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January-March 2004

www.cttriallawyers.org

Volume 22, Number 1

Published by: **The Connecticut Trial Lawyers Association**

From The President's Notebook

By Kathleen L. Nastri

As I write this column, I do not know whether or not Governor Rowland will follow through on his promise to the doctors to veto House Bill 5669, an "Act Concerning Medical Malpractice Insurance Reform." There are, however, some things that I do know. I know that throughout the debate on medical malpractice reform, the trial lawyers took the high road. We carefully researched the facts. We never made up a story or twisted the facts in order to appeal to sympathies or panic the public. We relied on studies published by the U.S. Government, independent insurance research organizations, professors of insurance law, judicial department statistics, the Office of Legislative Research, and others. When we testified, we were careful to never state a fact that was not true or provide a legal opinion

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Review of 2002 & 2003 Tort Cases: Supreme and Appellate Court

By Dale P. Faulkner

Dale Faulkner, a former editor of the Forum, practices in New London with Faulkner & Boyce, PC, 216 Broad Street, New London.

A. CLAIMS AGAINST GOVERNMENT

1.

CITATION: *Salemme v. Seymour*, 262 Conn. 787 (2003).

FACTS:

(1) The plaintiff sued the town under the highway defect statute, § 13a-149, for an accident alleged to have occurred on 10/27/97.

(2) Attached to the complaint was the notice, provided in a letter dated 11/25/97, which said that an accident occurred at "approximately 5:10 p.m., October 27, 1997." It said that the accident occurred on Silvermine Road, and that it was caused by "the extremely slippery conditions of the road caused by wet leaves and pine needles."

(3) On 12/30/99, the defendant moved to strike the complaint on the ground that the notice failed to give sufficient notice of the details of his claim.

(4) On 2/25/00, the plaintiff sent an amended notice to the defendant describing the locus as "Silvermine Road, Seymour, Connecticut, at its intersection with Maple Avenue, Seymour, Connecticut."

(5) The trial court granted the motion to strike which decision was affirmed by the Appellate Court, which also held that the statute's savings clause did not extend the time for delivery of the notice. 67 Conn. App. 464 (2001).

ISSUE: Whether the savings clause of the statute applied to the notice?

RULE: The savings clause operates to protect plaintiffs from having their § 13a-149 claims barred by vague, indefinite or inaccurate notice of accident locations. It does not protect notices where the location element of the notice was entirely absent. Here, the location of Silvermine Road lacked usefulness, but the location is not entirely absent from the notice. Thus, the savings clause should have applied.

COMMENT: A squeaker.

2.

CITATION: *Spears v. Garcia*, 263 Conn. 22 (2003).

FACTS:

(1) The plaintiff was struck by a car when she was pushed out onto the street by a high pressure stream of water from an illegally opened fire hydrant.

(2) Suit was brought against the city and its fire department.

(3) The trial court granted the defendants' motion for summary judgment on the grounds that (1) the complaint did not contain a reference to a statute containing a waiver of governmental immunity; and (2) § 52-557n does not permit a direct cause of action against the defendants.

(4) The Appellate Court reversed holding that the defendants had notice of the plaintiff's reliance on the statute because it was referred to in the papers in opposition to the motion and that § 52-557n abrogates governmental immunity, allowing that the defendants be sued in negligence. 66 Conn. App. 669 (2001).

ISSUE: (On the defendants' petition for cert.) Does § 52-557n permit a plaintiff to bring a direct cause of action in negligence against a municipality?

RULE: The language of the statute clearly and expressly abrogates the rule of governmental immunity. § 52-557n(a)(1) provides in relevant part:

"Except as otherwise provided by law,

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CTLA FORUM
Published bi-monthly by the Connecticut Trial Lawyers Association
100 Wells Street
Hartford, Connecticut
06103-2920
(203) 522-4345

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The *Forum* is published bi-monthly by the Connecticut Trial Lawyers Association, 100 Wells St., Hartford, CT 06103-2920 (tel: 1-860-522-4345). Inquiries regarding advertising rates and specifications should be made to the CTLA office. Articles and features should be sent to William F. Gallagher, Editor, The *Forum*, The Gallagher Law Firm, 1377 Boulevard, P.O. Box 1925, New Haven, CT 06509. Settlement/verdict reports should be sent to Kathleen L. Nastri, Koskoff, Koskoff & Bieder PC, 350 Fairfield Ave., Bridgeport, CT 06604.

Statements and opinions in editorials or articles reflect the views of the individual authors and are not necessarily those of CTLA. Publication of advertising does not imply endorsement. All advertising is subject to approval of the Connecticut Trial Lawyers Association.

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Hartford, CT 06103-2920
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(860) 522-1027 Fax
http://www.ct-tla.org

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Review of 2002 & 2003 Tort Cases: Supreme and Appellate Court

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a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties. . . ."

The statute is independent and exclusive of § 7-308 and § 7-465.

COMMENT: An excellent result.

3.

CITATION: *Tyson v. Commissioner of Transportation,* 77 Conn. App. 597 (2003).

FACTS:

(1) The plaintiff sued the state under the highway defect statute, § 13a-144, alleging that he was injured when the vehicle in which he was riding was struck by boulders, rocks, and other debris that had broken loose from a rock ledge adjacent to the highway.

(2) The plaintiff's pre-suit notice said that he was "violently thrown about in his vehicle causing him to sustain injuries to his neck and back."

(3) The trial court denied the defendant's motion to dismiss which was predicated on the claims that the alleged defects did not fall within the scope of the statute and that the notice was patently defective in its description of the injuries.

ISSUES:

(1) Are cliffs or rock ledges adjacent to the highway so necessarily connected to the highway as to expose travelers to dangers?

(2) Was the description of injuries in the notice sufficient so as to satisfy the test of reasonable definiteness?

RULE:

(1) Whether a condition in a highway constitutes a defect must be determined in each case on its own particular circumstances. Even though the rocks and debris are not part of the roadway, they can cause the highway to be defective because they are likely to dislodge and roll onto the road. Reasonable remedial measures exist to alleviate the dangers posed by falling rocks and debris.

(2) Although the notice did not give an exact medical description of the injuries, such specificity is not required. The description that the plaintiff had been "violently thrown about" was sufficient to prompt the state to make its investigation.

COMMENT: Remember that a notice stating that "plaintiff was injured," filed under the municipal highway statute, was held to be insufficient as a matter of law. *Martin v. Plainville,* 240 Conn. 105 (1997). Best to be as expansive as the circumstances allow.

4.

CITATION: *Serrano v. Burns,* 70 Conn. App. 21 (2002).

FACTS:

(1) The plaintiff sued the state under the highway defect statute § 13a-144, for an accident alleged to have occurred at a highway rest area.

(2) The plaintiff's notice indicated that the place of occurrence was the "State of Connecticut Rest Area, Middletown, Connecticut, between exits 19 and 20 on Interstate 91 (rear lot)."

(3) Other documentation developed in the case, for example, the plaintiff's deposition, indicated that the fall occurred on a handicapped sidewalk ramp within the rest area.

(4) The trial court granted the defendant's motion for summary judgment concluding that the notice was patently defective as a matter of law because it could not find that a fall on a handicapped sidewalk ramp is the same as a fall in the rear parking lot, and that the notice failed to give sufficient information to permit the state to gather data about the case.

ISSUE: Whether the notice was patently defective as a matter of law?

RULE: The test as to whether a notice is patently defective is not whether the description is exactly the same as other evidence of the place of injury but whether it provides sufficient information to permit an intelligent investigation. The notice did not direct the state to a location markedly different from that indicated in the other documentation and was not so indefinite as to render it patently defective. Thus, the question of adequacy is one for the jury.

COMMENT: This was the second appellate round for these parties and the second win for the plaintiff. In *Serrano v. Burns,* 248 Conn. 419 (1999), the defendant's claim that the parking lot was not within the ambit of the highway defect statute was rejected.

B. STATUTES OF LIMITATIONS

1.

CITATION: *Taylor v. Winsted Memorial Hospital,* 262 Conn. 797 (2003).

FACTS:

(1) On March 10, 1993, the plaintiff, a nurse anesthetist, suffering neck pain, was examined and underwent a CAT scan at the defendant hospital. He was discharged and prescribed medication which he knew was used to reduce brain swelling.

(2) On March 12, 1993, he experienced changes in motor control functions and was admitted.

(3) On March 16, 1993, he was told that he had suffered a stroke on March 12th.

(4) In October 1995, having read magazine articles regarding the treatment of strokes, the plaintiff engaged a lawyer.

(5) On March 6, 1996, suit was started, alleging that the defendant was negligent in failing to diagnose and properly treat him for a stroke.

EDITOR'S NOTE

The Forum needs articles on current developments in Connecticut personal injury law.

CTLA's membership consists of lawyers who regularly seek to enhance the rights of accident victims.

In carrying out that mission, the lawyers (especially young lawyers) research and write on many topics, be it the drafting of memos for their cause or against that of their opponents or just for the office.

Many of these efforts are of compelling interest to all of us, and could be converted into articles for publication here.

Please give us the opportunity to publish your work. We have the capacity to help in preparing your material for publication. So don't be reluctant to make submissions out of a concern that it doesn't look like an article.

Send your submissions to the Editor, William F. Gallagher, The Gallagher Law Firm, P.O. Box 1925, New Haven, CT 06509, or to Neil H. Ferstand, Executive Director, CTLA, 100 Wells Street, Suite 2H, Hartford, CT 06103.

(6) The defendant claimed that the action was barred by the statute of limitations, § 52-584.

(7) The jury returned a verdict for the plaintiff.

ISSUES:

(1) Does § 52-584 impose on a plaintiff a duty to investigate a potential claim of medical malpractice?

(2) Did the plaintiff, as a health care professional, have a heightened duty under § 52-584 to discover his claim of medical malpractice?

RULE:

(1) The statute provides that a medical malpractice action be brought "within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered...."

(2) A claim accrues once he or she discovers or in the exercise of reasonable care should have discovered that actionable harm has been sustained.

(3) There is no affirmative duty to investigate a potential claim.

(4) The statute does not require those in health care to discover their claims earlier because of that status.

COMMENT: Note that the action was brought (barely) within the three year repose portion of § 52-584, which bars suit brought more than three years from the date of the offending act or omission.

2.

CITATION: *Tarnowsky v. Socci,* 75 Conn. App. 560 (2003).

FACTS:

(1) The plaintiff, within two years of allegedly falling on ice and snow, brought an action against the owner and tenant of property on which he fell.

(2) During discovery, the plaintiff learned that the defendant had been hired to remove ice and snow.

(3) Almost three years after the fall, the plaintiff sued the defendant.

(4) The trial court granted the defendant's motion for summary judgment on the basis that the two year statute of limitations period of § 52-584 had expired.

ISSUE: When does the statute begin to run for a plaintiff who immediately knows the fact of his injury but later discovers the identity of the tortfeasor who caused the injury?

RULE: Actual or constructive knowledge of the identity of the tortfeasor is an essential element of actionable harm and an action is not barred by the two year statute until the plaintiff knows or should know the tortfeasor's identity.

COMMENT: Another action saved, too, by the repose portions of § 52-584.

C. CAUSES OF ACTION

1.

CITATION: *Craig v. Driscoll,* 262 Conn. 312 (2003).

FACTS:

(1) An adult patron of the defendant's pub was allegedly served alcohol there while intoxicated.

(2) Upon leaving the pub, the patron, while driving, allowed his vehicle to veer off the road and run over a pedestrian.

(3) The plaintiffs, the mother and brother of the pedestrian, arrived at the scene and witnessed her injuries, which two days later, caused her death.

(4) The plaintiffs sued the defendants for negligent and reckless infliction of emotional distress.

(5) The trial court granted the defendant's motion to strike on the basis that negligence in selling alcohol was not a cause of action at common law because the voluntary consumption is an intervening act severing the server's responsibility. The Appellate Court reversed. 64 Conn. App. 699 (2001).

ISSUES: (On the defendants' petition for cert.)

(1) Whether, notwithstanding the Dram Shop Act, there is a cause of action for negligent infliction of emotional distress on a bystander against a purveyor of alcohol for injuries caused by an intoxicated adult patron?

(2) Whether the voluntary consumption breaks the chain of causation between the purveyor and the resulting injuries?

RULE:

(1) The Dram Shop Act does not preclude a common law cause of action for negligent infliction of emotional distress against a purveyor of alcohol.

(2) Voluntary consumption is a foreseeable intervening act that does not break the chain of causation.

COMMENT:

(1) This decision was overruled, surely at the behest of the booze industry, by the General Assembly's amendment to the Dram Shop Act (Public Act No. 03-91) which outlawed a cause of action against a seller for negligence to a person 21 or older.

(2) Don't disregard this decision simply because of that amendment. It's a substantial source of study of the law of emotional distress, duty, causation, substantial factor, intervening and superseding cause, and public policy.

2.

CITATION: *Stokes v. Lyddy,* 75 Conn. App. 252 (2003).

FACTS:

(1) The plaintiff was attacked and bitten by a dog while walking on a public sidewalk.

(2) The dog was owned by a tenant of the defendant and was kept in the defendant's building.

(3) The trial court granted the defendant's motion for summary judgment on the grounds that the defendant did not owe a duty to the plaintiff.

ISSUE: Whether a landlord owes a duty, at common law, to a nontenant who, while at a location away from the leased premises, is bitten by a tenant's dog?

RULE: The defendant owed no duty to the plaintiff under the theory of premises liability; nor under a theory requiring a landlord to maintain a public sidewalk in safe condition and to prevent nuisances; nor under a theory that the common law duty of a keeper of a dog be extended.

COMMENT: Nice try by the plaintiff in a case of first impression.

D. DAMAGES/TORT REFORM/ COLLATERAL SOURCES

1.

CITATION: *Schroeder v. Triangulum Associates,* 259 Conn. 325 (2002).

FACTS:

(1) The jury returned a verdict for the plaintiff awarding no non-economic damages, but awarding economic damages in excess of $750,000.00, which were nearly all of such damages claimed.

(2) The trial court denied the plaintiff's motion to set aside the verdict.

(3) The trial court also denied a motion to set aside filed by the plaintiff's employer and the second injury fund which had intervened seeking reimbursement for a lump sum settlement paid to the plaintiff pursuant to a voluntary workers' compensation agreement.

(4) The trial court, following a collateral source hearing, reduced the verdict by the amount of social security benefits paid.

ISSUES:

(1) Whether the trial court improperly denied the motion to set aside the verdict awarding no non-economic damages?

(2) Whether the second injury fund is entitled to reimbursement for a lump sum paid pursuant to a voluntary compensation settlement?

(3) Whether social security benefits are a collateral source?

RULE:

(1) The trial court should have followed the methodology adopted in *Wichers v. Hatch,* 252 Conn. 174 (2000), and, had it done so, should have set the verdict aside especially in the light of the evidence concerning the plaintiff's spinal fusion and permanent injury.

(2) Settlement payments made pursuant to voluntary compensation agree-

ments are "compensation" and, thus, the employer and the second injury fund are entitled to reimbursement.

(3) Social security disability benefits are not collateral source payments within § 52-225(b).

COMMENT: More guidance on the all too frequent rejection by juries of non-economic damages and solid resolution of still lingering tort reform issues.

2.

CITATION: *Jones v. Kramer*, 72 Conn. App. 789 (2002).

FACTS:

(1) At trial, the plaintiff claimed more than $40,000.00 in economic damages, including more than $30,000.00 in medical and $10,000.00 in lost wages.

(2) The jury's verdict for the plaintiff awarded $15,000.00 in economic damages, and $35,000.00 in non-economic damages. No interrogatories were given to the jury to establish which of the claimed economic damages were awarded.

(3) The trial court, following a collateral source hearing, reduced the verdict by the full net amount received from the plaintiff's medical insurer, namely $12,000.00.

ISSUE: Whether the trial court properly reduced the economic damages by the total of all collateral source payments or whether only payments specifically included in the verdict should have been deducted?

RULE: The trial court properly concluded that § 52-225a(a) required that the verdict be reduced by "an amount equal to the total of amounts determined to have been paid" from collateral sources.

COMMENT: Let's hope that this isn't the end of this case so that Judge Bishop's dissent and its challenging reasoning concerning § 52-225a and who has the burden of proof on collateral sources receive a second look.

E. ATTORNEYS

1.

CITATION: *DeLeo v. Nusbaum*, 263 Conn. 588 (2003).

FACTS:

(1) The plaintiff commenced his action against the defendant on June 27, 1996, claiming that he had been inadequately represented in a dissolution action brought by his wife.

(2) All of the negligent acts and omissions were alleged to have occurred in 1992.

(3) On June 22, 1993, the plaintiff sent a letter to his wife criticizing the actions of the attorneys for both him and his wife.

(4) On June 28, 1996, the defendant represented the plaintiff at a deposition regarding the dissolution action.

(5) The trial court directed a verdict for the defendant concluding that the action was barred by the statute of limitations (§ 52-577) by ascertaining that the date of the end of the attorney-client relationship was that of the letter which the plaintiff sent to his wife.

ISSUE: Whether the attorney-client relationship ended with the plaintiff's letter to his wife so as to prevent the tolling of the statute of limitations under the continuous representation rule?

RULE: The act of sending a letter to the wife did not rise to the level of a de facto termination of the attorney-client relationship. Under the continuous representation doctrine, tolling of the statute may occur when the plaintiff can show: (1) that the defendant continued to represent him with regard to the same matter, and (2) either that the plaintiff did not know of the alleged malpractice or that the attorney could still mitigate the alleged harm during the continued representation period.

COMMENT: An affirmation of the earlier Appellate Court decision in *Rosenfield v. Rogin, Nassau, Caplan, Lassman & Hirtle, LLC,* 69 Conn. App. 151 (2003).

2.

CITATION: *Rosenfield v. Rogin, Nassau, Caplan, Lassman & Hirtle, LLC*, 69 Conn. App. 151 (2002).

FACTS:

(1) The plaintiff sued the defendant alleging malpractice for failing to file in a timely manner an action against L, his former attorney.

(2) L had represented the plaintiff in a foreclosure case which a trial court dismissed, orally on 12/1/92, and in which that court issued a memorandum of dismissal on 12/18/92. The subsequent appeal, decided on 4/1/94, affirmed the dismissal.

(3) The defendant served a complaint on L on 12/15/95 alleging negligence in preparing and presenting evidence at the trial.

(4) L's motion for summary judgment was granted on the basis that the action was barred because it had not been brought within the three years of the oral dismissal of 12/1/92, and thus was barred by § 52-577. No appeal was taken from that decision.

(5) In the present action, the trial court granted the defendant's motion for summary judgment concluding (1) that the doctrine of collateral estoppel did not preclude the court from addressing whether the action against L was time barred; (b) that the continuing course of conduct tolled the statute of limitations, and (c) that the continuous representation doctrine applied as to L and accordingly, the action against L was filed timely.

ISSUES:

(1) Did collateral estoppel preclude an inquiry as to whether the action against L was timely brought?

(2) Did the continuing course of conduct doctrine toll the statute of limitations in the claim against L?

(3) Did the continuous representation doctrine apply in the foreclosure action so as to make the filing against L timely?

RULE:

(1) Because the defendant was neither a party nor in privity with a party in the case against L, collateral estoppel did not apply, and the trial court in this case was not precluded from addressing the tolling issue.

(2) The continuing course of conduct doctrine requires evidence of a breach of duty that remains in existence after commission of the original wrong. Such evidence did not exist here since the allegations against L were failures to prepare and present evidence, not a continuing duty. Thus the trial court erred in applying the doctrine.

(3) The continuous representation doctrine may apply to toll the statute in a legal malpractice action. Thus, because L continued to represent the plaintiff in connection with the appeal, into 1994, the statute against L was tolled. Because the case against L was filed timely, the trial court's granting of the defendant's motion for summary judgment was proper.

COMMENT:

(1) Be patient in mastering the facts.

(2) This is the first appellate adoption of the continuous representation doctrine.

(3) This is one of Judge Spears' last opinions. He's missed.

F. INDIAN LAW

CITATION: *Kizis v. Morse Diesel International*, 260 Conn. 46 (2002).

FACTS:

(1) The plaintiff, who is not Indian, fell at the Mohegan Sun Casino because of an allegedly negligently placed fieldstone in a walkway.

(2) She sued eight defendants in their capacity as employees of the Mohegan tribe and the Mohegan tribal gaming authority, none of whom are Indian.

(3) Two defendants, a building official employed by the tribe and the director of facilities operation employed by the authority, filed a motion to dismiss claim-

ing that as employees of sovereign entities they are entitled to immunity.

(4) The trial court denied the motion concluding that tribal immunity arises out of the tribe's status as a nation and, thus, belongs to the tribe and not to employees who are not tribe members and who are sued as individuals.

ISSUE: Whether Connecticut trial courts have subject matter jurisdiction for personal injury actions allegedly occurring on tribal land when the plaintiff is not Indian and the defendants are employees of the tribe and authority?

RULE: The tribal court is the exclusive forum for the adjudication of tort claims against the tribe and its employees because the tribe is a sovereign nation and its court is the forum in which the sovereign has consented to be sued. Thus, Connecticut courts do not have subject matter jurisdiction.

COMMENT: It's the 21st Century and sovereign immunity is alive and well.

G. PREMISES

CITATION: *Meek v. Wal-Mart Stores, Inc.*, 72 Conn. App. 467 (2002).

FACTS:

(1) The plaintiff sued the defendant alleging that he was injured when aluminum folding tables in boxes fell from a shelf immediately above a shelf to which he was returning a chair.

(2) The plaintiff alleged several acts or omissions of negligence, including that the tables were stacked on the shelf in an unsafe manner and that they were not secure.

(3) The jury returned a plaintiff's verdict reduced by its finding of comparative negligence of 50%.

(4) The trial court granted the plaintiff's motion to set aside the verdict and for an additur, concluding that there was no evidence to support the finding of comparative negligence.

(5) The trial court denied the defendant's motion to set aside the verdict, rejecting its claims that there was insufficient evidence of negligence and that the court's charge on negligence was improper.

ISSUES:

(1) Was there sufficient evidence to support the finding of the defendant's negligence?

(2) Was it proper to charge that the jury could find negligence if it found that the stacking of the tables was unreasonable under all the circumstances?

(3) Did the trial court abuse its discretion in finding that the defendants failed to prove comparative negligence even if the plaintiff caused the tables to fall by reaching for or removing an item from the nearby shelf?

RULE:

(1) Applying emerging principles relating to self-service stores and after conducting a thorough review of the evidence, the Appellate Court concludes that the jury could have found that the defendant was negligent in the manner in which the tables were stacked.

(2) The trial court properly charged the jury that negligence could be found if the jury found that the tables had been stacked in an unreasonable manner under the circumstances, including the foreseeability that customers would rearrange them and that while the defendant, to be found negligent, must have had general knowledge that the table display was dangerous, it need not have knowledge of the actual condition of the display at the time of the accident.

(3) Removing merchandise from shelves is the likely act of any customer in a self-service store. It cannot be said that a customer's reaching for or removing an item from a shelf amounts to negligence.

COMMENT: An enlightened opinion in the first years of the 21st Century. And an example of excellent creativity by the plaintiff's lawyer.

H. RELEASE IN FUTURO

CITATION: *Hyson v. White Water Mountain Resorts of Connecticut, Inc.*, 265 Conn. 636 (2003).

FACTS:

(1) The plaintiff claimed that she was injured as a result of the defendant's negligence while riding a snowtube.

(2) The trial court granted the defendant's motion for summary judgment because of a release signed by the plaintiff, before embarking on her ride, purporting to release the defendant from liability even though negligence was not expressly mentioned in the document.

ISSUE: Whether a document entitled "RELEASE FROM LIABILITY" signed by the plaintiff precluded her from recovering damages in a negligence action even though the document did not have language expressly relieving the defendant from negligence?

RULE: A party cannot be released from liability for injuries resulting from its future negligence in the absence of language that expressly so provides.

COMMENT: This is not the final word on the efficacious effect of releases in futuro. The Court declined to decide in this case whether a release having such express language would be enforceable as a matter of public policy.

I. MEDICAL MALPRACTICE

1.

CITATION: *Hayes v. Decker*, 263 Conn. 677 (2003).

FACTS:

(1) The plaintiff, who had suffered a heart attack, sued the defendant internist alleging that he failed to recognize and treat symptoms of cardiac ischemia and advised the plaintiff to discontinue Procardia which, the plaintiff claimed, caused an increase in the damage to his heart.

(2) At a hearing on the defendant's motion in limine, the plaintiff's expert testified that the discontinuation of the medication did not cause the heart attack, but that it did cause a rise in blood pressure which resulted in more damage to the heart.

(3) His opinion was based on three principles, namely, that (a) an increase in blood pressure causes an increase in the heart's demand for oxygen; (b) oxygen deprivation causes heart tissue death; and (c) increased blood pressure during a heart attack causes increased heart damage.

(4) The plaintiff's expert also testified that he was unaware of any studies documenting that link.

(5) The trial court precluded the testimony, on the basis of *Porter*, because there was no study concluding that the withdrawal of the drug increased the severity of the heart attack and that the more reliable evidence was that the speed of treatment decreases the severity of the attack.

(6) The jury returned a defendant's verdict. The trial court denied the plaintiff's motion to set aside. The Appellate Court reversed, concluding that the testimony should have been admitted. 259 Conn. 928 (2002).

ISSUES:

(1) Whether the trial court misapplied the rule of *Porter*?

(2) Whether *Porter* applied to the principles underlying the expert's opinion?

RULE:

(1) The trial court misapplied *Porter* by applying it to the expert's conclusions rather than to the scientific evidence on which it was based and by basing its decision on the belief of the alternative conclusion, namely, that speedy treatment is more likely to reduce severity.

(2) *Porter* should not have been applied because the bases underlying the expert's opinions were generally accepted principles of cardiology and were not the type of "obscure scientific theories" that *Porter* was intended to guard against.

COMMENT: The sorting out of *Porter* continues.

2.

CITATION: *Murillo v. Seymour Ambulance Assn., Inc.*, 264 Conn. 474 (2003).

FACTS:

(1) The plaintiff accompanied her sister to the hospital where she observed repeated efforts to insert an IV needle in her sister's arm by the defendants, an EMT and nurse.

(2) The plaintiff then told the defendants that she felt faint and her sister told the defendants that the plaintiff felt as if she were going to pass out.

(3) Neither defendant attempted to aid the plaintiff, who fainted and fell.

(4) The trial court granted the defendants' motions to strike on the basis that they did not owe a duty to the plaintiff.

ISSUE: Whether the defendants owed a duty to the plaintiff, a bystander, to prevent foreseeable injury as a result of her watching the medical procedures performed on her sister?

RULE: As a matter of public policy, no duty was owed because medical providers should not be required to keep a watchful eye on bystanders and should not be obligated to divert their attention from their patients. Public policy against increased litigation militates, also, against recognizing the duty.

COMMENT: Good medical practice would suggest that the health care providers should have come to her aid. Have a heart!

G. LEASING STATUTE

CITATION: *Fojtik v. Hunter*, 265 Conn. 385 (2003).

FACTS:

(1) The plaintiffs sued a driver (lessee) and the rental car company (lessor) for damages resulting from a car accident.

(2) At the time of the accident, the lessee's driver's license had been suspended. Under the lease, she was an authorized driver.

(3) The trial court granted the lessor's motion for summary judgment on the grounds that the lessee had violated the condition of the lease agreement requiring that she be a validly licensed driver and thus she did not have lawful possession of the vehicle.

ISSUE: Whether a lessor may be liable for the conduct of its lessee under § 14-154a, when the lessee was driving the leased vehicle with a suspended license?

RULE: The lessee, as an authorized driver, was in "lawful possession" of the vehicle, notwithstanding any breach of the lease agreement by her. Thus, the lessor is liable under § 14-154a for damages caused by the lessee.

COMMENT: This important affirmation of the extent of responsibility imposed by the leasing statute puts a halt on the direction seemingly destined by the rule of *Pedevillano v. Bryon,* 231 Conn. 270 (1994).

President's Notebook

continued from page 1

that was not accurate. In our discussions with the press, we were careful not to attack the doctors; rather, we recognized their problem and, to some degree, sympathized with their plight.

I know that doctors are angry over the situation. I know that their premiums have increased, while their incomes have remained flat or decreased. I know that many of them work hard and perform life-saving procedures. I also know that sometimes doctors commit malpractice and that when they do, consequences to the victims can be devastating.

I have tremendous respect and admiration for the victims who joined us in this fight, who helped us to educate legislators, doctors and the public, about what it's really like to be a victim of medical malpractice. We joined with people like George Meder, whose daughter died during a routine ear operation, and Annette Ross, who remains paralyzed after receiving an epidural during labor. We joined with the Connecticut Patients' Rights Group and its fearless leader, Jean Rexford, to keep the focus on the consequences of medical malpractice. We endorsed taking measures to prevent the occurrence of malpractice. We did everything that we could to help victims get out their message that the legislators should not "make the victims of medical malpractice also the victims of bad laws."

I know that our CTLA staff, including Neil Ferstand, Christine Burbank and Diana Roe, all of whom are true believers in our cause, did everything that they could do to help me over the last 12 months, and that they will continue to do that and more. They wrote letters. They made phone calls. They drafted editorials. They stood in the halls of the Capitol while we waited and waited and waited.

I know that we have the greatest lobbyists in Connecticut. Jay Malcynsky and Bob Shea and the entire team at Gaffney Bennett worked their way through the halls of the Capitol like the pros that they are. They never gave up on a vote and they never stopped trying to convince the legislators in Hartford of the merits of our position. They don't eat much and I'm sure they never sleep. These guys were never better than they were on the night the House of Representatives voted on the Medical Malpractice Reform Bill. We had learned that there would be a caps amendment proposed to the Bill and we knew we had to defeat it. As the Democrats and the Republicans caucused before the session began, they staked out positions outside the caucus rooms. They literally tackled legislators in an effort to support those who had supported us and to change the minds of those who were opposed to us. As the debate raged on the floor of the House, they planted themselves outside the chamber and continued their efforts. We ran up and down the stairs from the gallery to the door of the chamber, where we continued our last minute conversations. When the bell rang and we knew that the House was about to vote, we ran to the gallery to watch the red lights and the green lights light up on the tote board as we counted our way to a defeat of caps, just before midnight.

I know that when the Senate failed to take up the caps amendment and then passed the Medical Malpractice Insurance Reform Bill sometime after midnight on May 4, 2004, that we won a battle in the midst of a raging war. As I write that line, it sounds both overly dramatic and trite. But as I listened to the debate last night and repeatedly heard the legislators, even those who supported us, say that this was but a "first step" toward solving the problem, I knew that caps would be back. I know that the doctors will not give up on this fight. I know that the insurance companies will never stop trying to protect themselves. I know that the CBIA and the Chambers of Commerce have us in their sights. I also know that the civil justice system works. I know that victims of medical malpractice deserve to be compensated. I know that trial lawyers will continue to fight to protect the civil justice system and to protect those victims.

I know that it's been a long year and that this has been an enormous team effort. I also know that as the fight goes on, the trial lawyers and the victims, the lobbyists and the CTLA staff, continuing to work together toward a common goal cannot be beaten. If Governor Rowland chooses to veto the Bill, we'll be back. If Governor Rowland signs the Bill, we'll be back. No matter what the issue, no matter who our challengers are, the Trial Lawyers and its dream team will continue to fight for its members, its clients and the civil justice system.

The Attack on Trial Lawyers and Tort Law

A Commonweal Institute Report

By David C. Johnson, Fellow

Commonweal Institute is located at 325 Sharon Park Drive, Suite 332, Menlo Park, CA 94025, tel: 650-854-9796, fax: 650-854-8132, info@commonwealinstitute.org. Commonweal Institute is a non-profit non-partisan think tank and communications organization committed to advancing a broad moderate to progressive agenda based on the principles of commitment to future generations, environmental protection, a balance between business and society, inclusiveness and fairness, separation of church and state, personal choice and privacy, and a comprehensive and nuanced approach to national security. It issued this report October 1, 2003 authored by David C. Johnson, Fellow of the Institute.

It prefaced the report with a quote from an article captioned "Now, Trial Lawyers Could Use A Good Lawyer …" which appeared in the Christian Science Monitor on June 10, 2003. It reads:

> *"With Republicans in charge of much of Washington — and moving to put limits on litigation — the headquarters of the Association of Trial Lawyers of America (ATLA) could be described as a building under siege. [. . .] ATLA lobbyists are fighting a wave of legislation aimed at capping what juries can award, curbing class-action suits, and protecting individual industries from litigation. Similar bills are getting passed in states, and even attorneys themselves are piling on — filing petitions to limit plaintiff lawyers' fees.*
>
> *At the offices of ATLA, chief lobbyist Linda Lipsen insists the atmosphere has been hostile to their interests since Republicans took control of the House in 1994. Yet the lawyers Ms. Lipsen represents smell a new brand of retribution.*
>
> *'If you cut the legs off the trial lawyers, then you significantly weaken the Democratic Party, and that's what this is all about,' says Jeff Wigington, product liability lawyer from Corpus Christi, Texas, who recently won a $225 million suit against the Ford Motor Co.*
>
> *In the trial-lawyer headquarters at ATLA, Lipsen, the organization's chief lobbyist, points out that they have only three lobbyists fighting for the 'freedom' of individual Americans from limits on their rights against 80 lobbyists on the other side. Not that a group representing the nation's fiercest litigators minds a fight. Lipsen smiles. "We're way up there on their enemy's list."*[1]

The full report is reprinted in this issue of the Forum, with permission of the Commonweal Institute. Members are encouraged to contribute to the Commonweal Institute. Research as reflected in the report that follows takes funding. We encourage our members to consider sending a contribution to the Commonweal Institute to support their future research and advocacy. Donations can be sent to the Institute's Menlo Park address that appears above.

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Introduction

> "It is no secret that, for more than three decades, business interests have invested billions of dollars to sell the public a distorted view of a legal system that is justifiably envied throughout the world. They say rampant litigiousness requires tort "reform" that restricts the legal rights of injured people, not those of businesses suing businesses, which account for most litigation. What they seek, really, is corporate welfare-assurance that their misdeeds will be paid for not by them, but by others."[2]
>
> — Richard H. Middleton, Jr.,
> President, Association of Trial Lawyers of America, 1999-2000

Former ATLA President Richard Middleton, Jr., is correct in stating that "for more than three decades, business interests have invested billions of dollars to sell the public a distorted view of a legal system." Influencing public opinion has been a key strategic aim of the business-driven campaign for so-called "tort reform," which is designed to limit corporate liability, prevent civil lawsuits against corporations, and restrict citizens' ability to pursue recourse in the courts.

In addition to these corporate backers of tort reform, however, there are also politically-oriented right-wing think tanks and other organizations, many not directly associated with industry, that have played a major role in promoting "tort reform."

This Commonweal Institute Report, *The Attack on Trial Lawyers and Tort Law,* shows that, in addition to the expected corporate-front organizations like the American Tort Reform Association (ATRA) and Citizens Against Lawsuit Abuse (CALA), the "tort reform" movement is ideologically associated with a network of organizations, such as the Washington Legal Foundation, the Cato Institute and the American Legislative Exchange Council, which are part of what they themselves call the "conservative movement." This web of "movement" organizations receives general operating support, project grants, and strategic guidance from a core group of ideological far-right-wing foundations that has been working for nearly thirty years to alter public attitudes and move the national agenda to the right.

This web of right-wing organizations funds and supports many other voices that speak on behalf of tort reform and other issues. The people who write the books are funded. The people who write the op-ed pieces are funded. The people who speak on radio and cable TV shows are funded. The people speaking to public interest organizations are funded. Even the people who initially write many of the templates for letters to the editor are funded. In addition to funding these individuals, the right-wing organizations provide them with institutional bases and access to publishers and media.

These right-wing movement organizations have a broad political agenda. They advocate an anti-government ideology that promotes privatization, deregulation, Social Darwinian competition and free markets as solutions to all social problems. By pushing underlying public attitudes ever closer to their ideology, the right-wing organizations have created a political climate favorable to politicians and public officials who advocate tort reform.

The right-wing movement has two major interests in tort reform:

1. Their ideological interest is in weakening constraints on the conduct of corporate entities, and,
2. Their tactical interest is in limiting the income of trial lawyers, thereby limiting the attorneys' ability to lobby and contribute money to what they call "the left."

Trial lawyers and the system of tort law that they support are losing ground. When one looks at major print and broadcast media, at public opinion polls, and at the positions taken by politicians of both major parties, it is clear that there has been a steady shift toward the Right's and the tort-reform movement's attitudes and policies. There is very little reaching major media that frames issues in terms that favor trial lawyers and injured parties. As a result, there is a virtual monopolization of the marketplace of ideas by the Right and tort reform advocates.

Much of the success of the Right's network of organizations comes because they are seen as "independent voices" that are not tied to the insurance industry or other businesses that benefit from the tort reforms they advocate. The independent voices function as a major means of "selling the public" on the purported need for tort reform. This tactic benefits special business interests and conservative movement organizations, and has made them formidable opponents of trial lawyers.

Trial lawyers, too, would benefit from credible independent voices educating and persuading the public of the value of a robust system of tort law. This report will help trial lawyers, and other groups under attack by the Right, recognize the power and effectiveness of the Right's message communications infrastructure. Further, by implication, the report shows the potential benefits of funding comparable organizations to serve as independent voices in the public interest.

Section 1 – Tort Reform Organizations and the Far Right

> "For the last 15 years, insurance companies, manufacturers of dangerous products and chemicals, the tobacco industry and other major industries have been engaged in a nationwide assault on the civil justice system. In nearly every state and in Congress, corporations and their insurers have waged a relentless campaign to change the laws that give sick and injured consumers the ability to hold their offenders responsible for the injuries they cause. . .
>
> Since 1991, 'tort reform' advocates have set up dozens of tax-exempt groups . . . to plant their 'lawsuit abuse' message in the media and the public consciousness, and to influence legislation, the judiciary and jurors. These groups claim to speak for average Americans and represent themselves as grassroots citizens groups determined to protect consumer interests. But their tax filings and funding sources indicate that they actually represent major corporations and industries seeking to escape liability for the harm they cause consumers — whether it be from defective products, medical malpractice, securities scams, insurance fraud, employment discrimination or environmental pollution. These organizations hide their pro-business agenda behind consumer-friendly names like Citizens Against Lawsuit Abuse, Stop Lawsuit Abuse, Lawsuit Abuse Watch, and People for a FAIR Legal System."
>
> "The CALA [Citizens Against Lawsuit Abuse] Files — The Secret Campaign by Big Tobacco and Other Major Industries to Take Away your Rights," a report by the *Center for Justice and Democracy* and *Public Citizen*[3]

A Network of Seemingly-Independent Organizations

Studies like the "The CALA Files"[4] show that, since its inception in the 1980s, the industry-funded "tort reform movement" has pursued a strategy of creating and funding numerous seemingly-independent advocacy organizations that push tort-reform arguments, work to discredit opponents, and use marketing methods to change underlying public attitudes over the long term. Well-known tort reform organizations include the American Tort Reform Association (ATRA) — "a coalition of more than 300 major corporations and trade associations," according to "The Cala Files" — and its numerous state Citizens Against Lawsuit Abuse (CALA) organizations, as well as several state Lawsuit Abuse Watch (LAW) organizations. (For examples of national and state organizations that advocate tort reform, see Appendices 4, 5 and 6)

Their strategy has included the use of phony "grassroots" campaigns designed to give an impression of widespread public support for an issue, the circulation of false or misleading lawsuit scare-stories, the creation of organizations and websites like "LawyersStink.com"[5] that seek to defame and diminish lawyers in the public mind, and the dissemination of anti-lawyer jokes and cartoons. (See Appendix 3)

Most importantly, the tort reform movement is associated with a network of organizations, such as the Heritage Foundation, the Washington Legal Foundation, the Cato Institute and the American Legislative Exchange Council. All are part of the self-described "conservative movement."

The Funding Behind the Right-Wing Movement Organizations

Right-wing organizations in this network all receive major general operating support, project grants and coordinated strategic guidance from a core group of interlocking, ultra-conservative foundations that has been working for nearly thirty years to alter public attitudes and move the national agenda to the right. This core group of right-wing foundations includes the Scaife, Castle Rock (endowed by the Adolph Coors Foundation in 1993), Bradley, Olin and Koch foundations. (See Appendix 4)

> "Five foundations stand out from the rest: the Lynde and Harry Bradley Foundation, the Koch Family foundations, the John M. Olin Foundation, the Scaife Family foundations and the Adolph Coors Foundation. Each has helped fund a range of far-right programs, including some of the most politically charged work of the last several years."
>
> — "Buying a Movement," *People for the American Way Foundation*[6]

These foundations are associated with the extreme right of the political spectrum. The Bradley Foundation's money comes from Lynde Bradley, a member of the John Birch Society.[7] The Coors Foundation previously financed the John Birch Society.[8] The Koch Foundations were founded by Charles and David Koch, sons of Fred Koch, founder of the John Birch Society. David Koch, the 1980 Libertarian Party Vice Presidential candidate, funds many libertarian organizations, and is co-founder of the libertarian Cato Institute.[9] William Simon of the Olin Foundation was a member of the secretive Christian-Right Council for National Policy, and chairman of an organization set up by the Rev. Sun Myung Moon's Unification Church.[10] Richard Mellon Scaife and his foundations were the primary funders of the anti-Clinton efforts of the 1990s, which included funding the vitriolic magazine, *American Spectator.*[11] As for today's John Birch Society, it is currently engaged in a "Get US Out!" (of the UN) campaign, a philosophy reflected across the right-wing movement.[12]

There are now over 500 organizations, of which Heritage Foundation is the most influential, all receiving funding from this core group. A 1999 study, *$1 Billion for Ideas: Conservative Think Tanks in the 1990s,*[13] shows how well-funded these organizations are. The study found that the top 20 of these organizations spent over $1 billion on their ideological campaign in the 1990s, not only on tort reform, but on a number of other issues they are advancing.

