

**U.S. TORT REFORM
AND
THE IMPLICATIONS ON
INSURANCE RISKS WITHIN THE U.S. MARKET**

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I. INTRODUCTION

I am pleased to meet with you this evening. I have had the opportunity to visit Japan on numerous occasions, working in Tokyo, Osaka, Kyoto and several other cities. I am appreciative of the opportunities I have to share business and legal ideas with colleagues in Japan as they relate to the business interests of Japanese companies within the U.S.

The subject of this evening's discussion is U.S. tort reform and the implications on insurance risks within the U.S. market. This is a broad subject involving relatively complex legal, economic, public policy, and social issues. I must tell you that I am neither an economist nor a politician; nor am I a paid lobbyist for any particular trade group or association. My observations and opinions are based on my experience as an attorney representing insurance companies and their insureds in a wide variety of legal matters in courts across the country. I am also fortunate to work closely with underwriting representatives and claims handling representatives at numerous insurance companies in resolving general liability claims as well as insurance coverage disputes.

In theory, the U.S. tort system is intended to provide a mechanism through which disputes involving claims for bodily injury, injury to reputation, and damage to real or personal property can be resolved in an efficient, cost effective, and fair manner. In practice, the system works. Moreover, the U.S. tort system serves, in a positive way, important policy goals, such as compensating victims, holding tortfeasors responsible for their actions, and improving safety. In certain instances, depending on the nature of the claim, place of venue, and numerous other variables, however, the system is costly, inefficient, and does not necessarily result in the administration of fair and appropriate awards. As a result, the U.S. tort system is, at times, unpredictable. This unpredictability presents problems for businesses operating within the U.S., including insurance companies.

There has been progress in the U.S. in recent years with respect to efforts to reform the U.S. tort system, which arguably has made the system somewhat more predictable. However, the system still produces many unpredictable results. Although tort reform at the federal, state, or even judicial levels may incrementally increase predictability, it will never result in a completely predictable tort system. History has taught us that as long as there are creative and intelligent plaintiffs' attorneys, lobbyists, judicial activists, a politicized judiciary, and well-financed interests groups, tort reform will not be the single solution to the problem. I suggest that well-designed and implemented insurance underwriting practices and insurance claims handling practices

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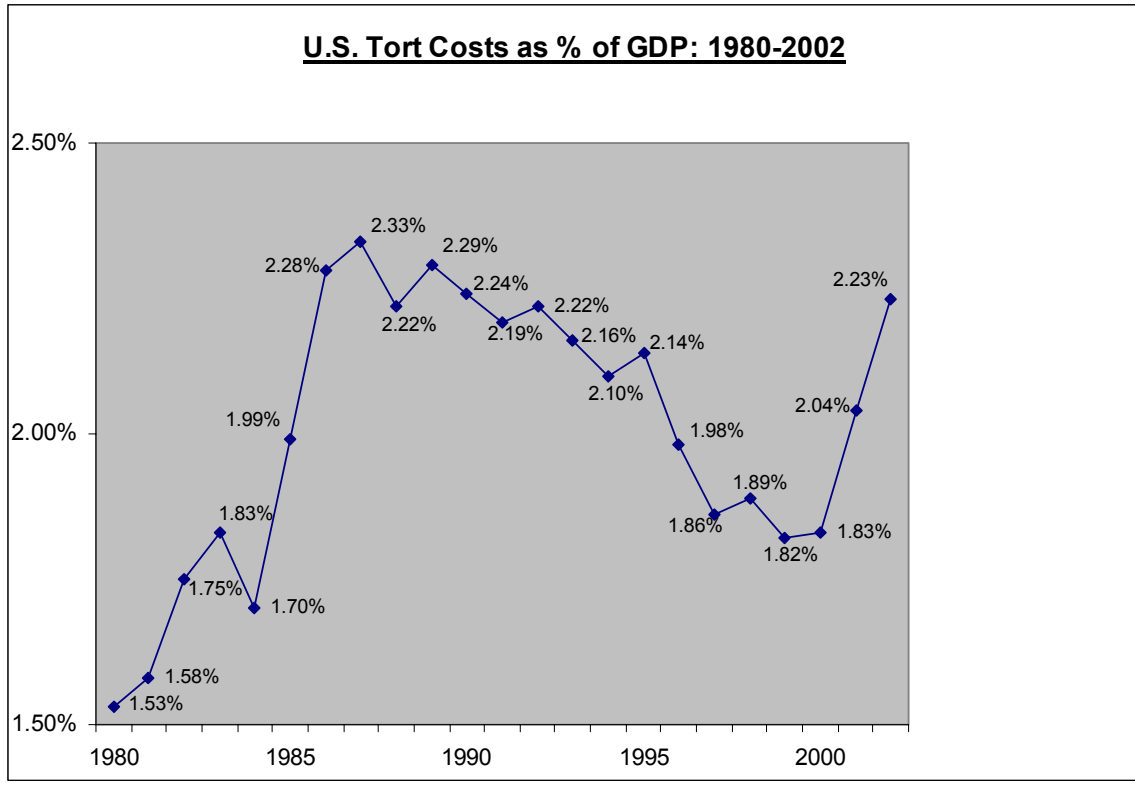
can lead to greater predictability. I am pleased to share my observations with you this evening.

