

## Are We There Yet?

Tort-reform activists have seen major reforms recently, from the passage of the Class Action Fairness Act of 2005 to important elections on state supreme courts. But for every move the tort-reform advocates have made, they have been countered by “Trial Lawyers, Inc.” Continuing to fight the good fight has never been more important — or difficult.

By Steven B. Hantler



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A journalist recently asked me whether the American Justice Partnership (AJP), where I serve as voluntary chair, and other legal-reform supporters had “turned the corner” in our battles with the trial bar. My first thought was to answer “Yes.” After all, we’ve seen significant tort-reform legislation enacted in many states since 1994; we’ve helped to elect rule-of-law majorities to state supreme courts; and we’ve launched the AJP, a coalition of more than 60 state and national organizations that, for the first time, creates an active network of legal-reform supporters dedicated to reform at the state level. Add to this the passage of the Class Action Fairness Act by Congress in 2005, and you can make a strong case that reformers have begun to turn things around. So why, instead, did I answer “We’re making great strides, but we cannot declare victory”?

A quick review of the history of legal reform helps to explain. At the outset, legal reformers focused primarily on federal tort-

reform legislation. But the results were disappointing, and when few meaningful results were achieved in Congress, we turned our attention to state legislation. Though we were more successful at the state level, it turned out that even the most substantial state victories could be undone by the opposition. “Trial Lawyers, Inc.,” as the Manhattan Institute for Policy Research has termed the trial bar, accepts no defeat as final, and countered legal reform with a strategy of “judicial nullification.”

**Much as we’d all like to declare victory, the truth is that civil-justice reformers have not yet turned the crucial corner.**

Two pioneers of the legal reform movement had warned about judicial nullification. John Engler, the former governor of Michigan and current National Association of Manufacturers president, was the first to recognize that even “the best state tort reform legislation is only as good as the next, activist supreme court that declares it unconstitutional.” Victor Schwartz, an advisor to Engler and general counsel of the American Tort Reform Association (and a partner at Shook, Hardy, & Bacon L.L.P.), also under-

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stood that it would be more cost-effective for the trial bar to support the election of a majority of four or five justices on a state supreme court than for the election of a majority in two state houses and the governor's office.

### The Alabama Example

The truth of their words first became apparent in Alabama following the 1988 election of former Alabama Trial Lawyers Association president Sonny Hornsby as chief justice. The Hornsby court wasted no time in voiding Alabama's tort reform legislation. Soon, multi-million dollar punitive damage verdicts were so common in Alabama that *Forbes* magazine dubbed the state "Tort Hell."

Legal reformers answered in kind, taking their efforts beyond the legislative arena to the political arena and, in particular, to judicial elections. In 1994, a retired judge and a law professor who were critical of lottery-style justice did the unthinkable by challenging two trial-bar-supported incumbents on the Alabama Supreme Court. At the time, few in Alabama gave Judge Perry O. Hooper, Sr. or Prof. Harold See much chance of winning, but to the astonishment of the trial bar, both candidates won. Hooper was seated as Chief Justice (after a year of litigation to establish the lawful winner of the election and an appeal to the U.S. Supreme Court). And See, despite having received a majority of the votes of living and breathing voters, was deemed the loser by the narrowest of margins when all votes — those of the living and the dead — were counted. With tighter ballot security in 1996, See went on to win election as an associate justice and remains there to this day.

Working on the campaigns of Justices Hooper and See, I learned two things. First, with apologies to James Carville, the lesson learned in Alabama was that "It's the politics, stupid." Without Karl Rove's campaign strategy and Kelley McCullough's campaign management, Alabama might still be "Tort Hell." Second, winning legal reform requires that we take long odds and not just sure bets. The unflagging support of a core group of believers, including Bill Pryor (who is now an 11th Circuit Court of Appeals Justice), Matt McDonald, Phil Stano, Chris Jankowski, Forrest Latta and the late Davis Carr, made all the difference.

Trial Lawyers, Inc. countered the "Alabama turnaround" by expanding its lawsuit-abuse business to other states — Georgia, Louisiana, Mississippi, New Mexico and several others. Like unsavory characters run out of one town, they can always be counted on to show

up in another town. Legal reform in one state only spells new litigation problems in other states, so that today Nebraska, Oklahoma and Utah are suddenly among the latest venues for multi-million dollar cases and verdicts. Back in Alabama, meanwhile, five Supreme Court seats are up for grabs this November and the trial bar is on the case (a matter I'll return to in a column later this year).

This cycle of reform and reaction goes on and on, after every gain in every state. Although parodied as unsavory "ambulance chasers" on late-night talk shows, trial lawyers are among the most skilled lawyers and savvy entrepreneurs in America, and they do not give up easily. While they may have lost some legislative battles and a few state supreme court majorities, the cost of lawsuits increases year after year and is likely to exceed \$300 billion in 2006. While Congress passed the Class Action Fairness Act, far more significant asbestos reform legislation remains bottled up, thanks to the untiring efforts of the tort lobby.

So, much as we'd all like to declare victory, the truth is that civil-justice reformers have not yet turned the crucial corner. In fact, things would get worse if we were to rest on our laurels. The threat of "share-value killer" or "bet-the-company" lawsuits is more serious in 2006 than it was in 1994. We need just look at the pharmaceutical industry to know that it is not safe to go back into the litigation water — as witnessed by Merck's battles in the Vioxx cases. It would be hard to think of any industry that has done as much good in the world as pharmaceuticals. Yet even that industry, with the health and lives of millions in the balance, must operate under relentless assault from the trial bar.

This doesn't mean we should resign ourselves to endless abuse of the courts. But it does mean that we are in this fight for the long haul — a fight the AJP ([www.AmericanJusticePartnership.org](http://www.AmericanJusticePartnership.org)) will continue to wage. The trial lawyers have settled in for a sustained campaign to bend state and federal laws to their own purposes. And to defeat them will take a long-term strategy of smart politics and permanent reform.

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