Coordination and Interconnection of the Right-Wing Movement Organizations

The right-wing funders, their organizations and associated politicians are closely linked, centrally coordinated and act in concert — that is why they can be considered components of the same movement. Since these individuals and organizations owe some portion (if not all) of their livelihood to a very small core group of funders, they cannot be expected to act independently.

Right-wing funding patterns support lock-step coordination. One example of this coordination is a weekly meeting hosted by Grover Norquist, of the Scaife/Coors/Olin /Bradley (among others)-funded Americans for Tax Reform,[14] and attended by representatives of the funding foundations, major right-wing organizations like the National Rifle Association, the Christian Coalition and the Heritage Foundation, the Republican Party, House and Senate Republican leadership, right-wing associated media, and the White House.[15] Robert Dreyfuss, in his Nation article "Grover Norquist: 'Field Marshal' of the Bush Plan," writes, " 'The meeting functions as the weekly checklist so that everybody knows what's up, what to do,' says Kellyanne Fitzpatrick, a conservative pollster who has been a regular attendee for years."[16]

A *USA Today* story, "Pipeline Leads to White House" says of Norquist, "To the extent that there is a conservative network, Grover is at the switchboard."[17] Explaining how Norquist's weekly meetings are used to keep varied organizations and individuals in line, a *Guardian Limited* story says:

> "While the ostensible purpose of the meeting is to share information and coordinate strategy, they also give Norquist the opportunity to act as an ideological enforcer. When one member of the Bush administration worried to a New York Times reporter that the administration's plan to repeal the estate tax would cripple charitable giving, he was publicly warned by Norquist that this was 'the first betrayal of Bush', and was gone not long afterward. When a conservative pundit . . . criticized a fellow conservative . . . she was immediately informed by Norquist to decide 'whether to be with us or against us'. She was no longer welcome at the meetings."[18]

David Brock, in his book *Blinded By the Right,* described from inside this "movement" how different parts of the right-wing web and their funders interacted during the attempt to remove President Clinton from office. Brock writes that funding was supplied by Richard Mellon Scaife, with Federalist Society (partly funded by Scaife) lawyers and judges working behind the scenes assisting Special Prosecutor Ken Starr and supplying information to the (partly Scaife-funded) *American Spectator* magazine.[19]

The interconnectedness of these organizations — leveraging the work of individuals and organizations tied to this movement — increases their effectiveness in disseminating messages to the public through seemingly independent channels. Individuals whose education was directly or indirectly funded by scholarships from the core group of funders and obtained at educational institutions that receive funding from this core group then graduate to work at organizations that receive funding from this core group, producing work that is funded by grants and fellowships from this core group. Their research cites other research pieces, published by others similarly receiving funding from this core group. Their books are published by publishers receiving funding from or ideologically associated with this core group, promoted by media and businesses ideologically associated with this core group, reviewed by other individuals similarly associated with this core group, and sold in part through channels ideologically associated with the goals of this core group. In addition, still other organizations that receive funding from this core group then refer to this work to validate and give the appearance of credibility to their own work or messaging. (See Appendix 2)

> "The overlap among members of foundations, think tanks and, increasingly, the Bush team, borders on the incestuous."
>
> — "Perspective: Who funds whom?" *Energy Compass*[20]

This interconnectedness gives their "research" an aura of credibility by citing each other's work and presenting it as conducted by independent, authoritative sources. The majority of the "conservative" experts and scholars writing newspaper op-ed pieces, books and magazine articles, and even the organizations that generate the "talking points" and position papers used by TV pundits and radio talk show hosts, are directly funded by, work for organizations supported by, or receive some form of support from this core group of funders. (See Appendix 2)

This pattern of concentrated, interlinking financial backing and ideological interconnectedness is found in conservative organizations backed by the core group of funders previously described. A similar pattern is not found between the funders and organizations outside the right-wing movement.

The Ideology Underlying Tort Reform Arguments

Tort reform has been sold to the public on the bases of (1) "unreasonably" large settlements that "greedy" attorneys receive: (2) silly, unworthy ("frivolous") lawsuits; (3) adverse impact of lawsuits on the cost of products and insurance premiums; (4) adverse impact of malpractice suits on the cost, quality, and availability of medical care; (5) adverse, "unfair" impact on certain industries (e.g., tobacco, asbestos, fast food); and, finally, (6) the purportedly unscrupulous nature of trial attorneys.

But a number of tort reform arguments rest upon a broader, underlying ideological foundation, one built around the ideas of personal responsibility, free markets, deregulation of business, and privatization of government functions. For example, the values of self-reliance and personal responsibility are evoked in tort reform arguments regarding the dangers of cigarette smoking and fast food. The free enterprise theme is frequently evoked in arguments for limiting punitive damages, because of the potential harm to a company or a whole industry. By promoting an anti-government, pro-corporate philosophy that encompasses many issues, the Right has laid the ideological groundwork for public acceptance of these tort reform arguments. The problem is that the right's ideologues have warped the values they claim to espouse, and the danger is that they have taken them to extremes.

In an article in *Capitalism* magazine, Joseph Kellard links tort reform to "personal responsibility," using hyperbolic and ideologically loaded language such as "statist" to describe those who believe in government, "looting of individuals" to describe taxes, and "physical force" to describe laws.[21] He decries

> "…the falsehood of 'social responsibly', i.e., [the idea] that each individual is somehow responsible for others. This statist idea of evading and manipulating the essence of personal responsibility so as to transform its meaning to include social interdependence, on which Medicare and certain anti-tobacco crusade 'causes' are based, engender injustices, such as the looting of individuals to support the lives of others.
>
> The corollary and equally crucial distinction that statists must destroy to perpetrate these injustices is between voluntary, self-responsible action and the initiation of physical force. If a company sells cigarettes — especially when warnings of their possible detrimental health effects have been forcibly placed on each cigarette pack for over three decades, health effects of which were widely known for many decades prior to such warnings — and people voluntarily smoke their cigarettes and become ill from them, then such harm is not the responsibility of the tobacco company, any more than it is McDonald's responsibility if one often consumes their hamburgers and subsequently develops heart disease. When failure of personal responsibility for discovering the known dangers and consequences of anything one voluntarily ingests are excused, and when laws are subsequently enacted which hold others, i.e., businessmen, responsible for initiating force for what individuals have voluntarily indulged in, then irrational lawsuits are filed and justice becomes impossible."

Similarly, an *Insurance Journal* story, "What About Personal Responsibility,"[22] declares, "People bring lawsuits against other people and businesses for an almost endless variety of reasons. Some are legitimate, many are not. And most of the time, the claims that seem to be absurd or even downright frivolous may never have happened if the claimants had only used common sense or had taken the responsibility for their own actions."

These and similar arguments have been used frequently to make a case for tort reform, but they also are the basis for right-wing arguments on other issues. A restrictive notion of "personal responsibility" also underlies the right-wing philosophy of limiting government's ability to help people. In *"Do You Really Believe in a Limited Government?"*[23] Randall R. Rader, a Federal

Judge and member of the Federalist Society, writes: "If we profess a philosophy of limited government, we profess in the same breath a faith in unlimited personal responsibility."

From there, it's not a great leap to eliminating Social Security (or, for that matter, any of the other entitlement or service programs designed to help the needy). Lawrence W. Reed, former president of the Mackinac Center for Public Policy, (which receives funding from Scaife/Bradley/Koch),[24] argues that "in a free society, responsibility for one's retirement is too important to relinquish to the vagaries of politicized programs. . . . Social Security, make no mistake about it, will ultimately be privatized partially or wholly. . . . It's time that Americans take back a responsibility they should never have trusted to government in the first place, one way or another, the sooner the better."

In *"Personal Responsibility: A Brief Survey,"*[25] David Duff ties "personal responsibility" ideology to yet more standard conservative issues, advocating the elimination of public schools ("When parents began to delegate educational responsibilities to the government, a decline soon followed."); government assistance for health care and welfare ("As with other services, health care and social welfare programs are most effectively provided by the private sector"); government regulation of business ("Government intervention or redistribution, in whatever form, hampers the accurate measure of a businessman's effectiveness in these areas"); unemployment benefits ("allowing people to live off the state while taking an excessive amount of time to find employment"); and taxation itself ("Taxation makes it difficult for many citizens to meet their responsibilities. As time passes, more and more families adopt an attitude of resignation, and fall back on government aid.")

Bringing the underlying ideology of personal responsibility back to tort reform arguments, and never missing an opportunity to ridicule attorneys, the Power-Of-Attorneys website[26] (see Appendix 5) writes, "Personal responsibility left the building the moment personal injury lawyers took over the show and America is none the better for it."

What all these examples of the ideology of "personal responsibility" demonstrate is that attempts to refute tort reform arguments are likely to be effective only if they are supported by a campaign that addresses the underlying ideology that the Right has promoted for the past 30 years.

The Political Agenda — Defunding Trial Lawyers

The alliance of the tort reform movement with the far right involves an agenda that goes beyond such tort-specific issues as jury awards. These linked movements want more than just restricting litigants' rights and weakening regulatory constraints on business. By working to limit jury awards, and thus limiting the income of plaintiffs' attorneys, conservatives seek to "defund the trial lawyers," thereby undermining the attorneys' ability to lobby effectively and to contribute money to the conservatives' political opposition.

In a candid article discussing the Right's agenda, Grover Norquist writes, "Modest tort reform, much of which has been actively considered by committees in both houses, would defund the trial lawyers, now second only to the unions — and this is debatable — as the funding source of the Left in America."[27] He has also written, "Modest tort reform would deprive pillar number three — greedy trial lawyers — of billions from American consumers. In some states trial lawyers give more to Democrats than union leaders do."[28]

This agenda is further illustrated in an August 10, 2003 *Seattle Times* story, "GOP using 'tort reform' as powerful political club":[29]

> "The drive to limit court-awarded damages in civil lawsuits, often called 'tort reform,' usually is framed as a contest between accident victims' rights and corporations' desire to be protected from unreasonably high judgments. Increasingly, however, the battle is deeply partisan, as conservative groups try to mobilize the political right and cripple a key Democratic constituency, trial lawyers. . .
>
> 'It's a double kiss,' said a key strategist involved in the battle taking place in Congress, state legislatures, bar associations and local judicial elections. 'Republicans get to force one of the biggest backers of Democrats to spend money just to survive and, at the same time, please everybody from the Chamber (of Commerce) to the drug companies, to the Realtors, doctors, you name it.'
>
> Ed Lazarus, a Democratic political operative who works for the American Trial Lawyers Association, said: '(I)t's very clear what the program is — it is to defund the Democratic Party.' For the GOP, he said, 'it's a doubleheader: more income for your side, and you take income from the other.' "

The above-mentioned Norquist stories make public what many have suspected — that the Right is not involved in advocating tort reform solely due to their concern over the insurance rates paid by doctors or damage awards paid by businesses. In a coordinated effort to weaken their political opposition, they are similarly targeting the Labor movement through "Paycheck Protection" legislation,[30] teachers unions through advocacy of vouchers,[31] aid to the urban poor, and attacking voting rights.

Section 2 — Reaching the Public, Legislators and Judges

Multi-Issue Think Tanks and Communications Organizations

The right-wing foundations described in Section 1 fund a coordinated network of advocacy organizations, providing general operating support rather than funding narrowly-focused programs. At the center of this network are multi-issue, e.g., tort reform, school privatization, pro-life, etc., think tanks that are marketing and communications organizations, oriented aggressively toward media relations and public communications, as well as traditional scholarly idea generating institutions. Because they address a variety of issues from the same philosophical perspective, the think tanks are able to advance an underlying ideological agenda.

> "We believe that ideas have consequences, but that those ideas must be promoted aggressively. So, we constantly try innovative ways to market our ideas."
>
> — Heritage Foundation Website[32]

The Right's Communications Infrastructure

These right-wing organizations function as an infrastructure that translates the ideas and policies of ideological think tanks into influential language, and then repeatedly disseminates those messages to the general public through a variety of communications channels. For example, the Washington Legal Foundation, which is a leading proponent of "shaping public policy through aggressive litigation [when in favor of the Right's goals] and advocacy," writes that their

> broad-based communications outreach program disseminates our free enterprise message through print and electronic media, public education advertising campaigns, and on-site seminars and briefings.[33]

The Right's organizations use sophisticated marketing meth-

ods to "translate" — packaging ideas to appeal to people's deeper feelings and values — and disseminate messages designed to alter underlying public opinions to be supportive of their shared ideology. Even single words or phrases, selected for their effectiveness, are shared by multiple voices to reinforce the right wing message. (See Appendix 1)

This in turn leads to public support for their organizations and ideology, puts public pressure on legislators to support their issues, and elects public officials who support their agenda and appoint judges and agency officials who carry out their policies.

> The National Center for Policy Analysis prides itself on aggressively marketing its products for maximum impact by "targeting key political leaders and special interest groups, establishing on-going ties with members of the print and electronic media, and testifying before Congress, federal agencies, state lawmakers, and national associations."
>
> — from *National Committee for Responsive Philanthrophy's* study, "The Strategic Philanthropy of Conservative Foundations" [34]

When it comes to tort reform, the strategy has been remarkably consistent. Conservative "think tanks" publish research that backs up the "tort reform" movement's claims and develop "talking points" for distribution to speakers, pundits, writers and the media. Other organizations provide trained speakers for radio and television programs. Still others publish magazine articles, op-ed pieces, and books based on the research from the think tanks. Some organizations work to discredit opponents. Others work to disparage the legal profession in the public mind. Yet others spread misleading stories about what they call lawsuit abuse. (See Appendix 3) All of this is designed to weaken trial lawyers and liability lawsuits, while simultaneously garnering support for tort reform.

In sum, tort reform messages are amplified by the Right's communication machine. Because conservative movement organizations share the same basic ideology, they are able to validate and leverage each other's work, creating a multiplier effect. This enables them to operate as a message amplification infrastructure, which has been referred to as "The Mighty Wurlitzer."[35] To the public, it appears that there are many diverse voices from a number of independent organizations and media outlets, giving the appearance of a widespread consensus of opinion. In truth the messages come from a core group using its network of advocacy organizations as an echo chamber, making one voice sound like many.

A Broad Campaign, Utilizing Multiple Channels

> "Politics is about persuading large numbers of people."
>
> — Rush Limbaugh

The Right's message amplification infrastructure has a broad reach, repeating coordinated strategic messages through multiple communication channels: conservative talk radio, Fox News, Internet sites like the Drudge Report, op-ed pieces in newspapers across the country, prefab letters-to-the-editor, books, pundits and columnists, talking points distributed to politicians and public speakers, advertisements, and newspapers like the *Washington Times* and *Wall Street Journal*.

The result, if you listen closely, is that the same words and phrases magically appear in multiple media at approximately the same time. Staying on message is a skill well-honed by the proponents of tort reform.

The tort-reform movement even utilizes such innovative messaging channels as sponsoring high-school essay contests on lawsuits. Citizens Against Lawsuit Abuse (CALA), for example, encourages students to enter their essay contest by offering, "cash prizes … in the amounts of $1000, $500 and $250 to finalists selected by a distinguished panel of elected officials, attorneys, and other civic leaders."

"The essay," CALA writes, "may include any of the following discussion points:

1) Define Lawsuit Abuse.
2) Give 2-3 examples of frivolous (abusive) lawsuits.
3) Discuss why some people & their lawyers file frivolous lawsuits.
4) Determine if jury service has any affect on stopping law suit abuse and/or
5) Determine if lawsuit abuse undermines principles of individual responsibility."[36]

In effect, such organizations are using public institutions to promote and legitimize an attorney-bashing agenda, while simultaneously propagandizing a new generation.

Coordinated Dissemination of Strategic Messagess

The Right's messaging infrastructure draws effectively on communication techniques from the fields of marketing, public relations, and corporate image-management. They package their messages to appeal to people's deeper feelings and values, and they have refined their communication techniques and vocabularies to motivate their potential supporters effectively. Both the industry-sponsored "tort reform" organizations and right-wing groups coordinate their messaging to increase their effectiveness. (See Appendix 1)

The right-wing Manhattan Institute's Center for Legal Policy (CLP)'s captures perfectly the marketing and message-dissemination capabilities of right-wing think tanks.

> The CLP's mission is to communicate thoughtful ideas on civil justice reform to real decision-makers. The Center fulfills this mission by publishing general-interest books and academic volumes; white papers, reports and op-eds; and a forum series on civil justice issues. The CLP also holds conferences and seminars for policy-makers, judges and journalists; CLP senior fellows make frequent radio, television and public appearances and have testified before both houses of Congress; and Senior Fellow Walter Olson manages a website, overlawyered.com, with daily updates and incisive commentary on the effects of "overlawyering" on American business and society.[37]

The communication efforts of numerous state Against Lawsuit Abuse (CALA) organizations, coordinated by the American Tort Reform Association (ATRA), are described in the Center for Justice and Democracy's report, "The CALA Files:"

> The CALAs' strategy and message has been coordinated by ATRA and its public relations consultant APCO & Associates, which supply the groups with strategic guidance, media training, and pre-produced radio, television, print advertising and billboards designed for maximum media exposure and legislative impact. Other regional and national political consultants and polling firms help tailor the CALA message to local concerns.[38]

The Tactic of Creating Conventional Wisdom

One key to moving public opinion has been to create "conventional wisdom" through the constant repetition of simple messages through multiple channels over a long period of time. Two main examples are the claims that "Social Security is going broke" and that "public schools are failing." Both statements are at best questionable, yet both have been firmly embedded in the "public mind" by purposeful repetition in a variety of media outlets and communications venues.

Examples of conventional wisdom manufactured by the tort reform movement include:

- "Junk lawsuits" are "out of control," "strangling our legal system" and "crippling businesses."
- "Lawsuit abuse" "extorts money" from legitimate business.
- Trial lawyers are "greedy."
- The large numbers of "frivolous lawsuits" drive up insurance costs.

These are just some of the simplistic and misleading messages that the tort-reform movement has spent vast amounts of time and money drumming into the public mind. As more and more people come to believe in the existence of these "problems," the "solutions" offered by right-wing politicians become increasingly appealing.

Shaping conventional wisdom depends on following a long-term plan. The National Association of Manufacturers' Fair Litigation Action Group's (FLAG) website shows their understanding of the value of a long-term approach:

> …FLAG will work through the National Association of Manufacturers Legal Policy Issues Committee to initiate **a broad multi-year awareness campaign** [emphasis added] among NAM members and their employees, including more than 350 member associations located in all 50 states. The campaign will focus on the importance of fair liability laws and what legal reform measures are needed to achieve this goal.
>
> — National Association of Manufacturers — Fair Litigation Action Group (FLAG)[39]

In a long-term approach, strategic messages are developed and repeated as steps toward the final goal. For example, first stories about ridiculous-sounding lawsuits are spread. Once "everyone knows" lawsuits are "frivolous" and "out of control," the public is barraged with messages about how these lawsuits are causing doctors to leave the profession. Only then does the movement introduce legislative "solutions."

Reaching State Legislatures

The American Legislative Exchange Council (ALEC) stands as a compelling example of the political power that can result when the traditional business-oriented, single-issue organizations operate in conjunction with the multi-issue organizations of the Right. ALEC, founded in 1973 by Paul Weyrich, (also the founder of the Heritage Foundation), is a major player in state tort reform battles. ALEC develops legislation templates for tort reform laws being passed in several states.[40] In a June, 2003, commentary[41] Weyrich wrote:

> Fortunately, we have the organization that is playing a vital role in advancing the conservative agenda where it works best — the state and local level — and this organization serves as our early radar system for detecting coming trends and concerns in public policy. . .
>
> As an example of how the states can circumvent Washington gridlock, Parde says the votes in the U.S. Senate are just not there for substantive tort reform. But approximately a dozen states have used the model legislation developed by ALEC to provide some kind of relief from "jackpot justice," unwarranted settlements that are costly to consumers and businesses and medical practitioners.

In a recent commentary, Rep. Frank Mazur of Vermont, in describing ALEC's 2003 annual meeting, unwittingly reveals the strategic ideological interconnectedness of the Right:

> In early August, I attended the annual meeting of the American Legislative Exchange Council (ALEC) in Washington, DC. ALEC is a national organization of legislators who are committed to the Jeffersonian principles of free markets, limited government, and individual liberty. Ninety-eight members of Congress are former ALEC members.
>
> Over 2,700 participants attended the meeting including state and national leaders, senior business executives, leading public policy experts and members of the media. Vice President Richard Cheney, Homeland Security Secretary Tom Ridge, Colorado Governor Bill Owens, former Congressman J.C. Watts, Jr. and Washington, DC Mayor Anthony Williams headlined this annual meeting.
>
> Over three days, twelve workshops were held on tort reform, homeland security, school choice, state budgets, prescription drugs Medicare/Medicaid reform and environmental health. Experts discussed and in some cases debated these issues and presented various views for legislators to consider in their states.[42]

In a report titled "Corporate America's Trojan Horse in the States, The Untold Story Behind the American Legislative Exchange Council,"[43] the Natural Resources Defense Council and Defenders of Wildlife state that "ALEC is little more than a tax-exempt screen for major US corporations and trade associations that use it to influence legislative activities at the state level." The report describes how, for a two-year $50 membership fee, state legislators are given "junkets to prime tourist destinations, . . . free or heavily subsidized trips that resemble vacations for their spouses and children, and an assortment of other fringe benefits." According to the report, ALEC also operates a Political Action Committee (ALEC-PAC) that gives contributions to state legislators. While ALEC describes itself as nonpartisan, all the state legislators who serve as officers are Republicans, as are all but one of its 29 directors.

Tort Reform Organizations Work to Influence, Elect and Appoint Supportive Politicians and Judges

The right-wing movement has also taken to treating federal judges to all-expenses-paid seminars at luxury resorts and "educating" them about economics and free markets. (See Appendix 4, regarding the Law and Economics Center of George Mason University.) In a July, 2000, report titled "Nothing For Free: How Private Judicial Seminars Are Undermining Environmental Protections and Breaking the Public's Trust," the Community Rights Council examines the interest groups and right-wing foundations funding these junkets. According to the report, "the three organizations hosting the most trips . . . share a remarkably similar, and in some respects extreme, conservative/libertarian ideology."[44]

The extremist Right and the tort reform movement are also working to elect politicians who will pass their legislation and judges who will ultimately rule in favor of the interests of the movement and its partners. The CALA Files report discussed efforts to elect state judges who will rule in favor of tort-reform advocates:

> A principal focus since the mid-1990s has been to ensure the election of pro-industry state judges . . . The tobacco industry has also been involved in such elections, for example, in Texas, Louisiana, Mississippi and Alabama. Such activities also became a significant focus for ATRA [American Tort Reform Association] and APCO [APCO & Associates, a "grassroots" lobbying and PR firm] as well in the late 1990s as more and more state courts have struck down tort law restrictions.[45]

A *Dayton Daily News* story further illustrates these efforts to elect state judges; it reports, "The fight is no more evident than in the campaign contributions for two seats on the Ohio Supreme Court. Whoever wins the seats Nov. 5 could be asked

to judge whether capping jury awards in medical malpractice cases is constitutional."[46]

In Texas, the tort reform movement (with Enron's Ken Lay helping start "Texans for Lawsuit Reform," one of the first tort reform organizations)[47] was instrumental in electing George W. Bush as governor of Texas, launching his political career.

> The story is often told of how George W Bush came almost out of nowhere to win the Texas governorship in 1994 from a popular Democratic incumbent, Anne Richards. It is often explained in terms of Mr. Bush's optimistic never-say-die nature and his easy manner with ordinary Texans.
>
> But it had a lot to do with one campaign pledge. "Probably the first and most important thing I will do when I am governor of this state," he promised, "is to insist Texas changes the tort laws and insist we end the frivolous and junk lawsuits that threaten our producers and crowd our courts.
>
> — "How big money buys big votes in US race," *Guardian Unlimited*[48]

Electing state judges — and now appointing federal Judges – is a key component of the strategy of both the Right and the tort reform movement. This potentially renders in-court legal arguments irrelevant.

> The wins are key: In the mid-1990s, business persuaded lawmakers in several states to limit punitive damage awards, only to have the courts nullify the laws as unconstitutional. Sympathetic jurists would be less likely to reverse legal reforms the states passed.
>
> — "Tort Reform: A Little Here, a Little There..." *Business Week*[49]

Meanwhile, the Right and the tort reform movement are going on the offensive against anyone who might question their goals, including fellow conservatives. The core group that controls the right wing movement is attacking moderate Republicans, accusing them of ideological impurity, deriding them as "RINOs" (Republicans In Name Only), and even seeking to drive them from office and out of the party.[50]

For their part, pro-tort reform corporate organizations are pressuring states by threatening to advise investors against investing in municipal bonds of states that do not limit punitive damage awards.

> Meanwhile, the heavy hitters in the industry have come out swinging. At the Risk and Insurance Management Society Inc. (RIMS) conference in Chicago last month, AIG CEO Maurice "Hank" Greenberg came out in favor of a U.S. Chamber of Commerce scheme to target jackpot justice states by appealing to investors not to buy their municipal bonds.
>
> — "Tort Reform Advocates Strike While Iron is Hot." *Insurance Journal*, May 5, 2003[51]

Section 3 — Effectiveness of the Tort Reform Campaign

The Right Sets the Public Agenda

In recent years, the Right and the tort reform movement have enjoyed unprecedented success in influencing both federal and state legislation and policies by: 1) using organizations perceived by the public as independent, 2) repeating the anti-tort message as consistently as possible through multiple channels, 3) employing sophisticated communications methods, 4) following a coherent long-term plan, and 5) coordinating both ideologically and tactically with the Right's network of advocacy organizations.

As a result, the Right's message amplification infrastructure successfully drowns out significant opposing voices. As People for the American Way Foundation's study "Buying a Movement" has put it:

> The result of this comprehensive and yet largely invisible funding strategy is an extraordinary amplification of the far right's views on a range of issues. . . They have . . . been able to keep alive in the public debate a variety of policy ideas long ago discredited or discarded by the mainstream. . . The success of the right-wing efforts are seen at every level of government, as a vast armada of foundation-funded right-wing organizations has both fed and capitalized on the current swing to the right in Congress and in the state legislatures.[52]

Right-wing ideological premises and arguments dominate the national debate, with big money using the right-wing communications infrastructure to drown out other voices. "As one investigative journalist stated years ago in a pioneering investigation of the conservative philanthropy of Richard Scaife," wrote Sally Covington in her 1997 study, "The Strategic Philanthropy of Conservative Foundations," " 'layer upon layer of seminars, studies, conferences, and interviews [can] do much to push along, if not create, the issues, which then become the national agenda of debate.... By multiplying the authorities to whom the media are prepared to give a friendly hearing, [conservative donations] have helped to create an illusion of diversity where none exists. The result could be an increasing number of one-sided debates in which the challengers are far outnumbered, if indeed they are heard from at all.' " [53]

A May *Insurance Journal* article boasts:

> "In my 20-plus years in this business, I don't remember a situation where both at the federal level, where the political makeup of the House and Senate . . . were majorities for the conservative side and public sentiment have lined up at the same time," said Joseph J. Annotti, a spokesperson for the National Association of Independent Insurers. "This improves the chances of getting meaningful reforms enacted. We've all learned our lessons from the past. You've got to use your political chips when you have them."
>
> And the chips most certainly are being played. The American Tort Reform Association has publicized the results of a poll it financed in which the 800 respondents, across party lines, overwhelmingly agreed there are too many lawsuits, greedy lawyers are to blame, and they'd punish politicians who did not vote for reform by voting against them."[54]

The combined tort campaign and right-wing message amplification approach has, unfortunately, garnered significant public and legislative support. Although trial lawyer and pro-tort organizations have made significant lobbying efforts over the years, they are losing in the court of public opinion. The *Insurance Journal* article reports that, "83 percent of those polled agreed there are too many lawsuits in America, and 45 percent support tort reform as opposed to 6 percent who oppose it. More impressively, 67 percent of the respondents said they'd be more likely to vote for a politician who favored tort reform and 64 percent said they' d be less likely to vote for a candidate who opposed it."[55]

In June, the American Osteopathic Association's report, "Professional Liability Reform, 2002-2003 Enacted Legislation"[56] listed the following recent successes regarding tort reform:

- Alaska capped punitive damages at $500,000
- Colorado enacted a $300,000 non-economic damages cap
- Idaho enacted a $250,000 non-economic damages cap
- Mississippi enacted limited punitive damages

- Nevada enacted a $300,000 non-economic damages cap
- Ohio barred criminal offenders from receiving tort awards, and enacted a $300,000 non-economic damages cap and sliding-scale attorney fees
- Oklahoma enacted a $300,000 damages cap
- Texas enacted a $250,000 non-economic damages cap with a punitive damages cap at 1.4 million, and
- West Virginia enacted a $250,000 damages cap

Then, in July, 2003, the *Insurance Journal* reported that, "This year has been the busiest for enactment of state civil justice reform legislation since 1995, according to the *American Tort Reform Association* (ATRA). At mid-year, 20 states already have enacted laws; 19 laws were enacted by the conclusion of 1995. . . . Some states have not concluded legislative sessions and others have called special sessions in order to advance reforms." According to the article, Texas passed far-reaching legislation that included joint and several liability reform, limits on non-economic damages, medical liability reform and punitive damages reform. Arkansas, Idaho and West Virginia have also passed comprehensive "reforms." Additionally, "This year, eight states have enacted medical liability reforms and another 17 have considered or are still considering legislation."[57]

Influencing Jurors

Even where anti-tort legislation is not enacted, the pool of potential jurors has been inundated with tort reform messages to the point where these ideas are taken as conventional wisdom. Jurors — even when it runs against their own personal interests as consumers — are exercising personal tort reform by finding against plaintiffs.

In his report "Juror Perceptions About Lawsuits and Tort Reform" Dr. Richard Waites of the firm The Advocates, reports "a significant relationship between attitudes toward tort reform and verdicts," and writes that "jurors who adhere to tort reform beliefs and will apply them to achieve a more conservative verdict are also more likely to believe that individuals have a great deal of responsibility for their own conduct and outcomes. Those jurors are also less likely to hold a corporation or anyone else responsible for someone' s injuries absent clear evidence and strong arguments."[58]

The Minnesota Trial Lawyer report "Tort Reform: Perception Versus Reality" reaches similar conclusions:[59]

> The most notable consequence of the tort-reform media campaign is the changed attitudes of judges and jurors. The industry's campaign to portray the legal system as out-of-control and plaintiffs' lawyers as unscrupulous has impacted deliberations in the jury room. One study . . . concluded that 83% of jurors think that there are "far too many frivolous lawsuits," 57% believe that "lawsuits interfere with the development of new and useful products," and 51% believe that "big business . . . is adequately concerned" with safety. Juries also demonstrated a reluctance to find fault in industry practices."

Achieving Their Goals

Major print and broadcast media, public opinion polls and the positions taken by politicians of both major parties make it clear that there has been a steady shift toward the tort-reform movement's and the Right's attitudes and policies. Very little that reaches the major media frames issues to the advantage of trial lawyers and injured parties. The acceptance of the term "tort reform" even by its opponents shows how effectively the right wing has managed to frame the issue.

The right-wing movement, in combination with corporate interests, has been successful not only in opposing trial lawyers, but also in getting people into government office who support their ideology. As a result, they have gained control over the legislative and administrative branches of the Federal government. With resulting appointments to the Courts, the Right and the tort-reform movement are poised to achieve their ultimate goal: passage of federal tort reform legislation that effectively "defunds" trial lawyers.

Section 4 — Conclusion

This report has shown that the tort reform movement is part of a two-pronged effort to influence public opinion and gain political power. Industry tort-reform groups utilize "independent voices" — PR agencies and phony "grass-roots" front groups that appear to be independent of the direct beneficiaries of "tort reform." Meanwhile, the Right has in place a tremendous ideological messaging infrastructure, working for the past 30 years to influence the public's underlying social and ideological attitudes on issues, including tort reform. They have been disciplined, strategic, and patient. They have focused substantial resources on changing the underlying political and social environment, rather than focusing only on single issues.

Fighting Back

To mount an effective opposition, it is important that trial lawyers and others understand how the right-wing opposition operates. Information about the right-wing movement should be broadly disseminated to trial lawyers and others who are impacted by the actions from the Right.

Trial lawyers are not the only ones being attacked by the Right. Labor, public education, the environment and a wide range of other issues of concern are also under attack. Efforts to develop and/or strengthen relationships between organizations representing these constituencies, for the purpose of countering right-wing and corporate offenses, are important.

The Right has coordinated their efforts geographically as well as through many "independent voice" sources. The attack on the tort system is coordinated between national organizations like ATRA and state organizations like the CALAs. The effectiveness of this approach demonstrates the importance of close communication between national organizations like ATLA, and the numerous state organizations that favor a strong tort system, including organizations of other than trial lawyers.

Communication and coordination between existing organizations is not enough. One problem is that those responding to the Right's attacks tend to focus on narrow, short-term issues, often reaching existing supporters rather than the general public. Trial lawyers, for example, have tried to explain to the public the truth about damage awards and misleading claims of lawsuit abuse, in response to the current attacks from the tort reform movement and the Right. But, because so many of the pro-tort reform arguments rest on the Right's ideology, the effort to combat tort reform must also work to diminish public acceptance of the underlying ideology itself. Just as blackberry vines in the garden reappear until the root system is removed, tort reform arguments will continue to thrive with the public until the underlying ideology loses strength.

The Right's success demonstrates the need — *and provides the model* — to build independent communications infrastructure organizations that reach the general public with messages that counter ideological messaging from the Right. One doesn't have to reinvent the wheel, one need only look at the Right's success and emulate it. Trial lawyers and other groups attacked by the Right should begin funding multi-issue organizations with a long-term marketing/communications plan to counter the Right's ideology *as well as* specific tort reform arguments. Without independent voices serving as advocates for trial lawyers and the tort system, both the public and the politicians can be expected to support continued tort "reform."

Funding such organizations will have additional favorable

effects. People and politicians who understand the need for strong consumer and patient protections are also likely to be pro-environment, pro-choice, and supportive of other issues. Similarly, pro-environment, pro-choice, etc. voters are very likely to be strongly supportive of the rights of consumers and patient and the interests of trial lawyers. And, owing to the principle of interconnectedness, over time, a funded marketing/communications infrastructure will support a growing network of credible individuals writing books, articles and commentaries, appearing on television and radio news and issues programs, speaking to public interest groups, and using their skills in many beneficial ways.

The question is how one best goes about building public support for an issue or perspective. The answer is simple, you support independent parties who will serve as independent voices, and who will make your case.

Appendix 1 — Example of Coordinated Dissemination of a Strategic Message

One of the tactics used by the Right is repetition of messages that are designed to resonate with the public and evoke a desired reaction. This appendix presents an example of coordinated use of one such strategic message, which has been repeated in various media, and by various organizations and prominent individuals. In this example the strategic message is that lawyers, lawsuits, etc. are "**out of control.**" The unspoken, subliminal implication of this phrase is that "we have to get it under control."

- Magazine columns: "The tort system in the United States is **out of control.**" "The Tort Tax," *National Review.*[60]
- Newspaper editorials: "The editorial argued that trial lawyers are the reason civil litigation is **out of control.**" Business Councils of New York State story describing *Buffalo News* editorials.[61]
- Politicians: "In this state, the lawsuit industry is devastating the practice of medicine," Bush said, drawing applause. "Too many frivolous lawsuits in this state are being filed against doctors. That's a fact. And too many jury awards are **out of control.**" – President Bush[62]
- Books: 'The Emmy Award-winning host of Court TV's "Catherine Crier Live" describes an American legal system dangerously **out of control** — and finds the lawyers guilty as charged.' Publisher's note for *"The Case Against Lawyers: How the Lawyers, Politicians, and Bureaucrats Have Turned the Law into an Instrument of Tyranny – and What We as Citizens Have to Do About It"* by Catherine Crier
- Advertisements: "**out of control** lawsuit system." Health Coalition on Liability and Access (HCLA) advertisement in *Roll Call* magazine.[63]
- Radio news programs: "Michael Horta, spokesman for a business-backed group pushing for tort reform says the legal process is **out of control** and money is not going to those who need it." *BBC, World Business Review,* Feb. 21, 2003.[64]
- Physicians' associations: "Over the past several months, many ACP-ASIM members have called to express concern about **out-of-control** medical liability premiums and excessive lawsuits against doctors." American College of Physicians-American Society of Internal Medicine (ACP-ASIM).[65]
- Websites: "Lawsuit abuse is a huge problem growing out of control." Orange County CALA. "These are sure fire signs of a legal system spinning completely **out of control.**" Power-of-attorneys website.[66]
- College newspapers: "Tort law '**out of control,**' lawyers to blame, say legal professionals." *Michigan Daily.* University of Michigan. October 16, 1995.[67]
- Letters to the editor: "In the end, if reform is defeated, and the current **out of control** tort system is allowed to gut the access of patients to the physicians whose care they need, the more important question to ask — one which every lawyer in this state should be asking himself — is: Will my doctor be there for me?" May 13, 2003. Massachusetts Lawyers Weekly Legal Services.[68]

Appendix 2 — An Example of Interconnectedness

This is a look at a portion of one individual's tort-reform work, to demonstrate how interconnectedness leverages the work of individuals and organizations tied to the right-wing movement.

Michael I. Krauss, Professor of Law, George Mason University is author of "Tort Reform, CATO Institute's Handbook for 107th Congress, 2001."[69] Other tort reform publications at Cato include "Restoring the Boundary: Tort Law and the Right to Contract."[70] George Mason University is covered in detail elsewhere in this report, and receives funding from the Scaife, Bradley, Koch, Earhart, Olin and Coors foundations.[71] Cato, also discussed elsewhere in this report, receives funding from Scaife, Bradley, Koch, Earhart, Olin and Coors.[72]

According to Professor Krauss' biography,[73] he is a Salvatori Fellow at the Heritage Foundation, described elsewhere in this document, which receives funding from Scaife, Bradley, Coors and others;[74] a member of the Advisory Board of Freedom House, which receives funding from Scaife, Bradley and Smith Richardson;[75] a member of the adjunct faculty of the Institute for Justice, which receives funding from Scaife, Bradley, Koch, Olin and Coors;[76] on the Board of Governors of the National Association of Scholars, which receives funding from Scaife, Bradley, Olin and Coors.[77] His "Past Employment and Service" lists the Competitive Enterprise Institute, which receives funding from Scaife, Bradley, Koch and Coors.[78]

Krauss has made various presentations[79] to the Federalist Society, which receives funding from Scaife, Bradley, Koch, Olin and Coors.[80]

Krauss' tort-reform work is cited at the anti-lawyer website Overlawyered.com.[81]

Krauss' tort reform paper, "Federalism and Product Liability: One More Trip to the Choice-of-Law Well," was published in 2002 *Brigham Young University Law Review* 759.[82] Brigham Young University receives funding from the Earhart and Olin foundations.[83]

Krauss' tort reform paper, "Tort Law, Moral Accountability and Efficiency," ("Most people agree that today's Tort law discourages personal responsibility,") was published in Markets & Morality, a publication of the Acton Institute for The Study of Religion and Liberty,[84] which receives funding from Bradley, Koch and Coors.[85]

Krauss' paper, "Smoke and Fire: Government Recoupment Suits and the Rule of Law," was published by the Independent Institute,[86] which receives funding from Koch and Olin.[87]

The Washington Legal Foundation, described elsewhere in this report, receives funding from Scaife, Olin and Coors,[88] and published Krauss' "Suits Against "Big Fat" Tread On Basic Tort Liability Principles" in their publication, *Legal Backgrounder*.[89] Professor Krauss also speaks at the Washington Legal Foundation.[90]

Krauss' paper, "Today's Tort Suits Are Stranger Than Fiction"[91]

appeared in the publication *Virginia Viewpoint*, published by Virginia Institute for Public Policy, which receives funding from Coors, Koch,[92] and managed by the former President of Cato Institute.

Krauss' work is cited in a pro-tort-reform column by Walter Williams, the John M. Olin Distinguished Professor of Economics at George Mason University.[93]

Krauss' work is cited in a tort reform article by Consumer Freedom (www.consumerfreedom.com), a food- and liquor-industry front-organization.[94]

Krauss is quoted in numerous newspaper stories[95] on tort reform issues.

Michael Krauss' interconnectedness with other right-wing issues:

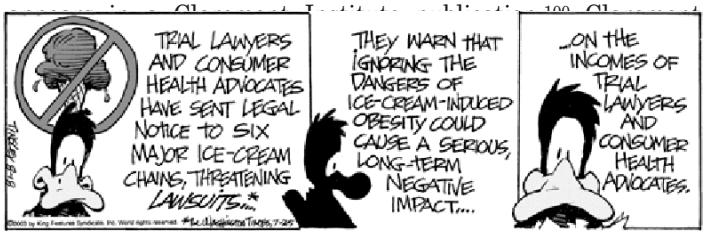
These examples show the utility of having an infrastructure in place to support the Right' s use of the interconnectedness effect to advance multiple issues. With a ready-to-go message amplification infrastructure in place, the right is able to utilize their many funded scholars, such as Krauss, to advance a broad range of causes, not just tort reform.

Krauss authored a *Washington Times* column, "Loading the dice for the ruling?" opposing affirmative action and diversity.[96]

Krauss gave an endorsement of Foundation Francisco Marroquin,[97] where he had lectured, which receives funding from Bradley.[98]

Krauss authored a July 23, 2003 column on conservative *Fox News Online*, "Just Say No To Drug Re-Importation,"[99] supporting the pharmaceutical-industry position.