My presentation is broken down into four subject areas. First, I will discuss the U.S. tort system and the need for reform. Second, I will discuss the political dynamics impacting the tort reform movement in the U.S. Third, I will provide an overview of tort reform activity in the U.S., including brief overviews of what is happening at the federal, state, and judicial levels. Finally, I will discuss the implications on U.S. insurance risks and specifically, underwriting and claims handling practices within the U.S. market.

II. THE U.S. TORT SYSTEM AND THE NEED FOR REFORM

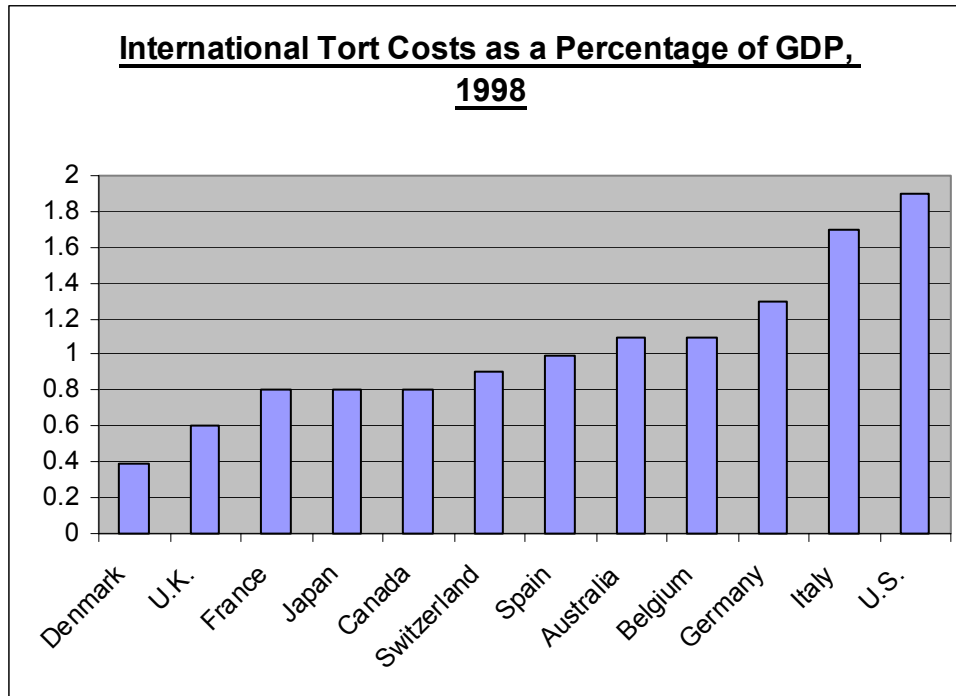
A “tort” is an injury to someone’s person, reputation, or feelings or damage to real or personal property.¹ In addition, there are a variety of claims involving disputes between companies which are sometimes characterized as “commercial torts” or “business torts,” including claims for unfair competition, false advertising, misappropriation of trade secrets, and misrepresentation. While the U.S. tort system is designed to be cost effective, efficient, and can lead to the administration of fair and appropriate results, there is much anecdotal evidence to support the popularly held opinion that the system is subject to abuse and promotes a litigious society. A few examples are all that is needed to reinforce this perception. For instance, a New York man filed a lawsuit against four of the world’s biggest fast food chains – McDonald’s, Kentucky Fried Chicken, Burger King, and Wendy’s – claiming that they were responsible for his obesity and poor health because they failed to inform him that fast food was unhealthy.² The plaintiff filed this claim despite the fact that fast food is not addictive, and does not contain any substance that could cause physical craving.³ In another case, a jury awarded a New Mexico woman \$160,000 in compensatory damages and \$2.7 million in punitive damages when she sued McDonald’s after she spilled the restaurant’s coffee on herself.⁴ In addition to such anecdotes, statistical evidence also demonstrates an extremely active American tort system.

