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THE PARASITIC DESTRUCTION OF AMERICA'S CIVIL JUSTICE SYSTEM*

Theodore B. Olson**

IN one of his many popular books on zoology, evolution, and behavior, Harvard paleontologist Stephen Jay Gould describes a species of wasp that passes its larval life as a parasite in the body of a caterpillar. It devours the caterpillar from the inside out, taking care to keep its host alive as long as possible until the caterpillar is no longer capable of sustaining its uninvited, unwelcome, and lethal guest. The larva then "completes its work and kills its victim, leaving behind the caterpillar's empty shell."¹

Gould's wasp could be a metaphor for what is happening to America's civil justice system. Our mechanism for the peaceable resolution of civil disputes has transmogrified into an insatiable organism that is devouring a segment of our society and culture from the inside-out. Like the giant underground fungus discovered several years ago in Michigan, which manifests itself above the ground only in the form of an occasional mushroom,² our civil justice system parasite is barely perceptible to the average person on a day-to-day basis, except for the occasional but increasingly frequent news reports of a freakish lawsuit or outlandish jury verdict. But the destructive process is nevertheless continuously at work, growing and relentlessly consuming vital resources and disabling our productive capacity.

I believe that most of the resources we spend on our civil justice system are unproductive and wasted: slowing our economic engine; handicapping our productive segment in its efforts to compete globally; pushing up the cost of essential services such as medicine, food, shelter, transportation, and, of course, insurance; stifling the introduction of new and useful products and services; and fostering disrespect for our courts, judges, and dispute resolution systems. We must bring this organism under control to avoid further irreparable injury to our society and our culture.

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1. STEPHEN JAY GOULD, HENS TEETH AND HORSES TOES 32-45 (1983) (referring to the *Ichneumon* wasp).

2. *Heir to the Earth*, N.Y. TIMES, Apr. 3, 1992, at A28.

Some examples, incidents, statistics, and anecdotes give the problem real life definition. Some of these illustrations may appear to be silly or aberrational, but they are all real and are symptomatic manifestations of an interconnected, troublesome, and destructive phenomena.

For instance, in July of 1992 a Texas jury ordered an investment management firm to pay \$163 million in damages, \$100 million of which were punitive damages, arising out of a dispute over a corporate take-over contest.³ The victorious lawyer called the verdict justified, claiming that "a bunch of noncaring arrogant people"⁴ from Connecticut had tried to bully his southern clients. We thus learn that arrogance, at least out-of-state arrogance, has become *very* expensive. In Texas of all places. The *Houston Monarch* decision represented the third nine-figure jury verdict in Texas in 1992.⁵

Previously, a Galveston jury had awarded \$550 million against auditors and bankers in a securities fraud case,⁶ and a Dallas jury awarded \$124 million to an executive who claimed he had been wrongfully terminated (that was a firing, not an execution).⁷ The executive had been making about \$100,000 per year, so the verdict would have nicely covered his salary for the next 1,240 years.

Texas also gave us the United States' largest civil judgment with the infamous \$10.3 billion *Pennzoil-Texaco* verdict.⁸ The legal fees from that case alone enabled the plaintiff's lawyer to become one of the nation's wealthiest persons.⁹ A jury in Corpus Christi awarded \$1.5 million to the mother of a deceased teenager because distiller Brown-Forman failed to warn the youngster that she could die from drinking an excessive quantity of tequila.¹⁰

Large jury verdicts may affect the way business decisions are made. In Illinois, a Chicago jury awarded \$124.6 million in punitive damages for the loss of an eye because a doctor misadministered the anti-inflammatory drug depo-medrol.¹¹ The drug company's crime was failure to adequately warn that physicians might misuse its product.¹² How much must the pharma-

3. *Texas Jury Awards Over \$163 Million for Fraud and Breach of Fiduciary Duty*, [July-Dec.] Sec. Reg. & L. Rep. (BNA) No. 24, at 1280 (Aug. 14, 1992) (reporting the case of *Houston Monarch Inc. v. First Reserve Corp.* No. 89-048692 (Tex. D. Ct. July 22, 1992)).