Krauss signed a petition, *Don't Let The President Lie With Impunity,* (President Clinton, not President Bush). This petition



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- **Lawyers and Other Reptiles.** 'A California lawyer has filed a $100,000 libel lawsuit against GTE Directories Sales Corp., alleging that the publisher listed her name and phone number in at least one yellow pages directory under "Reptiles".' At Citizens Against Lawsuit Abuse website.[103]
- **Laughing at Lawyers, Funny Lawyer Quotes, Jokes & Cartoons, the Lawyer Joke Exchange.** Two Web collections located at a tort reform advocacy website, Power-of-attorneys.com, which also hosts Class Action Law Update, Personal Injury Lawsuits and Legal Information.[104]
- **Lawyers Congregate To Pick Your Food (And Your Pocket).** "Listen carefully when you hear professor [Richard] Daynard and his trial lawyer friends talk about fat deposits," cautions Center for Consumer Freedom Executive Director Rick Berman in a *Boston Herald* op-ed. "They're really referring to their bank accounts, not your love handles." The Center for Consumer Freedom.[105]
- **Looney Lawsuits.** A web collection of silly-sounding lawsuits. American Tort Reform Association.[106]

An example of organizational interconnectedness, utilizing ridicule

The connections in the example: Fox News, Cato Institute, JunkScience.com

- ***"Scare-Mongering Over 'Hillybilly Heroin' Deprives the Rest of Us."*** Published at Fox News by Steven Milloy, publisher of *JunkScience.com*, an adjunct scholar at the Cato Institute and the author of the upcoming book *Junk Science Judo: Self-defense Against Health Scares and Scams* (Cato Institute, 2001).

"The OxyContin controversy is a liberal's dream come true. Sympathetic — almost heroic — dopeheads avenged by government agencies and trial lawyers swarming all over the greedy and malfeasant drug company."[107]

Appendix 4 — Examples of the Involvement and Funding of Right-Wing Organizations That Advocate Tort Reform

Heritage Foundation

Website: http://www.heritage.org/

Statements from the Heritage Foundation website:

"Founded in 1973, The Heritage Foundation is a research and educational institute — a think tank — whose mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense."[108]

"We believe that ideas have consequences, but that those ideas must be promoted aggressively. So, we constantly try innovative ways to market our ideas."[109]

Example of Heritage Foundation tort-reform product:

"The Urgent Need for Civil Justice Reform" by Edwin Meese III and Paul Rosenzweig.[110] A sample from this commentary:

"These lawyers, with the complicity of creative judges in a few states, routinely create new rights and obligations where none had existed before. The tobacco cases are merely the blueprint for a strategy of systematically transferring political power to a select few. [. . .] The next set of targets for predatory lawsuits has been identified: With the assistance of state courts, tort lawyers next intend to reform the health-care system in America. And beyond the health-care system looms the specter of other "creative" suits. [. . .] In short, if the trial lawyers can't change America through the courts, they are seeking to buy the Congress they need to enact the agendas they support. And every American, conservative or liberal, should fear the prospect. Because if we don't fix the civil justice system, we risk all that is precious in the American system — democracy and self-government most of all."

Heritage Foundation: Examples of recent major right-wing foundation funding:[111]

Date	Amount	Comment	Provider
1-1-2002	1,375,000	No comment provided	SarahScaife Foundation
1-1-2002	15,000	No comment provided	The Carthage Foundation (SCAIFE)
1-1-2001	200,000	General support	Castle Rock Foundation (COORS)
1-1-2001	925,000	No purpose given	Sarah Scaife Foundation
1-1-2000	200,000	General operating support.	Castle Rock Foundation
1-1-2000	1,500,000	No purpose given	Sarah Scaife Foundation
1-1-1999	780,000	No purpose given	Sarah Scaife Foundation
1-1-1999	412,500	To support the Domestic Policies Studies Program, Bradley Resident Fellows, and State Relations Department	The Lynde and Harry Bradley Foundation, Inc.
1-1-1999	825,000	Continued support of the Domestic Policies Studies Program, Bradley Resident Fellows, and State Relations Department	The Lynde and Harry Bradley Foundation, Inc.
1-1-1999	200,000	General support of think tank providing free-market answers to national public policy issues	Castle Rock Foundation

Heartland Institute

Website: http://www.heartland.org/

Example tort-reform product:

Publication *"Lawsuit Abuse Fortnightly,"* available at website.[112]

Example of corporate funding source, according to Friends of the Earth:[113]

Funding from ExxonMobil $90,000 in 2001

Example of interconnectedness:

From Heartland's *Lawsuit Abuse Fortnightly:*

"Information on lawsuit abuse can be found on these Web sites:
www.heartland.org — Heartland Institute
www.alec.org — American Legislative Exchange Council
www.atra.org — American Tort Reform Association
www.fed-soc.org — Federalist Society
www.halt.org — HALT
www.manhattan-institute.org — Manhattan Institute
www.overlawyered.com — OverLawyered
www.wlf.org — Washington Legal Foundation"

Heartland Institute: Examples of recent foundation funding:[114]

Dat	Amount	Comment	Provider
1-1-1998	10,000	Educational Programs	Claude R. Lambe Charitable Foundation (KOCH)
1-1-1997	15,000	Intellectual Ammunition magazine	John M. Olin Foundation, Inc.
1-1-1997	10,000	Educational Programs	Claude R. Lambe Charitable Foundation
1-1-1996	10,000	Educational Programs	Charles G. Koch Charitable Foundation
5-19-1995	25,000	To support general operations	The Lynde and Harry Bradley Foundation, Inc.
1-1-1995	25,000	POLICY NETWORK SUPPORT	Sarah Scaife Foundation
1-1-1995	10,000	General Program	Charles G. Koch Charitable Foundation

Americans for Tax Reform (ATR)

ATR is not directly tied to the tort-reform movement, but is included here because it funds Grover Norquist, who leads the weekly right-wing coordination meetings, and who has written that the real goal of tort reform is to "defund" trial lawyers as a step toward defunding "the left."

Web address: http://www.atr.org

Some examples of recent foundation funding:[115]

Date	Amount	Comment	Provider
1-1-2002	100,000	No comment provided	Sarah Scaife Foundation
1-1-2001	50,000	No purpose given	Sarah Scaife Foundation
1-1-2001	50,000	Public education efforts on cutting taxes and reducing the cost of government	John M. Olin Foundation, Inc.
1-1-2000	50,000	No purpose given	Sarah Scaife Foundation
1-1-1999	75,000	Public education efforts on reducing taxes and reducing the cost of government	John M. Olin Foundation, Inc.
1-1-1999	50,000	No description given	The Carthage Foundation (COORS)
1-1-1999	100,000	No purpose given	Sarah Scaife Foundation
1-1-1998	50,000	No description available	The Carthage Foundation
1-1-1997	100,000	Public education efforts on reducing taxes and the cost of government	John M. Olin Foundation, Inc.
1-1-1997	75,000	PROGRAM SUPPORT	The Carthage Foundation
12-10-1996	12,500	To support general program activities	The Lynde and Harry Bradley Foundation, Inc.
9-30-1996	12,500	To support general program activities	The Lynde and Harry Bradley Foundation, Inc.

Washington Legal Foundation (WLF)

Website: http://www.wlf.org/

Statements from the WLF website:

> "WLF's broad-based communications outreach program disseminates our free enterprise message through print and electronic media, public education advertising campaigns, and on-site seminars and briefings. WLF also publishes its opinion editorials "In All Fairness" in The New York Times, which reaches seventy major media markets and is read by ninety percent of America's major newspaper editors.
>
> WLF publishes timely legal studies in seven highly regarded formats written by expert authors. Through target marketing, our publications reach judges, federal and state legislators, executive branch officials, business leaders, the media, students, professors, and national decision-makers. To date, we have produced 1,470 publications."[116]
>
> "WLF is a unique institution with three essential cornerstone programs:
> - shaping public policy through aggressive litigation and advocacy
> - publishing timely legal studies
> - educating policy-makers and the public through extensive communications outreach"[117]

Example tort reform product:

> Civil Justice Reform, Online Journal.[118]
>
> WLF Publishes the Legal Opinion Letter, a pro- tort reform publication.

Washington Legal Foundation: Examples of recent foundation funding:[119]

Date	Amount	Comment	Provider
1-1-2002	50,000	No comment provided	The Carthage Foundation (SCAIFE)
1-1-2001	65,000	No purpose given	Sarah Scaife Foundation
1-1-2001	100,000	General Operating Support	Claude R. Lambe Charitable Foundation (KOCH)
1-1-2000	500,000	Litigation and legal studies programs	John M. Olin Foundation, Inc.
1-1-2000	100,000	WLF's Civic Communications Program	John M. Olin Foundation, Inc.
1-1-2000	75,000	No purpose given	Sarah Scaife Foundation
1-1-1998	250,000	A bi-weekly series of op-ed articles published in the *New York Times*	John M. Olin Foundation, Inc.
1-1-1998	250,000	Litigation and legal studies programs	John M. Olin Foundation, Inc.
1-1-1998	125,000	No description available	The Carthage Foundation (SCAIFE)
1-1-1998	150,000	General Operating Support	Claude R. Lambe Charitable Foundation KOCH

American Legislative Exchange Council (ALEC) Civil Justice Task Force

Website: http://www.alec.org/viewpage.cfm?pgname=5.03

> "Established in 1973 by Paul Weyrich of the Free Congress Foundation, among others, ALEC's purpose is to reach out to state office holders. In the words of ALEC's executive director, Sam Brunelli,
>
> > 'ALEC's goal is to ensure that these state legislators are so well informed, so well armed, that they can set the terms of the public policy debate, that they can change the agenda, that they can lead. This is the infrastructure that will reclaim the states for our movement.'
>
> ALEC has the financial support of more than 200 corporations including Coors, Amway, IBM, Ford, Philip Morris, Exxon, Texaco and Shell Oil."[120]
>
> — Media Transparency description of ALEC

ALEC: Examples of recent foundation funding:[121]

Date	Amount	Comment	Provider
1-1-2002	70,000	No comment provided	Allegheny Foundation (SCAIFE)
1-1-2001	50,000	General support	Castle Rock Foundation (COORS)
1-1-2001	75,000	General operating support	Charles G. Koch Charitable Foundation
1-1-2000	75,000	No purpose given	Allegheny Foundation (SCAIFE)
1-1-2000	85,000	General Operating Support	Charles G. Koch Charitable Foundation
1-1-2000	50,000	General support	Castle Rock Foundation
1-1-1999	75,000	No description given	Allegheny Foundation
1-1-1999	50,000	Provides policy leaders in the 50 states with research, model legislation general support for 1998/1999	Castle Rock Foundation
1-1-1999	50,000	Agency provides policy leaders in the 50 states with research and model legislation. General support of 2000 activities	Castle Rock Foundation
1-1-1999	13,000	General Operating Support	Charles G. Koch Charitable Foundation

Federalist Society

Website: http://www.fed-soc.org/

Example tort reform product:
Publishes *Class Action Watch.*[122]

Federalist Society: Examples of recent foundation funding:[123]

Date	Amount	Comment	Provider
1-1-2002	300,000	No comment provided	Sarah Scaife Foundation
1-1-2002	100,000	No comment provided	The Carthage Foundation (SCAIFE)
6-6-2001	92,500	To support general operations ($160,000) and a matching grant for the State Constitutions Project ($25,000)	The Lynde and Harry Bradley Foundation Inc.
1-1-2001	60,000	General operating support	Castle Rock Foundation (COORS)
1-1-2001	100,000	No purpose given	Sarah Scaife Foundation
1-1-2001	25,000	No purpose given	The Carthage Foundation
1-1-2001	45,000	Student Education	Charles G. Koch Charitable Foundation
1-1-2001	100,000	General Operating Support	Claude R. Lambe Charitable Foundation (KOCH)
1-1-2001	206,000	The administration of the John M. Olin Fellows in Law program	John M. Olin Foundation, Inc.
1-1-2001	225,000	The John M. Olin Lectures in Law Series, the Citizen-Lawyer Project and the state constitutions project	John M. Olin Foundation, Inc.
12-14-2000	92,500	To support general operations ($160,000) and a matching grant for the State Constitutions Project ($25,000)	The Lynde and Harry Bradley Foundation, Inc.
7-10-2000	80,000	To support general operations	The Lynde and Harry Bradley Foundation, Inc.
1-6-2000	80,000	To support general operations	The Lynde and Harry Bradley Foundation, Inc.
1-1-2000	206,000	The administration of John M. Olin Fellows in Law program	John M. Olin Foundation, Inc.
1-1-2000	20,000	The administration of the John M. Olin Fellows in Law program	John M. Olin Foundation, Inc.
1-1-2000	180,000	The John M. Olin Lectures in Law Series, the Citizen-Lawyer Project and a conference on tort liability	John M. Olin Foundation, Inc.
1-1-2000	200,000	No purpose given	Sarah Scaife Foundation

National Center for Policy Analysis (NCPA)

Website: http://www.ncpa.org

Statement from NCPA's website:

> "The NCPA's goal is to develop and promote private alternatives to government regulation and control, solving problems by relying on the strength of the competitive, entrepreneurial private sector. Topics include reforms in health care, taxes, Social Security, welfare, criminal justice, education and environmental regulation."

From National Committee for Responsive Philanthropy's study, "The Strategic Philanthropy of Conservative Foundations":

> "The NCPA's goal is to develop and promote private alternatives to government regulation and control, solving problems by relying on the strength of the competitive, entrepreneurial private sector. Topics include reforms in health care, taxes, Social Security, welfare, criminal justice, education and environmental regulation."
>
> "The National Center for Policy Analysis prides itself on aggressively marketing its products for maximum impact by "targeting key political leaders and special interest groups, establishing on-going ties with members of the print and electronic media, and testifying before Congress, federal agencies, state lawmakers, and national associations."[124]

Example tort-reform product:
"Doctors Face Soaring Malpractice Premiums"[125]

Examples of corporate funding sources, from Science in the Public Interest:[126]

National Center for Policy Analysis Board of Directors

- Thomas W. Smith, Managing Partner of Prescott Investors, Inc.
- John C. Goodman, President, NCPA
- Pete du Pont, Richards, Layton and Finger
- James Cleo Thompson, Jr., Chairman of the Board, Thompson Petroleum Corp.
- Jere W. Thompson, President, The Williamsburg Corporation
- Dan W. Cook III, Senior Director of Goldman Sachs & Co.
- Robert H. Dedman, Chairman of the Board, ClubCorp International
- Virginia Manheimer, Trustee, The Hickory Foundation
- Henry J. "Bud" Smith, Chairman Emeritus, Clark/Bardes, Inc.

Supporting Foundations include:

- DaimlerChrysler Corporation Fund
- El Paso Energy Foundation
- ExxonMobil Foundation
- Eli Lilly and Company Foundation
- Lilly Endowment Inc.
- Procter & Gamble Fund

NCPA: Examples of recent foundation funding:[127]

Date	Amount	Comment	Provider
1-1-2002	175,000	No comment provided	Sarah Scaife Foundation
12-13-2001	50,000	To support general operations	The Lynde and Harry Bradley Foundation, Inc.
6-6-2001	50,000	To support general operations	The Lynde and Harry Bradley Foundation, Inc.
1-1-2001	75,000	No purpose given	Sarah Scaife Foundation
1-1-2001	50,000	General Operating Support	David H. Koch Charitable Foundation
1-1-2001	30,000	General Operating Support	Claude R. Lambe Charitable Foundation
12-8-2000	50,000	To support general operations	The Lynde and Harry Bradley Foundation, Inc.
7-10-2000	50,000	To support general operations	The Lynde and Harry Bradley Foundation, Inc.
1-6-2000	50,000	To support general operations Inc.	The Lynde and Harry Bradley Foundation, Inc.
1-1-2000	150,000	The Center's research and education programs, including a study on national health insurance	John M. Olin Foundation, Inc.
1-1-2000	50,000	General Operating Support	David H. Koch Charitable Foundation
1-1-2000	150,000	No purpose given	Sarah Scaife Foundation
1-1-1999	150,000	No purpose given	Sarah Scaife Foundation
1-1-1999	100,000	To support general operations	The Lynde and Harry Bradley Foundation, Inc.
1-1-1999	50,000	General Operating Support	David H. Koch Charitable Foundation
1-1-1998	150,000	The Center's research and education programs	John M. Olin Foundation, Inc.
1-1-1998	125,000	No description given	Sarah Scaife Foundation
1-1-1998	75,000	No purpose given	Scaife Family Foundation

Manhattan Institute's Center for Legal Policy

Website: http://www.manhattan-institute.org/html/clp.htm

Statement from their website:

> "The Center for Legal Policy (CLP) is a leading voice for reform of America's civil justice system. Founded in 1986, hundreds of news reports have cited the CLP's civil justice work, with The Washington Post going so far as to call Senior Fellows Peter Huber and Walter Olson the "intellectual gurus of tort reform."
>
> The CLP's mission is to communicate thoughtful ideas on civil justice reform to real decision-makers. The Center fulfills this mission by publishing general-interest books and academic volumes; white papers, reports and op-eds;

and a forum series on civil justice issues. The CLP also holds conferences and seminars for policy-makers, judges and journalists; CLP senior fellows make frequent radio, television and public appearances and have testified before both houses of Congress; and Senior Fellow Walter Olson manages a website, overlawyered.com, with daily updates and incisive commentary on the effects of "over-lawyering" on American business and society. CLP Books such as Liability and Galileo's Revenge, written by Senior Fellow Peter Huber, and The Litigation Explosion and The Excuse Factory, written by Senior Fellow Walter Olson, have permanently changed the legal landscape in the field of tort."

Example tort-reform product:

Walter Olson's Book: *"The Rule of Lawyers — How the New Litigation Elite Threatens America's Rule of Law."*[128]

"A Spanking for the Trial Lawyers"
Wall Street Journal, 5-23-03[129]

Manhattan Institute: Examples of recent foundation funding:[130]

Date	Amount	Comment	Provider
1-1-2002	150,000	No comment provided	Sarah Scaife Foundation
1-1-2002	30,000	No comment provided	The Carthage Foundation (SCAIFE)
11-8-2001	75,000 MONTHLY	To support general operations	The Lynde and Harry Bradley Foundation, Inc.
8-10-2001	75,000	To support general operations	The Lynde and Harry Bradley Foundation, Inc.
1-1-2001	35,000	General operating support	Castle Rock Foundation (COORS)
1-1-2001	150,000	No purpose given	Sarah Scaife Foundation
1-1-2001	100,000	General Operating Support	Claude R. Lambe Charitable Foundation (KOCH)
11-7-2000	62,500 MONTHLY	To support general operations	The Lynde and Harry Bradley Foundation, Inc.
1-1-2000	15,000	No purpose given	The Carthage Foundation (SCAIFE)
1-1-2000	400,000	City Journal; fellowships for Heather MacDonald (Heather MacDonald), Tamar Jacoby and Abigail Thernstrom; and the Jeremiah Project directed by Prof. John Dilulio.	John M. Olin Foundation, Inc.
1-1-2000	183,449	*Gaining Ground? Measuring the Impact of America's Welfare Revolution*	Smith Richardson Foundation
1-1-2000	175,000	No purpose given	Sarah Scaife Foundation
1-1-1985	30,000	To support a fellowship for Charles Murray	John M. Olin Foundation, Inc.
1-1-1985	150,000	General support and publication program	The Carthage Foundation
1-1-1985	150,000	General operating and publication support	Sarah Scaife Foundation

Cato Institute

Website: http://www.cato.org

From Media Transparency's report on the Cato Institute:

"Founded in 1977 by libertarian activists, the Cato Institute moved to Washington, D.C. in 1981 in a bid to become an influential player in Washington policy circles. Today (1997), Cato is a multi-million dollar, multi-issue research and advocacy organization with a staff of 40-plus senior managers, policy analysts, and communications specialists. It is also assisted by the work of over 75 adjunct Cato scholars. Cato's mission is to "increase the understanding of public policies based on the principles of limited government, free markets, individual liberty, and peace. The Institute will use the most effective means to originate, advocate, promote, and disseminate applicable policy proposals that create free, open, and civil societies in the United States and throughout the world."[131]

Examples of corporate funding sources:

"The Cato Institute has also received funding from the American Farm Bureau Federation, American Petroleum Institute, Amoco, ARCO, the Armstrong Foundation, Association of American Railroads, Association of International Automobile Manufacturers, Coca-Cola, Eli Lilly Endowment, Exxon, Ford Motor Co., Golden Rule Insurance, Grover Hermann Foundation, JM Foundation, Liberty Fund, Lynde and Harry Bradley Foundation, Monsanto Co., Pfizer Inc., Philip Morris, Phillip M. McKenna Foundation, Procter and Gamble, Sarah Scaife Foundation, Sears Roebuck and Co., Sun Refining, T. Rowe Price and Assoc., and theVernon K. Krieble Foundation."[132]

Example tort reform products:
Cato's *Tort Reform issues* web pages.[133]
Cato Handbook for Congress, on tort reform[134]

Cato Institute: Examples of recent foundation funding:[135]

Date	Amount	Comment	Provider
1-1-2002	60,000	No comment provided	Sarah Scaife Foundation
1-1-2001	50,000	General Operating Support	Castle Rock Foundation COORS
1-1-2001	500,000	General Operating Support	David H. Koch Charitable Foundation
1-1-2001	250,000	General Operating Support	Claude R. Lambe Charitable Foundation Koch
1-1-2000	750,000	General Operating Support	David H. Koch Charitable Foundation
1-1-2000	250,000	General Operating Support	Claude R. Lambe Charitable Foundation (KOCH)
1-1-1999	125,000	No purpose given	Sarah Scaife Foundation
1-1-1999	100,000	To support the Project on Social Security Privatization	The Lynde and Harry Bradley Foundation, Inc.
1-1-1999	500,000	General Operating Support	David H. Koch Charitable Foundation
1-1-1999	250,000	Program Operating Support	Claude R. Lambe Charitable Foundation
1-1-1985	100,000	Support of Domestic Studies Program	The Carthage Foundation

Citizens for a Sound Economy (CSE)

Website: http://www.cse.org/informed/key_template.php?issue_it=2.

Statement from their website:

> "An elite group of greedy trial lawyers is exploiting our legal system and turning it into "jackpot justice." Over $163 billion is paid each year in damages and lawyers' fees related to tort lawsuits. We want to give back our legal system to honest, decent Americans. Our grassroots army has fought and won legal reforms at the federal level and the state level in Florida, Alabama, Texas, and Illinois. We educate citizens on how frivolous lawsuits affect them personally — impacting their pocketbooks, businesses, values and way of life. CSE activists are spearheading efforts to enact real tort reform across the country. What you can do: Attend our town meetings on lawsuit abuse. And tell your elected officials that you want our legal system returned to decent, honest Americans with real grievances."

From Media Transparency's report:[136]

> "...Based in Washington, D.C., CSE describes itself as an organization of "grassroots citizens dedicated to free markets and limited government." However, it is commonly known as what Public Relations Quarterly has called a "corporate front group." The publication explained that "the use of such 'front groups' enables corporations to take part in public debates and government hearings behind a cover of community concern [in order to] oppose environmental regulations, and to introduce policies that enhance corporate profitability."

Example tort reform product:
Lawsuit Abuse : Issue Homepage[137]

Examples of corporate funding sources:[138]

> "Philip Morris (>$1 million), US West ($1 million), Hertz ($25,000), DaimlerChrysler AG ($25,000), Exxon ($175,000), U.S. Sugar Corp ($280,000), Florida Crystals (sugar industry; $280,000), Sugar Cane Growers Cooperative of Florida ($140,000), Microsoft ($380,000)."

CSE: Examples of recent foundation funding:[139]

Date	Amount	Comment	Provider
1-1-2002	175,000	No comment provided	Sarah Scaife Foundation
1-1-2001	175,000	No purpose given	Sarah Scaife Foundation
1-1-2001	450,000	General Operating Support	Charles G. Koch Charitable Foundation
1-1-2001	250,000	General Operating Support	Claude R. Lambe Charitable Foundation (KOCH)
1-1-2000	750,000	General Operating Support	David H. Koch Charitable Foundation
1-1-2000	700,000	Educational Program Support	Claude R. Lambe Charitable Foundation
1-1-2000	175,000	No purpose given	Sarah Scaife Foundation
1-1-1999 Foundation	75,000	No description given	Scaife Family
1-1-1999	200,000	No purpose given	Sarah Scaife Foundation
1-1-1999	1,000,000	General Operating Support	David H. Koch Charitable Foundation
1-1-1999	600,000	General Operating Support	Claude R. Lambe Charitable Foundation

George Mason University School of Law's Law & Economics Center

Website: http://www.gmu.edu/departments/law/lawecon/

The Law & Economic Center … "treats federal judges to all-expenses-paid, two-week seminars held at tony resorts. At these conferences, judges are drilled in advanced legal and economic theories that advocate a hands-off approach to the 'free market.'"[140]

> "The Law and Economics Center mission is to educate judges in how to apply principles of economic analysis to the law. By 1991, the Center had provided such training —— with seminars held at resort locations to enhance their attractiveness — to over 40 percent of the federal judiciary.
>
> "Like the Center for the Study of Market Processes, the LEC is run independently of George Mason, with corporate and foundation sponsors covering "all travel, lodging and meal expenses for the most powerful players in the legal system — judges."
>
> — *"Moving a Public Policy Agenda,"* National Committee for Responsive Philanthropy[141]

> "Put simply, this "Center" is a right-wing propaganda mill masquerading as a purveyor of academic "economics." The "teachers" have been Harold Demsetz and others from the University of Chicago and its major academic outposts (paid at an hourly rate commensurate with the up to $600 per hour commanded by George Stigler and the others as antitrust "experts" in court). No opposing economists have ever been allowed to appear before the judges. When I asked the Center's people why they didn't permit distinguished non-Chicago economists to share the podium at these judicial teach-ins, they laughed and said, "Let them go start their OWN seminars for the judges!"
>
> — Charles Mueller, Editor, Antitrust Law & Economics Review[142]

Some examples of recent foundation funding:[143]

Date	Amount	Comment	Provider
1-1-1997	100,000	Law and Economic Centers founded by Henry G. Manne (at the University of Miami, Emory University, George Mason University) Law and Economics Center	Sarah Scaife Foundation
1-1-1996	125,000	Law and Economic Centers founded by Henry G. Manne (at the University of Miami, Emory University, George Mason University) Law and Economics Center	Sarah Scaife Foundation
1-1-1995	125,000	Law and Economic Centers founded by Henry G. Manne (at the University of Miami, Emory University, George Mason University) Law and Economics Center	Sarah Scaife Foundation
1-1-1993	100,000	Law and Economic Centers founded by Henry G. Manne (at the University of Miami, Emory University, George Mason University) Law and Economics Center	Sarah Scaife Foundation
1-1-1992	100,000	Law and Economic Centers founded by Henry G. Manne (at the University of Miami, Emory University, George Mason University) Law and Economics Center	Sarah Scaife Foundation
1-1-1991	110,000	Law and Economic Centers founded by Henry G. Manne (at the University of Miami, Emory University, George Mason University) Law and Economics Center	Sarah Scaife Foundation
1-1-1990	100,000	Law and Economic Centers founded by Henry G. Manne (at the University of Miami, Emory University, George Mason University) Law and Economics Center	Sarah Scaife Foundation

And:

George Mason University Foundation, Inc.

Some examples of recent foundation funding:[144]

Date	Amount	Comment	Provider
1-1-2002	325,000	No comment provided	Sarah Scaife Foundation
1-1-2001	400,000	No purpose given	Sarah Scaife Foundation
1-1-2001	3,030,250	Educational and Research Programs	Charles G. Koch Charitable Foundation
1-1-2000	2,080,000	Educational and Research Programs	Charles G. Koch Charitable Foundation
1-1-2000	550,000	No purpose given	Sarah Scaife Foundation
1-1-2000	10,000	Law and Economics Center General Operations	Philip M. McKenna Foundation, Inc.
1-1-1999	450,000	No purpose given	Sarah Scaife Foundation
1-1-1999	10,000	Law and Economics Center General Operations	Philip M. McKenna Foundation, Inc.

And:

George Mason University:

Some examples of recent foundation funding:[145]

Date	Amount	Comment	Provider
1-1-2001	20,000	School of Law. Law and Economics Center *To provide support for the program for judges and for general support*	Earhart Foundation

		for educational programs during 2001	
1-1-2001	200,000	The programs of the Law and Economics Center	John M. Olin Foundation, Inc.

1-1-2000	200,000	School of Law. The programs of the Law and Economics Center	John M. Olin Foundation, Inc.
1-1-2000	20,000	School of Law. Law and Economics Center	Earhart Foundation
1-1-1999	45,455	School of Law. A John M. Olin Faculty Fellowship for David E. Bernstein	John M. Olin Foundation, Inc.
1-1-1999	200,000	School of Law. Institutes in Law and Economics for federal judges	John M. Olin Foundation, Inc.
1-1-1997	200,000	School of Law Institutes in Law and Economics for federal judges	John M. Olin Foundation, Inc.
1-1-1996	200,000	School of Law. Institutes in Law and Economics for federal judges	John M. Olin Foundation, Inc.
1-1-1995	185,000	School of Law. Teaching institutes in Law and Economics for federal judges, faculty workshops and research in law and economics	John M. Olin Foundation, Inc.
1-1-1994	185,000	School of Law. Teaching institutes in Law and Economics for federal judges, faculty workshops and research in law and economics	John M. Olin Foundation, Inc.
1-1-1993	150,000	School of Law. Teaching institutes in Law and Economics for federal judges, faculty research and workshops in law and economics, 1993	John M. Olin Foundation, Inc.
1-1-1992	150,000	School of Law. To support teaching institutes in Law and Economics for federal judges, faculty research and workshops in law and economics	John M. Olin Foundation, Inc.
1-1-1991	150,000	School of Law. To support teaching institutes in Law and Economics for federal judges, faculty workshops and research in law and economics	John M. Olin Foundation, Inc.
1-1-1990	100,000	School of Law. To support teaching institutes in Law and Economics for federal judges	John M. Olin Foundation, Inc.
1-1-1989	100,000	School of Law. To support teaching institutes in Law and Economics for federal judges	John M. Olin Foundation, Inc.

12-1-1988	5,000	School of Law & Law and Economics Center	Charles G. Koch Charitable Foundation
10-25-1988	100,000	Economics program for federal judges	The Lynde and Harry Bradley Foundation, Inc.
6-22-1987	63,550	Support the Law and Economics Center's 1987 Summer Economics Institute for Law Professors.	The Lynde and Harry Bradley Foundation, Inc.
1-1-1987	100,000	Law and Economics Center. To support the 1987 Law and Economics Institute for Federal Judges	John M. Olin Foundation, Inc.
1-1-1986	63,000	Law and Economics Center. To support the 14th Basic Economics Institute for Judges	John M. Olin Foundation, Inc.

Appendix 5 — Examples of the Involvement of Organizations That Advocate Tort Reform (no funding data included)

Americans for Job Security (no website)

AJS is a "stealth" issue-ad organization that exists to develop and run "issue ads" against Democratic candidates. See the information on this organization at Campaign Finance Institute.[146]

The American Tort Reform Association (ATRA) and The American Tort Reform Foundation

Website: http://www.atra.org/

ATRA coordinates approximately 40 state tort reform coalitions.

Tort reform product example: Publishes the weekly *Legislative Watch* and *The Reformer,* a monthly newsletter.

According to the Center for Justice and Democracy report *"The CALA Files — a Report on Tort Reform":*

> "The business-led effort to take away consumers' legal rights (called "tort reform" by its corporate proponents; "tort deform" by its pro-consumer opponents)* has had at its helm the American Tort Reform Association (ATRA) located in Washington, D.C. In turn, ATRA has contracted with APCO & Associates, one of the nation's leading "grassroots" lobbying/PR firms."[147]

ATRA publishes short, misleading accounts of so-called *"Looney lawsuits."*[148]

ATRA is also the American Tort Reform Foundation, which receives some of its funding from Scaife's Carthage Foundation.[149]

The American Tort Reform Foundation website is: http://www.atrafoundation.org/

Business Roundtable — Civil Justice Reform

Website: http://www.brtable.org/issue.cfm/10

According to their website:

> "Continue efforts for federal and state tort reform, including the judicial system. Work toward incremental reforms, including class action, punitive damage, and joint and several liability reform."

Citizens Against Lawsuit Abuse (CALA)

A number of related state organizations, coordinated by ATRA.

California Website: http://www.cala.com/.

Example tort-reform products:
Lawsuit horror stories

According to the Center for Justice and Democracy report *"The CALA Files — a Report on Tort Reform":*[150]

> "They euphemistically call themselves any number of names, typically: Citizens Against Lawsuit Abuse (CALA), Lawsuit Abuse Watch, Stop Lawsuit Abuse or People for a FAIR Legal System.
>
> While CALA groups tell the media, as well as lawmakers, that they are sustained by small donations from ordinary citizens, the money trail from many of these groups leads directly to large corporate donors, including tobacco, insurance, oil and gas, chemical and pharmaceutical companies, medical associations, and auto manufacturers. They are also funded by ATRA, as well as professional associations, local businesses and industries that also wish to be shielded from consumer lawsuits.
>
> - The CALA blueprint was honed in South Texas in the early 1990s where the first group to carry the "lawsuit abuse" message ran doom and gloom television and radio ads warning that the legal system was out of control, affecting the economy and the pocketbook of average people. Creating a model that was duplicated nationwide, the Texas CALA groups developed a statewide support network that included the Texas Chamber of Commerce, the right-wing Texas Public Policy Foundation, and numerous corporations wishing to shield themselves from consumer lawsuits."

Chamber Institute for Legal Reform (CILR)

US Chamber of Commerce.

Website: http://www.litigationfairness.org/who.html

Example tort-reform products:
Stories of Outrageous Class Action Lawsuits[151]
Facts & Figures[152]

According to their website:
"Litigation Fairness Campaign goals:

- Reforming the class action system to make it simpler, fairer and faster
- Common-sense reforms to ensure fairness in product liability suits
- Assuring damage awards are fair and equitable
- Elimination of frivolous lawsuits
- Enforcement of legal ethics rules"

Coalition for Affordable and Reliable Healthcare (CARH)

Website: http://www.carh.net/

According to their website:

> "CARH is a coalition of healthcare providers, professionals, and other organizations that is dedicated to solving this problem by coordinating with the Bush Administration, Congress, and the media to educate the public and see national legislation enacted that would result in comprehensive medical liability reform."

Common Good — Reforming America's Lawsuit Culture

Website: http://cgood.org/

According to their website:

> "Fear of litigation has undermined our freedom to make sensible decisions. Doctors, teachers, ministers, even little league coaches, find their daily decisions hampered by legal fear. Our system of justice, long America's greatest pride, is now considered a tool for extortion, not balance."

Health Coalition on Liability and Access (HCLA)

Website: http://www.hcla.org/

According to their website:

> "HCLA is a national advocacy coalition united in our strong belief that federal health liability laws are needed to bring greater fairness, timeliness and cost-effectiveness to our system of civil justice. We also believe legal reform is the best way to protect medical progress and to ensure that affordable health care is accessible to all Americans."

Junk Science

Website: http://www.junkscience.com/

Statement from their website:

> "PERSONAL INJURY LAWYERS may use junk science to bamboozle juries into awarding huge verdicts. Large verdicts may then be used to extort even greater sums from deep-pocket businesses that may be fearful of future jury verdicts."

Critical description of this organization:

> "This is the page of Steven J. Milloy and is sponsored by the swell-sounding Citizens for the Integrity of Science, a front organization located in Potomac, Maryland, whose WWW page directs the websurfer back to Mr. Milloy's Junk Science Page. This is not surprising since Mr. Milloy is the "Administrative Contact" of the front organization."
>
> — The Skeptics Dictionary[153]

Steven J. Milloy is the founder and publisher of junkscience.com, an adjunct scholar at the Cato Institute, and a columnist for FoxNews.com.[154]

(More Steven Milloy interconnectedness information is available in a short research piece at Clear Project, at http://www.clearproject.org/reports_milloy.html.)

National Association of Manufacturers — Fair Litigation Action Group (FLAG)

Website: http://www.nam.org/secondary.asp?TrackID=&CategoryID=1031&

According to their website:

> "The Fair Litigation Action Group (FLAG) will work through the NAM Legal Policy Issues Committee to initiate a broad multi-year awareness campaign among NAM members and their employees, including more than 350 member associations located in all 50 states. The campaign will focus on the importance of fair liability laws and what legal reform measures are needed to achieve this goal. As a result of this heightened awareness among NAM members and their employees, members of Congress and other state and national leaders will better understand why the legal system needs to be reformed. FLAG will identify a priority list of fair litigation issues with the primary goal of ultimately working for the enactment of fair litigation laws."

Overlawyered.com — *Chronicling the high cost of our legal system*

A weblog published by Walter Olson.

Interconnectedness example from Mr. Olson's biography at the Cato Institute:

> "A senior fellow at the **Manhattan Institute**, the think tank in New York City, Mr. Olson is a frequent contributor to the magazine **Reason**, and his writing appears regularly in such publications as the New York Times and the Wall Street Journal. He has appeared numerous times before Congress, federal agencies and state lawmakers and has approximately 300 broadcast appearances under his belt, including "Crossfire", "MacNeil-Lehrer", "Oprah", "Donahue", and NPR. His website **Overlawyered.com**, launched in 1999, has won wide acclaim for its mix of entertaining and serious commentary. Before joining the **Manhattan Institute** in 1985 he spent five years with the **American Enterprise Institute**, and worked before that on Capitol Hill."[155]

Walter Olson's Web site has links from:

TownHall.com — operated by Heritage Foundation
Federalist Society
Hudson Institute
Reason Magazine
Manhattan Institute, and their Center for Legal Policy
Civil Justice Association of California (ATRA)
Opinion Journal (Wall Street Journal)
Support John Stossel.org
Right Wing News
Chamber Institute for Legal Reform
National Association for Business Economics
Atlantic Legal Foundation
Illinois Civil Justice League (ATRA)
Common Good
New Yorkers for Civil Justice Reform
Michigan Lawsuit Abuse Watch
JunkScience.com

Power-of-Attorneys

Website: http://www.power-of-attorneys.com/
also lawyersstink.com

This is a website of lawyer-hatred. "Lawyers stink" shirts and caps are for sale. The site also offers a "Lawyer joke of the day" as well as other anti-lawyer vehicles.

Sickoflawsuits.org — A CALA organization

Website: http://sickoflawsuits.org

Items from their website:
"Lawyers Exploiting the Mentally Ill"
Lawsuit Abuse Library

Their links include TownHall.com, which is run by the Heritage Foundation.

Appendix 6 — Examples of State Tort Reform Organizations

Communities Against Unethical Attorneys — Washington State

Website: http://www.caua.org/

Georgia Public Policy Foundation

Website: http://www.gppf.org/

Illinois Civil Justice League

Website: http://www.icjl.org/

Statement from their website:

> "The League, with its members, was the principle author and proponent of major tort liability reform in the Illinois General Assembly in 1995."

Michigan Lawsuit Abuse Watch (M-LAW)

Website: http://www.mlaw.org

Statement from their website:

> "M-LAW's goal is to eliminate the many negative effects that lawsuit abuse has on families, job providers and communities. Excessive litigation has robbed consumers of needed products and services and has added a hidden "lawsuit tax" onto countless other products and services."

New Yorkers for Civil Justice Reform

Website: http://www.nycjr.org/

Statement from their website:

> "Dedicated to informing the public of the destructive and costly influence of lawsuit abuse in America."

Tennesseans for Legal Reform

Website: http://www.tnlegalreform.com/

Statement from their website:

> "Tennesseans for Legal Reform (TLR) is leading the fight this year for badly needed tort reform legislation, particularly medical malpractice legislation, but says it will also be a long-term organization in Tennessee."

Texans Against Lawsuit Abuse (TALA)
A CALA organization

Website: http://www.tala.com/

There are many more state organizations.

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CTLA Law Reporter

By Kathleen L. Nastri, Associate Editor

If possible, please submit your verdicts and settlements on a 3.5" floppy disk in Word 97 format, together with a hard copy.

Several readers have mentioned that the verdicts and settlements reported would be more helpful if we included in our report the date on which the case was resolved and the insurance carrier, if any. Therefore, when you send your reports in, please do your best to include this information.

JUDGMENT OF $1.85 MILLION

Motorcycle — Truck Wrongful Death Case

The case of *Cindy L. Billings, et al v. Symbol Mattress,* Docket No. CV-01-0065285-S, filed in the Judicial District of Windham at Putnam, was brought in March, 2001.

On August 4, 2000, at approximately 8:30 p.m., the plaintiffs' decedent, Wilfred J. Billings, was operating his 1981 Kawasaki motorcycle eastbound on Lake Road in Killingly, Connecticut. At the same time, the defendant, Richard M. Egan, was operating a 1996 Ford Box truck on Lake Road westbound. The truck was owned by the defendant's employer, Symbol Mattress Company. As Egan was returning to the Symbol Mattress warehouse on Lake Road, he turned the truck left across the eastbound lane of Lake Road, directly into the path of the plaintiffs' decedent's motorcycle. There was a collision and the plaintiffs' decedent was thrown from his motorcycle, resulting in his death. The plaintiffs' decedent suffered multiple compound fractures of the face and skull and a brain stem injury, compound fractures of his extremities, multiple cutaneous injuries, and injuries to his internal organs. He was pronounced dead at the scene.