Tort litigation in the U.S. is on the rise. The 2003 Tillinghast-Towers Perrin study, which provides an objective evaluation of trends in the American tort system,⁵ finds that tort litigation has increased dramatically in recent years.⁶ In the year 2001, costs associated with the tort system in the U.S. increased by 14.3% and constituted 2.04% of the gross domestic product (GDP).⁷ The 2001 rate of increase in tort costs far surpassed the rate of economic growth of that year, which was 2.6%.⁸ In 2002, tort costs in the U.S. grew by 13.3%.⁹ These costs composed 2.23% of the GDP in 2002, the highest percentage of tort costs as part of GDP since 1990.¹⁰



As the highest annual increase in tort costs since 1986, the 2001 rate marks a departure from the more stabilized growth rates of the 1990s, which served as a reprieve from the double-digit rates of increase of the 1970s and 1980s.¹¹

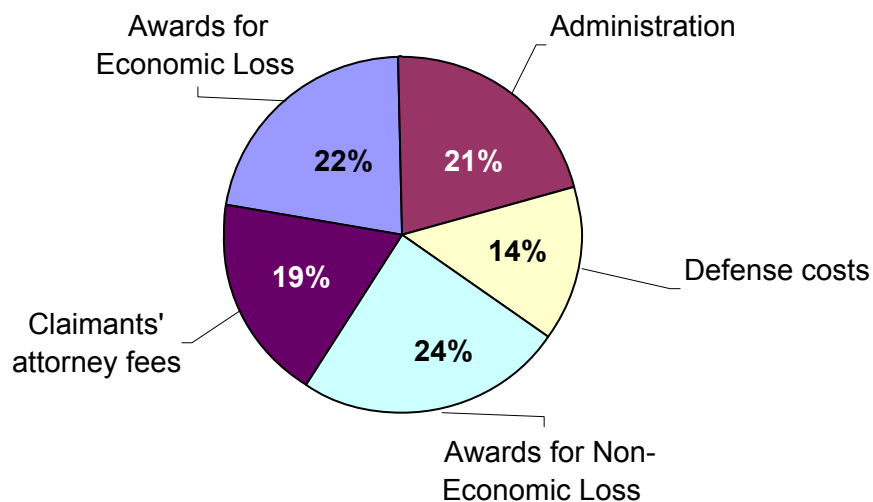
Even under conservative estimates, the American tort system is the most expensive in the world, and presents costs greater than twice that of the average cost of liability systems in other industrialized nations.¹²