4. Christi Harlan, *Jury Award Bolsters Texas' Big Reputation*, WALL ST. J., July 27, 1992, at B8.

5. *Id.*

6. Kevin Moran, *Disk Maker Faces Fraud Judgement*, HOUS. CHRON., Feb. 5, 1992, at Bus. 1. The verdict was subsequently voided by the district court judge as contrary to the great weight of evidence as part of a settlement agreement. *Id.*

7. Brenda Sapino, *\$124M Verdict Jolts Employment Bar; Defense Compares "Shocking" Outcome to Lottery Payoff*, TEX. LAW., June 1, 1992, at 8.

8. See *How Texaco Lost Court Fight*, N.Y. TIMES, Dec. 19, 1985, at D1; see also *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

9. Peter Brimlow & Leslie Spencer, *The Best Paid Lawyers in America*, FORBES, Oct. 16, 1989, at 197, 204.

10. Gabriella Stern, *Brown-Forman Held Partly Liable for Death by Alcohol Poisoning*, WALL ST. J., Oct. 1, 1992, at B9. Brown-Forman's negligence represented only 35% of causation whereas the jury attributed the remaining 65% to the decedent. See *Brune v. Brown-Forman Corp.*, 758 S.W.2d 827 (Tex. App.—Corpus Christi 1988, writ denied).

11. Charles Mount, *Injured Man Awarded \$127 Million from Upjohn*, CHI. TRIB., Oct. 19, 1991, at C1.

12. *Id.*

ceutical company do to participate in the physician's decisions? In Philadelphia, a jury returned a verdict of \$2.5 million in compensatory damages and \$31.5 million in punitive damages, against the publisher of the *Philadelphia Inquirer* for a story allegedly libelous to a former prosecutor.¹³ Publishers are becoming concerned that increasingly large libel verdicts and punitive damage awards will stifle aggressive investigative reporting particularly by smaller publishers.

Punitive damages have been around for a long time, but they were not much of a problem until the 1960s. The largest affirmed punitive damage award has increased by a factor of 1,500 since 1959. The types of lawsuits people are filing these days range from the weird to the incredible. An example of the lengths to which people will go these days to sue insurance companies was reported recently by a major daily newspaper. According to the paper, the widow of a USAir pilot sued for accidental death benefits under a life insurance policy, claiming that her husband's fatal cerebral hemorrhage was an accident caused by sex with a female flight attendant in a hotel room.¹⁴ She alleged that her husband's death was an accident because emotional arousal and physical exertion associated with sex precipitated the fatal incident.¹⁵ Fortunately, at least this case was dismissed. U.S. District Judge John Kane ruled that, as he put it, "sex is no accident."¹⁶

A homeless Morristown, New Jersey man has twice sued the town for refusing to allow him to sleep in the town library and harass library users with offensive gestures and overpowering body odors.¹⁷ The city incurred over a quarter of a million dollars in legal fees before settling the suit for \$150,000.¹⁸ Just as incredibly, a disappointed Ross Perot supporter sued Mr. Perot accusing him of breaking his promise to run.¹⁹ In another case, a law firm was recently sued for its failure to advise a former client of changes in the law that occurred long after the attorney-client relationship ended. A Seattle woman sued a liquor manufacturer for failing to warn her that consuming a fifth of liquor a day might damage her unborn child.²⁰

13. *Libel*, NAT'L L.J., Jan. 21, 1991, at S6. This award arose from a second trial of the libel claim. The superior court held and the supreme court affirmed a reversal of the first verdict because the trial court interpreted Pennsylvania law too broadly in favor of the plaintiff. *Sprague v. Walter*, 543 A.2d 1078 (Pa. 1988). The superior court refused to overturn the second verdict and denied a motion for a new trial. *\$34 Million Libel Award Against Philadelphia Paper is Upheld*, CHI. TRIB., Sept. 11, 1992, at 4.

14. *Sex is No Accident*, NAT'L L.J., Mar. 30, 1992, at 43.