The plaintiff had been attending a summer backyard party at his home and had been drinking beer at the outing. He had blood alcohol content of .08 upon autopsy. The defendant driver was returning from a day of delivering mattresses in New York State. An accident reconstruction was immediately conducted by Edmund Sullivan, a former Connecticut State Police Accident Reconstructionist. Fortunately, skid marks and debris were still visible when the plaintiffs' expert visited the scene and it was determined that, despite Mr. Billings' alcohol consumption, he was entirely within the lane of travel. By analyzing the vehicle damages, it was determined that the plaintiffs' decedent was operating his motorcycle well within the speed limit when the defendant truck turned left directly into the plaintiffs' decedent's path of travel. It was apparent that the defendant driver had a clear view of the motorcyclist for over 1,000 feet before turning left into the driveway, but apparently did not notice his presence.

Cindy L. Billings, wife of the plaintiffs' decedent, arrived on the scene immediately after the accident occurred, accompanied by Nathan and Matthew Billings, the plaintiffs' decedent's sons. Collectively, they observed the plaintiffs' decedent at the accident, lying in the roadway, bleeding profusely, and in excruciating pain, until the plaintiffs' decedent eventually died.

The plaintiffs, Cindy L. Billings, Nathan Billings and Matthew Billings, suffered extreme mental distress and anguish caused by witnessing the accident scene immediately after the accident occurred, before the conditions changed, and by observing the painful death of the plaintiffs' decedent. As a result of witnessing these conditions, the plaintiffs suffered recurrent nightmares, flashbacks, depression and mental illness for which they have received professional counseling and therapy. Citing *Clohessy v. Bachelor*, a 1997 Connecticut Supreme Court case, the decedent's wife and two sons each made claims for their "bystander emotional distress".

At the time of his death, Wilfred Billings had a gross annual income of $21,500.00, working as a warehouser. He was 42 years old and had a high school education.

After the deposition of the defendant Egan was completed, an offer of judgment was filed by the plaintiffs in October, 2001, which was timely accepted by the defendants in the amount of $1,250,000, to be paid to the Estate; $300,000 to be paid to Cindy L. Billings for her loss of consortium and bystander emotional distress; $150,000 to be paid to Nathan Billings; and $150,000 to be paid to Matthew Billings for the bystander emotional distress each had suffered.

Submitted by Robert I. Reardon, Jr., Esq. of The Reardon Law Firm, P.C., New London.

SETTLEMENT AT MEDIATION

John Doe — $1.25 million; Jane Doe — $300,000 Motor Vehicle Accident

The case of *John Doe and Jane Doe v. Sally Sister and Joe Brother,* filed in the Judicial District of New London at Norwich, was brought in October, 1998.

On July 18, 1998, the plaintiff husband, John Doe, was operating his Harley Davidson motorcycle south on Route 117 in Ledyard, Connecticut. His wife, the plaintiff, Jane Doe, was riding as a passenger on the Harley. Neither Jane nor John Doe was wearing a helmet. It was a sunny day. The roads were dry. As the plaintiff approached the intersection of Route 117, with a parking lot to his right, a truck owned by the defendant, Joe Brother, operated by the defendant, Sally Sister, pulled out from the parking lot, directly in front of the plaintiffs. The motorcycle collided with the truck in the southbound lane of Route 117. Both Jane and John Doe were thrown off the motorcycle, ending up on the road.

The plaintiffs' accident reconstructionist concluded that the truck pulled out in front of the plaintiffs when the plaintiffs were approximately 70 feet away from the truck. The reconstructionist estimated the plaintiff-operator's speed to be between 25 and 30 mph, which was within the speed limit on that section of Route 117.

John Doe suffered multiple traumatic injuries, including a fracture at C2; large left temporal contusion; subdural hematoma; multiple facial bone fractures; multiple rib fractures; right flail chest; right pneumothorax; a fracture of

the right fibula and lateral and medial malleoli; traumatic brain injury; right clavicular shaft fracture; chipped teeth; malalignment of the occlusal surfaces of the teeth; and depression.

After an admission to a critical care hospital and a rehabilitation hospital, John Doe was able to return to his regular job about four months after the accident. He was left with a 20% permanent mental impairment, a 5% permanent partial disability of his right shoulder, an 18% permanent partial disability of the cervical spine, a 10% permanent partial disability of his right leg, and a 10% permanent impairment of pulmonary function. John Doe stated during his deposition that he intends to retire early from his job, because he cannot handle the stress of the job and his rib and ankle pain while working.

Jane Doe suffered a left elbow laceration; right shoulder sprain; cervical sprain; cerebral concussion with nausea and dizziness; right rotator cuff injury; contusions to the face; temporomandibular joint injury; aggravation of pre-existing depression and post-traumatic stress disorder; a fractured tooth; bystander emotional distress and loss of consortium. Jane Doe was rendered unconscious at the scene. She awakened and saw her husband, lying in the road, bleeding from the head. She suffered loss of consortium as a result of his change in personality due to his traumatic brain injury. She was left with a 4% disability of the whole person due to difficulty with mastication. She had some scars on her left temple and elbow resulting from her injuries.

She testified in her deposition that she had to discontinue working as an ambulance attendant because she could no longer cope with her job duties. She did not wish to respond to traumatic situations any longer. She testified that she intends to retire early from her new job as a result of the effects of the accident on her and her husband.

The defendants requested mediation of this case before retired Justice Speziale. The case settled at the mediation for $1.25 million for John Doe and $300,000 for Jane Doe.

Submitted by Dennis A. Ferdon, Esq. of Anderson & Ferdon, Norwich.

SETTLEMENT:

Thigh/Lift Surgery Medical Malpractice
Settlement of $300,000.00

In the case *of Jacqueline Harrigan v. William Keavy, M.D.,* Docket No. CV-97-0057508-S, filed in the Superior Court for the Judicial District of Milford, the parties settled for $300,000.00 during jury selection.

On January 10, 1996, 64-year-old Jacqueline Harrigan had thigh/lift surgery performed by William Keavy, M.D., at his clinic in New York City. At the time, Dr. Keavy also had an office in Stamford. The day after the surgery, Mrs. Harrigan was discharged. She called Dr. Keavy 24 hours later and told him that she was having unusual pain, tightness and burning in her thighs. Dr. Keavy, who had performed 12 prior cosmetic surgeries on the plaintiff, informed her that these symptoms were normal in light of the type of surgery performed, but that if she wanted to see him, he would be available for an appointment the next day at his Stamford office. The plaintiff declined because, based upon her 20-year physician/patient relationship, she trusted Dr. Keavy's judgment. The next day, Dr. Keavy called the plaintiff and she reported the same symptoms. Dr. Keavy again reassured her and stated that he would see her at her first post-operative appointment three days hence.

At the January 16th post-operative appointment, Dr. Keavy removed the bandages and it was discovered that the plaintiff had sustained third degree burns from pressure necrosis secondary to the circumferential bandages applied immediately following the surgery. The plaintiff's legs had apparently swollen within the bandages, which cut off circulation and caused her to develop large areas of eschar (black, dead tissue) on the interior of her thighs. Dr. Keavy treated the condition conservatively and referred her to a local colleague for further treatment.

In the ensuing two years, the plaintiff consulted with several cosmetic surgeons and dermatologists, including New Haven Reconstructive/Cosmetic Surgeon, Jeffrey Salomon, M.D., who, in 1997, performed two successful reconstructive surgeries on the thighs. Nevertheless, the plaintiff experienced scarring and permanent contractures in her groin, which remained painful and inhibited her ability to exercise.

The plaintiff claimed $19,000 in out-of-pocket medical expenses and two years lost earnings, even though at the time of the surgery she was unemployed and close to retirement age.

The defendant contended that, in both of the post-operative conversations with the plaintiff, he had offered to see her, including paying a house call, which she declined. Dr. Keavy also claimed that he had no recollection of the plaintiff having reported burning which, according to the plaintiff's expert, Nelson Goldberg, M.D. of Baltimore, Maryland, was a red flag for a potential serious complication. Defendant's expert was Yale cosmetic surgeon, James Lyons, M.D.

Submitted by Stephen Jacques, Esq. of Moore, O'Brien, Jacques & Yelenak, Cheshire.

SETTLEMENT:

Fall off loading dock; 53-year old male; 15% impairment of cervical spine and 10% impairment of lumbar spine
Settlement of $500,000.00

In the case of *Harry Ishler v. Dorcal Associates Ltd. Partnership, et al,* filed in the United States District Court, Civil Action No. 3:97CV1206 (JCH), the parties settled before trial for $500,000.00.

The plaintiff, Harry Ishler, was a 53-year old truck driver for Produce Leasing, Inc. of Burlington, Massachusetts. On July 21, 1995, he was making a delivery at the Waldbaum's Supermarket in Norwalk, CT. While rolling a fully loaded pallet truck off the back of his truck, Mr. Ishler inadvertently stepped off the side of the loading dock, landing four feet below on the pavement of the parking lot.

Suit was brought against Dorcal Associates Ltd. Partnership, the owner of the property, and their tenant, Waldbaum's, alleging that the loading dock in question was too small for the type of deliveries being made thereon, and because there were no railings around the sides of the loading dock. The defense argued that there were no standards or regulations that required the dock to be any larger or to have a railing, or other safety measure, around the platform's perimeter. Instead, they contended that it was Mr. Ishler's own carelessness and inadvertence in stepping off the loading dock that caused him to be injured. The plaintiff conceded in his deposition that he had previously been to the loading dock and that he knew he was very close to the edge of the dock.

As a result of this fall, Mr. Ishler suffered an injury to his cervical spine that resulted in cervical disc surgery with fusion. He also suffered a herniated lum-

bar disc, which required a lumbar laminectomy. Despite the surgeries, Mr. Ishler continued to suffer debilitating pain in both the neck and the lower back region. Besides physical therapy, he also required numerous epidural injections, as well as the use of constant pain medications. As a result of these injuries, the claimant was never able to return to work. The economist hired by RisCassi and Davis determined discounted lost income of $271,417.00. The total medical bills, all of which were paid by the workers' compensation carrier, equaled $86,630.58. The doctors determined that Mr. Ishler had a 15% permanent disability of the cervical spine and a 10% disability of the lumbar spine.

The defendants contended that, despite his injuries, the plaintiff was able to return to work. They received an opinion from the IME physician, Dr. Aris Yannopoulos, which supported this contention. The plaintiff's treating physicians felt it was extremely unlikely that Mr. Ishler would ever find employment in the open labor market, as he would be unable to find a job that he could physically tolerate.

After settlement discussions with the Honorable Joan Margolis, United States Magistrate Judge, the case was settled on the eve of trial for $500,000.00. The workers' compensation carrier agreed to take back only two-thirds of their lien. They also agreed to pay Mr. Ishler an additional $23,000.00, which was not subject to any lien recovery.

Submitted by David W. Cooney, Esq. of RisCassi and Davis, P.C., Hartford.

JURY VERDICT:

Medical Malpractice;
Verdict of $1.6 Million

In *Kittie LaBanca, Executrix, et al v. Hamden Internal Medical Associates, et al,* No. CV-96-0388716-S, filed in the Superior Court for the Judicial District of New Haven, a jury returned a $1.6 million verdict as a result of the 1994 death of a man diagnosed with heart disease five years earlier.

John LaBanca was a 53-year-old married father of three grown children at the time of his death of a heart attack on May 7, 1994. Although the medical records reflected that the plaintiff had been told five years earlier that his electrocardiogram showed an abnormal condition, there was a claim that he had not been adequately advised of the importance of the condition. The estate claimed that the failure of the defendant to provide Mr. LaBanca with the name of a specific cardiologist or to perform any further cardiac related testing was an indication that the defendant did not adequately advise Mr. LaBanca of the importance of the abnormal EKG.

John LaBanca, a veteran of the U.S. Army Reserve, had worked for Bridgeport-based Swan Engraving for more than 25 years prior to his death. During the 15 years prior to his death, Mr. LaBanca had suffered a number of work injuries that left him significantly disabled.

On June 18, 2001, the six-member jury ruled that Mr. LaBanca's physician, Dr. Charles Rethy and the physician's Hamden Internal Medicine, were liable for Mr. LaBanca's death.

The trial, before Superior Court Judge Clarence Jones, lasted two weeks. Jurors deliberated a total of five hours before returning the verdict. The verdict included $300,000 for loss of earnings and $1.3 million for loss of enjoyment of life's activities and death.

Submitted by James D. Horwitz, Esq. of Koskoff, Koskoff & Bieder, Bridgeport.

SETTLEMENT AT MEDIATION

Motor vehicle accident
Settlement of $325,000.00

In *Ivon Lopez v. James Cali, et al,* No. CV-99-0360654-S, filed in the Superior Court for the Judicial District of Fairfield, at Bridgeport, the parties settled after mediation for the sum of $325,000.00, $250,000.00 of which was paid up front and the remainder was placed into an annuity as a structured settlement.

On April 3, 1997, the plaintiff, who at the time of the collision was 15 years old, was riding in a motor vehicle operated by her mother on Interstate 95 southbound in Fairfield, when their car was struck in the rear by a truck owned by Dichello Distributors. These vehicles had been stopped in traffic when the truck was struck in the rear by an automobile operated by James Cali. The force of this impact then pushed the truck into the rear of the plaintiff's vehicle.

The plaintiff complained of neck and back pain and was treated by Dr. Eric Garver in Bridgeport for a period of three weeks. She also had physical therapy for a period of two weeks. Ms. Lopez was then discharged from treatment.

She and her mother thereafter moved to Florida, and she had no further medical examinations or treatment for a period of approximately 12 months, at which time she complained of numbness and tingling down the lower extremity. An MRI at that time determined that there was a herniated disk at L4-L5, and the plaintiff again sought treatment from Dr. Garver. Dr. Patrick Mastroianni subsequently performed surgery to repair the disc. A second surgical procedure was subsequently required.

The medical specials totaled approximately $50,000.00. The plaintiff has a 15% permanent disability of the lumbar spine as a result of this occurrence.

The defense took the position that this automobile collision did not cause the disc herniation, due to the fact that there was an approximately one year lapse in treatment between the time of the accident and the determination that there was a disc herniation. In addition, liability was denied due to the fact that the defendant maintained that this collision was so-called "low impact".

With respect to the lapse of time, no herniated disc was found on x-ray at the time of the initial evaluation and treatment by Dr. Garver. However, no MRI was taken until approximately one year later. With respect to the "low impact" question, the plaintiff took the position that this was irrelevant as no evidentiary foundation could be established. The plaintiff's automobile had never been repaired and had been sold.

Plaintiff's treating physicians were Eric Garver, M.D. and Patrick Mastroianni, M.D., both of Bridgeport. The mediator was Gerald Cooper, Esq. of New Haven. The structured settlement was provided by EPS Settlements Group in Rhode Island.

Submitted by Mark D. Arons, Esq. of Millman & Arons, Westport and James O'Rourke, Esq. of The Law Offices of James O'Rourke, Stratford.

SETTLEMENT:

Fall on board a cruise ship;
61-year-old woman; comminuted fracture of right radius;

Settlement of $45,000.00

In the case of *Mary Mattox v. Celebrity Cruises, Inc.,* Case No. 00-0367-CA-27, filed in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, the parties settled for $45,000.00.

The plaintiff is a resident of Connecticut. She and her husband

boarded the cruise ship *MV Century,* owned and operated by the defendant cruise line, which sailed from the Port of Miami, Florida on September 9, 1998. On the morning of September 10, the plaintiff was walking up a short outdoor ramp leading to the entrance to a restaurant on board the ship when she slipped on liquid that had been spilled on the ramp. The ramp had no handrails.

The plaintiff does not know what type of liquid caused her to fall, nor how long the dangerous condition had existed. There were no witnesses to the fall, other than the plaintiff's husband, and he was unable to provide any details about the defective condition.

As a result of the fall, the plaintiff suffered a comminuted fracture of her right radius. X-rays were taken in the ship's infirmary, but no cast or splint was applied. The following day, the ship docked in Key West. The plaintiff was examined by an orthopaedic surgeon, who placed her wrist in a splint and recommended surgical correction. The plaintiff flew home later that evening.

The following morning, the plaintiff was examined by Dr. Joseph Wombwell, who operated later that day. She was in a cast for six weeks, which was followed by an extensive course of physical therapy.

Because of her injuries, the plaintiff was unable to travel to her daughter's home out of state for Thanksgiving. She was also unable to attend church services for several weeks, and she could not drive for approximately four months.

Cruise ship tickets typically reduce the statute of limitations to one year following the date of an injury to a passenger aboard ship. Courts in Florida and elsewhere have upheld these provisions, deeming the ticket to be a contract between the cruise line and the passenger, which shortens the statute of limitations. Such tickets also have a provision for sole venue in a state court in the county in Florida in which the cruise line's corporate offices are located. The ticket in this case did contain the one year limitation period for filing suit, and established venue in the Miami-Dade County Circuit Court.

Florida law permits the parties to agree to extend the one year statute of limitations, since this is a modification of the contract. The parties agreed to extend the statute of limitations for four months in order to pursue settlement. This was unsuccessful and suit was filed in January, 2000.

The plaintiff was 61 years old at the time she was injured. She is a retired secretary. Her total medical bills were approximately $13,000.00. Her health insurer, Blue Cross/Blue Shield, paid the bills in full and retained a lien on the settlement proceeds.

Plaintiff's counsel had concerns about proving liability. Other factors leading to settlement were the plaintiff's potential travel expenses in returning to Florida for deposition and trial, as well as the expense of presenting medical testimony at trial, in light of the fact that all of her treating physicians are out of state. When a tourist is injured in Florida, the common practice among trial attorneys is to have a local physician examine the plaintiff, review all medical records of treating physicians who are out of state, and then to render an opinion at trial as to permanent injury and causation. All of the records of the out-of-state physicians are thereby introduced as part of the local doctor's file.

Before the plaintiff retained counsel, the defendant made a settlement offer of a certificate good for $500 off a future cruise.

Submitted by Steven Meyer, Esq. of Boca Raton, Florida, counsel for the plaintiff. A member of CTLA, Meyer was formerly associated with the Law Offices of R. Bartley Halloran, P.C. and with Hoberman & Pollack, both in Hartford.

JURY VERDICT:

Fall through barrier; Torn rotator cuffs; 73 –year-old female; Verdict of $418,517 Reduced by 5% for Comparative Negligence Offer of Judgment Interest

In *Eleanor Preisig vs. Danbury Mall Assoc. Ltd. Partnership and Genesee Management, Inc.,* No. CV-98-0334027-S, filed in Danbury Superior Court, the jury returned a plaintiff's verdict against both defendants in the amount of $418,517, reduced by 5% for comparative negligence.

On December 23, 1996, Eleanor Preisig was shopping at the Danbury Fair Mall, owned by the defendant Danbury Mall Associates and managed by Genesee. The mall has a center court area that is usually used as a fountain, but is drained of water for seasonal decoration. At Christmastime, this sunken center court area is decorated with a variety of displays and surrounded at corridor level by a barrier of stanchions into which four-foot plexiglas panels are placed by way of a hook and eye system. Mrs. Preisig approached the center court display and leaned lightly against the guardrail, which immediately gave way. She fell three feet to the bottom of the display/fountain area and injured her shoulders.

The plaintiff alleged that the barrier was insufficient to prevent a patron from falling into the sunken display area and the defendants failed to provide adequate warning against leaning on or against the barrier, which they knew to be inadequate to support the weight of an adult. The defendants contended that the plaintiff should not have leaned against the barrier and should have appreciated its inadequacy; but, nevertheless, the barrier was safe for its intended use as a visual barrier. The evidence included testimony that the glass partitions had to be cleaned of fingerprints regularly. Thus, the plaintiff argued, it was foreseeable that one would lean on the structure, because people routinely touch and lean on the rails to the point of requiring cleaning.

Mrs. Preisig initially underwent treatment and left shoulder surgery for a torn rotator cuff. Subsequently, a pre-existing right shoulder condition worsened, which her physician related to the fall. A year later, her right shoulder was operated on as well. She underwent courses of physical therapy following each surgery. She is left with a 12% permanent partial impairment to each shoulder and incurred $42,000 in medical expenses. There were no lost wages.

On January 26, 2001, the jury returned a verdict of $418,517 against both defendants, less 5% comparative negligence. Offer of judgment interest and costs were taxed in the amount of $31,157. It is believed that the defendants were self insured for the initial $50,000. According to their discovery responses, the primary insurer over that amount was Acceptance Insurance Company of Mt. Laurel, NJ. The judgment has been satisfied.

Plaintiff's expert witnesses were Craig Foster, MD of Danbury, her orthopedic surgeon, and Richard Ziegler, PE, as to the inadequacy of the guardrail system

Submitted by D. Randall DiBella, Esq. and John D. Tower, Esq. both of Cramer & Anderson, New Milford.

JURY VERDICT:

Rear-end Collision; 23-year-old female; 8% impairment of lumbar

spine; Verdict of $70,000.00, Plus Offer of Judgment Interest

In the case of *Diana Prepetit v. Kim Coscia,* Docket No. CV-00-0554542-S, filed in the Superior Court for the Judicial District of New London, at New London, the jury returned a verdict of $70,000.00. The plaintiff filed an offer of judgment for the policy limit of $50,000.00. The defendant's insurance company was Allstate and they made a top offer of $7,500.00.

The plaintiff was a passenger in the back seat of a vehicle, which was rear-ended by the defendant. The defendant claimed she was only going 10-15 mph at the time of the collision; however, the photo of the rear-ended vehicle showed extensive damage to the bumper and frame.

The plaintiff was taken to Lawrence and Memorial Hospital complaining of back and neck pain. X-rays of the neck were negative. A week later she went to Backus Hospital and x-rays of the lumbar spine were taken.

The radiologist at Backus diagnosed Ms. Prepetit with a small chip fracture at L-4. She then followed up with an orthopedic surgeon, Michael Halperin, who stated there was a small fracture, which likely healed, and there was no neurological impairment. The plaintiff then treated with Michael Thomas. She only treated for two months and discontinued further treatment against the doctor's wishes. She continues to have occasional low back pain. The total medical bills were $3,221.13.

The defendant hired radiologist Mark Glickstein, MD, who testified via video deposition that Ms. Prepetit did not receive a fracture at L4 and her condition was a naturally occurring ossification of her spine called a limbus vertebrae.

Under cross-examination, Dr. Glickstein admitted that he has provided hundreds of IMEs for various insurance companies and attorneys. In 2000, he made $94,000.00 on IMEs, and he previously performed at least two IMEs, where he had determined that the claimant had a limbus vertebrae and not a fracture. He did state it was possible the x-ray revealed a fracture, but it was unlikely.

The plaintiff relied on the medical records of the radiologist and the orthopedic surgeon and the testimony of the chiropractor, Michael Thomas, who presented a detailed explanation of the spine and the x-rays. He stated that, under the 5th Edition AMA Guidelines, her rating for the lumbar fracture was 8%.

The case was tried before the Honorable Thomas Corradino. On September 20, 2001, the jury returned a verdict of $3,221.13 economic and $66,778.87 non-economic for a total amount of $70,000.00. The Allstate policy is only $50,000.00, and a bad faith action may be filed.

Submitted by Stephen M. Reck of Trebisacci & Reck, LLC, of Pawcatuck.

Article By Steven Meyer

Many Connecticut residents spend part of the year in Florida. Florida's motor vehicle insurance laws differ from those of Connecticut in some important respects.

Florida law requires only two coverages — property damage liability and no-fault. If the insured causes damage to another vehicle, the former pays for that damage. Coverage is issued in the minimum amount of $10,000 with no deductible.

No-fault pays a percentage of medical bills and lost wages an insured suffers as a result of operation of the vehicle, irrespective of who is at fault in causing the loss. Florida remains one of only a handful of states that mandate this coverage. The minimum coverage allowed is $10,000, with a $2,000 deductible.

Any vehicle registered in another state that is in Florida for at least ninety days out of any 365 day period must obtain no-fault coverage. If, for example, a Connecticut resident spends December through March in Florida and brings his own car registered in Connecticut, he must add no-fault coverage to his insurance policy. It may be necessary to obtain a temporary binder with this coverage through an insurance agent in Florida.

A Connecticut driver may not be concerned about having no-fault pay his own lost wages or medical bills in the event of a collision. However, if he fails to obtain the required no-fault coverage and a passenger in his vehicle is injured, the passenger may have a claim against him personally. Because of the number of seasonal residents, a typical fact pattern involves a collision between two vehicles, both registered in states other than Florida. An injured passenger in either vehicle may have a claim against one or both owners for failure to secure no-fault coverage, irrespective of fault. If the passenger's health insurer pays medical bills, it may try to subrogate the claim against the driver, who failed to secure no-fault coverage.

Because there is no requirement for bodily injury coverage, many Florida vehicles do not carry it. This means that an at-fault driver may have no coverage for injury he causes to your client. If a driver does carry this optional coverage, the minimum amount is $10,000, which is insufficient to pay the fair value of damages incurred in many collisions. Consequently, uninsured/underinsured motorist coverage is very important. Each driver must ensure that he has sufficient coverage to protect himself and his family.

If a Connecticut resident is in Florida on a more temporary basis, he will likely rent a car. Under Florida law, a renter's insurance coverage is primary. This means that the insurance policy on any vehicle owned by the renter or on which the renter is a named insured will be responsible initially for paying any damages to a person or property caused by the renter. If the damages exceed the coverage limits on the renter's own policy, then the rental company will be on the hook for the excess.

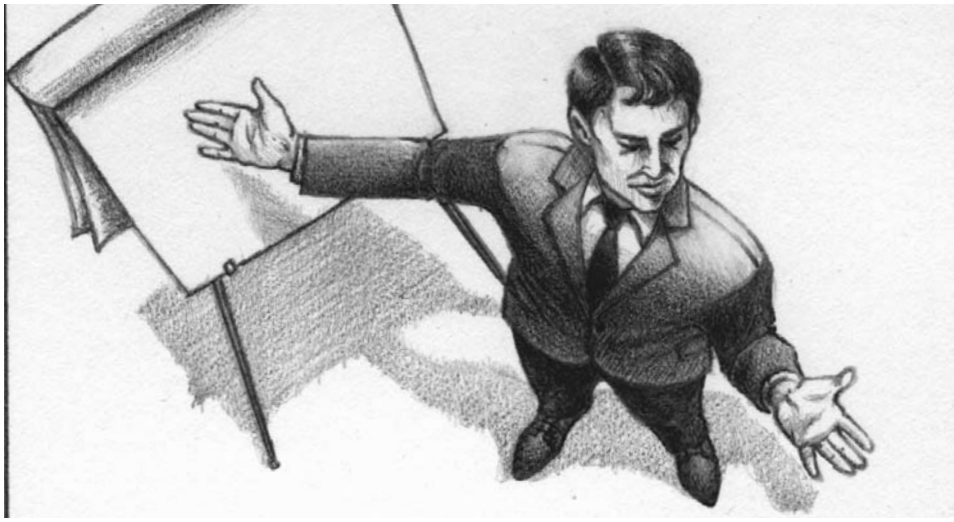
Rental companies do not provide uninsured/underinsured motorist coverage unless one specifically purchases this extra coverage at the time the rental contract is signed. Renters need to be aware of this fact and ensure that the coverage on their own policy is adequate to protect themselves and their families. Many bad drivers do not carry any bodily injury coverage, so a renter may find themselves in a collision in which the at-fault driver is uninsured.

Many credit card issuers do provide this coverage if the card is used to rent the vehicle. A renter would be well-served to familiarize himself with the terms of his own auto insurance policy and his credit card agreement before relying on this.

If a passenger in a rental car must make an uninsured motorist claim, the law of the state(s) in which the passenger and driver's automobile policy was issued governs. A typical fact pattern might have two friends, one from Connecticut and one from New York, on vacation in Florida. The New Yorker rents a car, which is rear-ended by an uninsured Florida driver, injuring the Connecticut resident who is a passenger. Whether the UM coverage of the driver or passenger is primary depends upon the language in each policy and the law of those two states. Some states do not allow inter-

policy stacking or limit the total UM recovery from both policies to an amount equal to the greater of the two coverages.

Many foreign tourists are operating rental cars on Florida roads, too. If they cause a collision in which an American citizen is injured, it may be very difficult to pursue a claim against the at-fault driver or his insurer. Once again, having adequate UM coverage is paramount to protecting oneself and one's family in the event of an unfortunate collision.



Workers' Compensation

November 22, 2003 to February 17, 2004

By Robert F. Carter, Associate Editor

SUPREME COURT

Heart disease claim barred as not an occupational disease

Coronary artery disease was not shown to be an occupational disease in the case of a state policeman and criminal investigator, and the claim was thus barred as untimely. The claimant presented evidence that the stress of his work caused his heart disease, but he did not offer sufficient evidence that his heart disease was an occupational disease. Since he did not prove that it was an occupational disease, he did not qualify for the more lenient statute of non-claim. *Malchik v. Division of Criminal Justice,* 266 Conn. 728 (Dec. 9, 2003).

One hopes that the Court will not forget its own history. In *Lelenko v. Wilson H. Lee Co.,* 128 Conn. 499 (1942), one of Chief Justice Maltbie's great opinions, the claimant's antimony poisoning was the first case of antimony dermatitis in a large number of linotype operators in a large facility over many years; and none of the doctors in the case had any experience with such a case of antimony dermatitis, though it was a reaction known to occur in a few hypersensitive individuals. Nevertheless, the Court firmly held that this was an occupational disease, without an exclusionary analysis. The *Lelenko* Court stated:

> We cannot import into the conception of occupational disease under our law the element that the disease must be a usual or generally recognized incident of the employment. Compensation under our law is not to be denied because the injury would not have occurred except for the peculiar susceptibility of the individual worker.

Id. at 504. Epidemiology should not be required to prove an occupational disease; it certainly was not in *Lelenko.* The law in Connecticut has been for decades, in Justice Maltbie's words:

> If...a disease is the natural result of conditions which are inherent in the employment and which attach to that employment a risk of incurring it in excess of that attending employment in general, an award of compensation is not precluded because the risk is one which has not become generally recognized or because only employees unusually susceptible will suffer from the disease.

Id. at 505. One hopes that the Court will not impose a newly restrictive definition of occupational disease merely to bar claims as untimely, while ignoring Justice Maltbie's fair and time-honored approach to the problem. However, claimants these days would be advised to include some medical or other testimony that, for example in this case, the doctor believes that the work is more stressful than average; that similarly stressful work would cause heart disease in other police officers or criminal investigators as well as the claimant; and that this condition is therefore an occupational disease.

The *Malchik* Court did imply, however, that where the heart disease claim is filed within one year of the last date of the stressful work, it would be timely. This is marginally encouraging, in light of some cases which have held that a claim is untimely unless filed within a year of the first manifestation of the heart condition, even when the work continues thereafter to contribute to the condition, and even when the condition is undiagnosed at the time of first manifestation. *Pearce v. New Haven,* 4385 CRB-03-01-5 (March 28, 2002). In a recent CRB decision on whether a heart and hypertension claim was timely, the CRB recited its version of the rule, that notice of claim must be filed within a year from an accidental injury or from the last repetitive trauma. But the analysis of the CRB focussed not on the duration of exposure to stressful work, but on when the claimant knew he had hypertension. *Hunt v. Naugatuck,* 4607 CRB-5-02-12 (Feb. 9, 2004). Scienter, however, plays no part in the statute of non claim, unless the condition is an occupational

disease.

If justice counts, what is obviously needed is a discovery statute for all claims, where the statute of nonclaim does not start running until the condition is or should have reasonably have been discovered. Legislatures have enacted such discovery statutes in many other jurisdictions; and Connecticut law already reduces benefits if the employer is prejudiced by delay in filing the claim.

The Court in *Malchik* also held that the numerous presumptions of compensability for heart conditions in various state and municipal employees which the legislature has enacted had no effect on the issue of whether the claimant's heart condition was an occupational disease.

Hours of household employment defined

In deciding whether a domestic worker works more than twenty six hours a week, and hence qualifies as an employee eligible for workers' compensation benefits, the calculation is whether the claimant was regularly employed for more than twenty six hours during the majority of the fifty two weeks prior to the date of injury, interpreting Sec. 31-275(9)(B). *Smith v. Yurkovsky,* 265 Conn. 816 (Sept. 23, 2003). The Court fashioned a reasonable and almost-clear rule: fifty two weeks is the number to use, and the majority of weeks of more or less than twenty six hours, rather than an averaging of hours per week, is determinative. What I couldn't figure out from the opinion is whether the Court really meant to use fifty two weeks in all cases, rather than the number of weeks regularly worked. If so, the rule would bar a household employee who started an essentially full time job, and worked thirty five hours a week for twenty five weeks, until he or she got hurt. Surely the Court didn't aim to bar the claim of such an employee, who clearly should be considered to have been regularly employed for more than twenty six hours a week.

Widow's claim barred for failure to file a separate notice of claim

Where the widow failed to file a separate notice of claim in addition to the timely notice of claim filed by her husband before he died, her claim for surviving spouse benefits was dismissed. This so, even where the employer and insurer in fact had timely notice of the death claim and intervened in the third-party civil action to recover workers' compensation benefits which it never paid. *Kuehl v. Z-Loda Systems Engineering, Inc.,* 265 Conn. 525 (Sept. 2, 2003). It is pointless to reiterate the old case law which suggests that the statute did not intend that dependents be required to file separate claims; suffice it to say, however, that this battle is lost, and that filing a separate widow's claim is crucial, as well as terribly easy to forget.

Policeman's mysterious accident held non-compensable

In a case shrouded in mystery, the Court restored the trial commissioner's denial of benefits to a Naugatuck policeman who, during his shift, drove off the road and had an automobile accident. The commissioner, in denying benefits, recited the inconsistencies in the claimant's testimony as the basis for denying the claim. Clearly something seemed fishy. The Appellate Court had held that the accident was compensable since the policeman was on duty, driving around town in the police car, when it happened. *Daubert v. Naugatuck,* 71 Conn. App. 600 (Aug. 20, 2002). The Supreme Court reversed, on the ground that the claimant failed to prove that his accident occurred while he was fulfilling the duties of his employment or doing something incidental to it. Based on the testimony, the commissioner was free to believe that the claimant was not acting in the course of his employment when the accident occurred. *Daubert v. Naugatuck,* 267 Conn. 583 (Feb. 17, 2004).

APPELLATE COURT

Commissioner may find causation based on common sense

In addressing a frivolous appeal which challenged the compensability of a back injury from lifting heavy wood and brush, the Appellate Court pointed out that the commissioner did not need medical evidence to find causation, where it is within common knowledge that lifting heavy objects can cause back injury. Only when the theory of cause and effect involves complex medical issues outside common knowledge is expert testimony required. *Sprague v. Lindon Tree Service, Inc.,* 80 Conn. App. 670 (Dec. 30, 2003). There was adequate medical testimony on causation here anyway, but the reminder is useful: commissioners are rarely required to have a doctor vouch for causation, and can make the call themselves where the facts and common sense indicate an injury, whatever the technical defects of the medical record. This authority is sometimes necessary when a timid doctor declines to give an opinion on causation on the ground that he didn't witness the accident.

Medical benefits do not trigger Sec. 284b benefits

The Appellate Court confirmed that continued receipt of medical treatment and medical benefits after indemnity payments have ceased do not trigger any rights to continued health insurance or other benefits under Sec. 31-284b. *Wilson v. Stamford,* 81 Conn. App. 339 (Feb. 3, 2004). The decision is interesting for a concurrence by Justice Berdon, who points out that the holding makes no sense given the plain language of the statute, that compensation under the Act includes medical benefits; but that the issue has been foreclosed by the Supreme Court: *Weinberg v. ARA Vending Co.,* 223 Conn. 336 (1992).

COMPENSATION REVIEW BOARD

Town constable not covered by Sec. 7-433c

Even though the claimant was one of several full-time salaried uniformed police officers working for East Lyme, the CRB held that he was not eligible for heart and hypertension benefits under Sec. 7-433c, on the ground that he was a town constable rather than a "regular member of a paid municipal police department." Like many towns, East Lyme has a resident state trooper assigned to the town, plus policemen paid by the town who do regular policing duties. The CRB had to strain pretty hard to exclude the claimant from the statutory coverage of Sec. 7-433c: he sure looks like a regular member of a paid municipal police department, full time, uniformed, driving a police car, whether or not there is a resident state trooper who does some of the work. *Genesky v. East Lyme,* 4600 CRB-8-02-12 (Dec. 8, 2003). Jerry Stevens, bless his heart, must be turning over. The decision is on appeal.

Medical history in physician's report is admissible

Respondents' attorneys are still arguing that medical history in a physician's report is inadmissible hearsay. Of course the history is admissible in a report of a treating physician, and has been for decades. It must be embarrassing to have to argue such nonsense, and the CRB properly rejected the argument, affirming the award of benefits for conjunctivitis in a school teacher. *Walker v. Hartford,* 4605 CRB-1-03-1 (12/30/03). The respondents, with equal effrontery, also argued that the injury was not compensable because the date of the injury could not be pinpointed exactly and with certainty. This issue has been settled at least since 1934: *Stier v. Derby,* 119 Conn. 44 (1934). Life would be a lot nicer if lawyers would cut the crap.

SUPERIOR COURT

Deposition preparation is part of cost of deposition

An expert's time in preparing for a deposition is properly a part of the cost of the deposition to the deposing party under Sec. 13-4(3). The Court points out, however, that there is a split of authority in the Superior Court decisions. *Brought v. Batson,* CV02-0347176S (Danbury, Dec. 17, 2003), 36 Conn. L. Rptr. No. 5, 189 (Feb. 2, 2004). Presumably the commissioners will follow the courts.

Attaching copy of statute is insufficient warning in notice of third party action

Where the plaintiff notified the employer of the pendency of the civil action, merely attaching a copy of Sec. 31-293 was insufficient to provide the required notice: that failure of the employer to intervene within thirty days will result in the loss of the employer's right to bring a reimbursement action. Thus the employer could intervene and seek reimbursement of compensation paid. *Gregory v. Wainwright,* CV562732 (New London JD, Sept. 5, 2003), 35 Conn. L. Rptr. No. 11, 411 (Oct. 13 2003). Should we care? We still don't know whether an employer's failure timely to intervene, causing the employer's right of action against the third party to "abate," bars recovery, in cases arising after the separate lien provision was added to Sec. 293 in 1993. I finally filed a motion for summary judgment the other day on this issue, but the case settled; so far as I know, the issue still hasn't been litigated.

Joseph F. Keefe

8/6/46 to 12/18/03

Joseph F. Keefe, of Torrington, a past president of CTLA, died December 18, 2003 at the age of 61. He graduated from Fairfield University cum laude in 1964, and the University of Connecticut School of Law in 1967. He practiced in Hartford for three years, and then returned to Litchfield County and practiced for the remainder of his life in Torrington. He practiced in the areas of criminal defense, personal injury and commercial litigation. He was a founding member of the Connecticut Criminal Defense Lawyers Association, and served as its president. He also served on the Board of Directors of the National Association of Criminal Defense Lawyers, and was a fellow of the American Academy of Forensic Science. He was a highly respected trial lawyer and good friend. He will be missed.

Judge Anne Dranginis of the Connecticut Appellate Court gave the eulogy for Joe at his funeral Mass at St. Anthony of Padua Church in Litchfield. She has given permission to the Forum to reprint here her eulogy.

It is my sorrow-filled privilege to remember Attorney Joseph F. Keefe, Jr., and to celebrate the full and complex journey that was his life, on behalf of our entire community, but especially on behalf of the legal community of the state of Connecticut. Joe was a "local boy made good", but ever so much more than that.

All of us in the legal community who fill this church cannot believe that we will not have his wise counsel as we work on…

We have lost both a legend and a giant. But as I again watched and listened to Joe's speech at the 2002 Litchfield High School graduation, which I attended, where he noted that it had been 42 years since his similar graduation, it was clear that he had already defined himself in very different terms.

He told the graduating class that as time went on, they would be very different people than they were at that moment. He cautioned them that they would ultimately measure themselves, not by material possessions, whether they had a hot car or a pool in their manicured back yards, but by how they treated other people, what they did for other people, what they had accomplished in some way to make the world a better place in which to live. He told them that they would lose their current "sense of certainty" about their ideas, their beliefs…that age brought more than grey hairs, but a fuzziness of the edges of their strong

sense of being right about almost any issue or person…

He told them to experience the "rich tapestry of life," to see the good and the bad as part of the journey. And he stressed that as important as faith and religion were to one's sense of wellbeing, more important was the day-to-day help of family and friends…loyal friends made over the course of the years. He said it all to them…and, as we all are here to confirm…he also lived it.

He was born and raised in Litchfield, at Keefe stables, which when I was a little girl, was as close to heaven as any lucky person could get. He loved animals, as you all know. It was his job at Christmastime to set up the nativity scene in the Keefe household. He called it "Away in a Manger" as a little boy… hence the recessional hymn. He collected the pieces with the help of his dear mother.

He was a charmer from the start; a skill set that would be put to considerable use in his adulthood! But each time he behaved badly, he would run up to Murphy's Pharmacy and buy a "mushy" card for his mother and all would be forgiven. Ruth and Mr. Keefe called him "Mom's precious pet", and he would be in the clear again. He had great tactical skill even then.

He was allergic to cats…but started adopting them at an early age. When trail riding in White's Woods, he came home with "Tally Ho". It was simply too cold to leave the abandoned kitten in the woods.

Then he had a horse from Colorado he trained and sold to pay for his first year at Fairfield…its treat was sugar that Joe's mother kept at the house. When he

arrived at the back door, his mother was not there, so he stepped into the kitchen, holding the reigns, and naturally the horse followed him in!! Knowing what havoc could result if the horse startled, he calmly tried to back the horse out of the kitchen. The stirrup caught in the doorknob, breaking it, and the window. His mother put a towel over the window and explained to Mr. Keefe the next morning that "the doorknob" broke the window. Mr. Keefe never knew.