For instance, in 1998, tort costs in the U.S. were 1.9% of GDP while tort costs in Denmark, the United Kingdom, France, Japan, Canada and Switzerland were less than 1% of their GDPs.¹³

The 2003 Tillinghast-Towers Perrin study attributes the trend of increased tort costs to a corresponding increase in asbestos claim liability, class action lawsuits, large damages awards, shareholder suits against corporate boards of directors of public companies, and medical cost inflation.¹⁴ The study estimates that 2003 tort costs increased at a rate of 8.5%; that the 2004 costs will increase 6%-11%; and that a similar rate of increase will occur in 2005.¹⁵

Where Tort Costs Go



The inefficiency of the American tort system is demonstrated in this chart. As illustrated, only a minority of the total costs of the tort system goes toward compensating the injured plaintiff. Awards for non-economic loss constitute 24% of tort costs, and awards for economic loss compose 22% of tort costs. This means that only 46% of the costs associated with tort liability are given to plaintiffs to compensate them for their injuries. The majority of the costs of the tort system go elsewhere: 14% of costs are spent on defending claims, 19% are spent on plaintiffs' attorneys' fees, and 21% goes toward administrative costs.

It is argued that the excessive costs of this tort system are borne by the American public. Undoubtedly, the legal liability of tort law is carried by private firms.¹⁶ If the distribution of tort costs is random, tort costs increase the costs of a firm and decrease the profits of a firm in a manner analogous to the corporate income tax.¹⁷ Most economists think that the brunt of the corporate tax is shifted to the consumer through higher prices or to the worker if wages are reduced as a result of a decrease in demand for the taxed item.¹⁸ Like the corporate income tax, the litigation costs imposed on businesses are passed on to consumers through a "tort tax" that businesses add to the price of goods or services to cover litigation costs.¹⁹

