can be done about frivolous" suits? "I've always been an advocate for tighter standards at the filing stage of complaints and giving judges greater ability to dismiss cases early if they don't have merit," he says, "and of [disallowing] attorneys' fees in certain circumstances where they come into court with frivolous claims. There is that authority now, but courts are reluctant to exercise it.

"We need serious reform and a good-faith effort on all sides to stop these abuses and bring things under control because, at the end of the day, it's bad for consumers and bad for the legal system. In many of these cases, there could be swift compensation that would help people who have been injured, but instead the plaintiffs' lawyers want to hit the jackpot. They want to play Robin Hood, except instead of taking

from the rich and giving to the poor, they want to give to themselves. It's a terrible situation if you're seeking justice and a fair system.

"I want to be clear," he is quick to add, that the legal system is there to protect peoples' rights and compensate injured people who deserve compensation. We need to balance that against the need for reform, but we're a long way from being in danger of prostrating those rights. There is more that can be done to tell courts that they have a responsibility to clear out frivolous cases so people who really need to be in court and need compensation can get it."

An urgent need for change

Nearly everyone outside the legal system, and many inside it, agree that tort reform is urgently needed to protect American companies and their employees against predatory and frivolous suits and outrageous awards that can drive them out of business. Yet there is strong resistance from politicians who accept huge campaign contributions from lawyers anxious to maintain their gravy trains and "consumer advocates" who cling to the ruinous notion that any action to protect business is necessarily bad for "the people."

Then there's the fact that most judges and the majority of lawmakers are themselves lawyers who have been elected for a period of time. Why should they want to reform a system that so effectively enriches their friends and colleagues and -- once their terms are over and they have returned to private practice -- will likely line their very own pockets?

Still, the President and Congress have succeeded in passing class action reform, are working on asbestos and medical liability and should have more to come in the next couple of years. None too soon for American business and workers...but way too late for some.