After graduating from Fairfield University in 1964, Joe joined the class of 1967 at the University of Connecticut School of Law. I remember my mother, who taught in Litchfield, telling me how smart he was and how wonderful it was that he was going to law school. He became a mentor, whether he knew it or not, for many young college students in this area. While in law school, he adopted "Miss Tuffy Cat" who was thought to be a kitten, but who promptly produced a litter Some allergy!

He married and had 3 beautiful children (more on that later) while working at Regnier, Moller and Taylor in Hartford for three years. Then the lure of the Litchfield Hills beckoned, and he joined Jess and Paul Smith. Linc Cornell and John Mettling were members of the firm, as was Marcia Smith. A number of young lawyers followed, all nurtured by Joe and his partners; Carlo Forzani, Larry Peck, Bill Conti, Al Mencuccini, and ultimately David Moraghan and Tom Waterfall… David and Tom were dedicated to him to the end, and returned that nurture to him in so many ways. David and Tom, his family thanks you for your many kindnesses extended to him during his final illness.

His reputation as a trial lawyer was widely acknowledged. His practice included all the state courts, and federal courts. He loved the study of the law, but the arena of the courtroom was his first love. He worked to improve the stature of the law, and his dedication to preparation and care of his clients brought not only him respect, but gave respect to the process of the rule of law. His work on a national basis for the American Trial Lawyers Association, and the National Association of Criminal Defense Lawyers gave him the opportunity to contribute to the advancement of the profession he held so dear. He was recognized as a teacher of law to practicing attorneys all over the country…and he was respected by the various judges, especially those resident judges in the Judicial District of Litchfield, Justice Speziale, Judges Pickett, Moraghan, Gill, DiPentima. He made and protected "the record" and did not lead us into error.

He was the consummate lawyers' lawyer. He certainly was the best trial lawyer in this part of the state, and recognized everywhere for his competence and his civility. He took on a criminal case for a young man whose father was himself a legal giant, succeeded in suppressing evidence, and succeeded in protecting the future of a young person who is now a productive and successful member of his community. When a defendant at Litchfield Superior Court decided to "get a real lawyer" Joe agreed to take the case only after telling the trial judge that in fact our then public defender, who later became a judge, was "better than me", which they both knew wasn't correct. But Joe recognized the importance of the public defender's office, and the respect between attorneys, which can be so lacking today. He despaired when I went "over to the dark side." I never got to try a case against Joe, even though I tried cases against his big time lawyer friends. As with other young lawyers, there was always that quiet phone call to advise if something was amiss and could be easily corrected. Or the phone call about what was really going on… "when to hold them, and when to fold them." He protected us…he advocated for us…and his ability to read the cards and play them was like no one other and will create a vacuum for many of us who relied on him. He had Irish charm, for sure, but he also had that knowing eye, and nose and wit for handling problems or cases in ways that got his clients or his friends, the best possible result under the circumstances, with the least amount of fuss or damage. A brilliant tactician. A lawyer's lawyer, whose first license plate out of law school was JKKL…Joe Keefe King Lawyer, whose boat was "Reasonable Doubt" …another plate "AQUIT" …Kid Shaleen…

But enough of the lawyer…as he said himself, the measure of the man is in family and friends. Ruth reiterated his lack of materialism…he called Nordstrom's "Ruth's satellite office" and told Juanita, a maintenance person at Hartford Hospital who wanted his cats…that she could have his Corvette before she could have Sundance, Dakota, and Scarlet! Patty is taking good care of them…Joe would be happy. Patty, the family recognized your daily advocacy for Joe in the hospital, and is grateful.

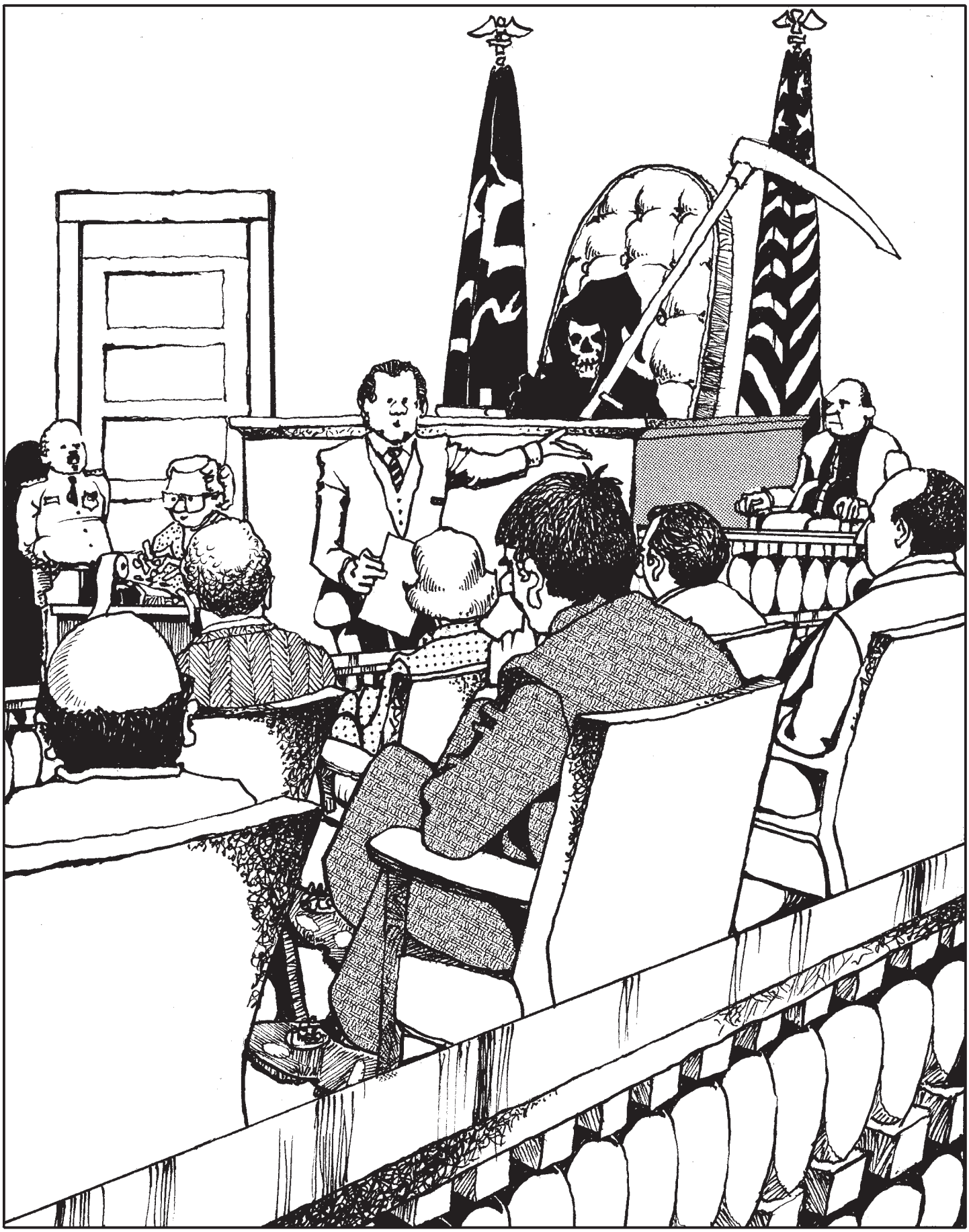
The Schmiedel cousins came to see him…some came last night from Boston…he must know that he has been surrounded by family and friends…loyal friends to the end.

At Litchfield High School, Joe told the class of 2002 that the good in the tapestry of life came from meaningful relationships with others, and that there would be joy in the birth and nurture of children. Watching and guiding children would have the reward of seeing them become productive adults. Joey, Martina, and Rosemary…. He was so proud of you. He knew he was not a perfect parent, if there is such a thing, especially in the eyes of the child, but he spoke to us all of your accomplishments. Joey, his soldier boy…even though he may not have known of your imminent departure for Iraq, he was proud of your service and your sense of duty to us all. Godspeed to you on your perilous journey. We will pray for peace. Rosemary, he was happy about your being involved in the law as a paralegal, but mostly about your beautiful baby and what a wonderful home you have created. Martina, his Phi Beta Kappa environmental scientist daughter continued a tradition of both your families in a love of learning and contribution for a better world.

Many of you know that Ruth referred to Joe as "brother" (well, after calling him Butch until he became a lawyer!). How appropriate. He was not only a dear brother to her…and how she has dearly loved him, but he has been a brother in the most significant spiritual way to so many…to the clients he respected, and to whom he restored their humanity…their hope. To the "brothers" (in of course the gender-neutral essence of the term) at the bar…for his civility and competence…to his many loyal friends, like Michael Gay, who helped him in the bad times in the tapestry of his life…who laughed and played with him during the good times…who stood by him during his final illness…and now during his untimely passing…a number of you insisted on visiting, and Ruth hopes that all on this list is complete but cannot be sure and does not want anyone who might be omitted to be hurt…John Fitzgerald, Bart Halloran, Hugh Keefe, Austin McGuigan, Walter Sedor, Ed Metesky, Jess and Marcia Smith, Lynn Wittenbrink, Charlie Thompston, Carlo Forzani, Al Mencuccini, Gary Constant, Bernie Soldate, Larry Peck… he was also a brother to his fallen friends, Ed Peters and Shanahan, whose loss was keenly felt by Joe.

As a brother to all he shared his love and his boundless humor…he was capable of laughing at himself, and realized that today's sense of certainty would easily yield to a more mellow tomorrow. Joe Keefe was a man with vision…of the law, of the importance of family, friends and fun…his intelligence, wit, and practical judgment enhanced that, but did not define him.

We join with Joey, Martina, Rosemary, and Ruth, and all of us who are his friends, in mourning his loss, but also in celebrating his completed tapestry. God is being entertained as we speak.



Editorial

RETHINKING NOTICE
(in premises liability cases)
By William F. Gallagher

The plaintiff, an elderly woman in excellent health, was walking down an aisle of a local Super Stop & Shop when she slipped and fell on a "clear, thick, slippery liquid" in the middle of the aisle. She did not see it, as her attention was on the merchandise displayed, but she felt it after the fall as it was on her clothes and hands and arms. Try as he might, by interviews with witnesses, store personnel, the police and personal inspection of the store, and later depositions of all involved, her attorney could not develop evidence of notice to establish that the liquid was there long enough for Stop & Shop to have cleaned it up, nor could he establish that it was on the floor as a result of negligence of Stop & Shop employees.

Sound familiar? Guess what a judge would do in Connecticut on this evidence? The burden requires the plaintiff in this type of case to plead and prove, among other things, that the proprietor or his employees either caused the foreign substance to be on the floor or, in the exercise of reasonable care, had notice of it, that is, he could have discovered it and either removed it or warned of its presence before the accident occurred. Since it is invariably impossible to prove how the substance got there, most plaintiffs resort to circumstantial evidence to establish notice by establishing that there were footprints through it, or shopping cart tracks through it, or other debris in or near it – just a few of the ways to establish circumstantially that the liquid had been there for a while – long enough for the store to have discovered it and cleaned it up. Usually without evidence of notice, the plaintiff loses, and this is unfair. But there is a very simple answer. It is burden-shifting, the rationale for which already exists in our case law.

First, however, consider the benefits to the merchant of the method of operation known as "self-service retail." This method encourages the business's patrons to obtain for themselves from shelves and containers the items they want to purchase, and to move them from one part of the store to another in shopping carts or baskets as they continue to shop for other items. At the same time, this method increases the risk of spillage. Modern merchandising techniques used by self-service retail stores are specifically designed to attract a customer's attention to the merchandise on the shelves and thus away from the hazards on the floor.

As between two innocent parties, one the business proprietor having a duty to maintain the premises in a reasonably safe condition for the use of his customers, and the other being the invited customer, the burden to prove the cause of an unsafe condition on the premises should be on the one with the duty to prevent it. It makes little sense to impose the burden on the injured customer to prove how the foreign substance came to be on the floor, or how long it had been there.

Simply imposing a rebuttable presumption that shifts the burden from proving notice on the part of the customer to proving the absence of negligence on the part of the merchant solves the problem. In other words, the business owner has the burden of proving the absence of negligence because he is the one who invited the injured customer to his business premises in the first place, and he is the one with the duty.

This approach is no big deal. The basis for it already has been recognized by our own appellate courts. Consider the following from Judge Lavery's unanimous Appellate Court decision in Meek v. WalMart Stores, Inc., 72 Conn. App. 467, 478 (2002)(a case involving the negligent stacking of tables that fell and injured a customer):

> We realize that a negligent activity theory, as opposed to a premises defect theory, "usually requires that the store-owner, its agents, or

employees actually create the condition or defect that results in an injury to a patron. *There is no logical distinction, however, between a situation in which the storeowner directly creates the condition or defect, and where the storeowner's method of operation creates a situation where it is reasonably foreseeable that the expectable acts of third parties will create a dangerous condition or defect*. See DeWeese v. J.C. Penney Co., 5 Utah 2d 116, 121, 297 P.2d 898, 901 (1956)("a negligent act may be one which 'creates a situation which involves an unreasonable risk to another because of the expectable action of the other *or a third person'*" (quoting 2 Restatement of Torts ß302(b) (1934)." (emphasis added) Canfield v. Albertsons, Inc., supra, 841 P.2d at 1226.

(emphasis added)

The burden-shifting approach was recently used by the Kentucky Supreme Court in Lanier v. Wal-Mart Stores, Inc., 99 S.W. 3d 431 (2003). This case involved a foreign substance on the floor that the plaintiff fell on and was injured. The court held that when the plaintiff proves the existence of a foreign substance on the floor, there is a rebuttable presumption that the premises owner did not maintain the premises in a reasonably safe condition. The trial court had granted summary judgment, and the intermediate appellate court affirmed, finding that the plaintiff could not prove how the liquid got there or whether Wal Mart employees had actual or constructive notice that it was there. The court overruled this earlier approach, which placed the entire burden on the plaintiff. The court observed that realities of self-service stores where customers select their own merchandise and carry it from point to point increases the risk that products will be dropped or spilled. It held that it would be unreasonable to require the customer to prove how a foreign substance was caused to be on the floor or how long it had been there.

The case is worthy of study. Judge Lavery has provided the analytical underpinnings for the adoption of such a rule:

> *There is no logical distinction ... between a situation in which the storeowner directly creates a condition or defect, and where the storeowner's method of operation creates a situation where it is reasonably foreseeable that the expectable acts of third parties will create a dangerous condition or defect.*

Stated another way, a proprietor of a self-service retail store is as a matter of law on notice that merchandise will spill or fall, thus relieving the plaintiff of proving this element of a premises liability cause of action against a self-service retail store.

The American Jury

A jury reflects the attitudes and mores of the community from which it is drawn. It lives only for the day and does justice according to its lights. The group of twelve, who are drawn to hear a case, makes the decision and melts away. It is not present that next day to be criticized. It is the one governmental agency that has no ambition. It is as human as the people who make it up. It is sometimes the victim of passion. But it also takes the sharp edges off the law and uses conscience to ameliorate a hardship. Since it is of and from the community, it gives the law an acceptance which verdicts of judges could never do.

Justice William O. Douglas
The Anatomy of Liberty (1954)

Proposed Rules Regarding Pleading

What follows is a general revision of Connecticut's rules regarding pleading in civil cases. The rules arose out of a study by CBA's Committee on the Courts, chaired by Edward M. Sheehy of Williams, Cooney & Sheehy in Shelton concerning the possible adoption of notice pleading. Rather than a wholesale adoption of the federal rules, the consensus of the Committee was that a revision of the fact pleading rules was warranted. After a year of study, the Committee proposed to the Chief Justice's Civil Commission the adoption of the proposed rules. The Chief Justice's Civil Commission, after carefully reviewing the proposal, voted unanimously to forward the proposal to the Rules Committee. What the Rules Committee will do with the proposal is uncertain.

The purpose of reprinting the proposal in this issue of the Forum is to give the bar as much advance notice of the proposed changes, and an opportunity to comment. It may be that the Rules Committee does not adopt or endorse the proposal. If it does, however, there is a relatively short time frame between publication of the proposal and public hearing. We have, accordingly, decided to publish the proposed rules in this issue of the Forum, as the proposal does involve substantial change in civil practice. It is intended that the rules apply to all cases upon their effective date.

§ 10-1. General Rules For Pleading

Each pleading setting forth a claim for relief, whether an original claim, counter-claim, cross-claim or third-party claim, shall contain a plain and concise statement of (a) the material facts on which the pleader relies to establish the claim for relief therein, (b) the legal theory on which the pleader relies to establish the claim for relief therein, and (c) the party by whom and against whom each such claim is brought. Each pleading shall be set forth in separate counts and separate paragraphs in the manner provided by § 10-26. If in the opinion of the judicial authority the pleadings do not sufficiently define the issues in dispute, it may direct the parties to prepare other issues, and such issues shall, if the parties differ, be settled by the judicial authority.

COMMENTARY

These changes are meant to clarify the requirements governing the essential contents of a pleading, as part of the overall revision of the rules of pleading. The changes are not intended to switch from a "fact pleading" to a "notice pleading" system. However, the pleading requirement should be focused on the facts material to the claim asserted rather than any and all facts that may be relevant to the dispute between the parties. This minor change retains the fact-pleading system while striving to eliminate unnecessary demands for pleading revisions seeking the type of information that should be obtained through discovery. The change also makes clear that the pleader must explicitly identify the "legal theory" being relied upon in each count as well as the party or parties by whom and against whom each claim is asserted. The term "legal theory" rather than "cause of action" is used to describe this requirement (and the requirements in Section 10-26, governing separate counts) because "cause of action" has been interpreted in some cases to permit more than one legal claim to be stated under a single count. *See, e.g., Hill v. Williams,* 74 Conn. App. 654, 661 (2003) (negligence and breach of contract); *Burns v. Koellmer*, 11 Conn. App. 375, 385-86 (1987) (contract and quasi-contract). A "legal theory" is the name by which any particular legal claim is commonly known, e.g., breach of contract, quantum meruit, common law negligence, negligence per se, breach of fiduciary duty, fraud, etc. By requiring an explicit identification of the "legal theory" relied upon in each count, this rule change will eliminate confusion engendered by pleadings, especially those involving multiple counts and multiple parties, without such specification

§10-2

COMMENTARY

This section is deleted as unnecessary. No substantive change in the pleading rules is intended.

§ 10-3. Allegations Based on Statutory Grounds; Foreign Law

(a) When any claim made in a pleading is grounded on a statute, the statute shall be specifically identified by its number.

(b) A party to an action who intends to raise an issue concerning the law of any jurisdiction or governmental unit thereof outside this state shall give notice in his or her pleadings or other reasonable written notice.

COMMENTARY

For clarity. No substantive change is intended.

§ 10-6. Pleadings Allowed and Their Order

The order of pleading shall be as follows:

(1) The plaintiff's complaint.
(2) The defendant's motion directed at the plaintiff's pleadings.
(3) The defendant's answer (including any special defenses) to the complaint.
(4) The plaintiff's motion directed at the defendant's pleadings.
(5) The plaintiff's reply to any special defenses.

COMMENTARY

These changes are auxiliary to the central revision proposed herein, which eliminates the three stages of motions practice (motion to dismiss, request to revise, motion to strike) and replaces them with a single "motion directed at the pleadings." See Commentary to § 10-29A.

§ 10-8. Time to Plead

Each defendant shall file an answer or motion directed at the pleadings within sixty days of the return date of the writ, summons and complaint. Any subsequent pleadings **and** motions shall advance at least one step within each successive period of **thirty** days from the preceding pleading or the filing of the decision of the judicial authority thereon if one is required, except that in summary process actions the time period shall be three days and in actions to foreclose a mortgage on real estate the initial time period shall be fifteen days. The filing of interrogatories or requests for discovery shall not suspend the time requirements of this section unless upon motion of either party the judicial authority shall find that there is good cause to suspend such time requirements.

COMMENTARY

This change is intended to establish a more realistic time-frame for filing the "motion directed at the pleadings" contemplated by these revisions. Although sixty days is a lengthy period, it is not excessive if the unified motion achieves the efficiencies sought to be realized. The reference to "requests" is deleted because the request to revise has been eliminated.

§ 10-9

COMMENTARY

This section is deleted as unnecessary. No substantive change in the pleading rules is intended.

§ 10-20. Contents of Complaint.

The first pleading on the part of the plaintiff shall be known as the complaint. It shall be organized and contain the information required by § 10-1 and, on a separate page of the complaint, a demand for relief which shall be a statement of the remedy or remedies sought under each count of the complaint. When money damages are sought in the demand for relief, the demand for relief shall include the information required by General Statutes § 52-91.

COMMENTARY

The purpose of this change is to include an express reference to the practice book provision setting forth the general rules of pleading. No substantive changes are intended. The change also makes it clear that the demand for relief shall identify the relief being sought by each count of the complaint.

§ 10-26. Separate Counts and Paragraphs.

Each complaint and other pleading shall be organized using separate, consecutively numbered paragraphs for each separate allegation. Each legal theory upon which any relief is sought contained in the same pleading shall be separately identified and set forth in a separate count, which shall also be identified by number (First Count, Second Court, etc.) and each such Count shall begin with paragraph 1. The party or parties by whom and against whom each such count is brought shall also be identified. Pleadings shall not contain unnecessary repetitious, scandalous, impertinent, immaterial or otherwise improper allegations.

COMMENTARY

The requirements of this provision are harmonized with the requirements of ' 10-1 setting forth the general pleading rules. Each legal theory upon which relief is sought should be set forth in a separate count. The phrase "legal theory" is used instead of "cause of action" for the same reason explained in the Commentary to Section 10-1. The rules require each specific legal claim to be identified explicitly and set forth distinctly in a separate count, so that the legal sufficiency of the allegations can be tested, discovery and other pre-trial matters can be managed, and trial can be litigated by the parties and adjudicated by the court without confusion or uncertainty about the underlying legal claims at issue. Each count must also identify the party or parties against whom the legal claim in that count is made. For example, a two-count complaint alleging negligence and breach of contract might contain these headings: "First Count (Negligence against Defendants John Doe and Doe Corporation)" and "Second Count (Breach of Contract against Defendant Doe Corporation"). The changes are also intended to incorporate the pleading requirements implicit in the former provision governing the request to revise, § 10-35.

§ 10-29A [NEW] Motion Directed at the Pleadings

(a) Any party wishing to challenge a pleading based on the ground (1) that the court is without subject-matter jurisdiction, (2) that the court is without jurisdiction over the person, (3) that venue is improper, (4) that process was insufficient, (5) that service of process was insufficient, (6) that the pleading fails to comply with the pleading rules set forth in §§10-1, 10-20 and/or 10-26, (7) that there has been misjoinder or nonjoinder of parties, (8) that there has been joinder of two or more causes of action that cannot properly be united in one complaint, or (9) that any claim, prayer for relief or defense contained in the pleading is legally insufficient, may do so by filing a motion directed at the pleadings under this section.

(b) A motion under this section directed at the original complaint shall be filed within sixty days after the return date unless a different deadline is established by the parties or court under subsection (d) hereof. Except as otherwise provided in subsection (f) hereof, a motion under this section directed at any other pleading shall be filed within thirty days after filing of that pleading. These time limitations may be extended by agreement of the parties or by the court as the interests of justice may require.

(c) Except as provided in subsection (d) hereof, all grounds for any motion under this section shall be separately identified in a single motion. A memorandum in support of the motion shall argue each ground set forth in the motion under separate argument headings to the extent practicable. Any party opposing a motion brought under this section shall file and serve a memorandum in opposition to the motion at least five days before the motion is considered on the short calendar.

(d) A party may not file a motion under this section directed at another party's pleading unless (i) the initial motion seeks dismissal based only on the grounds(s) enumerated in subsections (a) (1) and/or (a) (2) hereof, (ii) the court permits more than one such motion, for good cause shown, or (iii) the parties agree that more than one such motion is appropriate under the circumstances of the case. Except as provided in subsection (h) hereof, or as otherwise provided by law, claims not raised by motion as provided in this section are deemed waived.

(e) Whenever a motion brought under subsection (a)(6), (a)(7), (a)(8) or (a)(9) hereof is granted, in whole or part, the judicial authority, in rendering the decision thereon, shall state orally or in writing the grounds upon which that decision is based with sufficient particularity to permit the matter to proceed efficiently under subsection (f) of this section.

(f) If a motion brought under this section is granted, in whole or in part, it normally shall be granted with leave to replead within **thirty** days of issuance of notice, unless the judge granting the motion expressly finds either (i) that leave to replead would be futile, or (ii) the pleader already has been given sufficient opportunity to cure the defect(s) at issue and has failed to do so such that the interests of justice are not impinged by denial of leave to replead. If a revised pleading is permitted and is filed by the pleader, a motion under this section directed to the new pleading may be filed within **thirty** days thereafter, but any such motion must be limited to a claim that the pleader has failed to comply with the court's prior ruling, or that the moving party could not reasonably have been expected to raise previously due to a defect or deficiency in the prior pleading.

(g) If a motion brought under this section is denied, then the party filing the unsuccessful motion shall file a responsive pleading within **thirty** days of issuance of notice by the court, unless that time limit is extended by agreement of the parties or order of the court.

(h) The motion to dismiss, request to revise and motion to strike are abolished as separate procedural devices, except that (i) lack of subject matter jurisdiction may be raised at any time in accordance with existing law, and (ii) a challenge to the legal sufficiency of a claim may be raised by any mechanism permitted by existing law other than a motion to strike.

COMMENTARY

These changes are intended to significantly revise motions practice concerning the adequacy of the pleadings. The central objective of the changes is to eliminate the three stages of motions practice (motion to dismiss, request to revise, motion to strike) and replace that process with a process involving a single motion accomplishing the same purpose. The three-stage process is usually inefficient and time-consuming in numerous respects, especially if different judges consider the various motions over a substantial period of time. The single-motion process implemented here consolidates all issues relating to the adequacy of a pleading — jurisdictional, service, venue, form and content, and legal sufficiency — into a unified process for resolution in a single adjudication. The process is not intended to be inflexible. For example, where jurisdictional issues are implicated, a defendant should not be required to raise other pleading-related claims until those threshold issues have been resolved. Additionally, there may be relatively unusual circumstances where the moving party cannot fairly be expected to raise all issues simultaneously (a complaint may be so poorly drafted that the moving party cannot effectively challenge its legal sufficiency without first obtaining clarification through a revised pleading), then the moving party can ask the judicial authority to bifurcate consideration of the motion and permit further consideration of the legal sufficiency issue after the required revision is submitted. The idea is to promote resolution of all pleading-related issues by a single judge in an efficient manner, so that the pleadings are put in proper form and closed without undue delay.

COMMENTARY

See commentary to § 10-29A.
§§ 10-30 through 10-45 deleted

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Proposed Rules Regarding Depositions and Discovery

The Civil Division Task Force chaired by Judge John Langenbach has proposed to the Rules Committee an amendment to §13-28 and §13-30 concerning depositions, and proposed changes to the standard discovery in motor vehicle cases. These proposals follows.

§ 13-28. Depositions — Persons before Whom Deposition Taken; Subpoenas

(a) Within this state, depositions shall be taken before a judge or clerk of any court, notary public or commissioner of the superior court. In any other state or country, depositions for use in a civil action, probate proceeding or administrative appeal within this state shall be taken before a notary public, of such state or country, a commissioner appointed by the governor of this state, any magistrate having power to administer oaths in such state or country, or a person commissioned by the court before which such action or proceeding is pending, or when such court is not in session, by any judge thereof. Any person so commissioned shall have the power by virtue of his or her commission to administer any necessary oaths and to take testimony. Additionally, if a deposition is to be taken out of the United States, it may be taken before any foreign minister, secretary of a legation, consul or vice- consul appointed by the United States or any person by him or her appointed for the purpose and having authority under the laws of the country where the deposition is to be taken; and the official character of any such person may be proved by a certificate from the secretary of state of the United States.

(b) Each judge or clerk of any court, notary public or commissioner of the superior court, in this state, may issue a subpoena, upon request, for the appearance of any witness before an officer authorized to administer oaths within this state to give testimony at a deposition subject to the provisions of Sections 13-2 through 13-5, if the party seeking to take such person's deposition has complied with the provisions of Sections 13-26 and 13-27.

(c) A subpoena issued for the taking of a deposition may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents or tangible things which constitute or contain matters within the scope of the examination permitted by Sections 13-2 through 13-5. Unless otherwise ordered by the court or agreed upon in writing by the parties, any subpoena issued by a party commanding the production of documents or other tangible things at a deposition shall not direct compliance within less than fifteen days from the date of service thereof.

(d) The person to whom a subpoena is directed may, within fifteen days after the service thereof or <u>within such time as otherwise ordered by the court or agreed upon in writing by the parties</u>, ~~or or before the time specified in the subpoena for compliance if that time is less than fifteen days after service,~~ serve upon the issuing authority designated in the subpoena written objection to the inspection or copying of any or all of the designated materials. If objection is made, the party at whose request the subpoena was issued shall not be entitled to inspect and copy the disputed materials except pursuant to an order of the court in which the cause is pending. The party who requested the subpoena may, if objection has been made, move, upon notice to the deponent, for an order at any time before or during the taking of the deposition.

(e) The court in which the cause is pending, or, if the cause is pending in a foreign court, the court in the judicial district wherein the subpoenaed person resides, may, upon motion made promptly and, in any event, at or before the time for compliance specified in a subpoena authorized by subsection (b) of this section, (1) quash or modify the subpoena if it is unreasonable and oppressive or if it seeks the production of materials not subject to production under the provisions of subsection (c) of this section, or (2) condition denial of the motion upon the advancement by the party who requested the subpoena of the reasonable cost of producing the materials being sought.

(f) If any person to whom a lawful subpoena is issued under any provision of this section fails without just excuse to comply with any of its terms, the court before which the cause is pending, or any judge thereof, or, if the cause is pending in a foreign court, the court in the judicial district wherein the subpoenaed person resides, may issue a capias and cause the person to be brought before that court or judge, as the case may be, and, if the person subpoenaed refuses to comply with the subpoena, the court or judge may commit the person to jail until he or she signifies a willingness to comply with it.

(g) Deposition of witnesses living in this state may be taken in like manner to be used as evidence in a civil action or probate proceeding pending in any court of the United States or of any other state of the United States or of any foreign country, on application of any party to such civil action or probate proceeding.

§ 13-30. Depositions — Deposition Procedure

(a) Examination and cross-examination of deponents may proceed as permitted at trial. The officer before whom the deposition is to be taken shall put the deponent on oath and shall personally, or by someone acting under the officer's direction, record the testimony of the deponent. The testimony shall be taken stenographically or recorded by any other means authorized in accordance with Section 13-27(f). If the testimony is taken stenographically, it shall be transcribed at the request of one of the parties.

(b) All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. <u>Any objection during a deposition must be stated concisely and in a non-argumentative manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Section 13-30(c).</u> In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party shall transmit the questions to the officer, who shall propound them to the witness and record the answers verbatim.

(c) At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending may order the officer conducting the examination forthwith to cease taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Section 13-5. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending.

(d) If requested by the deponent or any party, when the testimony is fully transcribed the deposition shall be submitted to the deponent for examination and shall be read to or by the

deponent. Any changes in form or substance which the deponent desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the deponent for making them. The deposition shall then be signed by the deponent, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the deponent within thirty days after its submission to the deponent, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the deponent or the fact of the refusal or failure to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Section 13-31(c)(4) the judicial authority holds that the reasons given for the refusal or failure to sign require rejection of the deposition in whole or in part.

(e) The person recording the testimony shall certify on the deposition that the witness was duly sworn by the person, that the deposition is a true record of the testimony given by the deponent, whether each adverse party or his agent was present, and whether each adverse party or his agent was notified, and such person shall also certify the reason for taking the deposition. The person shall then securely seal the deposition in an envelope endorsed with the title of the action, the address of the court where it is to be used and marked "Deposition of *(here insert the name of the deponent)*," shall then promptly deliver it to the party at whose request it was taken and give to all other parties a notice that the deposition has been transcribed and so delivered. The party at whose request the deposition was taken shall file the sealed deposition with the court at the time of trial.

(f) Documents and things produced for inspection during the examination of the deponent, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (1) the person producing the materials may substitute copies to be marked for identification, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, and (2) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition to the court, pending final disposition of the case.

(g) The party on whose behalf a deposition is taken shall at such party's expense provide a copy of the deposition to each adverse party.

PROPOSED REVISIONS TO STANDARD INTERROGATORIES

Proposed revisions to standard interrogatories directed by plaintiffs to defendants in motor vehicle accidents.

PLAINTIFFS INTERROGATORIES

The undersigned, on behalf of the Plaintiff, hereby propounds the following interrogatories to be answered by the Defendant, under oath, within thirty (30) days of the filing hereof insofar as the disclosure sought will be of assistance in the prosecution of this action and can be provided by the Defendant with substantially greater facility than could otherwise be obtained.

[NEW:] Definition: "You" shall mean the defendant to whom these interrogatories are directed except that if that defendant has been sued as the representative of the estate of a decedent, ward, or incapable person, "you" shall also refer to the defendant's decedent. ward or incapable person unless the context of an interrogatory clearly indicates otherwise.

1. State the following:
   a. Your full name, and any other name(s) by which you have been known;
   b. Your date of birth;
   c. Your motor vehicle operators license number;
   d. Your home address;
   e. Your business address;

ANSWER:

2. Have you made any statements, as defined in the Connecticut Practice Book Rule 13-1 to any person regarding any of the incidents alleged in the Complaint?

COMMENT: This interrogatory is intended to include party statements made to a representative of an insurance company prior to involvement of defense counsel.

ANSWER:

3. If the answer to Interrogatory #2 is affirmative, state:
   a) the name and address of the person or persons to whom such statements were made;
   b) the date on which such statements were made;
   c) the form of the statement (i.e. whether written, made by recording device or recorded by stenographer, etc.);
   d) the name and address of each person having custody, or a copy or copies of each statement.

ANSWER:

4. State the names and addresses of all persons known to you who were present at the time of the incident alleged in the Complaint or who observed or witnessed all or part of the incident.

ANSWER:

5. As to each individual named in response to Interrogatory #4, state whether to your knowledge, or the knowledge of your attorney, such individual has given any statement or statements as defined in the Connecticut Practice Book Rule *13-1* concerning the subject matter of the Complaint in this lawsuit. If your answer to this Interrogatory is affirmative, state also:
   a) the date on which the statement or statements were taken;
   b) the names and addresses of the person or persons who took such statement or statements;
   c) the names and addresses of any person present when such statement or statements were taken;
   d) whether such statement or statements were written, made by recording device or taken by court reporter or stenographer;
   e) the names and addresses of each person having custody or a copy or copies of such statement or statements;

ANSWER:

6. Are you aware of any photographs depicting the accident scene, any vehicle involved in the incident alleged in the complaint, or any condition or injury alleged to have been caused by the incident alleged in the complaint? If so, for each set of photographs taken of each such subject by each photographer, please state:
   a. the name and address of the photographer, other than an expert who will not testify at trial;
   b. the dates on which such photographs were taken;
   c. the subject (e.g. plaintiffs vehicle, scene, etc.);
   d. the number of photographs.

ANSWER:

7. If, at the time of the incident alleged in the Complaint,

you were covered by an insurance policy under which an insurer may be liable to satisfy part or all of a judgment or reimburse you for payments to satisfy part or all of a judgment, state the following:

a) the name(s) and address(es) of the insured(s);

b) the amount of coverage under each insurance policy;

c) the name(s) and address(es) of said insurer (s).

8. If, at the time of the incident, which is the subject of this lawsuit, you were protected against the type of risk which is the subject of this lawsuit by excess umbrella insurance, or any other insurance, state:

a) the name(s) and address(es) of the named insured;

b) the amount of coverage effective at this time;

c) the name(s) and address(es) of said insurer(s).

ANSWER:

9. State whether any insurer, as described in Interrogatories 7 and 8 above, has disclaimed/reserved its duty to indemnify any insured or any other person protected by said policy.

ANSWER:

10. If applicable, describe in detail the damage to your vehicle.

ANSWER:

11. If applicable, please state the name and address of an appraiser or firm which appraised or repaired the damage to the vehicle owned or operated by you.

ANSWER:

12. If any of the Defendants are deceased, please state the date and place of death, whether an estate has been created, and the name and address of the legal representative thereof.

ANSWER:

13. If any of the defendants is a business entity that has changed its name or status as a business entity (whether by dissolution, merger, acquisition, name change, or in any other manner) since the date of the incident alleged in the complaint, please identify such defendant, state the date of the change, and describe the change.

ANSWER:

14. If you were the operator of any motor vehicle involved in the incident that is the subject of this action, please state whether, at the time of the incident, you were operating that vehicle in the course of your employment with any person or legal entity not named as a party to this lawsuit, and, if so, state the full name and address of that person or entity.

ANSWER:

15. If you were the operator of any motor vehicle involved in the incident that is the subject of this action, please state whether you consumed or used any alcoholic beverages, drugs, or medications within the eight (8) hours next preceding the time of the incident alleged in the complaint and, if so, indicate what you used or consumed, how much you consumed, and when.

ANSWER:

16. Please state whether, within eight (8) hours after the incident alleged in the complaint, any testing was performed to determine the presence of alcohol, drugs or other medications in your blood, and, if so, state:

a. the name and address of the hospital, person or entity performing such test or screen:

b. the date and time:

c. the results.

ANSWER:

[REVISED. NOT AGREED:] 18. Within the time required by Rule 13-4(4) of the Rules of Practice, please disclose, pursuant to Rule 13-4(4), the names and addresses of all experts whom you expect to call as expert witnesses at trial and state, as to each:

a. the subject matter on which each expert witness is expected to testify;

b. the substance of the facts and opinions to which each expert witness is expected to testify;

c. a summary of the grounds for each opinion.

ANSWER:

The committee questions whether an Interrogatory is the appropriate discovery vehicle to use to disclose experts. It is the recommendation of the committee that any revisions to this Interrogatory be deferred, pending the results of the subcommittee considering revisions to expert disclosure rules.

PLAINTIFFS REOUESTS FOR PRODUCTION

The Plaintiff(s) hereby request(s) that the Defendant provide counsel for the Plaintiff(s) with copies of the documents described in the following requests for production, or afford counsel for said Plaintiff(s) the opportunity or, if necessary, sufficient written authorization, to inspect, copy, photograph or otherwise reproduce said documents. The production of such documents, copies or written authorization shall take place at the offices of — on [day], [date] at [time].

The definition of "you" provided in the corresponding Interrogatories shall also pertain here.

1) A copy of the appraisal or bill for repairs as identified in response to Interrogatory #11.

2) A copy of the declaration page(s) of each insurance policy identified in response to Interrogatory #7 and/or #8.

3) If the answer to interrogatory 9 is in the affirmative, a copy of the complete policy contents of each insurance policy identified in response to Interrogatory #7 and/or #8.

4) A copy of any photographs identified in response to Interrogatory #6.

5) A copy of any non-privileged statement, as defined in Practice Book Section 13-1, of any party in this lawsuit concerning this action or its subject matter.

6) A copy of all lease agreements pertaining to any motor vehicle involved in the incident which is the subject of this action, which was owned or operated by you or your employee, and all documents referenced or incorporated therein.

8) A copy of all records of blood alcohol testing or drug screens referred to in answer to Interrogatory 17, or a sufficient signed authorization to obtain the same.

DEFENDANTS INTERROGATORIES

The undersigned, on behalf of the Defendant, hereby propounds the following interrogatories to be answered by the Plaintiff, , under oath, within thirty (30) days of the service hereof insofar as the disclosure sought will be of assistance in the defense of this action and can be provided by the Plaintiff with substantially greater facility than could otherwise be obtained.

Definition: "You" shall mean the plaintiff to whom these interrogatories are directed except that if suit has been insti-

tuted by the representative of the estate of a decedent, ward, or incapable person, "you" shall also refer to the plaintiffs decedent, ward or incapable person unless the context of an interrogatory clearly indicates otherwise.

1. Please state the following:
   a. your full name and any other name(s) which you have been known;
   b. your date of birth;
   c. your motor vehicle operators number;
   d. your home address;
   e. your business address;

ANSWER:

2. Identify and list each injury you claim to have sustained as a result of the incidents alleged in the Complaint.

ANSWER:

3. When, where and from whom did you first receive treatment for said injuries?

ANSWER:

4. If you were treated at a hospital for injuries sustained in the alleged incident, state the name and location of each hospital and the dates of such treatment and confinement therein.

ANSWER:

5. State the name and address of each physician, therapist or other source of treatment for the conditions or injuries you sustained as a result of the incident alleged in your Complaint.

ANSWER:

6. When and from whom did you last receive any medical attention for injuries alleged to have been sustained as a result of the incident alleged in your Complaint.

ANSWER:

7. On what date were you fully recovered from the injuries or conditions alleged in your Complaint?

ANSWER:

8. If you claim you are not fully recovered, state precisely from what injuries or conditions you are presently suffering?

ANSWER:

9. Are you presently under the care of any doctor or other health care provider for the treatment of injuries alleged to have been sustained as a result of the incident alleged in your Complaint?

ANSWER:

10. If the answer to interrogatory #9 is in the affirmative, state the name and address of each physician or other health care provider who is treating you.

ANSWER:

11. Do you claim any present disability resulting from injuries or conditions allegedly sustained as a result of the incident alleged in your Complaint?