15. *Id.*

16. *Id.*

17. *New Jersey Man Still Homeless After Settlement*, LIABILITY WK., Oct. 26, 1992. The plaintiff, Richard Kreimer, later announced his intention to run for Governor of New Jersey, using the settlement proceeds to finance his candidacy. *Homeless Litigant Plans to Enter Politics*, UPI, Dec. 2, 1992 available in LEXIS, Nexis Library, CURRNT File. Mr. Kreimer originally brought suit in federal court only to have his district court judgment overturned by the Third Circuit Court of Appeals. See *Kreimer v. Bureau of Police*, 958 F.2d 1242, *reh'g denied*, 1992 U.S. App. LEXIS 7642 (3d Cir. 1992).

18. Robert Hanley, *Homeless Man Has Deal in 2d Suit in Morristown*, N.Y. TIMES, March 3, 1992, at 7B.

19. Jonathan M. Moses & Timothy Noah, *Ross Perot Sued Over Decision Not to Run*, WALL ST. J., July 21, 1992, at B8.

20. Joni H. Blackman, *Alcohol on Trial; A First-of-its-Kind Case Looks at Who Should*

In a somewhat troubling reversal of positions, a Boston aquarium sued animal rights groups for \$5 million for criticizing the aquarium's handling of dolphins.²¹ This suit was the latest example of what is called a "SLAPP" (Strategic Lawsuits Against Public Participation) suit designed to discourage citizen activist groups.²² The aquarium retaliated against the animal rights groups for suits brought against the aquarium relating to the transfer of a dolphin to a Navy training program. The activist group contended that the transfer should have been preceded by notice in the *Federal Register*.²³

The nation's capitol has recently been the site of several questionable suits. In Washington, D.C. a building owner and a water heater manufacturer presented a \$15 million settlement to an infant injured when her mother left the child in a sink during a bath and a pre-school age brother entered the room and turned on the hot water, scalding the child.²⁴ The outgoing Washington, D.C. fire chief, Theodore Coleman, sued the monthly trade journal *Fire Chief* for defamation because the magazine did not put his picture on its cover.²⁵

Another Texas case demonstrates the incredible extent of recent jury verdicts. Two shrimpers ignored warning labels on bags of chemicals. The warnings contained bold face capital letters, in two languages, in red and black ink that specified exactly how not to use certain chemicals. The warnings contained words like "WARNING," "TOXIC . . . GAS," "HARMFUL," "SEVERE ALLERGIC REACTION," "DO NOT BREATHE," and "EMERGENCY." The shrimpers nevertheless did exactly what the labels warned them not to do and were asphyxiated. The Texas Supreme Court upheld liability underlying a \$30 million damage award to the decedents' parents because the labels did not use the word "death."²⁶ Finally, the Supreme Court of the United States recently denied certiorari in a New

Pay Price for Mother's Drinking, L.A. TIMES, May 4, 1989, at 1. The jury rendered a verdict of not guilty in favor of the defendant, refusing to find Jim Beam negligent in failing to specifically warn of the danger of Fetal Alcohol Syndrome from drinking excessively during pregnancy. *Id.*

21. *Boston Aquarium Countersues Activists*, WALL ST. J., Sept. 18, 1992, at B6.

22. *Id.*

23. *Id.*

24. Michael York, *Child Scalded in Sink to Get \$15 Million*, WASH. POST, May 27, 1992, at D1.

25. John McKelway, *I've Been Ignored, and It'll Cost Everyone Concerned Big Bucks*, WASH. TIMES, Aug. 1, 1989, at B1. Coleman called his injury "defamation by omission." *Id.* Traditionally *Fire Chief* pictured the chief of the city hosting the international fire chief convention. When Washington, D.C. hosted the convention, however, the journal pictured Thomas Jefferson rather than Coleman. *Id.*

26. *General Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 925 (Tex. 1993); see James Dinlarten, *The Spoils of Tragedy: Award Still Growing in "Shrimp Dip Case"*, HOUS. CHRON., Aug. 3, 1992, at A1. In August, 1992, the potential final judgement had increased to \$55 million, including post-judgement interest. Before the supreme court appeal, plaintiff's counsel offered to settle for \$15 million less than the judgement if the defendants changed their warning labels, but the defendants refused. Janet Elliot, *Stakes Go up in Warning Label Spat: Plaintiffs Offer to Cut \$15 Million from Award in Death Case*, TEX. LAW., Oct. 14, 1991, at 8. The Texas Supreme Court held that the plaintiffs were statutorily limited to four times actual damages. Since actual damages only amounted to \$1 million per decedent, each decedent's parents were limited to \$4 million in punitive damages. *General Chem.*, 852 S.W.2d at 922.

