

Q&A

Declaring War On Lawsuit Abuse

The American Justice Partnership fights for tort reform, state by state.

The American Justice Partnership was launched in January 2005 under the auspices of the National Association of Manufacturers to stop abuses of the legal system at the state level and to lobby for tort re-

form. Bernie Marcus, co-founder of Home Depot, helped create the AJP, which is chaired by Steven B. Hantler, assistant general counsel at DaimlerChrysler. Here are highlights of a conversation with Marcus and Hantler:

We can't resist asking you, Mr. Marcus, about your statement that you couldn't create a Home Depot in today's business climate. Why not?

Marcus: It's not only because of our tort system, but also for many other reasons. Congress, state governments and the regulatory system have absolutely turned their backs on the free enterprise system. Sarbanes-Oxley is probably one of the worst laws I've ever seen in my life. It's taken the risk factor out of business. When we started Home Depot years ago, everything we did was

Bernie Marcus thinks SOX is among the worst laws ever written.

a risk. When we doubled in size, it was a major risk. If we had to worry about being sued every inch of the way, or worry about a board that was not willing to back us, we could never have become what we are. But today's boards are risk-averse. Why would you want to take a risk when you're putting your own wealth at risk?

And having total outside boards doesn't make a lot of sense to me. When we started Home Depot, our board was made up of shareholders. They contributed. They were involved. Whatever happened to the company had a great effect on their assets. You always knew you got the right information. You always knew you had a board watching you all the time. Having a college professor on the board may look great, but it doesn't help your business too much.

Hasn't there been a slight decline in the number of class actions being filed?

Marcus: I read recently that part of the decline can be attributed to the lawsuits not filed by Milberg Weiss, which is under indictment. However, we still have a lawsuit epidemic in this country. The good news is that more businesses are beginning to recognize that the litigation epidemic is a terrible drag on the economy and their business.

If you are a director on a board, I would like you, at the next board meeting, to ask the CEO, after he or she goes through all the numbers, including profits, return on investment and all that, "What does litigation cost us every year?" It's an enormous number for large and small companies, but it's not on the balance sheet. It's nowhere in the P&L. It's like it doesn't exist.

How much does it cost?

Hantler: It was \$246 billion in 2004 and is approaching \$264 billion for 2005. What's not reflected in those numbers is the damage to share value and company and product reputation when companies are under the withering assault of the trial bar. The reserves that companies are having to hold have gone up exponentially, and that money is not hitting the bottom line.

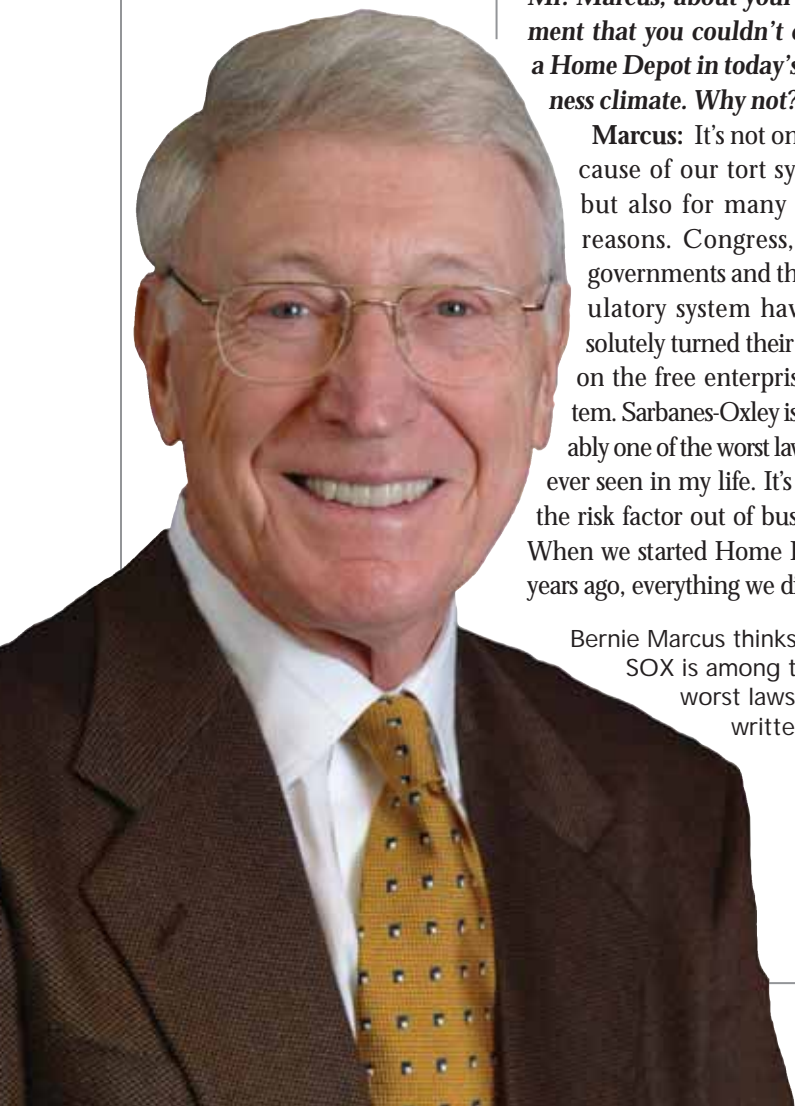
In your view, what has to happen?