ANSWER:

12. If so, state the nature of the disability claimed.

ANSWER:

13. Do you claim any permanent disability resulting from said incident?

ANSWER:

14. If the answer to Interrogatory #13 is in the affirmative, please answer the following:
   a. list the parts of your body which are disabled;
   b. list the motions, activities or use of your body which you have lost or which you are unable to perform;
   c. state the percentage of loss of use claimed as to each part of your body;
   d. state the name and address of the person who made the prognosis for permanent disability and the percentage of loss of use;
   e. list the date for each such prognosis.

ANSWER:

15. If you were confined to your home or to your bed as a result of injuries or conditions sustained as a result of the incident alleged in your Complaint, state the dates between which you were so confined.

ANSWER:

[NOTE THAT THIS COMBINES TWO INTERROGATORIES FROM THE CURRENT SET OF STANDARD DISCOVERY]

16. List each medical report received by you or your attorney relating to your alleged injuries or conditions by stating the name and address of the treating doctor or other health care provider, and of any doctor or health care person you anticipate calling as a trial witness, who provided each such report and the date thereof.

ANSWER:

17. List each item of expense which you claim to have incurred as a result of the incident alleged in your Complaint, the amount thereof and state the name and address of the person or organization to who each item has been paid or is payable.

ANSWER:

18. For each item of expense identified in response to Interrogatory 17, if any such expense, or portion thereof, has been paid or reimbursed or is reimbursable by an insurer, state, as to each such item of expense the name of the insurer that made such payment or reimbursement or which is responsible for such reimbursement.

ANSWER:

19. If, during the ten year period prior to the date of the incident alleged in the Complaint, were you under a doctor's care for any conditions which were in any way similar or related to those identified and listed in your response to Interrogatory #2, state the nature of said conditions, the dates on which treatment was received, and the name of the doctor or health care provider.

ANSWER:

20. It during the ten year period prior to the date of the incident alleged in your Complaint, you were involved in any incident in which you received personal injuries similar or related to those identified and listed in your response to Interrogatory #2, please answer the following with respect to each such earlier incident:
   a. on what date and in what manner did you sustain such injuries?
   b. did you make a claim against anyone as a result of said accident?
   c. if so, provide the name and address of the person or persons against whom a claim was made;
   d. if suit was brought, state the name and location of the court, the return date of the suit, and the docket number;

e. state the nature of the injuries received in said accident.

f. state the name and address of each physician who treated you for said injuries;

g. state the dates on which you were so treated;

h. state the nature of the treatment received on each such date;

i. if you are presently or permanently disabled as a result of said injuries, please state the nature of such disability, the name and address of each physician who diagnosed said disability and the date of each such diagnosis.

ANSWER:

21. If you were involved in any incident in which you received personal injuries since the date of the incident alleged in the Complaint, please answer the following:

a. on what date and in what manner did you sustain said injuries?

b. did you make a claim against anyone as a result of said accident?

c. if so, provide the name and address of the person or persons against whom a claim was made;

d. if suit was brought, state the name and location of the court, the return date of the suit, and the docket number;

e. state the nature of the injuries received in said accident;

f. state the name and address of each physician who treated you for said injuries;

g. state the dates on which you were so treated;

h. state the nature of the treatment received on each such date;

i. if you are presently or permanently disabled as a result of said injuries, please state the nature of such disability, the name and address of each physician who diagnosed said disability and the date of each such diagnosis.

ANSWER:

22. Please state the name and address of any medical service provider who has rendered an opinion in writing or through testimony that you have sustained a permanent disability to any body part other than those listed in response to Interrogatories 13, 14, 20, or 21, and:

a. list each such part of your body that has been assessed a permanent disability:

b. state the percentage of loss of use assessed as to each part of your body;

c. state the date on which each such assessment was made.

ANSWER:

23. If you claim that as a result of the incident alleged in your Complaint you were prevented from following your usual occupation, or otherwise lost time from work, please provide the following information:

a. the name and address of your employer on the date alleged in the Complaint;

b. the nature of your occupation and a precise description of your job responsibilities with said employer on the date of the incident alleged in the Complaint;

c. your average, weekly earnings, salary, or employment for the year preceding the date Complaint;

d. the date following the date of the incident alleged in the Complaint on which you resumed the duties of said employment;

e. what loss of income do you claim as a result of the incident alleged in your Complaint and how is said loss computed?

f. the dates on which you were unable to perform the duties of your occupation and lost time from work as a result of injuries or conditions claimed to have been sustained as a result of the incident alleged in your Complaint.

g. The names and addresses of each employer for whom you worked for three years prior to the date of the incident alleged in your Complaint.

ANSWER:

24. Do you claim an impairment of earning capacity?

ANSWER:

25. List any other expenses or loss and the amount thereof not already set forth and which you claim to have incurred as a result of the incident alleged in your Complaint.

ANSWER:

26. If you have signed a covenant not to sue, a release or discharge of any claim you had, have or may have against any person, corporation, or other entity, as a result of the incident alleged in your Complaint, please state in whose favor it was given, the date thereof, and the consideration paid to you for giving it.

ANSWER:

27. If you or anyone on your behalf agreed or made an agreement with any person, corporation or other entity to limit in any way the liability of such person, corporation or other entity as a result of any claim you have or may have as a result of the incident alleged in your Complaint, please state in whose favor it was given, the date thereof, and the consideration paid to you for giving it.

ANSWER:

28. If, since the date of the incident alleged in your Complaint, you have made any claims for Workers Compensation benefits, state the nature of such claims and the dates on which they were made.

ANSWER:

29. Have you made any statements, as defined in the Connecticut Practice Book Rule 13-1, to any person regarding any of the events or happenings alleged in your Complaint?

ANSWER:

30. State the names and addresses of all persons known to you who were present with you at the time of the incident alleged in your Complaint or who observed or witnessed all or part of the accident.

ANSWER:

31. As to each individual named in response to Interrogatory #30, state whether to your knowledge or to the knowledge of your attorney, such individual has given any statement or statements as defined in the Connecticut Practice Book concerning the subject matter of your complaint or alleged injuries. If your answer to this Interrogatory is affirmative, state also:

a. the date on which statement or statements were taken;

b. the names and addresses of the person or persons who took such statement or statements;

c. the names and addresses of any persons present when such statement or statements were taken;

d. whether such statement or statements were written, made by recording device, or taken by court reporter or stenographer;

e. the name and address of each person having custody or a copy or copies of such statement or statements.

ANSWER:

32. Are you aware of any photographs depicting the accident scene, any vehicle involved in the incident alleged in the complaint, or any condition of injury alleged to have been caused by the incident alleged in the complaint? If so, for each set of photographs taken of each such subject by each photographer, please state:

a. the name and address of the photographer, other than an expert who will not testify at trial

b. the dates on which such photographs were taken;

c. the subject (e.g. “plaintiffs vehicle”, “scene”, etc.);

d. the number of photographs.

33. Within the time required by Rule 134(4) of the Rules of Practice, please disclose, pursuant to Rule 13-4(4), the names and addresses of all experts whom you expect to call as expert witnesses at trial and state, as to each:

a. the subject matter on which each expert witness is expected to testify;

b. the substance of the facts and opinions to which each expert witness is expected to testify;

c. a summary of the grounds for each opinion.

ANSWER:

The committee questions whether an Interrogatory is the appropriate discovery vehicle to use to disclose experts. It is the recommendation of the committee that any revisions to this Interrogatory be deferred, pending the results of the subcommittee considering revisions to expert disclosure rules.

34. If you were the operator of any motor vehicle involved in the incident that is the subject of this action, please state whether you consumed or used any alcoholic beverages, drugs or medications within the eight (8) hours next preceding the time of the incident alleged in the complaint and, if so, indicate what you consumed, how much you consumed, and when.

ANSWER:

35. Please state whether, within eight (8) hours after the incident alleged in the complaint, any testing was performed to determine the presence of alcohol or other drugs in your blood, and:

a. the name and address of the hospital, person or entity performing such test or screen:

h. the date and time:

c. the results.

ANSWER:

DEFENDANTS REOUESTS FOR PRODUCTION

The Defendant(s) hereby request(s) that the Plaintiff provide counsel for the Defendant(s) with copies of the documents described in the following requests for production, or afford counsel for said Defendant(s) the opportunity or, where requested, sufficient written authorization, to inspect, copy, photograph or otherwise reproduce said documents. The production of such documents, copies and written authorizations shall take place at the offices of _____ not later than thirty days after the service of this Request for Production.

An Air That Kills

A Book Review by Rick Base

Andrew Schneider, the Post-Dispatch's deputy assistant managing editor for investigations, is the co-author — with David McCumber, managing editor of the Seattle Post-Intelligencer — of "An Air That Kills," a new book on asbestos poisoning in Libby, Mont., and its national ramifications.

The Post-Dispatch asked Rick Bass — winner of both the O. Henry and Pushcart short-story prizes and the author of 18 books of fiction and nonfiction — to review the book. Bass lives near Libby in northwest Montana's Yaak Valley. This review was published in the St. Louis Post – Dispatch on January 23, 2004 and is reprinted here with permission.

In the middle of one of the most beautiful velvet green forests I've ever seen, in the northwestern corner of Montana, not far from my home, there is a mountain with its top sawed off, like some cranial operation gone horribly wrong. So toxic was the material beneath the mountain — vermiculite ore, associated with asbestos — that nothing grows on the sawn-off mountaintop.

Seen from the air, the ex-mountain appears as a chancrous sore, with toxic funnel eroding all flanks of the gouged-out caldera, remnants of where one company, W.R. Grace, clawed out millions of tons of asbestos, spraying the deadly dust onto its workers and into the community and the forest, while knowing (as did the U.S. government) that the dust would kill people graveyard-dead.

"An Air That Kills" is the story of the decades of larceny, death and deceit waged by an American corporation in small-town America and of our government's role in keeping those crimes secret and protected. The tale contains villains every bit as evil as any dressed up in fairy tales, and underdog heroes, too, whose only goal was to serve virtue and truth, and to perform their jobs with integrity: heroes in the medical profession and heroes within the government.

These public servants, although loyal to their agency — the Environmental Protection Agency — nonetheless, or because of that loyalty, chose to tell the hard and at first unbelievable truth: that W.R. Grace was killing its American workers through the 1990s and into the present, simply because it was better for its profits to do so.

Grace's workers suffered from the debilitating and incurable disease of asbestosis, gotten from working in the vermiculite mine, due in part to the ultra-fine nature of the tremolite form of asbestos mined there. The product responsible for the majority of the poison was Zonolite attic insulation, which contained the deadly vermiculite. A 1980 report "buried" deep within EPA files gave clear evidence, authors Andrew Schneider and David McCumber report, that "vermiculite from Libby is loaded with tremolite asbestos and the lives of the miners and everyone else who handles it down the line are at risk."

The Grace mill — facing lawsuits as the small-town miners of Libby began dying in droves, followed by their family members who breathed in the secondary dust from their work clothes — evaded those suits for a while. As the problem became too visible and the first lawsuits finally began to appear — in part because of the journalistic efforts of Schneider, McCumber and others — Grace, in that most American of corporate traditions, sequestered billions of dollars of assets in unreachable spinoff subsidiaries that could never be touched by the dead and the dying, before filing for bankruptcy, leaving taxpayers to pay for the cleanup of the nation's single worst Superfund site.

It's a task that won't be completed for decades, if ever.

Heroes and the horror

Schneider broke the story in November 1999 in the Seattle Post Intelligencer: The asbestos mill in Libby had been killing workers and townspeople for decades - the original report said the mine had killed 192 people and left at least 375 with fatal diseases — and the EPA had documents proving the exposures were deadly but had done nothing about this knowledge.

As in Andrea Peacock's earlier book on the subject, "Libby, Montana," Schneider and McCumber's book wades into the town's plight with respect and sensitivity, always mindful of the dignity of the victims.

Chief among these is the first miner to win a case against Grace, Les Skramsted, and the Erin Brockovich-like Gayla Benefield, who at first almost single-handedly fought W.R. Grace after losing her father and mother to the disease and contracting it along with her husband. (Schneider and McCumber report that 62 members of her family "have either died of the disease, have been diagnosed, or remain at high risk.")

Benefield allowed sicker miners to take her place in the judicial system time and again, so they could try to settle their claims against a stalling Grace before they died. She passed up a large out-of-court settlement to force Grace into a guilty verdict, even as she knew that doing so would result in her being "awarded" — a cruelly inaccurate word — a much smaller final settlement.

The physical descriptions of victims with the disease are graphic and wrenching. Victims of the disease struggle to find breath to walk out the door, to go get the paper in the morning or to shop for groceries. Near the end of the disease's brutal progression, they must carry oxygen bottles on wheels behind them and finally can no longer walk, even with the oxygen bottle's assistance.

As a resident of the county, I was sick and angry to read this book, ashamed of the force and power of money that rules our government. It makes it hard for me to believe assurances that all is well now, or will be well soon, and I'm worried, too, when honest officials say, "We don't know."

It can be a real challenge to deeply engage a reader in the narrative of such a profoundly horrific and dispiriting subject, but the authors frame the storytelling structure in a way that helps temper or attenuate the horror and disbelief, allowing us to engage more fully with each chapter.

Beginning chronologically with a description of the discovery of the Libby vermiculite mine early in the 20th century (along with some worldwide historic perspectives on the ills of asbestos, dating back centuries), Schneider and McCumber skillfully establish the major individuals in the story through detailed characterizations, and then gradually begin to work in the outrageous document analyses, in layperson's terms, in which the lawyers and activists prove beyond a shadow of a doubt the chilling truths of who knew what and when: in government, in industry and, lastly and most tragically, in the community — the victims themselves.

And then, with the tragedy in Libby fully detailed, the authors widen the scope of horror — the rest of the iceberg — to the rest of the country, and any place where asbestos has ever been used, mined or processed.

"Get someone on this"

Amid the tales of devastation, tragedy and cover-up, so much loss of utterly innocent life, I try to focus on the warriors such as Benefield and Skramsted; their local lawyers, Roger Sullivan and Jon Heberling, who threw their all into fighting W.R. Grace; and the EPA's on-site recovery coordinator, Paul Peronard, who gave the townspeople of Libby what they needed most: his promise that he would always tell the truth, that they would not be lied to again. Working with Peronard were several equally trustworthy and committed agency personnel. Included in the book also are the stories of heroes in the medical profession.

Particularly hard to read, however, are descriptions of the machinations of W.R. Grace's lawyers, and the company memos that scuttled back and forth across the decades, such as one by N.F. Bushell (a Grace manager in Vancouver), who wrote to headquarters about a worker in their Winnipeg plant who had asbestosis.

"There is asbestos in the ore that we receive from Libby," he wrote in 1968. "I'm afraid that we may still be exposing our employees to an unnecessary health hazard. ... Get someone on this subject before we get closed down or slapped with some pretty large claims from employees or their heirs. It won't take many more biopsy reports before we get fingered."

One of the most upsetting revelations in the book tells how J. Peter Grace, chief executive officer of W.R. Grace in the 1980s, was named by the Reagan administration to head the President's Private Sector Survey on Cost Control, known as the Grace Commission. Grace created numerous task forces, which presented various deregulation schemes to the administration.

Reporting on the puzzle that Peronard and others pursued — why, if EPA knew 20 years earlier that asbestos was so deadly, didn't it warn anyone? — Schneider and McCumber write, "Nobody official leveled with him (Peronard), but some of the old-timers in headquarters told him the follow-up was never pursued because of the recommendations that J. Peter Grace gave President Ronald Reagan on reducing government interference in industry's business."

From Libby to 9-11

The book also makes clear that asbestos reaches much farther than Libby: Thousands of other victims can be found around the country. The Post-Intelligencer's investigation found that crayons, garden products, kitty litter and brake parts still possessed asbestos, courtesy of a congressional overturn of the ban that had once existed and that most people, including health officials, still believe exists.

"An Air That Kills" documents the mortalities associated with this product at other mines and processing facilities all around the country, too. Near the end of the book, it reveals the sickeningly ironic fact that asbestos from Libby was used in the construction of the World Trade Center: a hundred tons of it sent suddenly adrift on Sept. 11, 2001. Using antiquated detection methods that had failed to detect asbestos in Libby until the more sophisticated transmission electron microscopy (TEM) technology was utilized, it was reported that insignificant asbestos fibers were found in Manhattan.

"While EPA may not have wanted to admit the need for a thorough federal cleanup of the entire affected area, it did think enough of the hazard to make sure its own offices in lower Manhattan were thoroughly decontaminated," write the authors. "Asbestos levels in those offices were tested not with the decades-old PLM technology but with newer, more accurate TEM analysis."

Libby's problems didn't only affect New York City. Investigations revealed that as many as 35 million homes around the country may be insulated with Zonolite — the product from Libby – a situation in which, according to the EPA, "actual risks may be even greater than estimated." A decision was made within the EPA to alert the nation to the widespread problem.

On Dec. 29, 2002, however, the St. Louis Post-Dispatch, for which Schneider now works, published a story that the Bush administration's Office of Management and Budget had decided to cancel the decision to label asbestos a public health emergency. EPA officials around the country went ballistic, even while consigning their careers to certain dead-ends by opposing the White House, and refused to sign the document.

Schneider and McCumber stayed after the story, filing for Freedom of Information Act information.

"On May 8, 2003," they write, "EPA finally released its warning to the millions of people that may have Zonolite Attic Insulation in their homes and businesses. ...

"Unfortunately for those who needed the information, the same morning that the insulation announcement was to be made, (EPA administrator Christine Todd) Whitman decided to tell the world that she was quitting EPA. Little or no media attention was paid to cancer-causing insulation that day. By August, no sign could be found of EPA fulfilling its promise to widely publicize the dangers from the insulation and hand out warnings at home improvement and hardware stores across the country."

Danger is everywhere

Sometimes I wonder how many Libbys — how many Lincoln Counties — it will take to awaken a sleeping and complacent nation, with regard to poisoning of our nests and ourselves. A hundred? A thousand? Even one — or one more — is too many, and, as "An Air That Kills" shows us, asbestos is everywhere.

The authors tell us that the 30 percent exposure rate in Libby and the 200-plus dead miners and their families in the area may be revealed in coming years to be but the tip of a very big national iceberg. The old contaminations of Libby and nearby communities are being cleaned up because of funding demands by Sen. Max Baucus, D-Mont., for those projects, but, again, the poison exists far beyond the borders of Lincoln County.

"An Air That Kills," although an exceedingly difficult read, emotionally — in the tradition of Rachel Carson's "Silent Spring" and Bill McKibben's "The End of Nature" or "Enough" — is a book of highest service and integrity. Its message is brutal but integral to the lives and times of a nation facing great change, turmoil and, all too often, destruction from within.

"An Air That Kills: How the Asbestos Poisoning of Libby, Montana, Uncovered a National Scandal" By Andrew Schneider and David McCumber. Published by Putnam,

New Studies on Medical Errors and Inadequate Care; Reducing Errors Will Save Lives, Decrease Costs, and Lower Insurance Premiums

This article appeared on the website for the Center for Justice & Democracy, http://centerjd.org.

1. The Problem: Deaths and Costs of Medical Malpractice

New studies find that up to 150,000 people die each year from medical mistakes and inadequate care in hospitals.

The National Committee for Quality Assurance (NCQA), a non-profit organization that monitors health care, has found that 57,000 Americans die each year because they are not given adequate health care. (National Committee for Quality Assurance, *The State of Health Care Quality 2003* 6, 2003.) "These deaths should not be confused with those attributable to medical errors or lack of access to health care," says NCQA. In 1999, the Institute of Medicine (IOM), part of the National Academy of Sciences, found that medical errors cause as many as 98,000 deaths each year. (Institute of Medicine, *To Err is Human: Building a Safer Health System,* 1999.)

NCQA finds that Americans are not getting the care they need because the health care industry has failed to adopt needed technology, doctors inconsistently deliver appropriate care, and the health care system fails to measure and report on performance, among other reasons.

Medical errors and inadequate health care costs Americans billions of dollars each year.

The NCQA finds that inadequate care costs over $1.6 billion in avoidable hospital bills and costs U.S. businesses $11.5 billion due to almost 41 million lost work days. These costs are in addition to the huge costs of medical errors found by the IOM in 1999. IOM estimated the total national costs (lost income, lost household production, disability and health care costs) of medical errors as between $17 billion and $29 billion each year, of which health care costs represent over one-half.

A recent government study of 18 specific types of medical errors finds that they cause tens of thousands of deaths and cost billions of dollars each year.

The federal government's Agency for Healthcare Research and Quality recently found that 18 categories of medical errors, such as postoperative infections, accidental reopening of surgical wounds, and medical objects left inside patients, result in 32,500 hospital deaths, cost $9.3 billion in additional hospital charges, and lead to over 2.4 million extra days spent in hospitals. (Julie Bell, "Study of Medical Errors Puts Tentative Price Tag on Impact: Hospital Charges Alone Boosted $9.3 Billion a Year," *Baltimore Sun,* Oct. 8, 2003.) The study, published in the Journal of the American Medical Association, found that even these figures greatly underestimate the problem since many medical complications were not analyzed for this study. (Lindsey Tanner, Associated Press, "Preventable Complications Cost More Than $9 Billion," *Deseret News,* Oct. 8, 2003.)

Dr. Chunliu Zhan, the study's lead researcher, said, "The message here is that medical injuries can have a devastating impact on the health care system." (Press Release, Agency for Healthcare Research and Quality, *Injuries in Hospitals Pose a Significant Threat to Patients and a Substantial Increase in Health Care Costs,* Oct. 7, 2003, http://www.ahrq.gov/news/press/pr2003/injurypr.htm.)

2. The Solutions

Higher-quality health care providers and plans would save lives and the enormous costs associated with these deaths.

The NCQA found that if health care providers and plans nationwide matched the quality of care already provided by the top 10 percent of health care providers and plans, 57,000 lives each year and billions of dollars would be saved.

NCQA recommends: investment in technology and systems to support evidence-based care; increased collaboration between health care professionals; payment systems that reward excellence; more consumer engagement in provider selection and care decisions; and greater transparency, to allow consumers and others to see and compare quality information.

When hospitals adopt available technology, they provide better care with greater consistency, and their insurance rates can drop.

Soon after the NCQA report was released, another newspaper story detailed how a handful of hospitals are using technology to make prenatal care and delivery safer. These hospitals are using computer software that improves monitoring and treatment by reminding staff of steps to take, stopping them from doing something wrong, and avoiding problems with illegible handwriting.

The software helps avoid medical errors and, according to the director of women and infant services at the first hospital to install the software, three years ago, "the program has already saved lives." Maimonides Medical Center in Brooklyn, where the program was purchased two years ago, already has negotiated a $300,000 discount on its annual malpractice premium. (Margaret Ramirez, "System Checks Steps in Care," *Newsday,* Oct. 7, 2003.)

Other simple improvements to medical practice are also crucial.

While technology is one way to reduce the prevalence of medical errors and avoidable complications, other steps are much simpler and easier to implement. According to Dr. Zhan, lead researcher for the Agency for Healthcare Research and Quality study, "Improved medical practices, including an emphasis on better handwashing, might help reduce the rates." In 1995, Dr. Wayne Cohen, who was then medical director of Bronx Municipal Hospital, said, "The city was spending so much money defending obstetrics suits, they just made a decision that it would be cheaper to hire people who knew what they were doing." (Dean Baquet and Jane Fritsch, "New York's Public Hospitals Fail, and Babies Are the Victims," *New York Times*, March 5, 1995.)

New Consumer Study Shows Insurers Price-Gouging Doctors Without Basis

This article was released by the Americans for Insurance Reform on November 20, 2003, and may be found at its website, www.insurance-reform.org.

Americans for Insurance Reform (AIR), a coalition of over 100 consumer and public interest groups representing more than 50 million people, announced today the release of a comprehensive study of medical malpractice based on new insurance data through 2002. The study finds that the years 2001 and 2002 saw no sudden upsurge in medical malpractice insurer payouts or costs to justify the abrupt rate hikes that many doctors have experienced over the last two years. In fact, payouts per doctor (in constant dollars) dropped from 2001 to 2002. (The entire study is available at www.insurance-reform.org).

According to AIR co-founder and spokesperson Joanne Doroshow, Executive Director of the Center for Justice & Democracy, "this study completely refutes the insurance industry's explanation for skyrocketing medical malpractice rates and undermines industry claims that a medical malpractice 'crisis' for insurers exists. Medical malpractice insurance premiums rose much faster in 2002 than was justified by insurance payouts, which actually dropped. The insurance industry is engaged in a pricing scheme designed to gouge doctors and the rest of the American people based on a premise that lacks any basis in fact."

AIR also found that over the last 30 years, medical malpractice payouts have largely tracked the rate of medical inflation and have been essentially flat since the mid-1980s. What's more, over the same period, insurance premium rates have not tracked payouts at all (e.g. jury verdicts, settlements, etc.), but instead directly follow the ups and downs of the economy. When the economy is strong and the insurance industry's market investments are gaining, medical malpractice rates decrease. On the other hand, when the economy is weak, as it has been since the second half of 2000, with the insurance industry's market investments down, medical malpractice insurance rates increase. These findings suggest that the real reason medical malpractice insurance rates fluctuate is market forces — not, as the insurance industry claims, because of a sudden massive increase in medical malpractice jury awards.

"These data together constitute a 'smoking gun,' which should, once and for all end the debate about the cause of these periodic medical malpractice crises," said the author of the study, J. Robert Hunter, Director of Insurance for the Consumer Federation of America, former Texas Insurance Commissioner and AIR co-founder. "Insurers, whose own investment actions have created a 'crisis' in insurance affordability and availability, are blaming others for their own mismanagement. For the next year or two, insurers will reap huge profits on the high premiums the doctors are now enduring."

The findings of AIR's study come at a crucial time, as the nation's insurance companies are in the process of advancing a legislative agenda to limit liability for doctors, hospitals, HMOs, nursing homes and drug companies that cause injury. Insurance companies are blaming high rates on the supposed increase in claims by patients, rising verdicts and exploding tort system costs when in reality, it is the insurance industry's efforts to make up for their economy-driven, market-based investment losses that are the cause.

Making the Most of the CTLA List Serve

By Douglas W. Hammond

Bill Gallagher just asked me to prepare another issue of this column, as soon as possible. Not having had a column underway, I will defer, until the next issue, a review of the most recent messages. Instead, I offer some general comments on the breakdown of messages, the attachment of briefs and memoranda, and the need to verify advice.

What can you learn about?
A Quick Survey of Message Subjects

Still not a subscriber to the CTLA list serve? Perhaps, you'd like to know what types of messages get posted to it. I made a quick, unscientific survey over a recent four-day period and found that the subjects of the posted messages break down approximately as follows:

- Legal Issues in Civil, Non-family Cases — 30%
- Case Strategy and Investigation in Civil, Non-family cases — 12%
- Opinions re: doctors (IME, WC, and treating) — 12%
- Expert Witnesses: Recommendations & Opinions — 10%
- Referral Requests and Replies in Civil, Non-family cases — 8%
- Criminal Law: Legal Issues and Referrals — 4%
- Local Courthouse Practices and Venue Issues — 5%
- Other (family law, judges, political, general & miscellany) — 19%

If communicating with your colleagues about these issues is important to your practice, consider joining the CTLA list serve.

Limitations of Attachments and Message Size

Some members have inquired about what briefs or memoranda can be attached to messages to the CTLA list serve. According to CTLA's Diana Roe, the size limit for messages sent to the CTLA lists is 1 MB. Any message over this size will be automatically rejected. There is no limit on the number or size of attachments, as long as the total message size (including any attachments) does not exceed 1 MB.

Generally, Ms. Roe noted, CTLA encourages list members to limit the size of messages as much as possible. Some list members have size limits smaller than 1 MB. Thus, the smaller the message the larger the likelihood that everyone will receive it successfully. Those of us who store thousands of old messages also appreciate it when the size of individual messages is kept down. Scrolling through documents with large attachments seems to slow the e-mail application down considerably, at least on our system.

The size limitation of the CTLA list serve should still allow attorney to post motions, memoranda or briefs to the list serve, when they would be of general interest to membership. (Where they would be of interest only to a particular inquirer, it is preferable to e-mail them directly).

One of the better ways to disseminate memoranda or similar attachments may be as plain text pasted into the body of an e-mail message. This cut-and-paste approach usually makes for a smaller message than if the memorandum had been attached. It also allows readers hesitant about opening attachments to see your memorandum.

As an illustration, I took a memorandum that I recently received as an e-mail attachment, in Microsoft Word document format. With a Microsoft Outlook new mail message already

open in another window, I went into the Word document and typed <Ctrl<A to select all text and <Ctrl<C to copy it. I then went into the body of the mail message and selected "Edit", "Paste Special", "text", which pasted the text into the mail message as plain unformatted text. The mail message now contains the all of the text that was in the brief. When it was in the form of a Microsoft Word attachment, the document had a size of 44KB. After I pasted the text into the mail message, the entire mail message had a total size of just 19KB. Thus, at the cost of some lost formatting, everyone can now read the entire brief without opening a large attachment.

To really put this approach to the test, I opened a 99-page Microsoft Word document, among the longest things I have ever written. I pasted it as plain text into the body of a mail message, in the same manner set forth above, and e-mailed it from my office e-mail account to my internet e-mail account. The total size was just 114K, only about 11% of the limit for message size.

Limitations of List Serve Advice

Please bear in mind that, as with advice that you might get from your partners at lunch, or from your colleagues in the courthouse halls, not every suggestion is a gem. Occasionally, (rarely, I hope), a reply may be dubious or wrong. Not all such advice may be corrected promptly, or even ever, which is understandable, because:

1. not all subscribers read all of the messages; (— Does anyone actually read them all?)
2. not every subscriber who encounters advice with which he or she disagrees can be expected to research it and correct it.

If you bear this limitation in mind, however, you can often get sage leads from the list serve, with which to start your own investigation and research into the facts or law of a case.

Sunshine in Litigation in Connecticut — The Time Has Come

By Robert I. Reardon, Jr.

From cases involving defective tires, exploding gas tanks and child sexual molestation by clergy, to doctors continuing to practice medicine after repeatedly committing malpractice, the sealing of court records and confidential agreements regarding discovery and settlement have become more and more commonplace. Litigation secrecy has become so commonplace that at least fifteen states enacted some form of legislation or court rule to prohibit these practices. Secrecy in our courts undermines everyone's right to know, denies us vital health and safety information and leads to needless injuries and deaths.

In 1994, CTLA first proposed model legislation known as the "Sunshine in Litigation Act" to address this problem. Each year since then, CTLA has lobbied for its passage at the Connecticut Legislature, and we will even more aggressively do so again this year.

In short, the Sunshine in Litigation Act requires all information submitted to a civil court, all civil discovery produced and all settlement agreements to be presumed open to the public. To overcome this presumption, the court must find that the person seeking confidentiality must sustain its burden of proving, by clear and convincing evidence, four separate requirements:

1. That there is a substantial interest in limiting public access to the information;
2. That the information contains private facts concerning a natural person or trade secrets;
3. That the interests in limiting public access outweigh the publics' need to know for health or safety reasons; and
4. No less restrictive means will adequately protect the interest of those seeking secrecy.

We need your help to successfully enact this bill into law by writing your state legislators and your local media outlets to call attention to its importance. Below is the entire text of the bill. Any suggestions for improvement before submission would be greatly appreciated. Please direct suggestions for improvement to Robert I. Reardon, Jr., at reardonlaw@aol.com.

PROPOSED ACT:

SUNSHINE IN LITIGATION ACT

AN ACT CONCERNING UNNECESSARY SECRECY IN OUR COURTS

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Civil Justice System Presumed Open. The operations of the civil justice system, including the following information and documents concerning matters before the civil courts, are presumed to be open to the public:

(a) all information and documents of any nature filed with, submitted to, or issued by any civil court in connection with any matters before it;

(b) all discovery in any matter before any civil court, whether or not the discovery is filed with or submitted to the court; and

(c) all settlement agreements in any matter before any civil court, whether or not they are filed with or submitted to the court.

Section 2. Standard of Overcoming Presumption of Public Access. No court may enter an order having the purpose or effect of limiting public access to any of the information or documents referred to in Section 1 of this subtitle unless it finds that the person seeking to limit public access has met its burden of proving, with clear and convincing evidence, that:

(a) there is a specific, serious and substantial interest in limiting public access to the information or documents;

(b) the information or documents constitute private facts concerning a natural person or trade secret or other confidential research, development or commercially secret data;

(c) the interest in limiting public access to the information or documents clearly outweighs both the presumption of public access and any adverse effect that limiting public access might have on anyone's safety or health; and

(d) no less restrictive means that limiting public access will adequately and effectively protect the interest asserted in secrecy.

Section 3. Access of Government Officials and Similarly Situated Litigants. No court may enter an order having the purpose or effect of limiting the access of the following persons to information or documents referred to in Section 1 of this subtitle, even when the standard set forth in Section 2 of this subtitled has been met, if

those persons voluntarily submit themselves to the jurisdiction of the court for the purpose of permitting enforcement of the provisions of the court's order limiting public access;

(a) a federal, state or local government official with regulatory, investigative, administrative, legislative, judicial, law enforcement, or other responsibility in regard to which the information or documents is relevant; and

(b) a litigant or an attorney for a litigant in a case or potential case in regard to which the information or documents is relevant.

Section 4. Notice of Motion to Overcome Presumption of Public Access. An order limiting public access in accordance with Section 2 of this subtitle may only be entered upon a written motion, which shall be open to public inspection. Upon filing the motion, or upon learning that any of the information contained in a notice previously issued pursuant to this section is incorrect, the movant shall:

(a) determine the time and place of the hearing on the motion, pursuant to procedures to be established by the clerk of the court;

(b) post a notice, in a public place to be designated by the clerk of the court, stating: the style and number of the case; the identity of the movant; that a hearing will be held in open court on a motion to limit public access in the case; a brief but specific description of both the nature of the case and the information or documents in regard to which secrecy is sought; the specific time and place of the hearing; that any person may appear, intervene, and be heard on matters relevant to the motion; and the names, addresses, and phone numbers of the attorneys for the parties;

(c) send a copy of the notice by first class mail or speedier means, to all members of the public, including all members of the news media, who, in accordance with procedures to be established by the clerk of the court, have filed a standing request to receive notice of motions seeking to limit public access; and

(d) file a verified copy of the notice, along with proof of its posting and service, with the clerk of the court for inclusion in the case file and the Clerk of the Supreme Court for inclusion in the publicly open file to be established to enable the State/Commonwealth and its citizens to monitor the extent to which motions to limit public access are being filed.

Section 5. Hearing on Motion to Overcome Presumption of Public Access. A public hearing shall be held in open court on all motions seeking to limit public access as soon as practicable, but not less than fourteen days after the motion is filed and notice or, where applicable, revised notice is posted and served. Any person may appear, intervene, and be heard as a matter of right on any matter relevant to the motion.

Section 6. In Camera Review and Temporary Order Limiting Public Access. Notwithstanding any of the foregoing, in order to facilitate a determination of whether certain information and documents are open to the public:

(a) a court may receive and review information and documents in camera either to determine whether they are discoverable or to determine whether a motion to limit public access to them should be granted;

(b) upon a written motion and with notice to all parties in the case, a court may enter one temporary and nonrenewable order limiting public access to specific information or documents for not more than 30 calendar days so that a hearing can be held and a ruling entered on a motion to limit public access, if:

(1) the movant demonstrates a compelling need for it by proving, through affidavit or verified petition, specific facts which establish that immediate and irreparable injury will result in a specific interest of the movant before notice can be given and a hearing held in accordance with the provisions of this subtitle;

(2) the order establishes the time and place of the hearing on the motion to limit public access and requires the party seeking it to immediately provide the notice of the hearing required by this subdue, unless such a hearing has previously been scheduled and such notice has previously been given; and

(3) the order explicitly provides that it may be withdrawn or modified upon the motion of any person, with notice to the parties and hearing conducted as soon as practicable, and shall not reduce in any way the burden of the person seeking to limit public access at the hearing.

Section 7. Order on Motion to Overcome Presumption of Public Access. A motion to limit public access shall be decided by a written order, open to the public, that rules solely on the motion and states the style and number of the case, the specific reasons for finding and concluding whether or not the showing required by Section 2 of this subtitle has been made, and, if it finds and concludes that such a showing has been made, the specific information and documents which are to be closed to the public, and the time period for which they are to be so closed. Any such order limiting public access shall be carefully tailored to ensure that it does not limit public access to any information or documents in regard to which the showing required by Section 2 of this subtitle has not been made.

Section 8. Appeal of Order on Motion to Overcome Presumption of Public Access. Any order or portion thereof ruling on a motion to limit public access or any other request to limit a person's access to information or documents referred to in Section 1 of this subtitle shall be immediately appealable by any person who participated in the hearing preceding issuance of the order.

Section 9. Intervention. Any person may intervene as a matter of right in any civil action at any time before or after judgment to seek to obtain, modify, or vacate any order limiting public access to information and documents relevant to the case. Any person meeting the requirements of Section 3 of this subtitle may also intervene as a matter of right in any civil action at any time before or after judgment to seek to obtain access to information or documents pursuant to the provisions of that section.

Section 10. Continuing Jurisdiction, Enforcement, and Modification. A court that enters an order limiting public access retains continuing jurisdiction to enforce, alter or vacate that order. Motions to enforce, alter or vacate such orders shall be subject to all of the provisions of this subtitle, including the notice and hearing provisions or Sections 4 and 5, respectively. All orders properly entered in accordance with all of the provisions of this subtitle shall not be reconsidered at the request of the party or intervenor who has actual notice of the hearing preceding issuance of the order unless the party or intervenor shows that some relevant circumstances, not necessarily related to the case in which the order was entered, has changed. No challenged or reconsidered order limiting public access shall remain in effect unless the standard set forth in Section 2 of this subtitle is met at the time at which the order is challenged or reconsidered.

Great-West Life v. Knudson:

A health insurer's right to reimbursement redux

By F. Jerome O'Malley

Attorney O'Malley is a member of Tobin, Carberry, O'Malley, Riley & Selinger, P.C. of New London, Connecticut.

In 1990, the U.S. Supreme Court affirmed an ERISA plan's direct claim against its beneficiary for the reimbursement of medical benefits. Despite a Pennsylvania law prohibiting subrogation claims, the court ruled in *FMC Corp. v. Holliday*[1] that ERISA[2] preempted its application and authorized reimbursement from the claimant's tort recovery. This right of recovery was substantially limited, if not effectively eliminated, in the recent decision of *Great-West Life Insurance Co. v. Knudson.*[3]

In *Knudson,* as in *Holliday,* medical expenses were paid an injured employee under her company health plan. Both plans contained subrogation clauses, requiring the repayment of benefits from any subsequent tort recovery; both beneficiaries refused demands for full reimbursement; and both plan insurers then brought claims under ERISA in reliance upon the employee's contractual obligations. The similarities between *Holliday* and *Knudson* sharply diverge in their results, however, as reimbursement was denied in Knudson.

In *Holliday,* the employee asserted that a state antisubrogation law, similar to Connecticut's Section 52-225c[4], precluded the plan from exercising its subrogation rights against her tort recovery. The Supreme Court, however, noting the expansive language of ERISA,[5] ruled that ERISA preempted application of the Pennsylvania antisubrogation law and permitted the reimbursement claim. Similarly, in *Knudson,* the plan insurer sought recovery of $411,000 in medical benefits from a $650,000 tort recovery. A state court had approved a settlement that allocated approximately $257,000 to a special needs trust and Great-West filed an ERISA action in federal court, contesting the settlement's failure to provide full reimbursement to the plan. But while acknowledging that ERISA governed the insurer's contractual claim of reimbursement, the Court nonetheless denied recovery. In a unique analysis that resurrected historical distinctions between actions at law and in equity,[6] the Court ruled that ERISA only permitted actions that were traditionally equitable in nature. Since the claim for reimbursement was premised upon a contractual obligation to pay money, it was "quintessentially an action at law" and, therefore, unavailable.[7] In effect, then, a direct action against a beneficiary for reimbursement of medical benefits can no longer be pursued under ERISA, even though *Holliday* had affirmed this exclusive remedy only a decade before.[8]

Consequently, it appears that an insurer has no remedy in Connecticut to secure reimbursement from a plan beneficiary, since relief is also unavailable in Superior Court. Section 52-225c expressly prohibits the recovery of medical benefits from a tort settlement or judgment.[9] And apart from our antisubrogation statute, state common law claims for reimbursement, whether premised on tort or contract theories, have also been declared preempted by ERISA.[10] As either constitutes an action at law, however, both are now deemed unauthorized by ERISA. Finally, fashioning an equitable claim for restitution is also unavailing to an insurer. The *Knudson* court reasoned that restitution is a legal remedy when premised on a contractual claim that seeks to impose personal liability on a plan beneficiary; it is, therefore, also unauthorized by ERISA.[11]

Unfortunately, *Knudson* does not unequivocally foreclose claims against a plaintiff's counsel in possession of a client's tort proceeds. While the Court clearly ruled that plan beneficiaries were immune from reimbursement claims under ERISA, it suggested the possibility of equitable claims against fiduciaries in possession of third party proceeds. But as a scathing dissent points out,[12] claims for a constructive trust or equitable lien are unenforceable once the tort proceeds have been distributed. Given the majority's ruling, counsel would have no obligation to refrain from distributing the proceeds absent a court order. And a plan insurer would need advance knowledge of a settlement or judgment to obtain injunctive relief while the proceeds were in counsel's possession. An injunction could not direct payment of compensatory or punitive damages allocat-

ed in the settlement or judgment,[13] as they are inarguably forms of legal relief, and the imposition of a constructive trust is unlikely in a personal injury case since Connecticut has an established public policy against subrogation claims prescribed in Section 52-225c. A court would therefore have no identifiable basis for concluding that it was unconscionable for plaintiff's counsel to distribute settlement proceeds to an injured client, as required for the imposition of a trust.[14] Finally, in the unlikely event that an equitable lien or constructive trust were created by a federal court order, equitable subrogation could be imposed only against tort proceeds which fully compensate the insured's loss.[15] Thus, an insurer would not automatically receive full reimbursement of medical benefits, despite its contractual entitlement. In sum, since no practical remedy exists for insurers in Connecticut after *Knudson,* plaintiffs and their counsel can appropriately refuse medical reimbursement claims as unenforceable.