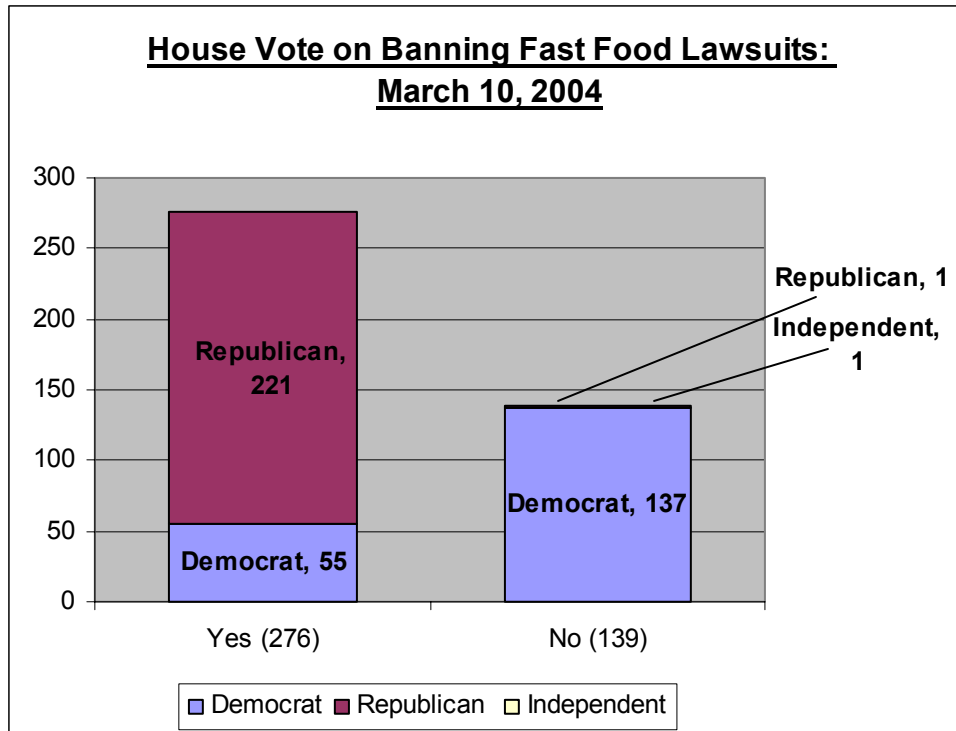
III. POLITICAL DYNAMICS IMPACTING TORT REFORM

The importance of issues relating to tort litigation and the financial interests that are affected by tort litigation have made tort reform proposals an important and thoroughly debated issue of public policy. The issue of “tort reform” is controversial and polarizing.

Contrary to the statistical data which I just briefly summarized, the need for tort reform is not shared by all. Recently, Bob Herbert wrote in the *New York Times*: “It may be hard to understand why tort reform is even on the national agenda at a time when insurance industry profits are booming, tort filings are declining, only 2% of injured people sue for compensation, punitive damages are rarely awarded, liability insurance costs for businesses are minuscule, medical malpractice insurance and claims are both less than 1% of all healthcare costs in America, and premium gouging underwriting practices of the insurance industry have been widely exposed.”²⁰

I recently spoke with Jeffrey O’Connell, a professor of law at the University of Virginia, who teaches in the areas of insurance and torts and also works with members of the U.S. Congress in drafting tort reform measures. According to Professor O’Connell, most tort reform measures are perceived as being one-sided. That is, tort reform measures have the effect of making it more difficult for a claimant to be compensated for injuries and also result in a claimant receiving less in compensation for injuries. Therefore, such reforms are easily attacked by tort reform opponents as being beneficial to business but unfair to claimants.

Tort reform proposals are subject to partisan political debate in state legislatures and the U.S. Congress. The Republican party is generally in favor of tort reform measures at the state and federal levels, while the Democratic party is opposed to such reform.²¹ The political divide over tort reform was recently demonstrated in a vote in the U.S. House of Representatives this past March over the banning of lawsuits against the fast food industry. In this vote, the House voted to ban lawsuits that blamed fast food restaurants for plaintiffs’ obesity or poor health²² along party lines.²³ The measure was stopped in the U.S. Senate, which is evenly divided between the political parties.



The insurance industry and the medical industry give significant contributions to the Republican party, while trial lawyer associations that represent the interests of plaintiffs' lawyers give significant contributions to the Democratic party.²⁴ Since the current tort system seemingly places the interests of business at odds with individuals with economic injury, the controversy over tort reform can be understood as a reflection of the larger political debate regarding the distribution of society's resources.²⁵ It is argued that when a judge or jury awards damages to an injured plaintiff, wealth is transferred from organizations that tend to be financially secure to those who are in need of financial support and their lawyers.²⁶ Tort reform proposals strive to place limits on this wealth transfer.²⁷

In this year's State of the Union Address, President Bush vowed to protect small businesses from "junk and frivolous lawsuits."²⁸ David Casey, President of the Association of Trial Lawyers of America, an organization that opposes tort reform, responded that President Bush's proposal to reform the tort system is indicative of his desire to "take away the legal rights of American families."²⁹ Casey remarked that President Bush simply "blame[s] America's economic problems on the lawyers who represent consumers and workers."³⁰

During his campaign to be the democratic presidential nominee, Senator John Edwards, a former plaintiffs' lawyer, received campaign donations from law firms associated with representation of plaintiffs.³¹ In fact, law firms represented eight of the top ten sources of revenue for Edwards' campaign.³² Now that Edwards has been selected to run as vice president with John Kerry, it can be anticipated that law firm and the trial lawyer interests will heavily support the Kerry/Edwards campaign.