York case affirming a \$4 million damage award to a subway mugger who was shot by police while fleeing the scene of the crime.²⁷

What does all this mean to the United States and its economy? The following statistics and anecdotes serve to reveal the severity of the problem. A Bush administration study found that corporations spend more on lawyers, \$200 billion, than they report in after-tax profits.²⁸ In 1989, over 17 million new civil cases were filed in state and federal courts, one lawsuit for every ten adults.²⁹ The number of civil suits filed in state trial courts increased from 13.6 million in 1984 to 17.3 million in 1989.³⁰ That is a 27% increase in five years. The "tort tax" takes a \$300 billion bite out of our economy every year.³¹ The details and components of these calculations are the subject of dispute because no one can agree what to include or how to measure. The numbers are, however, staggering by any measure. For example, Tillinghast, a Hartford based actuarial consulting firm, estimates that the United States liability system cost over \$117 billion in 1987.³² This calculation does not even include the costs of other forms of litigation including contract disputes, wrongful termination cases, and lender liability claims. *Forbes* says that the tort tax is growing at the compound rate of 12% per year.³³ Our tort system currently consumes 2 1/2% of our GNP.³⁴ That is estimated to be five times the proportion of GNP given over to the civil justice machinery in Great Britain, and seven times that in Japan.³⁵ According to Gary Schwartz, a law professor at UCLA, an American is ten times as likely as a Briton to file a liability lawsuit.³⁶ Because of our litigiousness, certain livelihoods have become threatened. Obstetricians have seen their liability insurance rates escalate 240% in a five year period.³⁷ An example of the enormous harm liability litigation has done to American industry is private aviation. Because most plane crashes are followed by a lawsuit against the manufacturer even though the FAA blames most of the accidents on pilot error, the industry has virtually disappeared in the United States.³⁸ In

27. *McCummings v. New York City Transit Auth.*, 613 N.E.2d 559 (N.Y. 1993), cert. denied, 62 U.S.L.W. 3375 (1993).

28. *Remarks by President Bush Natural Communities Conservation Planning Organizations, San Diego, California*, Fed. News Serv., Sept. 14, 1992, available in LEXIS, Nexis Library, FEDNEW File.

29. *Quayle: Are There Too Many Lawyers in America?*, N.J. L.J., Aug. 29, 1991, at 15.

30. National Center for State Courts, Reported Caseloads for State Courts (on file with author).

31. Leslie Spencer, *The Tort Tax*, FORBES, Feb. 17, 1992, at 40.

32. *Id.*

33. *Id.*

34. *Id.* at 42.

35. *Id.*

36. Joel Havemann, *Safety Net for Malpractice has Fewer Holes in Europe*, L.A. TIMES, Dec. 31, 1992, at A1.

37. *Obstetricians Sued Often, Large Court Awards Infrequent, Survey Concludes*, Daily Rep. for Executives (BNA), Mar. 3, 1988, at 42; Earl Ubell, *When Should a Doctor Pay for a Mistake*, PARADE, Sept. 12, 1993, at 1B (reporting that an average obstetrician pays \$140,000 per year for liability insurance).