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[1] *498 U.S. 52 (1990).* See "*FMC v. Holliday:* A Health Insurer's Right to Reimbursement Revisited." CTLA Forum, Vol. 9, No 2 (1991).

[2] Employees Retirement Income Security Act, 29 U.S.C. §1001 et seq.

[3] 534 U.S. 204 (2002).

[4] In pertinent part: "Unless otherwise provided by law, no insurer or any other person providing collateral source benefits as defined in section 52-225b shall be entitled to recover the amount of any such benefits from the defendant or any other person or entity as a result of any claim or action for damages for personal injury or wrongful death regardless of whether such claim or action is resolved by settlement or judgment.

[5] The "preemption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that relates to an employee benefit plan governed by ERISA." *Holliday, supra*, 56.

[6] Characterized by the dissent as ". . . reeking unduly of the study, if not of the museum." *Knudson, supra,* 234.

[7] *Knudson, supra,* 209.

[8] Remarkably, *Holliday* is never cited, let alone distinguished by the Court.

[9] *Pajor v. Town of Wallingford,* 47 Conn. App. 365 (1997).

[10] *Ingersoll-Rand Company v. McClendon,* 498 U.S. 133 (1990).

[11] *Knudson, supra,* 213.

[12] *Id., supra,* 227-229.

[13] *Mertens v Hewitt Assoc.,* 508 U.S. 248, 256 (1993).

[14] *Knudson, supra,* 215.

[15] See 44 Am Jur. 2d §§1805, 1815, 1820; *Berlinski v. Ouellette,* 164 Conn. 482, 489 (1973).

CTLA Law Letters

Neil Ferstand, CTLA Executive Director, has authored several Law Letters to the membership. We have included the most recent letters in this column.

The Memory Hole

Neil H. Ferstand, Executive Director

"Sunlight is said to be the best of disinfectants: Electric light the most efficient policeman."

Justice Louis D.Brandeis

Circa July 1986, the headline on the front page of one of Connecticut's best known and respected newspapers reported drastic changes to the legal system that were designed to give relief to physicians struggling with rapidly escalating malpractice premiums. But by 1987, one state lawmaker was noted as saying, "The insurance industry now says those measures will have no effect on insurance rates. We have been disappointed by the response of the insurance industry. The reforms we passed should have led to rate reductions because we made it more difficult to recover, or set limits on recovery. But this hasn't happened."

Fast forward to February of 2003.

Jerome Harleston, Senior Attorney for the Connecticut Office of Legislative Research in a research paper entitled National Cap on Non-Economic Damages states, "The data are inconclusive as to the efficacy of tort reform as a remedy for periodic crises in the cost of malpractice insurance. Previous rounds of tort reform have not prevented such crises and tort reform does not address the issue of patient safety."

Quoting a report from the U.S. Healthcare Financing Administration (HCFA), the National Association of Attorneys General, in a 1986 report, entitled Cause of the Current Crisis of Unavailability and Affordability of Liability Insurance, states "Almost all states enacted legislation in response to the rapid rise in malpractice insurance premiums which occurred during the mid-1970's. The empirical results give no indication that state legislative actions taken collectively, had their intended effects on premiums."

Am I missing something here, or are we down at the bottom of a Memory Hole looking up at the insurance and organized medical and business community about to make another attempt to relieve themselves onto the civil justice system?

The proponents of tort reform are not particularly interested in empirical reality. Neither are they interested in truth telling, but their daily obfuscation and misdirection is certainly getting a workout in the Connecticut daily press and in what seem like weekly communications to legislators. As we move closer to the February 4th start of the 2004 legislative session, their communication has become relentless.

The "Memory Hole" is, of course, a document disposal system in George Orwell's famous novel, 1984. The candidates for this incineration system were generally documents or pieces of information whose continued existence would very likely undermine the legitimacy of the state. The items were erased from living memory. Such is the living history of the efficacy of tort reform.

But it doesn't necessarily have to be that way. In fact, there's a good chance some legislators with long memories or an interest in delving into our past will discover the fallacious promises made to their predecessors in the 1970's, 1980's and 1990's.

Let's make sure you help us remind legislators of the existence of the Memory Hole. In fact, why not call your state legislators today and remind them. We'll be happy to help you. Call CTLA at (860) 522-4345.

You'd Think They'd Learn

Neil H. Ferstand, Executive Director

The current wide perception of a crisis in both the availability and cost of liability insurance echoes the "crises" of the mid 70s, early 80s and 90s. Then, as now, all types of liability lines were effected, including the cost of insurance for municipal governments. Interest rates and insurance industry business practices were proven largely to blame, but inevitably the tort system came under heavy attack as the sole presumed culprit.

Then as now, insurance, business, medical and manufacturing interests clamored for limitations on lawsuits and damages. Certain elements in government and a lazy press picked up on these claims, fueling the controversy by publishing highly selective and misleading accounts of large verdicts that seemed to lend truth to the criticisms.

Times have hardly changed.

If tort reformers would just admit that their current agenda is an effort to assist

the insurance industry in managing its own risks, it just might be less offensive. But that candor could cause a further negative impact on the industry's reputation, if that's possible. The general public would tend to look with even more suspicion on an industry that purports to manage everyone else's risk when it can't even manage its own.

Now, as then, the industry with the problem isn't the medical community, nor is it the law. Again, it's the insurance industry, and again the problem has been self-inflicted. It's certainly apparent, though, that the doctors are salivating over the fact that limiting verdicts and other tort reforms may greatly diminish their chances of being sued. Of course, it certainly won't help those they've grievously harmed.

"Lawmakers could do more to reduce premiums by improving the structure of the insurance marketplace, said Frank A. Sloan, an economics professor at Duke University who specializes in health policy and management. Medical malpractice "…is the most cyclical health policy there is," Professor Sloan said, adding, "There are periods of time when premiums stop going up, and then nobody's interested, then again we get a crisis and everybody says juries are terrible." Richard A. Oppel Jr., *New York Times,* 1/17/03

This is the fourth "crisis" in thirty years. Again, there are the frenetic calls for tort reform. When will proponents and their legislative allies grow tired of this charade? Anytime soon is doubtful.

So if tort reform passes, who benefits? Certainly not the doctors. They may be lucky to see a temporary fluctuation in their rates. Now, as then, the insurance industry will clearly be the biggest beneficiary.

This nationwide campaign was carefully orchestrated with the doctors out front. I suspect that the insurance industry mesmerized the doctors with the promise of immunity. Why else would these caregivers use scare tactics against the public? They succeeded in passing tort reform in several states, but as we have seen the doctors did not benefit.

As we approach the February 4th start date of this legislative session, now would be a good time to contact your state representatives and remind them of the history of the last 30 years. It's certainly time for these games of charades to be revealed as the lies they have always been. Let's not be fooled a fourth time.

The Doc's "Yellow Cake Uranium"
Neil H. Ferstand, Executive Director

"Few people realize" said David C. Johnson, Fellow at the Northern California based think tank, Commonweal Institute, "…that the criticisms of lawyers in our society are not just the spontaneous expression of public ill will. They are part of a larger campaign both to protect corporate interests and to undermine the public status of trial attorneys and thereby deprive them of political power. Even lawyer jokes' and cartoons are part of a campaign to portray trial lawyers in an unfavorable light."

The American Tort Reform Association (ATRA) in a press release dated January 20, 2004, praised the president's remarks during the state of the union address to end lawsuit abuse as a critical barrier to economic growth. ATRA went on to state that the president's comments on ending "frivolous and wasteful lawsuits" against doctors would help to curb the rising cost of healthcare and that medical liability reform has been proven to keep access to healthcare affordable and accessible.

One major problem. It's not true. That is if you believe the non-partisan Congressional Budget Office who, not two weeks ago, released an Economic and Budget Issue Brief, dated January 6, 2004, entitled "Limiting Tort Liability for Medical Malpractice."

The brief reviews some of the reasons why malpractice premiums have risen and the effects on victims of restricting malpractice liability for doctors. The authors go on to dissect the overused argument made by the medical community that fear of lawsuits cause doctors to practice defensive medicine and thereby drive up the overall costs of medical care. In their findings, CBO states, "Proponents of limiting malpractice liability have argued that much greater savings in healthcare costs would be possible through reductions in the practice of defensive medicine. However, some so-called defensive medicine may be motivated less by liability concerns than by the income it generates for physicians or by the positive (albeit small) benefits to patients. On the basis of existing studies and its own research CBO believes that savings from reducing defensive medicine would be very small."

And what about the "physicians leaving the practice" threat posed by the organized medical community? The CBO finds "…many reported reductions in supply by health care providers could not be substantiated or did not widely affect access to health care."

This comment concerning the evidence about the effects of restricting malpractice liability awards was the most priceless statement in the seven-page issue brief:

"By themselves however, such changes do not affect economic efficiency; they modify the distribution of gains and losses to individuals and groups but do not create benefits or costs for society as a whole. The evidence for indirect effects on efficiency through changes in defensive medicine, the availability of medical care or the extent of malpractice — is at best ambiguous."

Anyone thinking "yellow cake uranium?"

Weapons of Mass Deception
Neil H. Ferstand, Executive Director

"The things that will destroy us are: politics without principle; pleasure without conscience; wealth without work; knowledge without character; business without morality and science without humanity." Mohandas K. Gandhi

Dr. Sara McBee is one of the "victimized" physicians President Bush cited in his speech in Little Rock, Arkansas this past week. In describing this "…good soul, who loves life to the point of where she's willing to take her talents and deliver babies," the president used her to represent what he says is a civil justice system out of control.

Apparently, Mr. Bush believes no wrong, regardless of its effect on victims and surviving family members deserves any modicum of justice.

Perhaps the president can explain this to Linda and Roger Capper. Linda was one of Dr. McBee's obstetrical patients. Their four year old son Levi now has a life expectancy of about 18 years. He will never advance functionally beyond the age of 6 months. During Levi's delivery, according to the Capper's lawyer, Fayetteville attorney Tim Brooks, and his two obstetrical experts, "Dr. McBee did so many things wrong that it was hard for them to know where to begin their criticism."

"Her premiums continue to rise," says Mr. Bush, "…and Dr. McBee has stopped delivering babies, as a direct result of frivolous and junk lawsuits."

As to Dr. McBee's new career move, I would hope that the women of Fayetteville consider themselves lucky.

With the costs of healthcare skyrocketing, the Bush administration and its allies within Congress — Chambers of Commerce, conservative think tanks and

particularly insurance companies — are eager to shift blame onto trial lawyers. And doctors, who enjoy great credibility and trust among voters are the key to advancing this deception. Anyone who might suggest otherwise is either deluding themselves or not paying much attention.

Tort reform issues should be argued dispassionately with respect for the truth. That's not happening because the facts are not on the side of those advocating reform. They have to resort to the Weapons of Mass Deception: myth, distortion and scare tactics.

The Weapons of Civil Justice — Truth and Reason — can trump this deception.

As we approach the 2004 legislative session, here in Connecticut trial lawyers face the increasing challenge of protecting their clients not only in the courtroom, but also in the halls of the legislature. Equal access to the courthouse, in many areas of tort law, is once again under threat. If we all wish to protect the legal system we must all act. It will only happen with your help.

Teddy's Doing 360's

Neil H. Ferstand, Executive Director

"The citizens of the United States must effectively control the mighty commercial forces which they themselves called into being. There can be no effective control of corporations while their political activity remains." President Theodore Roosevelt, 1910.

Corporate America long ago recognized that the civil justice system, with its citizen jury, challenges corporate power. So it is certainly understandable, though hardly justifiable, that powerful interests have successfully orchestrated a movement to denigrate the very system designed to offer the American people the necessary checks and balances on corporate abuse.

To accomplish their goals they have amassed vast financial and ideological assets (think tanks) funded by $200 million in grants every year. Year after year. Groups such as the Heritage Foundation, American Enterprise Institute, Hudson Institute, Manhattan Institute, Cato Institute, and Citizens for a Sound Economy are a few of the most visible. These and nearly 500 more draw on $2.3 billion dollars in assets from approximately 10 major conservative foundations such as Olin, Koch and Scaife. The grants often take the form of large general operating grants that have all but allowed these groups to maintain and expand their infrastructure and public and legislative reach.

How have they succeeded? Well, they are students of history. They know better than we that juries were purposely designed to thwart the exercise of limitless power, be it executive, legislative, judicial or corporate. Most Americans would be shocked to learn that in Congress and many state legislatures, corporate funded think tanks and their flaks – not elected legislators have actually written many of the state and federal laws under which we live and work.

Today, nearly a century after Teddy Roosevelt's warning there is an eerie sense of urgency in the air. The American political system is awash in a tidal wave of corporate and foundation money all earmarked to manipulate the machinery of government.

America's corporate titans were not pleased with Roosevelt's comments. Steel magnate Henry Frick complaining of Roosevelt said " . . . we bought the son of a bitch and he didn't stay bought." Today, Teddy Roosevelt is doing 360's in his grave and probably wondering who will step forward to regain that "effective control" of abusive corporations.

Trial lawyers hold the key to regaining some of that "effective control" today.

There's an old adage in the marketing business, "First you tell them. Then you tell them what you told them. Then you tell them again." The civil justice system and trial lawyers are the great levelers. Let's not forget to tell whoever will listen what trial lawyers stand for.

Common Good

Neil H. Ferstand, Executive Director

"Victims must have unlimited access to the courts, because they have unlimited access to pain."

Rev. Jesse Jackson, 1987

By now you surely have either seen, read or heard about the polemic published this past week in *Newsweek* Magazine entitled "Law Suit Wars."

The series is devoid of facts and largely based on descriptions of decades of discredited arguments. It portrays an out-of-control legal system populated by avaricious lawyers who take advantage of soft-headed judges and fuzzy thinking juries — a system designed to extract huge unrealistic awards from blameless defendants for the sole benefit of lawyers and their mendacious clients.

This largely anecdotal series might be convincing were it not for its failure to produce facts to legitimize its claims. But facts, or even a modicum of truth for that matter, are not what the designers were after.

In the tort reform debate, manipulation and lies are the all too common tactics of the wagers of the war on civil justice. As in any good marketing scheme, the goal is instant message penetration, presenting a legal system gone mad. They have accomplished that goal.

One of the architects of the *Newsweek* scheme is Philip K. Howard, a legal reformer who has made a crusade of attacking the civil justice system through a series of books such as the "Death of Common Sense" and "The Collapse of Common Good." Coincidentally, "Common Good" is the name of Howard's civil justice tort reforming think tank and public relations vehicle.

The composition of the "Common Good" Board of Trustees and Advisory Board reveals this organization's agenda. The organization is heavily weighted with major corporate interests that have much to gain by limiting the rights of injured victims. A virtual "Who's Who" in the land of tort reform.

Three of the seven members of Common Good's Board of Trustees, including its Chair and Founder (Howard), are partners in the law firm of Covington and Burling. C&B has long represented and advised the tobacco industry. The firm has lobbied in Washington and state capitols for Philip Morris, Brown & Williamson, and Lorillard along with representing the U.S. Tobacco Institute. Another Trustee is Judyth Pendell, a senior fellow at the conservative Manhattan Institute and former Board member of the American Tort Reform Association.

Their Advisory Board and Public Policy "think tank" members represent a litany of right-wing conservative ideologues such as Robert Bork, Lynne Cheney, Irving and Bill Kristol and many other prominent conservatives. Not surprisingly, Common Good's hospital membership is lead by Dr. Thomas Frist, whose brother, Majority Leader and U.S. Senator Bill Frist, has lead the charge on medical malpractice reform in Washington. The Frist family owns The Hospital Corporation of America, one of the largest chains of for-profit hospitals.

Newsweek expended zero ink describing the background of this group and the purpose behind their crusade. But under the rubric of "know thy enemy" every lawyer should read it and send a rebuttal.

Lawyer$
Neil H. Ferstand, Executive Director

The admonition is as potent now as it was when I first heard it 31 years ago in a political science class: "Never pick a fight with anyone who buys ink by the barrel."

The professor's warning seems particularly apropos when considering the editorial pages of the Waterbury Republican American newspaper. Someone, decades ago, and most assuredly a lawyer, must've picked a fight with the paper's editors. Ever since, the civil justice system and trial lawyers in particular have borne the brunt of their corrosive commentary.

One of their latest examples of invective is entitled "Lasso The Lawyer$." The spelling is correct right down to the final "$" which appears throughout the editorial when discussing both "lawyer$" and their "plaintiff$"

Readers are invited to feast on a panorama of dissembling and disputed facts and urged to consider them as gospel. Not just in the area of medical negligence, either. Plaintiffs and their lawyers are portrayed as being ever "…ready with an anecdotal tear-jerk story involving some 'innocent victim' whose infirmities were caused by one or more of the despised industries — automakers, pharmaceutical companies, Big Tobacco, etc…"

According to the paper the "…vast majority of malpractice cases are filed by plaintiffs seeking to play lawsuit lottery" and have nothing to do with negligence or physician incompetence.

The tone of the editorial is not new for the Waterbury Republican, nor are the words and rhetoric used to describe the civil justice system — always in the poorest light and meant to sway the public away from holding wrongdoers accountable. The repeating theme is that the wrongdoers will never get a fair shake as long as lawyers and their whining plaintiffs are allowed to tell their story to juries who can't decide an outcome without passion or prejudice.

What is new and what should be appalling to all lawyers, judges, legislators and the general public is the disgusting use of non-verbal symbols to blatantly denigrate one of the most powerful tools the people of this country have at their command. It is destructive and ugly. The editorial staff, which has used these symbols more than once, should not go unchallenged or the usage unnoticed.

We've all heard many times that the city of Waterbury is the center of the universe. There are many problems with this statement, not the least of which is that the city's flagship newspaper exists in a universe not shared with the rest of us. We should all tell the Waterbury Republican American editors to come down to earth and discuss their opinions in an open and intelligent manner. This will garner more results than a disgusting display of arrogance.

Address all comments to: Editor, Waterbury Republican American, 389 Meadow Street, Waterbury, CT 06722 — smacoy@rep-am.com

Raising the Threat Level
Neil H. Ferstand, Executive Director

"It's almost like fighting the war on terrorists," AIG CEO Hank Greenberg told a group in Boston recently. *"I call the plaintiff's bar terrorists."* I suppose we should be grateful he didn't wrap himself in the flag and call us *"traitors"* as well. That term seems to have gained some currency lately, usually reserved for those who disagree with aggressive and dangerous policies.

Should we be surprised at Greenberg's invective? Some of us maybe. But those who have been watching and listening closely know the intent of his message. Those who have sought to *"reform"* the judicial and regulatory system oftentimes find themselves stymied when something as trivial as Constitutional rights and reason intrudes onto the debate. Thus, the frustration expressed by Greenberg, who likens the reasoned process of legislative checks and balances regarding class-action litigation reform, to the *"war on terror."*

Some of our on-going battle here is not against reality, but contrived perception. Corporate interests have clearly gained ground influencing the public. Witness the U.S. Chamber of Commerce and their recent announcement to spend up to $15 million for TV ad's that highlight the "hidden costs" of alleged plaintiff-driven litigation.

In this ever-escalating misinformation campaign the most notable consequence for trial lawyers is the changing attitudes of juries. Corporate America's effort to paint the legal system as out-of-control has certainly impacted deliberations in the jury room.

One study conducted by University of Delaware professors Valerie Hans and William Lofquist concluded that 83% of jurors think that there are "far to many frivolous lawsuits," 57% believe that "lawsuits interfere with the development of new and useful products." And 51% believe that "big business…is adequately concerned" with safety. Juries also demonstrated a reluctance to find fault in industry practices. Most of the jurors polled in the Hans and Lofquist study made fewer comments denigrating business compared to the more frequent negative evaluation of plaintiffs who seem to almost always have mercenary motives.

Scholars have attributed these juror positions to pro-tort reform propaganda that has occupied such a prominent role in writings, commentary and everyday discourse. UCLA professor Theodore Eisenburg noted that a "promising explanation of the pro-defendant trend rests on the efforts of tort reformers not only to secure passage of reform legislation, but also to change public perception and policymaker opinion on the tort system."

Using sometimes-graphic language Greenberg railed against the American tort system. *"Our legal system is out of control,"* he said *"it's a blight on the country."* With the influence Greenberg and his ilk have accumulated in Washington during the last three years, perhaps he can prevail upon the Homeland Security Department to ***elevate the threat level***.

In matters of ***"tort reform"*** we know the threat to the civil justice system is already ***"Severe."***

When Hacks Rule, Policies Drool
Neil H. Ferstand, Executive Director

"In order to make sure we're able to create jobs at home, and to prevent jobs from going overseas, ***this country must have tort reform****. Frivolous lawsuits, or the threat of a frivolous lawsuit, creates an environment that is not conducive to job creation and job expansion. Tort reform will help make it easier to keep jobs here at home."*

George W. Bush, Akron, Ohio, March 2004

Am I missing something? Didn't we have the same tort system in the 1990's as we have today? You remember that decade — record economic growth and an outstanding increase in stock and portfolio values. Even without factoring the "technology bubble," there was record employment and consumer confidence throughout the country. Correct me if I'm wrong, but wasn't the 1990's when we had something resembling fiscal sanity at the federal level and an administration that took responsibility, with a few notable exceptions, for it's actions.

That was a time when we took the idea of being guardians of our seniors, and our children's education and financial future seriously, not to mention our own financial future. There was talk of "lock boxes." Now the federal treasury is

treated as a prize to be conquered with the booty distributed to friends, corporate associates and political allies. And I'm not just talking about Connecticut.

But we were talking about the tort system weren't we?

Doesn't today's tort system force manufacturers from other countries who want access to the U.S. market to meet safety standards? *Doesn't this serve the twin values of making American products more competitive, while also keeping our society safer from reckless cost cutting by manufacturers?*

Doesn't tort law force Mexican trucking companies, granted access to our highways by NAFTA, to inspect brakes and steering systems? American business publications said this was important to avoid "liability." Actually, don't these trucking companies do it because tort law enforces safety standards (what NHTSA is unable to do) and "liability" would only come from a horrible accident caused by faulty brakes and poor or nonexistent maintenance? American tort law is keeping Texas cross border highway disasters from happening. Isn't that ironic?

As we speak, tort law is a bone (or is it a pretzel) stuck in the throat of corporate America. It's the only place where average American's can go to battle the powerful on a nearly level playing field.

George W. Bush didn't invent tort reform, but its promoters and political hacks have been and remain his most important political sponsors. When he became Governor of Texas in 1995, he emerged from a meeting with tort reformers and declared ***"reforming our civil justice system"*** is a legislative emergency. Governor Bush weighed-in, publicly denouncing "junk lawsuits" supposedly clogging Texas courts and hindering business. Even though, at the time, the number of tort cases was quite unremarkable by national standards. This all sounds familiar?

A political hack has nothing with which to promote a vacuous policy except politics. The American people almost always vote for policies that work. There aren't enough hacks, even at the White House, to sell policies that don't.

Achievements of an Organization
Neil H. Ferstand, Executive Director

We all know the challenges automobile personal injury claims present. Persuading juries to award damages for pain and suffering, especially in the connective tissue case, is never easy. Years of propaganda have made it even more difficult. Juries are suspicious of plaintiffs and prejudiced against their claims before they even enter the courthouse. Once again, in the name of tort reform, the propaganda front lines have extended from the Courthouse to the Capitol.

The fabricated "medical malpractice crisis" is at the forefront of the "tort reform" campaign in Connecticut and across the nation. ***I recognize that the majority of CTLA's members represent injury victims of automobile collisions on a regular basis, and do not represent victims of medical negligence or do so infrequently.*** I suspect that there is a feeling among many of these lawyers that current tort reform efforts will not have a significant impact on the rights of their clients or their practices.

These unsuspecting lawyers could not be more naïve, nor be more wrong. The present and ongoing attack on the Connecticut civil justice system is clear and convincing evidence of an attack on all injury victims, not just those who suffer at the hands of doctors and hospitals.

Last year, the trial lawyers of Mississippi failed in their attempt to block "caps" on non-economic damages in medical malpractice cases. Last week, back for more, tort reformers in that state claimed two more victories as the state Senate voted to cap noneconomic damages ***for all civil justice cases*** and the state Supreme court adopted new rules for handling mass litigation. Mississippi Governor Haley Barbour has made tort reform a prime objective. "Tort reform is the gateway to both more and better jobs as well as a healthy Mississippi," Barbour said. Variations on this theme are being played out in Maryland, Missouri, New Hampshire, Georgia, Virginia, Vermont, Wisconsin, Wyoming, Washington. The list goes on.

In Congress the House Judiciary Committee Chair is James F. Sensenbrenner, R-Wis. During an address last week to the National Association of Manufacturers (NAM) he stated, "Employers must persuade workers that civil justice reform is in their best interest if pro-tort reform forces hope to prevail." Michael Baroody, NAM's Executive VP, said that NAM is "committed" to having its members engage manufacturing workers more effectively on tort reform issues.

CTLA, through its leadership and lobbyists, has been diligent and aggressive in the campaign against all manner of tort reform in Connecticut, not just medical malpractice. Yet, as these battles continue, particularly in the area of medical malpractice, many of our members remain apathetic about the potential devastation that tort reform would have on our civil justice system.

Vince Lombardi said, "The achievements of an organization are the results of the combined effort of each individual." We need all our members to get involved in this fight. ***We — You — can not afford the luxury of inactivity.***

Please call me — there are things **you** can do to help.

Who's Driving Policy
Neil H. Ferstand, Executive Director

How is it possible that such a large problem as the so-called medical malpractice crisis has been on the radar screen for thirty years without once being the subject of a genuinely comprehensive study? It makes one think that the major player in this drama, the insurance industry, really doesn't want one. Now why would that be?

Given the supposedly critical nature of the problem and the broad solutions being proposed, it's inexplicable that Congress hasn't started requiring record keeping that would provide researchers with reliable raw data.

Perhaps, as we all know, it's easier and certainly more profitable to blame it on the trial lawyers. And that's something that would be easy for Grover Norquist, who would like nothing better than to cripple the trial lawyers and, by extension, the Democratic Party. The Trial Bar is the major barrier standing between Norquist and the accomplishment of his ultimate far-right goal — *"shrinking government so small that it could be drowned in the bathtub."*

"Democrats used to anger him," Norquist said recently. He's past angry now. "Do you get mad at cancer? We'll defeat and crush their institutions, and the trial lawyers will go sell pizza." G. Norquist Profile — January 13, 2004

Grover Norquist, is, of course, the President of Americans for Tax Reform (ATR). An organization so powerful in Washington that his usual Wednesday morning invitation-only meetings draw congressmen, lobbyists, senior White House and Senate staffers, industry group leaders and right-wing policy wonks. "When the White House sits down and says, 'We want to get the word out on something,' the top of the list is Grover," said conservative activist Peter Ferrara, a frequent meeting attendee.

ATR describes itself as a "non-partisan coalition of taxpayers" who oppose all federal and state tax increases. Here's a little ***non-partisan*** quip for you. In a press release describing the 2002 passage of HR 2341 the Class Action reform meas-

ure in the US House of Representatives, ATR had this to say about the bill:

"Tort reform passage is a victory for consumers and taxpayers alike," said taxpayer advocate Grover Norquist, who heads Americans for Tax Reform in Washington." And when it becomes law it will mean the end of trial lawyers who seek to profit off of both productive enterprise and the many innocent plaintiffs who are duped into being pawns for the greedy little bastards."

When considering how I would end this issue of CTLA's Law Letter — it seemed only fitting that I suggest you take the time necessary to look more closely at the center of power in Washington, D.C.

You can not help but become intensely motivated with the realization that there are people like Grover Norquist providing counsel and driving policy.

Seeing Yourself in the Big Picture
Neil H. Ferstand, Executive Director

The last eighteen months have been extremely busy at the Connecticut Trial Lawyers Association. What has made it a busy, challenging period, is not the day-to-day business operations of a professional organization. These things are important and fills up a good portion of our days - but what makes it really challenging is the recognition of what each of you must do in order to continue to effectively represent your clients and to the enormity of what we are called upon to do politically to survive.

It has been clear for many years that CTLA can not operate as a non-political membership organization, and it occurs to me that many of our members (and many more lawyers who don't even bother to pay for membership) still just don't get it. There are many that refuse to acknowledge the important work that this Association does. There are those who still do not understand that in Connecticut we are the only organization that provides the first and last barrier before legal rights are legislated out of existence. This is not some chimera or fantastical notion without substance.

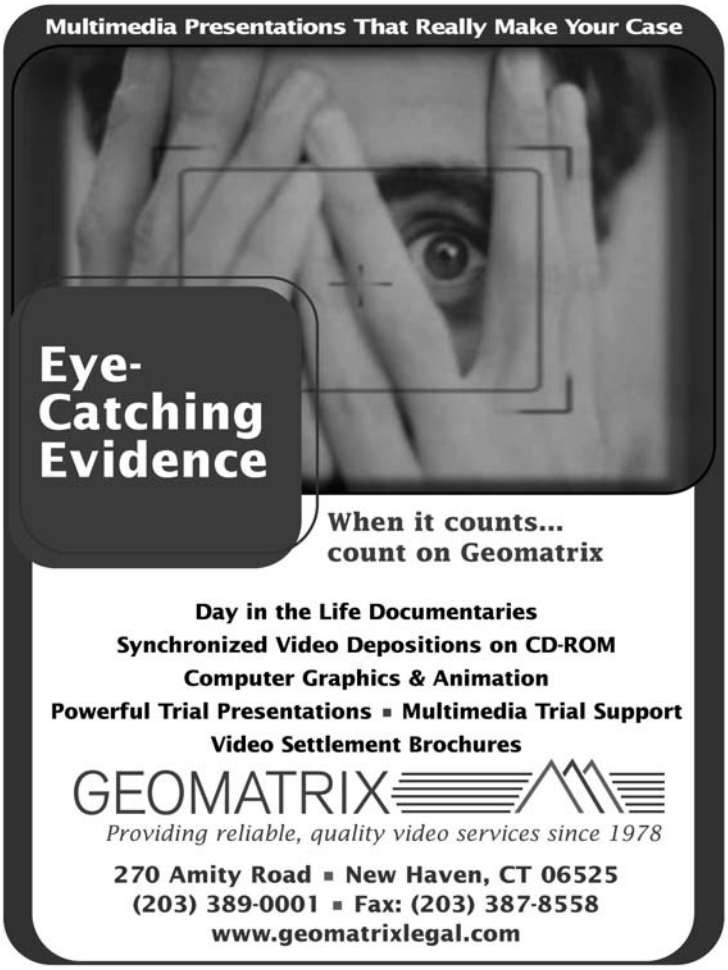
But there are those who believe that none of this really matters.

If they did there would be many more than 295 out of nearly 1,500 members who participate in one of our "Club Memberships." Where contributions go directly toward our legislative advocacy, experts, research and effort into making CTLA legislatively effective.

Now for the good news.

Thankfully, there are many dedicated, talented individuals in this organization who work uncompensated and untiringly to do what needs to be done. They give of themselves, their staff their money. They come to Hartford to testify before the legislature. They come to Board and Committee meetings to discuss how in the world we can possibly accomplish everything that we must in order to ***prevent the slow erosion of the civil justice system.*** They leave their practices to go to organized phone banks where they are asked to do the worst of the worst —ask their peers to give money to support our lobbying effort or simply renew their membership. Many of them have their calls refused or their messages go unanswered. ***This, despite the fact, that these attorney volunteers are giving their time and money to help the very people who refuse them.***

We all must view what we do as a calling in order to begin to change the landscape of a threatened civil justice system. It can no longer be enough to work at justice one client or one case at a time behind the closed doors of your office. ***We all have no clear choice but to care about the big picture.*** We must continue to hold those with little regard for the injured, weak and powerless accountable. No one who disregards the ideals of this calling or the plight of injured clients should get a free pass — no one.



CTLA Miscellany

Newsworthy items of general interest

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Distorting Facts in Malpractice Debate

By Jean Rexford

Jean Rexford is executive director of the Connecticut Patient's Rights Group, an organization of some 160 people formed in 2003. This essay appeared on the Op-Ed page of the Hartford Courant on February 2, 2004.

President Bush spoke a week ago in Little Rock, Ark., about "junk" lawsuits. He said that "one of the reasons people are finding their premiums are up, and it's hard to find a doc these days, is because frivolous and junk lawsuits are threatening medicine across the country."

What he said was a blatant misrepresentation of facts.

This month, the Congressional Budget Office found that malpractice costs account for less than 2 percent of [national health care] spending." CBO found that caps would make essentially no difference in health care costs or health insurance premiums. A bill with caps on permanent disabilities or quality-of-life damages and a ban on punitive damages, as advocated by Bush, "would lower health care costs by only 0.4 percent to 0.5 percent, and the likely effect on health insurance premiums would be comparably small."

Far from doing any good, the president's plan would broadly restrict the constitutional rights of all American citizens to go to court. And it would weaken the system's incentive to prevent medical mistakes — the root cause of the costs associated with medical error. It will do nothing to help doctors who are being price-gouged by insurance companies.

To the contrary, it will disproportionately hurt the most severely injured Americans, including quadriplegics, brain-damaged children, severe burn victims, people in nursing homes — anyone whose money losses are minimal, but whose quality of life is devastated. The president says their lifetime of paralysis or gross disfigurement or coma or retardation is worth $250,000 — a fraction of any insurance company CEO's yearly compensation.

In his talk, the president bent the truth more than once, talking about hospitals no longer delivering babies. True, in September 2003, Southwest Region Medical Center in Little Rock stopped delivering babies — but for reasons having nothing to do with medical malpractice insurance costs. The hospital averaged only 12 deliveries per month. Charles Smith, medical director of the University of Arkansas for Medical Sciences, a medical center, said that women prefer hospitals with the large staff, technology and equipment to deal with complications.

The location President Bush chose to talk about "junk" lawsuits was Baptist Health Medical Center. Baptist Health was the most profitable hospital in Arkansas in 2000, with $18 million in net income. Its profits increased by more than $4 million in 2001. Baptist Health paid its president $570,000-plus in salary and benefits in 2001 — more than double the lifetime limit on the non-economic damages that George W. Bush wants to impose on all victims of medical malpractice. Several other administrators and physicians were also paid $250,000-plus in 2001 — more than the lifetime cap proposed for malpractice victims. These figures may underestimate their income, because they reflect only salary and benefits paid to them by Baptist Health, not income from private practice or other income.

The president implied that there are loads of "junk" medical malpractice suits. Last year, there were 327 medical malpractice lawsuits in Connecticut — about the same number each year for the last ten years. There's no explosion of such lawsuits.

Members of my organization, the Connecticut Patients' Rights Group, know what it's like to be treated like junk. As when one of our family members goes to the hospital for minor surgery and ends up dead or in a coma. Or when our children die from illnesses and conditions that should easily have been recognized, but whose symptoms were ignored. Or when the women among us, for whatever reason, are dissuaded from mammograms or biopsies and have to learn to live with a death sentence because our cancers were found too late.

But perhaps the worst evidence of the system's disregard for malpractice happens when several among us have suffered at the hands of the same doctor encounter one another. We wonder how many more of us are out there and wonder why the medical societies and the state health departments don't remove bad doctors who produce all the junk the president wants to eliminate.

* * * * *

Statement of Joanne Doroshow, Executive Director, Center for Justice & Democracy, on the *Newsweek* Cover Story of December 15, 2003, "Lawsuit Hell"

In the December 15, 2003 issue of Newsweek there was a feature article captioned "Lawsuit Hell." The Center for Justice & Democracy responded with a press release issued December 7, 2003, a few days after the December 15 issue of Newsweek hit the newsstands. The Center's response corrects the record. The Newsweek article feeds into a false and dangerous perception that the civil justice system is overflowing with frivolous lawsuits. This is not the case, and the response of the Center for Justice & Democracy, authored by its director Joanne Doroshow, is an excellent analysis of the problems with the Newsweek article.

In the *Newsweek* article, the argument is made primarily based on anecdotes that are often not cited by name or even by date so they can be checked for accuracy. Our experience has been when journalists or researchers have tracked down anecdotes in similar articles, they find in virtually every situation that these cases have been misreported, exaggerated, described improperly or incompletely or otherwise misused to make a point. This research will take some time, although we do note right off that many

so-called "cases" cited by *Newsweek* to support its opinion were never even filed.

In the meantime, to assist readers trying to interpret this article, here is what we do know:

The *Newsweek* article fails to discuss statistics on litigation, which actually show overall that tort (personal injury) litigation is decreasing in this country. Far from "exploding," tort lawsuit filings have decreased 9 percent since 1992, according to the country's most accurate and comprehensive overview of state court litigation statistics. (Examining the Work of State Courts, 2002, a joint project of the Conference of State Court Administrators, the Bureau of Justice Statistics and the National Center for State Courts' Court Statistics projects.)

The *Newsweek* article contains no actual data to support its opinion that Americans today are "sue-happy" — in fact, the data shows the exact opposite is true. Each year, one in six Americans sustains an injury serious enough to cause some economic loss. Yet for the typical injury, "the injured person does not even consider the notion of seeking compensation from some other person or entity..." Only 10 percent ever file a claim, which includes informal demands and insurance claims. Only two percent file a lawsuit." The study concludes that these statistics are at odds with any notion that we live in an overly litigious society. Compensation for Accidental Injuries in the United States, Rand Institute for Civil Justice (1991).

The *Newsweek* article argues throughout that Little League coaches may be sued at the slightest provocation, apparently unaware that in 1997, Congress passed a law that immunizes Little League coaches from negligence lawsuits. Under the Volunteer Protection Act of 1997, volunteers for non-profit organizations or government programs around the country — even those dealing with children — can no longer be held responsible for their negligence.

The *Newsweek* article alleges that legal liability has led to more unsafe playgrounds; this is completely untrue. In 1991, the Consumer Product Safety Commission (CPSC) issued its "Handbook for Public Playground Safety," which has become "the state-of-the-art source for accident claims." According to independent researchers in this area, "Concerns of legal liability arising from failure to meet the recommended guidelines of the CPSC have lead to a widespread upgrading of playgrounds in schools, public parks, and day-care centers." In many situations, insurers have played a large role in forcing compliance with CPSC standards and other safety changes. Wallach, Frances, found at The World Playground Park & Recreation, Products and Services Web Directory, http://www.world-playground.com/Article.htm. Gilchrist, Julie, Schieber, Richard A. & David A. Sleet, "Legislative and Regulatory Strategies to Reduce Childhood Unintentional Injuries," 10 *Unintentional Injuries In Childhood* 111, (Spring/Summer 2000).

The *Newsweek* article calls juries overly sympathetic, emotional, and unable to handle complex issues, but close observers of the jury system, including judges, believe the opposite. Judges, who have more intimate knowledge of the system than anyone, have "a high level of day-to-day confidence in the jury system.… Only 1 percent of the judges who responded [to a 2000 survey of the entire federal judiciary] gave the jury system low marks.…Ninety-one percent believe the system is in good condition needing, at best, only minor work.… Overwhelmingly …judges said they have great faith in juries to solve complicated issues.… Ninety-six percent said they agree with jury verdicts most or all of the time. And nine of 10 judges responding said jurors show considerable understanding of legal issues involved in the cases they hear." Allen Pusey, "Judges rule in favor of juries: Surveys by Morning News, SMU law school find overwhelming support for citizens' role in court system," *Dallas Morning News,* May 7, 2000.) Virtually every independent jury scholar has expressed the same confidence in the jury system. Stephen Daniels and Joanne Martin, authors of an exhaustive analysis of juries, found there to be "little or no empirical information available regarding many of the claims made by the reformers about juries and the civil justice system." *Civil Juries and the Politics of Reform,* Evanston: Northwestern University Press (1994). Similar findings were made by Professor Valerie Hans in her recent book, *Business on Trial: The Civil Jury & Corporate Responsibility. Business on Trial: The Civil Jury & Corporate Responsibility,* New Haven and London: Yale University Press (2000).

The *Newsweek* article includes a number of wild exaggerations—largely discredited—about costs of the legal system and "defensive" medicine. The article states that the legal system's "costs to society" are an estimated $200 billion a year, but fails to explain that this widely-discredited figure includes all insurance premiums, as well as the immense costs of operating the incredibly wasteful and inefficient insurance industry, or that most of the costs of the system are the result of corporate wrongdoing causing injury, or that such numbers fail to factor in the cost savings, particularly to the taxpayer, of compensation and product safety. As Ralph Nader noted in congressional testimony, "If consumer advocates came to Congress asking for a complete overhaul of the nation's regulatory laws based on made up and mischaracterized numbers like these, we would rightfully be laughed out the door." Committee on Commerce, Science and Transportation, Sept. 19, 1991. The U.S. General Accounting Office has also criticized evidence used to support the notion that the tort system encourages unnecessary defensive medicine, including the U.S. Department of Human Services (HHS) for publishing a wildly inflated estimate, based on an improper methodology, of potential savings from defensive medicine. GAO notes that some defensive medicine is good medicine, managed care discourages bad defensive medicine, and doctors do defensive medicine because they make money from defensive medicine. Analysis of Medical Malpractice: Implications of Rising Premiums on Access to Health Care, General Accounting Office, GAO-03-836, August 2003.