Marcus: I went to the Securities and Exchange Commission at one point and asked them whether they would insist on every company having that number as part of their balance sheet. Shareholders should know what a threat this is to the system.

What did the SEC tell you?

Marcus: We got no answer from them. I've had private discussions with many CEOs, and they all say that they wish something like that would happen. Until the guys in Washington understand how serious this matter is, they're not going to react. What we have started is a state-by-state program. We've been able to bring together a coalition of about 60 national and state organizations, including the National Association of Manufacturers, the Council of State Chambers, the Council of State Manufacturing Organizations, the American Tort Reform Association, the Manhattan Institute and many other trade and tort reform groups.

There is a common enemy out there. Plaintiffs' lawyers are well-organized. They help elect activist judges at the state level. Most companies don't want to get involved because it doesn't look right. It may not look right but it's having a dramatic impact on their business.



Hasn't one of the big abuses been "jurisdiction shopping," where the class action lawyers simply shop to find a friendly judge?

Marcus: There are many legislatures that have passed tort reform, but it too often gets thrown out by activist state Supreme Courts. For years and years, activist judges have been elected with the support of the plaintiffs' bar. There are people entrenched in all sorts of places. You go to one of the "judicial hellholes"—and the entire state of West Virginia has been designated a hellhole—and you're a dead duck. We've been able to get tort reform in various states by focusing on state races. We've been able to do it in Alabama, Michigan, Texas, Georgia, Illinois and Mississippi, to name just a few states. We don't go near national politics. We're interested in the state battles.

What are the broader economic effects of the lawsuit epidemic?

Marcus: It goes into the price of every product. We all scream about pharmaceutical costs. I just had a prescription filled. It was a lot of money for a 30-day supply of pills. But the truth is, that manufacturer somewhere along the line is going to be sued for \$6 billion, \$7 billion, \$8 billion. The company has to build up its war chest. Every product we sold—for example, lawn mowers, ladders, hammers—there's a dollar amount built into those products from the manufacturers.

Hantler: I honestly believe that this climate has caused companies to close their manufacturing plants and go overseas. Even if the price of the product is equal to what it would cost here,

it's still less expensive because you don't have to deal with much of the lawsuit epidemic with your operations overseas. I think that's one reason China is doing such good business.

Just how powerful are the class action lawyers politically?

Marcus: It's not just the class action lawyers, it's the entire plaintiffs' bar. They've been organized for a number of years. They're perpetuating their trade. They're good business people, very entrepreneurial. They recognize that making an invest-



Steven Hantler: Litigiousness in the U.S. drives manufacturing overseas.

ment in court races and in attorney general races is good for them. They go state by state. They know whom they're going to support. They throw money into the pot. They are very well organized.

Is new investment your ultimate weapon in persuading states that it's not in their best interests to create a negative environment?

Marcus: The ultimate weapon is bringing together all the business interests to fight a concerted fight. Some heroic companies are fighting back, particularly in asbestos. What we're saying to everybody is that it's time to get involved in this fight.

Which companies are leading?

Hantler: We don't disclose who contributes to AJP. But DaimlerChrysler is willing to have me talk to the media and be involved. We're a company that is actively involved in tort reform.

Do you want to roll back all the protections that consumers have?

Hantler: Not at all. We need a strong system of torts where injured people can receive justice and fair compensation. But that's not what's happening in our legal system today. It's become a litigation lottery, where people want to get \$20 million, \$50 million or \$100 million. We call it "jackpot justice." There's no predictability or fairness.

And you think that boards of directors have a stake in this fight?

Hantler: Yes. I spoke to the CEO of a major insurance company who told me that because of certain tort reforms enacted in the state of Ohio, he could release \$50 million to \$100 million from reserves to income. Not only will tort reform make the system fairer, it will also allow companies to reserve the proper amount. If tort reform succeeds, it will clearly affect the bottom line.

Marcus: Sure. That money goes back into building the business and creating jobs. There are cases where people should be sued. There are places where people have been wronged. They should be able to go to court. We don't want to stop that. But having been exposed to some of these frivolous lawsuits, I've seen people just look at you with puzzled eyes, and they don't understand this can be happening in America. **D**

By the Numbers

How the States Stack Up

Legal Climate (from best to worst)

1	Texas
2	Colorado
3	North Dakota
4	Ohio
5	Michigan
6	Utah
7	Kansas
8	Virginia
9	North Carolina
10	Georgia
11	Nebraska
12	Tennessee
13	Wyoming
14	Washington
15	Alaska
16	Delaware
17	Indiana
18	New Hampshire
19	Iowa
20	South Dakota
21	Mississippi
22	Hawaii
23	Idaho
24	Minnesota
25	Louisiana
26	New Jersey
27	Oregon
28	Missouri
29	Arkansas
30	Wisconsin
31	Arizona
32	Illinois
33	Nevada
34	Maine
35	California
36	South Carolina
37	New Mexico
38	Oklahoma
39	Kentucky
40	Alabama
41	Massachusetts
42	Florida
43	West Virginia
44	Connecticut
45	Montana
46	Maryland
47	Pennsylvania
48	New York
49	Rhode Island
50	Vermont

Source: Pacific Research Institute