38. Spencer, *supra* note 31, at 42.

1979 the United States private aircraft industry employed 17,000 people.³⁹ By 1990, American manufacturers employed only about 1,000.⁴⁰

According to the chairman of the Keene Company, his company was worth \$800,000 when he started it twenty-five years ago. Today Keene spends that much every week on asbestos-related litigation. This nightmare began as a result of Keene's acquisition in 1968 of a company for \$8 million that made thermal insulation that was 10% asbestos. Keene sold \$15 million worth of asbestos-containing products over the next four years (out of \$500 million in total sales). The affiliate discontinued the use of asbestos in 1972, and Keene closed the affiliate in 1975. To date, Keene has paid \$400 million to resolve asbestos claims, of which \$265 million has gone to lawyers.⁴¹ American firms have paid \$9 billion for asbestos related claims including \$6 billion in lawyers' fees.⁴²

In a recent survey of smaller CPA firms, a surprising number said they were turning down audits and cutting back on client services because of liability suits.⁴³ As a result, costs of obtaining an audit increase as the number of small firms willing to assume the risk of liability decreases. To show that the liability crisis shows no political favorites, George McGovern recently described what it was like for him to run a small hotel after leaving public service.⁴⁴ He catalogued the impossible burden of paying for health care coverage for employees. McGovern attributed the high cost of health care coverage to patients suing doctors and what he characterized as the "explosion in blame-shifting and scapegoating for every negative experience in life."⁴⁵ He blamed his ultimate bankruptcy on the never-ending string of lawsuits he faced from guests and others.⁴⁶

In recent years the United States has experienced phenomenal and continuous growth in the number of lawyers, as compared with population growth in general.⁴⁷ While that alone may not prove anything, it certainly helps explain to me why we are facing the liability crisis I have been describing. It is an axiom that one lawyer in a town will starve, but two will thrive, because they will be suing one-another's clients. That seems to be what is happening throughout our system.

While GNP increases at an historically modest pace, tort costs continue to

39. Daniel John Sobieski, *The Kind of Legal Reform the United States Really Needs*, WASH. TIMES, Oct. 3, 1992, at B2.

40. *Id.*

41. Glenn W. Bailey, *Litigation Abuse is Destroying my Company*, WALL ST. J., July 15, 1992, at A13.

42. *Id.*

43. Lee Berton, *Liability Awards are Frightening Small CPA Firms Away from Audits*, WALL ST. J., Mar. 3, 1992, at B1.

44. George McGovern, *A Politician's Dream - A Businessman's Nightmare*, NATION'S RESTAURANT NEWS NEWSL., Sept. 21, 1992, at 60.

45. *Id.*

46. *Id.*

47. Maureen Hegell, *Profits Up, Crisis Eases*, BOSTON BUS. J., Feb. 16, 1987, at 1 (reporting that the number of lawyers increased at a rate seven times the rate of increase in the general population between 1980 and 1984).

grow exponentially.⁴⁸ Unless tort costs are putting something back into the system that I have not discovered, we are pouring an increasingly large segment of our national resources into an apparently bottomless pit.

As you have seen, punitive damages play a large part in the civil justice system. Punitive damages represent punishments, entirely extra-compensatory, for violating public standards. Punitive damages in that regard closely resemble fines. They are the punishment for the public wrong component of a tort. The private wrong is remedied by a compensatory damage award, to ameliorate the private plaintiff's actual injury, and the public wrong by the punitive damage award. We have, however, turned enforcement of this public wrong, punitive fine system over to private attorneys and private prosecutors who are not constrained by public standards, public checks, or public controls. Since awards get divided between the plaintiff and his lawyer, they both have a direct and substantial personal stake in the outcome. Generally, no portion of the punitive damage award, which supposedly arises from a violation of a public standard and is imposed for the public purpose of retribution and deterrence, is paid to the public. The public's interest plays no part in the private prosecutor's conduct, strategy, or goals. Only the desire to convince the jury to return the highest possible verdict motivates the private prosecutor.