***Newsweek* supports placing all medical malpractice cases into an heavily bureaucratic administrative tribunal run by medical professionals, yet the article fails to make any reference to past failures with such systems.** The Virginia Birth-Related Neurological Injury Compensation Program, similar to this proposal and in place for 15 years, has hurt patients, has done nothing to help doctors with their insurance problems and has allowed the state to become a safe harbor for negli-

gent and reckless doctors who should not be practicing medicine at all, according to series of investigations in the *Richmond Dispatch*. Virginia's Joint Legislative Audit and Review Commission has now suggested "abandoning or overhauling " the program and "ridding the board of its heavy presence of medical professionals." Bill McKelway, "Brain Injuries Spur No Action; Case Review, Required by Law, Is Not Being Done, Va. Study Found," *Richmond Times Dispatch,* Jan. 14, 2003; Bill McKelway, "Study Faults Program for Brain-Injured; Shortcomings Found in Care for Children," *Richmond Times Dispatch,* Nov. 13, 2002; Liz Szabo & Elizabeth Simpson, "Birth Injuries Get 'Minimal Review; State Report Says Board Must Hold Doctors Accountable," *Virginian-Pilot,* Nov. 15, 2002. Bill McKelway, "Brain-Injury Program's Outlook Dim; Cost Savings for Doctors Meant Less for Children," *Richmond Times Dispatch,* Nov. 16, 2002. Bill McKelway, "Danville Has High Birth-Injury Rate; Critics Say Virginia Law Shields Doctors from Lawsuits," *News Virginian,* June 1, 2003.There are many other reasons why such systems are unfair to patients and will lead to more medical errors. See, e.g., http://centerjd.org/MassTestimonyF.pdf

The *Newsweek* article blames litigation for the "culture of secrecy" that exists in hospitals, yet history shows that when you remove litigation as a factor, secrecy still exists. In Massachusetts, for example, where nearly all hospitals fall under the state's charitable immunity laws that cap their liability at $20,000, hospitals are still "vastly underreporting their mistakes to regulators and the public." According to *Boston Magazine,* "doctors, either out of shame, a fear of being sued or disciplined, or anxiety about their reputations, rarely talk openly about their errors.…The biggest challenge is finding a way to break the culture of silence in hospital corridors that has long crippled efforts to cut medical errors, just as the blue wall of silence has stifled police investigations." Doug Most, "The Silent Treatment," *Boston Magazine,* Feb. 2003.

The *Newsweek* article blames litigation for the astronomical rate hikes that many doctors are experiencing; there is a wealth of evidence demonstrating that the reason rates are rising has nothing to do with the legal system. Volcanic eruptions in insurance premiums for doctors have occurred three times in the last 30 years — in the mid 1970s, again in the mid-1980s, and now today. The cause is always the same: a severe drop in investment income for insurers compounded by underpricing in prior years. Each time, insurers have tried to cover up their mismanaged underwriting by blaming lawyers and the legal system. Americans for Insurance Reform's study, *Stable Losses/Unstable Rates,* shows that since 1975, medical malpractice paid claims per doctor in this country have tracked medical inflation very closely (slightly higher than inflation from 1975 to 1985 and flat since). In other words, payouts have risen almost precisely in sync with medical inflation. Moreover, contrary to what the insurance and medical lobbies have alleged, the years 2001 and 2002 saw no "explosion" in medical malpractice insurer payouts or costs to justify sudden rate hikes. In fact, rather than exploding, inflation-adjusted payouts per doctor dropped from 2001 to 2002. These data confirm that neither jury verdicts nor any other factor affecting total claims paid by insurance companies that write medical malpractice insurance have had much impact on the system's overall costs over time. See, http://www.insurance-reform.org.

The *Newsweek* article states that teachers are not discliplining students for fear of litigation; it fails to include statements by teachers who do not support this view. In a statement responding to President Bush's proposal to provide some immunity to teachers who hit children — a law which did pass — Bob Chase, President of the National Education Association, said, "Our members tell us the single thing that they would like, to restore discipline and order to classrooms, is to lower class size. That's the proven way to improve discipline and learning. Governor Bush's proposal is simply a call for another piece of federal legislation. We'd rather the President of the United States focused on proven solutions such as class size." Telephone interview with Becky Felischauer, NEA Senior Professional Associate, January 2, 2001, confirming quotation cited by Burns, Jim, "Bush wants Congress to pass teacher protection act," October 18, 2000, CNSNews.com, found at http://childrenfirstamerica.org/DailyNews/00Oct/10180011.html. Jamie Horowitz, spokesperson for the American Federation of Teachers, said, "I question how much of an issue this really is.... Not only do we provide our members with million dollar liability insurance, but also the school districts provide them with liability coverage, generally....Even though we provide our members with million dollar coverage, we've never had a million dollar client. I don't think fear of lawsuits is keeping teachers from doing their jobs, and so I question the extent of the problem" Telephone interview with Jamie Horowitz, January 2, 2001, confirming quotation cited by Burns, Jim, "Bush wants Congress to pass teacher protection act," October 18, 2000, CNSNews.com, found at http://childrenfirstamerica.org/DailyNews/00Oct/10180011.html.

The *Newsweek* article mentions almost nothing about the critical benefits of our civil justice system. Society benefits in countless ways as a result of lawsuits: they prevent future injuries by removing dangerous products and practices from the marketplace and spurring safety innovation; they educate the public to unnecessary and unacceptable risks associated with some products and services through disclosure of facts discovered during trial; and they provide authoritative judicial forums for the ethical growth of law. See CJ&D's study, *Lifesavers,* http://centerjd.org/free/Lifesavers.pdf. The power and authority of juries represents an important counterweight to the dominance of organized moneyed interests elsewhere in our government. *Newsweek* ignored all of this in its article. It also ignored observations by doctors like Dr. Wayne Cohen, who in 1995 was medical director of Bronx Municipal Hospital, who said, "The city was spending so much money defending obstetrics suits, they just made a deci-

sion that it would be cheaper to hire people who knew what they were doing." Dean Baquet and Jane Fritsch, "New York's Public Hospitals Fail, and Babies Are the Victims," *New York Times,* March 5, 1995.

The *Newsweek* article fails to provide readers with any background information on the law firm that Phil Howard, head of the group "Common Good," represents, so readers can make a more informed opinion as to his proposals to eliminate the jury system. Howard represents the law firm of Covington & Burling. Covington & Burling is not simply a firm that has represented some of our country's most unsafe industries, like tobacco and chemical. It is actually one of the of the principal architects of the so-called "tort reform" movement, seeking to immunize industries by taking power away from juries and replacing it with administrative systems over which politicians — and special interest money — have more control. Throughout the 1990s, Covington served as a funnel for tobacco money to so-called "tort reform" groups, both at the national and state level, and sometimes helped to set up those groups. Center for Justice & Democracy and Public Citizen, The CALA Files (1999).

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Opinion: Companies on Trial Play Blame-the-Plaintiff Card

The following opinions appeared in the Wall Street Journal on Janary 20, 2004 and January 12, 2004, respectively.

Your Jan. 12 editorial "Personal Editorial Bias" stated that I advised trial attorneys representing injured workers and patients to exclude from juries people who have strong beliefs about religion or personal responsibility.

In fact, I wrote that years of research suggest individuals who hold *extreme* opinions about personal responsibility often cannot be fair to either side. By "extreme," I mean people who believe that no matter what the circumstances, those who seek redress in court for injuries or death are somehow to blame. They should be able to foresee and avoid every danger, even when big business was the only one that could foresee and prevent the risk and injury. Blame-the-plaintiff is the message, instead of corporate responsibility.

A plaintiff's attorney has a duty to exclude jurors who hold attitudes so extreme they cannot decide the case based on evidence. Both sides must have a fair and impartial jury. That's not an anti-religious or anti-personal-responsibility message. On the contrary, I advocate impaneling jurors who are willing to apply the personal-responsibility bias equally to both sides. That is called fairness.

More than 200 years ago, Chief Justice John Marshall wrote, "The main reason the jury system is respected is the public expects a juror to be unbiased." I suppose tort reformers would have dismissed Justice Marshall as a former *trial lawyer*. Corporate America doesn't want juries that apply standards of personal responsibility fairly to both sides — that would result in accountability.

David A. Wenner, J.D.
Phoenix, Ariz.

'Personal Responsibility Bias'

We've all heard of race bias, gender bias, class bias, sexual orientation bias, et cetera. But maybe only a psychotherapist turned trial lawyer could come up with something called "personal responsibility bias." Apparently this affliction is especially pronounced among strange people with "traditional family values" and "strong religious beliefs."

That, at least, is the view offered by David A. Wenner in an $800 handbook offered by the American Trial Lawyers Association. Entitled *ATLA's Litigating Tort Cases,* the book is advertised as "essential to every trial lawyer's library!" As a recent dispatch by CNSNews.com reports, in a chapter on juries Mr. Wenner suggests that Americans with a keen sense of personal responsibility are just not the type of people with whom you want to try to play the "blame game" -- especially "if the plaintiff was in the best position to avoid the injury."

"The personal responsibility juror," writes Mr. Wenner, who served as co-chair of ATLA's Blue Ribbon Commission on Juror Bias, "tends to see the world with bright line rules on how people should act.... People should be self-reliant, responsible, and self-disciplined. When people act irresponsibly and are not self-disciplined, there are consequences. People must be accountable for their conduct."

Hmmmmn. Mr. Wenner tells us these passages have been distorted: All he's trying to do is ensure a fair trial for plaintiffs. But what does it tell you about the current state of our legal system that the same virtues that would be an asset in a friend or spouse or employee are deemed a liability in a jury of one's peers?

* * * * *

Statement by David S. Casey, Jr., ATLA President, in Response to President Bush's Assault on the Legal Rights of American Families in His State of the Union Address

"President Bush tonight blamed America's economic problems on the lawyers who represent consumers and workers who make our economy run. He said it is in America's economic interest to take away the legal rights of American families.

"It won't create jobs or help our economy to penalize those who suffer permanent, life-altering injuries as a result of medical malpractice, families defrauded by wrongdoing corporations, and those poisoned by asbestos companies who-with their insurers-knew and covered up the lethal dangers of asbestos for decades.

"The sad fact is that those who want to reward corporate abuse at the expense of the legal rights our Founders believed essential to our democracy don't trust the American people. They don't trust the men and women — our friends, neighbors, and co-workers — who serve on juries and listen to all the facts of a specific case. They trust politicians and corporate executives, not citizen juries. Victims of medical malpractice, consumer scams, and toxic pollution deserve better.

"Limiting the compensation a jury can offer a child paralyzed by a negligent doctor or a parent abused in a nursing home, restricting legitimate class action lawsuits, and bailing out asbestos companies — these are not 'reforms.' They are payoffs to the insurance, tobacco, drug, chemical, and other special interests that have spent billions of dollars to avoid

being held accountable for their actions."

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Insurers Raise Political Profile With Campaign Contributions

For the complete story see Bestwire on A.M. Best's website, http://www.ambest.com (Subscription necessary).

So far in the 2004 election cycle, insurers have given $9,729,800 to national-level candidates, according to an article in the January 19 issue of BestWeek, and the industry now ranks as the sixth-largest group of donors to political campaigns. According to Federal Election Commission data released in early December, more than two-thirds of that money, 68%, has gone to Republicans. Those donations are in line with insurers' giving patterns during the 2002 election cycle, when they gave 69% of their money to Republicans. The increased giving, relative to other industries, comes as several issues crucial to insurers' financial health are looming again: class-action lawsuit reform; changes to medical-malpractice liability and multibillion- dollar asbestos suits in state and federal courts.

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Malpractice Insurance Rate Still High Despite Amendment

This article appeared in the Dallas-Forth Worth Star Telegram on January 25, 2004.

A controversial amendment to the state's constitution was supposed to lower medical malpractice insurance costs for doctors, but few have seen their rates go down in the four months since voters narrowly approved it.

The state's largest malpractice insurer, the Texas Medical Liability Trust, has lowered rates 12 percent for about 11,000 of the state's 38,000 doctors. Other companies are either holding rates steady or have requested rate increases as high as 35 percent from the state Department of Insurance.

Supporters of Proposition 12, which placed a $250,000 cap on noneconomic damage awards such as pain and suffering in medical lawsuits, say it's too early to judge the law.

But the early signs are not encouraging, said Dan Lambe, executive director of the nonprofit consumer group that led opposition to the amendment.

"Promises were made, legal rights were sacrificed, the Texas Constitution was rewritten to appease the insurance industry ... and someone has to answer why we're not seeing relief," Lambe told the Austin American-Statesman for a Sunday story.

Some of the companies that have not lowered their rates blamed a surge of lawsuits filed before the law took effect. Although official statistics are unavailable, the law's supporters say malpractice claims increased by as much as 300 percent in the months before Proposition 12 passed.

"It's going to take a while for the dust to settle and for us to see the world through this new reality," Insurance Department spokesman Jim Hurley said.

Other companies said they could not lower their rates because the cap will save them very little money.

The Joint Underwriting Association, a state-run pool that serves as a safety net for doctors who can't find affordable insurance elsewhere, asked state regulators for a 35 percent rate increase after the amendment passed.

The cap on damages would not affect its rates, the association said, because most of its policies are for less than the cap.

The Insurance Department turned down the request. The association, which insures about 2,500 doctors, is trying to determine what it will do next, General Manager Joe Chilton said.

Two other major carriers, the Doctors Co. and American Physician Insurance Exchange, have not lowered rates or requested increases.

"We're eager to show that we're responding to the (new laws), but we have a fiduciary responsibility to the company to make sure our rates are well thought out," Insurance Exchange President Maury Magids said.

If the new caps seem to be working, Insurance Exchange may start lowering rates this summer, Magids said.

* * * * *

Study Links Some Hair Dyes to Kind of Cancer

By Mary Duenwald

This article appeared in the New York Times *on January 24, 2004.*

Scientists have found more evidence for a possible link between non-Hodgkin's lymphoma and long-term use of dark hair dye. A study of more than 1,300 women in Connecticut shows that those who began coloring their hair before 1980 increased their chance of developing the disease by 40 percent.

And among those who used permanent rather than nonpermanent dyes, who chose dark colors — browns, reds and black — and who dyed their hair frequently (eight times a year or more) for at least 25 years, the risk doubled, said Dr. Tongzhang Zheng, a Yale epidemiologist who led the study. The results are published in the current issue of the American Journal of Epidemiology.

"For those who used light colors, there was no such increase in risk," Dr. Zheng noted.

Nor was there significantly increased risk among women who used nonpermanent dyes. The difference between permanent and nonpermanent dyes is that permanent ones are mixed with an oxidizing agent. In that process, new chemicals are created, some of which may be carcinogenic, Dr. Zheng said.

Non-Hodgkin's lymphoma is a form of cancer that begins in the body's lymph system. The average American woman has a 1-in-57 chance of developing the disease in her lifetime, according to the American Cancer Society. For a man, the chance is 1 in 48.

Suspicions that hair dyes might increase cancer risk have been around since the 1970's, said Dr. Eugenia Calle, the cancer society's director of analytic epidemiology, but studies over the years have found no connection between the dyes and most forms of cancer.

The Yale researchers and the National Cancer Institute are now looking into whether there are any genetic influences that might make certain women more likely to develop lymphoma after exposure to dye.

Because all the studies done so far, including the latest one, have been observational rather than clinical, their findings do not provide evidence that hair dye causes lymphoma, said Gerald McEwen, vice president for science at the Cosmetic, Toiletry and Fragrance Association, a trade group in Washington.

"There's no smoking gun here," Mr. McEwen said, "no causal relationship."

In this study, the researchers found no increase in cancer risk among women who started dying their hair after 1980, no matter how frequently they did so or what color they used. In the late 1970's, hair dye makers stopped using certain coal-tar ingredients that had been found to cause cancer when fed to laboratory rats and mice.

"This is the first study that's been able to look at the time period after 1980," said Dr. Shelia Hoar Zahm, deputy director of cancer epidemiology and genetics at the National Cancer Institute, who collaborated on the study. "It suggests that the later formulations are safer. If the risk is limited to those people who started use before 1980, it means we're really in better shape now."

Another possibility, however, is that women have not had time to use the new products long enough for them to have any adverse effect, Dr. Zheng said. "It's very hard for us to say that now the products are safe," he said.

Previous studies on the association between hair dye and non-Hodgkin's lymphoma have been mixed. A few have shown no association, but two, one done in 1988 and one in 1992, have suggested that there may be a link.

If hair dye does play some role in lymphoma, Dr. Calle said, it would make sense that the darker colors, which have greater concentrations of ingredients, would have the strongest effect.

* * * * *

New GAO Report Destroys Tort Reformers' Arguments: Consumer Groups Ask AMA to Retract False Statements to Lawmakers

By Matthew G. Knopp

Matthew Knopp is a principal in the firm of Peterson, Young, Putra, Fletcher, Zeder, Massong & Knopp, P.S. in Seattle, Washington. He is vice-president of the Washington State Trial Lawyers Association Public Affairs Committee. This article appeared in the November 2003 issue of Trial News, a publication of WSTLA.

The findings of the latest (August 2003) US General Accounting Office (GAO) report "Medical Malpractice: Implication of Rising Premiums on Access to Health Care", dealt a devastating blow to the sponsors of so-called "tort reform". The report finds that medical malpractice insurance problems have had little impact on patients' access to health care, and where access issues exist (as in certain rural areas), they are the result of numerous preexisting factors unrelated to the legal system.

The findings of the report so clearly suggest that the AMA has provided misleading information to legislators, to the public, and even to their own members, that national and local consumer groups, have demanded that the AMA retract this false information.

Interestingly, the GAO report was originally requested by Republican House Chairs James Sensenbrenner, Jr., W.J. "Billy" Tauzin, and Steve Chabot. Before issuing its final report the GAO provided a draft to the AMA. The AMA asked the GAO to withhold release of the report and tried to convince the GAO to revise its findings. Despite this, the GAO stuck by its findings. A copy of the complete GAO report can be found online at http://www.gao.gov/cgi-bin/getrpt?GAO-03-836. Here are some of the pertinent conclusions to be drawn from the report:

1. GAO found claims of a widespread health care access crisis to be false or wildly exaggerated, and where access issues exist, there are multiple other reasons.

2. Claims that the tort system encourages unnecessary defensive practice of medicine are unsupported.

3. On a *per capita* basis, medical malpractice claims payments have grown slower than inflation from 1996 to 2002, whether damage caps were in place or not.

4. Factors other than caps on non-economic damages affect malpractice premiums and claims payment trends (for example, state laws on premium rate regulation and insurance company investment decisions).

5. Surveys on which the AMA has based its claims are unreliable.

6. The AMA and certain state medical societies have intentionally walked out on their patients and closed clinics on occasion - not because they lost coverage, but as a political strategy to pressure for damages caps.

The bottom line is that this GAO report is yet another piece of evidence which proves how meritless the tort reformers' arguments are. It should help all of us who believe fervently in the civil justice system and the rights of the injured to stand firm in our commitment to protect patients and let juries decide.

An insurance crisis demands an insurance solution. To do otherwise is to balance insurance companies' books on the backs of innocent victims.

* * * * *

Reject Gun Lawsuit Immunity

This editorial appeared in the Hartford Courant on February 23, 2004.

Senate action is imminent on an outrageous bill that would give the gun industry broad immunity from civil lawsuits — a privilege no other industry enjoys.

Called the Protection of Lawful Commerce in Firearms Act, the special-interest measure would bar most civil lawsuits against gun makers, importers and dealers. The bill would be retroactive, requiring the dismissal of all pending lawsuits. One example is the lawsuit filed by victims of the Greater Washington, D.C., sniper shootings against the store and the factory that were the sources of the assault rifle used in the slayings. Another case involves a lawsuit against a pawnshop filed by two New Jersey police officers who were wounded by a burglary suspect. He fired a gun that was part of a batch of weapons purchased from the pawnshop under suspicious circumstances.

The National Rifle Association has made lawsuit immunity a top priority this year. Too many members of Congress seem willing to bow before the gun lobby. Last year, the measure easily passed the House.

The Senate has a chance to block this unprecedented surrender of the right of plaintiffs to seek redress in court when gun dealers or manufacturers are negligent or reckless.

If the NRA measure becomes law, gun makers will have little incentive to voluntarily add safety features to weapons. Already, they are exempt from regulation under the 1972 law that created the Consumer Product Safety Commission.

Gun proponents claim they want to

stem frivolous lawsuits. They also argue that victims of gun violence ought to sue those who misuse weapons, not those who manufacture them.

But the gun industry already is protected from frivolous lawsuits because plaintiffs must prove negligence or reckless behavior, just as in any other consumer product case.

Denying victims a basic right would be a travesty. The Senate ought to defeat this giveaway to the gun lobby.

* * * * *

Ralph Nader Does it Again

This editorial appeared in the New York Times on February 23, 2004.

Four years ago, when people told Ralph Nader that his Green Party candidacy might split the Democratic vote and elect George W. Bush president, Mr. Nader said Al Gore and Mr. Bush were so much alike that it didn't really matter who won. The worst that could happen, he sometimes added, was that Mr. Bush would turn out to be far more conservative than expected. That would then mobilize Democrats and create a healthy new sense of urgency about progressive issues.

Well, four years later the Democrats are nothing if not mobilized. Yet Mr. Nader isn't satisfied. He's running again, this time as an independent, to the horror of both friends and critics. It was Mr. Nader, they say, who drained votes away from Mr. Gore in critical states like Florida and New Hampshire, throwing the White House to Mr. Bush. The idea that he's prepared to do it again has made them both terrified and furious.

Their concern seems overblown. If Mr. Nader didn't learn anything from the 2000 election, the voters certainly did. People might have voted for him once under the impression that sending a message was more important than picking the next president. We doubt very much that they will make the same mistake twice.

So much has happened in the last four years that it's hard to remember how low the stakes seemed when Mr. Gore and Mr. Bush were running. The country was at peace and prosperous. The big issue in Washington was what to do with the budget surplus. Mr. Gore kept changing his message and Mr. Bush was promising to be a uniter, not a divider. Both men knew from their polling that victory would belong to the one who captured the affections of a small number of wavering voters in a few states, and both tried desperately to come up with the fuzzy, centrist message to win them over.

It's not surprising that in 2000 many people thought they could afford to express their irritation with a vote for Mr. Nader. If they did that again this November, it would be a repudiation of the Democratic nominee so thorough that the party would certainly have bigger problems than third-party candidates to worry about.

The most regrettable thing about Mr. Nader's new candidacy is not how it is likely to affect the election, but how it will affect Mr. Nader's own legacy. Ralph Nader has been one of the giants of the American reform movement. His crusades for consumer rights and product safety alone should earn him a place in history. But he has always been an outsider, and his candidacy in 2000 seemed fueled by bitterness at the way he had been marginalized in Democratic politics. His anger is understandable, but it would be a tragedy if Mr. Nader allowed it to give the story of his career a sad and bitter ending.

* * * * *

Uses and Abuses of Science

This editorial appeared in the New York Times on February 23, 2004.

Although the Bush administration is hardly the first to politicize science, no administration in recent memory has so shamelessly distorted scientific findings for policy reasons or suppressed them when they conflict with political goals. This is the nub of an indictment delivered last week by more than 60 prominent scientists, including 20 Nobel laureates. Their statement was accompanied by a report published by the Union of Concerned Scientists, listing cases where the administration has manipulated science on environmental and other issues.

President Bush's supporters promptly denounced the statement and the report as an overdrawn and politically motivated work issued in an election year by an advocacy group known for its liberal disposition. Tellingly, however, neither Mr. Bush's friends nor the White House denied that any of the incidents listed in the report — all had been reported before in newspapers, trade magazines and scientific journals — had occurred. The best they could muster was a lame rejoinder from Dr. John Marburger III, Mr. Bush's science adviser, who said that these were disconnected episodes reflecting normal bureaucratic disagreements, none of them adding up to a "a pattern" of distortion or disrespect for science.

We respectfully urge Dr. Marburger to look again. On global warming alone, the administration belittled, misrepresented, altered or quashed multiple reports suggesting a clear link between greenhouse gas emissions and the burning of fossil fuels like coal and oil. A study detailing the impact of mercury emissions from power plants was sanitized to industry specifications. Another study suggesting that a Congressional clean-air bill would achieve greater pollution reductions than Mr. Bush's own plan, at approximately the same cost, was withheld. It does not take much effort to find a pattern of suppressing inconvenient facts that might force Mr. Bush's friends in the oil, gas and coal industries to spend more on pollution control.

The report details similar shenanigans involving other agencies, including Agriculture, Interior and even, on reproductive health issues, the Centers for Disease Control. It also criticizes the administration for stacking advisory committees with industry representatives and disbanding panels that provided unwanted advice. Collected in one place, this material gives a portrait of governmentwide insensitivity to scientific standards that, unless corrected, will further undermine the administration's credibility and the morale of its scientists.

* * * * *

Please Oppose Arbitrary Caps

The Connecticut Trial Lawyers Association respectfully urges you to oppose an arbitrary cap on noneconomic damages in medical malpractice cases.

- Putting a legislative cap on noneconomic damages is a strong statement that juries of regular citizens are not able

to—and should not be able to—make reasonable decisions about the amount of noneconomic damages that an injured person is entitled to receive. For roughly 200 years, juries have been making these important decisions, and juries have also been making important decisions about criminal convictions and penalties. The jury system works fairly and should not be restricted.

- An arbitrary cap on noneconomic damages often penalizes certain injured victims (children, women and senior citizens) who often times cannot show significant economic losses, including lost wages or lost earning capacity, as a result of their injuries.
- Arbitrary caps of different shapes and sizes have been enacted in several other states, but insurance rate data from these states clearly show that the caps are doing little or nothing to help insurance rates. A January 31, 2003 CT OLR report shows the 2002 estimated average premium increases in states that have caps. The following is a sampling of these states:

Virginia: 101.5% increase

Ohio: 34.6% increase

Mississippi: 43.7% increase

Florida: 43.5% increase

New Mexico: 42.2% increase

Indiana: 29% increase

Texas: 22.0% increase

Montana: 19% increase

- Oklahoma also recently enacted a $300,000 cap (that can be lifted by a judge in limited circumstances), and the recent news from Oklahoma is that: ***Malpractice Insurance Premiums may double for Oklahoma doctors.***
- Here in Connecticut, the rates will also increase if an arbitrary cap is enacted. Insurance industry representatives testified as recently as last week that rates will still increase (albeit by a reduced amount) if an arbitrary $250,000 cap is enacted.
- Another CT OLR Report (2-24-03) cites a 2002 Robert Wood Johnson Foundation funded report, The Medical Malpractice Insurance Crisis: Opportunity for State Action, where the author states: ***"the data are inconclusive as to the efficacy of tort reform as a remedy for periodic malpractice insurance crises. Previous rounds of tort reform have not prevented periodic malpractice insurance crises. Tort reform does not address the issue of patient safety."***

Please do not change the jury system with an arbitrary cap (that doesn't even help with insurance rates). Thank you.

* * * * *

What the Body Knows

This editorial appeared in the New York Times on March 4, 2004.

It's hard for most of us to think of an autopsy as an essential part of normal medical practice. It seems, somehow, so after the fact. In the past few decades, the rate at which hospitals conduct autopsies has plummeted, to perhaps 5 percent of hospital deaths today, from 41 percent in 1961. No one knows the exact number because the National Center for Health Statistics stopped collecting autopsy numbers after 1994, when the rate stood at 9.4 percent.

But autopsies have not declined because they're useless. In fact, most studies confirm that autopsies regularly turn up surprises, including mistaken diagnoses, undiscovered conditions and, in a small but steady number of cases, diagnosis and treatment errors that may have led to death. The numbers are not trivial. One study examined 1,000 autopsies between 1983 and 1988 and found that there were " 'major discrepancies' between the autopsy findings and the clinical diagnosis" in 317 cases.

Autopsies have dwindled for a number of reasons. Hospitals were once required to perform them to be accredited, but that requirement ended in 1971. Insurance companies do not pay for autopsies. But the problem really lies in our attitude toward them. In recent years, families have become increasingly reluctant to authorize autopsies, and doctors too often believe that modern diagnostic tools like CAT scans and M.R.I.'s have made them obsolete. Yet underlying these reasons is another, more pervasive one: the risk of malpractice suits. An autopsy that uncovers an error in treatment also uncovers the potential for litigation. Never mind that it may improve subsequent diagnoses.

An overwhelming amount of what we know about the human body and its diseases was discovered by means of autopsies. X-rays and M.R.I.'s may create the illusion that the human body is now, somehow, translucent, more open to the scientific eye, but the fact remains that in many ways, we are still as opaque as we ever were. Hospitals can discover how well they're doing not only by the number of people they cure, but also by closely examining a reasonable percentage of those they don't cure. To assume that a patient has died of a diagnosed disease is, too often, to assume too much.

* * * * *

Sweat the Cheesy Stuff

This editorial appeared in the New York Times on March 28, 2004.

As Sheldon Silver, the New York Assembly speaker, learned recently, whatever happens in Vegas does not always stay in Vegas. Mr. Silver and his wife went there on vacation two years ago. They hit the jackpot as soon as they checked into the Paris Las Vegas Hotel. The Silvers were upgraded to a $1,500-a-night suite usually reserved for high rollers. Never mind that he was paying a $109 government rate; these things happen, and Mr. Silver would have you believe it had nothing to do with the fact that Caesars Entertainment Inc., the hotel's owner, is hoping to get a slice of the casino action in New York State. Presumably Caesars lobbyists invite all visitors to Las Vegas out to dinner, as they invited the Silvers.

Mr. Silver has insisted that he has done nothing wrong. Similarly Gov. George Pataki has protested that there was nothing wrong with flying to St. Barts on a private jet provided by a developer — a developer who has business with the Port Authority — and the state's weak-kneed Ethics Commission agreed.

Plenty of elected officials need reminding that they were elected to serve, not be served. They were not elected to have their swimming pools built or the roads to their houses repaired, courtesy of the state. Government service is not meant to be a lifestyle enhancer.

Too many politicians figure they can get away with little things because

everyone knows you can't be bought for a free dinner or a plane ride. That's how it starts. In Connecticut, Gov. John Rowland's career began unraveling over such vacation-home accouterments as a hot tub.

Former Gov. George Ryan of Illinois, renowned for his death-penalty moratorium, now faces charges ranging from racketeering to tax fraud. Within the pages of a very long indictment, which Mr. Ryan has vowed to fight, there are accusations of trips to Jamaica and Palm Springs, courtesy of an associate who had a knack for landing state contracts.

Petty, cheesy morsels of corruption are like the proverbial "broken windows" of violent crime. If we all shrug our shoulders and look the other way, the consequences can be dire.

* * * * *

Impeachment Lynch Mob

This essay appeared in the Hartford Courant on March 21, 2004. Vincent Michael Valvo is publisher and editor of the Connecticut Law Tribune.

At the State capitol these days, the House Select Committee of Inquiry should be a shining beacon of righteousness and purity. Its mission, after all, is not just to investigate whether actions by Gov. John G. Rowland warrant a recommendation of impeachment, but also to demonstrate that our government is not hopelessly mired in the compost of corruption and self-dealing.

Yet it is hard to see how that faith in state government can be sustained, given that the inquiry committee has degenerated into a ruthless, bullying, lawless lynch mob interested only in the facade of justice. Investigating alleged abuse of power, it is itself grossly abusing its own authority, turning what should be a serious investigation into a sinister political inquisition.

State Rep. Michael Lawlor, a Select Committee member and chairman of the General Assembly's Judiciary Committee, has a new mantra: The impeachment of the governor is "a political decision. This is not a legal decision." Lawlor is wrong.

This is not a judicial action, but it is most certainly a legal one: It will determine the fate of an elected official, it will affect the stability of the executive branch, and it will set precedent for any future impeachment hearings. It shouldn't be beyond the ability of political actors to rein in their hyperbole and grandstanding for a few weeks to insure that our constitution is upheld.

The legislature got off to a good start. In December, when Rowland parboiled himself by lying about accepting gifts and repair work at his cottage in Litchfield, legislative leaders insisted on a cooling-off period over the holidays before deciding on a course of action. The U.S. attorney's office in New Haven is probing corruption in state government. The legislature had neither the skills nor inclination to duplicate that effort. An inquiry committee needed only to determine if the governor's actions warranted a recommendation of impeachment. That is why House Speaker Moira Lyons, upon forming the committee in early February, gave it a short, mid-April target date to conclude its work.

In the federal probe, the life and liberty of dozens maybe at stake. The legislative investigation concerns whether one man's brazen actions constitute a breach of public trust so great he should lose his job. The Select Committee, unfortunately, can't seem to get this straight. They've subpoenaed thousands of pages of documents from the governor alone, with tens of thousands more from supposed cronies. They want witnesses facing federal criminal investigation to step up to their committee and give testimony that might incriminate them in the criminal probe.

Its not surprising that many of the people receiving the committee's subpoenas don't want to cooperate. But to the Special Committee, any rebuff, any assertion of basic rights, is tantamount to professing evil.

Lawlor called efforts to fight the committee's subpoenas "stonewalling." Select Committee Democratic Chairman John Wayne Fox said that those who want to plead their Fifth Amendment rights must do so in the most public manner possible. "They're going to come to us in a public forum and not hide behind their lawyers," he told reporters.

Yet Fox has been a leading proponent of conducting much of the Select Committee's activities behind closed doors. It's astonishing that a committee that yearns to meet in secret calls for public flogging of those who would assert their rights.

Moreover, how can those called before the committee be interviewed if the committee has yet to decide what standard it's going to use to determine if impeachment is warranted? In what other forum do we ask the accused to defend himself first but learn the charge against him only after testimony is concluded?

The hubris of the committee is also telling. Connecticut has rules laying out who can and can't practice law in this state. The committee is trying to skirt those regulations – even though most of the committee members are attorneys and know the seriousness of their action. The committee hired as chief counsel a New York attorney unadmitted in Connecticut. At first, committee chairmen denied they had broken the law (but threatened retaliation against the state bar if anyone defied that assertion). Then they asked the Judicial Department for a special waiver that looked suspiciously illegal. As soon as that waiver was challenged in court the entire legislature tried to cover its tracks with special enabling legislation. This is a committee that isn't letting rules and regulations stand in its way.

Nor are lawmakers letting the presumption of innocence impede their march to judgment Comments from the committee make it clear that a vote recommending impeachment is likely. Even State Senate President Pro Tempore Kevin Sullivan last week commented on "the probable impeachment of the governor."

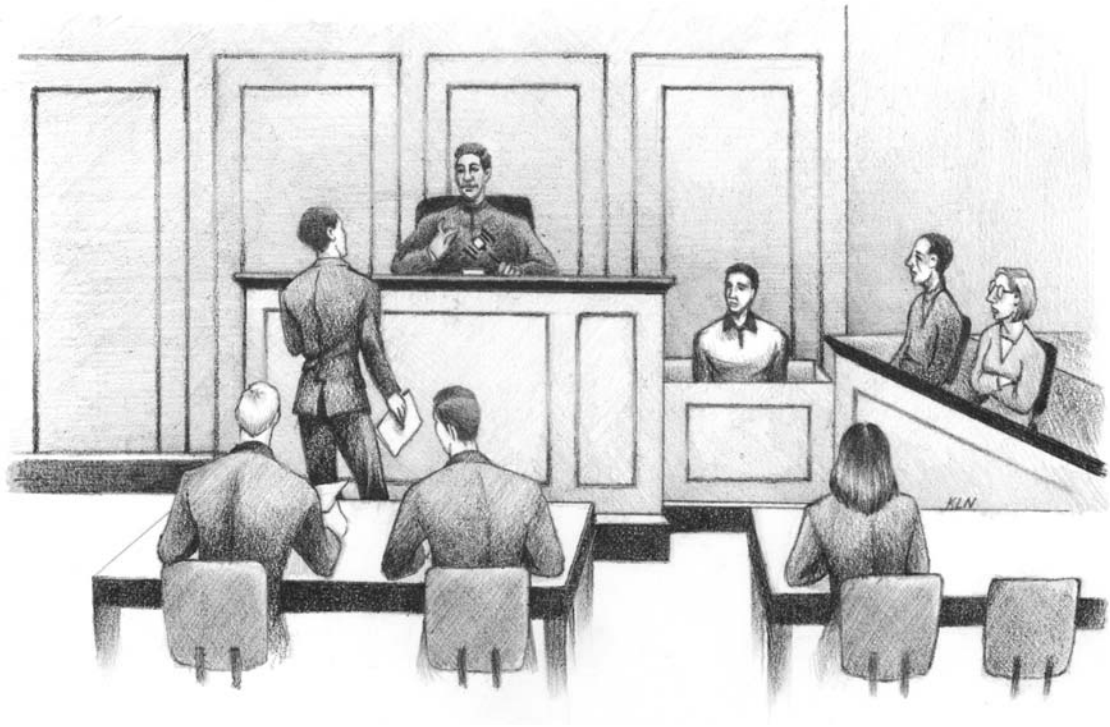
If the outcome is preordained, why all the hullabaloo about subpoenaed documents? Why even go through this exercise? Because the hallmark of any inquisition is the pain and suffering a tribunal puts defendants through on the way to the inevitable guilty verdict

The Select Committee is working not at finding the truth, but at putting on a show for the public, apolitical prosecution with a political aim: the toppling of the governor. Perhaps the governor needs to be removed. But we cannot right corruption in state government via a tribunal that lacks impartiality, fairness, humility or respect for the laws of our land.

CTLA
Code of Conduct

Adopted by the Board of Governors of the Connecticut Trial Lawyers Association on January 17, 2004

1. No CTLA member shall personally, or through a representative, contact any party, or an aggrieved survivor in an attempt to solicit a potential client when there has been no request for such contact from the injured party, an aggrieved survivor, or a relative of either, or the injured parties' union representative.
2. No CTLA member shall go to the scene of an event which caused injury unless requested to do so by an interested party, an aggrieved survivor, a relative of either, or by an attorney representing an injured party or survivor.
3. No CTLA member shall initiate a television appearance or initiate any comment to any news media concerning an event causing injury within 10 days of the event unless the member forgoes any financial return from the compensation of those injured or killed, provided, however, that an individual designated by a bar association to state the official position of such bar association may initiate such media contact to communicate such position.
4. No CTLA member shall personally, or through an associate attorney, file a complaint with a specific ad damnum amount unless required by the rules of that court. If such amount is stated, it shall be based upon good faith evaluation of facts which the member can demonstrate.
5. No CTLA member shall personally, or through a representative, make representations of trial experience or past results of litigation either of which is in any way false or misleading.
6. No CTLA member shall personally, or through a representative, initiate personal contact with a potential client (who is not a client, former client, relative or close personal friend of the attorney) for the purpose of advising that individual of the possibility of an unrecognized legal claim for damages unless the member forgoes any financial interest in the compensation of the injured party.
7. No CTLA member shall file or maintain a frivolous suit, issue, or position. However, no CTLA member should refrain from urging or arguing any suit, issue or position that he believes in good faith to have merit.
8. The CTLA Board of Governors has condemned attorneys or legal clinics who advertise for clients in personal injury cases and who have no intention of handling the cases themselves, but do so for the sole purpose of brokering the case to other attorneys. Any CTLA member who enters a contract of representation on behalf of a claimant shall, at the time of retention, fully advise the client, in writing, of all relationships with other attorneys who will be involved in the presentation, the role each attorney shall play, and the proposed division of fees among them. The client shall also be promptly advised of all changes affecting the representation.
9. No CTLA member shall knowingly accept a referral from a person, whether a CTLA member or not, who obtained the representation by conduct which this code prohibits.



TIPS ON INFLUENCING THE INFLUENTIAL

During the legislative session, CTLA will be sending weekly updates to members regarding the status of key pieces of legislation. Members should use the CTLA weekly updates as background information when contacting legislators. Letters from clients to legislators are also very helpful.

Your direct involvement with Connecticut Lawmakers can make a difference in improving the administration of justice in Connecticut!

Most issues are settled in the committees. Focus your contact on legislators from your district and on members of the particular committees handling the bills that concern you.

How to Write to Your Legislators:

Legislators want to hear from their constituents. Letters should be to the point. Follow these guidelines to get your message across:

1. Always identify the bill number and subject matter.
2. Write when the bills are being considered in committee or in the week before a floor vote.
3. State why you support or oppose the legislation, and how it would affect you, your employees, clients, and your business.
4. Write in your own words; do not copy someone else's letter or just sign your name to a printed letter.
5. Please do not send copies of CTLA Alerts.
6. Be constructive; do not make threats.
7. If a legislator does something that you appreciate, let him or her know.
8. Send a copy of correspondence to the CTLA office.
9. Write to the Governor as well as legislators.
10. Only write about one subject per letter. Use the proper form of address when writing:

The Honorable (Full Name) Connecticut State Legislature Legislative Office Building Hartford, CT 06106\	Salutation: Dear Senator (last name) or Dear Representative (last name)

When writing to a committee, address the letter to: "The Honorable (full name), Chairman, and members of the (name) Committee." During the legislative session, always send your correspondence to the capitol address. Otherwise use the home address.

How to Phone Your Legislator:

Use these numbers to leave a message for your legislator. You can also get bill information, find out the status of measures, committee schedules, session times, or other information. During the session, call these numbers: Senate Ds—800-842-1420; Senate Rs—800-842-1421; House Ds—800-842-1902; House Rs—800-842-1423.

How to Write Your Legislator—Electronically

The legislators can be reached via the Internet. Some of the legislators have their own addresses but all correspondence can be sent to the legislature's home page and it will be forwarded. General information about the legislature, legislators' addresses, committee schedules, copies of bills, etc. are also available on the legislature's home page at www.cga.state.ct.us.

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