No clear, specific, defined, knowable, legislative standards for punitive damage awards exist. The rules of liability are subjective, elastic, ambiguous, and often retroactive. There are no limits on the size of the fine. Since very little guidance is given to juries, and there is very little trial court or appellate supervision, there is no semblance of regularity or predictability in the punitive system. The amount of the fine is utterly at the whim of the ad hoc jury. Normally juries are instructed to set aside passion and prejudice, but in punitive damage cases, plaintiffs' lawyers are permitted broad license to incite anger at the defendant and sympathy for the plaintiff. The defendant's net worth is displayed and highlighted to stimulate higher recoveries. The more successful the defendant, the higher the fine. Corporations are demonized and any out-of-state defendant is a particularly attractive target. Thus, our normal rules for objective, dispassionate justice are tossed out the window when it comes to punitive damages. The amount of the punitive damage fine in a civil action may be vastly greater than in a criminal prosecution for the same conduct. None of the procedural safeguards available to criminal defendants are afforded to civil punitive damage defendants.⁴⁹ Yet conduct that our elected legislature has designated for criminal prosecution is supposed to be the most reprehensible in our society. How then can we impose greater punishment with less due process for deviation from unknowable standards in a civil case than in a criminal prosecution for violating a known specific prohibition of identical conduct?

48. *Plaintiffs Get Only Half of Every Dollar Paid in Tort Cases, JEC Subcommittee Told*, Daily Rep. for Executives (BNA), at A-9 (July 30, 1986) (reporting that between 1950 and 1984 the cost of the tort system increased more than 300% of the increase in GNP).

49. Stephen J. Davis, *A Travesty of Justice: Why Punitive Damages Shouldn't be Included in Civil Procedures*, 52 INS. REV. 53 (Nov. 1991).

The wrongdoer in punitive damage cases seldom pays the fine. The punitive damage award is almost always passed along to the taxpayer, shareholder, or policy-holder. Thus, the penalty rarely punishes the bad actor and often rewards a fully compensated private citizen with a windfall. Punitive damages combine the worst elements of a lottery and a plague by combining little rhyme or reason for who is rewarded and who is punished. Because punitive damages are so freakish, capricious, and lottery-like, they discourage the responsible entrepreneur. Anyone with any sense will stay away from productive activity that carries with it such whimsical risks, but the irresponsible, impecunious risk-taker will be induced to act, and a societal Gresham's Law takes place, pushing out the responsible, and inviting in the irresponsible.⁵⁰ As this occurs defensive measures begin consuming a greater proportion of the consumer's dollar. We all know about defensive medicine, increased paperwork, products covered with unnecessary warnings. My favorite is the standard airplane safety instruction that says "If you are seated in an exit row, please ask to be resealed if you do not understand these instructions."

I will venture a few conclusions and you can probably supply others as to why these phenomenon have happened.

First, as a society, we are no longer willing to accept responsibility for the consequences of our own conduct. We blame others for our own misfortunes. In California, jockey Willie Shoemaker sued the state because of a one-car accident in which he was the driver that left him a quadriplegic.⁵¹ In another California case, a court initially held that a thief who was injured trying to steal electrical conductors from an abandoned government base should have been warned that the power lines he touched were still wired and live.⁵² A New York man sued the New York Subway after his attempt to commit suicide by throwing himself in front of a subway train failed.⁵³ A Washington child recovered a \$15 million settlement when he fell eight feet from playground equipment onto an asphalt surface.⁵⁴ The playground, the court held, should have been made of wood chips, sand or rubber matting.⁵⁵

Additionally, judges have become wildly permissive in expanding the types of recognizable claims for liability. Judicial expansion of liability theories can be attributed to a desire to spread the impact of loss by making

50. Gresham's Law is an economic observation where two coins are equal in debt paying value, but unequal in intrinsic value. The coin having the lesser intrinsic value tends to remain in circulation while the other tends to be hoarded. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 998 (1981).

51. *Shoemaker Sues California for \$20 Million*, WASH. POST, Apr. 17, 1992, at C2. Shoemaker also sued the ambulance service that took him to the hospital, the doctors who cared for him, and the hospital where he was treated. *Extra Time: Crippled Shoemaker Seeks to Put His Life Back Together*, GUARDIAN, May 1, 1993, at 19. Shoemaker also threatened to sue Ford alleging faulty design of the Bronco he was driving, but ultimately settled for \$1 million. *Id.*

52. *Henderson v. United States*, 846 F.2d 1233-34 (9th Cir. 1988). Upon a second review, the Ninth Circuit held the government did not owe a duty to the injured plaintiff. *Id.* at 1236.

53. *John Case, Down with Lawyers*, DAILY TEL., July 8, 1993, at 18; see *Faber v. New York City Transit Auth.*, 575 N.Y.S.2d 877 (App. Div. 1991).

54. *Boy Wins Big Settlement in Playground Injury Suit*, N.Y. TIMES, Oct. 11, 1992, at 19.

55. *Id.*

manufacturers, retailers, and insurers pay for injuries even where there is little or no proof of fault. The risk is thereby spread to society. It is also partly due to intellectual softness, the unwillingness to apply existing rules of conduct to defeat claims. This, for example, has led to the "tortification" of contract law which arises in the form of bad faith litigation, but which has also led to an avalanche of suits against employers, banks, and co-workers.⁵⁶

Lastly, the system promotes excessive punitive damages by encouraging litigation innovation with the enticement of attractive judgments. Increased punitive damages lead to increased settlements and other rewards for the person who files suit. It is hard to blame lawyers for what has happened because the system encourages creative pleading and aggressive litigation. There are very few disincentives for either the lawyer or the litigant with a weak case.

A number of courses of action exist that can and should be taken to address and control arbitrary and excessive punitive damages. They include:

1. A national product liability act. (Last year the Senate refused to consider this proposal for the 10th year in a row.)⁵⁷
2. Punitive damage reform on state and local levels.
3. Pre-litigation advice and mediation.
4. More flexible and creative settlement mechanisms.
5. Clear standards of liability.
6. Reversal of the American rule and replacement with the "everywhere but America" loser-pays rule.
7. Reduction of discovery.
8. Greater penalties for frivolous claims and motions.
9. Limits on non-economic damages.
10. Elimination of junk science and pseudo experts.

Our society must, moreover, increase citizen awareness of what is happening to the civil justice system. The plaintiffs' bar is one of the most powerful lobbies in America and lawyers represent the nation's biggest campaign contributors. As a result, proposals to improve civil justice systems have gone nowhere.

The Manhattan Institute had come up with a very creative proposal to respond to the problem created by contingent fees. They recognize that you will never be able to eliminate the contingent fee — because it allows some people to gain access to court who would not otherwise be able to bring a legitimate claim. But, they theorize, the contingent fee should be based on real risks. Lawyers shouldn't get 40% or more of a "no-risk" case. They propose, in short, to cap contingent fees at 10% of the amount that the defendant may offer in settlement sixty days after the suit is filed. If the settlement is rejected, the plaintiff's lawyer can never get any more than 10%

56. Ted Gest et al., "See you in Court"; *Our Suing Society*, U.S. NEWS & WORLD REP., Dec. 20, 1982, at 58.

57. See Mark A. Hofmann, *Product Liability Return Bill Killed: But Backers Point to Shrinking Margin of Opposition*, BUS. INS., Sept. 14, 1992, at 1.

of the amount recovered up to the settlement offer. Only if there is a larger judgment can the contingent fee be the standard portion of the differential.

This proposal will encourage high settlement offers — which plaintiffs will have a high incentive to accept. The offer will be higher because defendants can offer a portion of their anticipated defense costs — thus encouraging realistic settlement proposals for cases likely to be lost.

Like any institutional decay, reform will depend on the willingness of the American people to get involved, to write letters and op-ed pieces, to organize and pay the price of participation. Corporations, especially insurance companies, are traditionally focused on the short-term bottom line, and are seldom willing to undertake the exposure and financial commitment necessary to accomplish long-term institutional reform. This must change or the system will just get worse.

If we fail to get the problem under control, the parasite that has entered our civil justice system will continue to consume our productive resources until we are no longer able to compete at all. We have already seen the effects in medicine, insurance, pharmaceuticals, aviation and accounting. This problem has taken a long time to take hold and it will be difficult to dislodge, but that task will only get more difficult the longer we wait. It certainly will not begin to improve if we do nothing but talk about the problem.

Comments