Tort reform has also been hotly debated by think tanks and within intellectual and academic circles. Intellectual organizations such as the Manhattan Institute have criticized the current tort system and have argued for reforms.³³ Law professors such as David Hyman of the University of Illinois at Urbana-Champaign note that the tort regime has failed to achieve a compensatory and deterrent effect, and criticize the costs imposed by the American tort system.³⁴ In contrast, there is academic support in favor of the current tort system. Stephen Daniels and Joanne Martin, in their book entitled *Civil Juries and the Politics of Reform*, refute the notion that there has been an “explosion” in litigation in recent years and criticize the assumption that juries favor plaintiffs and are biased against corporations.³⁵ Such rhetoric reflects the deep passions incited by the debate over the American tort system and proposals to reform it.

IV. OVERVIEW OF U.S. TORT REFORM ACTIVITY

The debate over tort reform continues at the federal level, in the U.S. Congress, at the state level, in state legislatures, and at the judicial level in federal and state courts across the country.

Before discussing some of the various reform measures which have been or are being addressed at the federal, state, and judicial levels, it is important to note that much of the significant reform which has been or will be achieved, will take place at the state level rather than the federal level. There are well-understood reasons why this is the case.

First, tort reform issues at the federal level are frequently overshadowed by other issues such as national defense and security, energy, healthcare, transportation, and other infrastructure issues.

Second, tort law, for all practical purposes, is a common law subject, which means it is defined by the individual states. Therefore, the federal government has traditionally deferred to the states in passing legislation which affects tort and tort reform-related issues.

Third, it is difficult to pass tort reform measures in Congress due to the procedural requirements associated with “controversial” tort reform legislation and the significant influence of the Trial Lawyers Association, one of the most powerful interest groups in Washington, D.C. The fact is that Congress, the Senate in particular, is greatly affected by political interest groups. Tort reform at the state level is much more achievable because the influence of the trial lawyers does not weigh as heavily.

Fourth, it is believed by some that representatives working in the state legislatures are much closer to their constituencies than those representatives working in Washington D.C., not only in physical proximity but also in understanding popular concerns.

However, certain issues, such as asbestos and class action litigation are perceived to have risen to a “crisis” level and have caused concern at the federal level, necessitating action. Asbestos litigation is recognized as having a significant impact on many communities, including some of the smaller, more rural, communities across the country. As I will discuss, businesses are going bankrupt, factories are being shut down, and employees are losing their jobs. Wide-spread public concern related to the impact of asbestos litigation resonates with politicians at the federal level.

A. Federal Tort Reform Legislation

Recent proposals for tort reform at the federal level have centered around addressing four areas of tort litigation: class action lawsuits, asbestos litigation, firearm litigation, and purveyor of food lawsuits. I will examine, in turn, each of these subjects, and related proposals for reform.

1. Class Action Lawsuits

As I mentioned earlier, many argue the recent increase in American litigation is owed, in large part, to class action litigation. I will now examine class action lawsuits in greater depth. First, I will provide you with a brief background of class action litigation and its procedural requirements. Second, I will examine what is recognized by many as the need for reform of class action litigation. Third, I will examine the recently proposed federal legislation that attempts to reform the troubled class action system.

In a class action lawsuit, one or more plaintiffs who claim a common injury may pursue their claims as a class in a single lawsuit.³⁶ Defendants may also be treated as a class.³⁷ In such a lawsuit, the representative plaintiff brings his claim on his own behalf, as well as on behalf of all injured plaintiffs in the larger class, or a defendant may be sued as a representative of other defendants.³⁸

The Federal Rules of Civil Procedure allow such class actions to be brought in federal court if four prerequisite conditions are met.³⁹ First, the class must be sufficiently large so that the “joinder of all members is impracticable.”⁴⁰ Second, there must be “questions of law or fact common to the class.”⁴¹ Third, “the claims or defenses of the representative parties... [must be] typical of the claims or defenses of the class.”⁴² Fourth, the representative plaintiff or defendant must “fairly and adequately protect the interests of the class.”⁴³

These requirements ensure that class action litigation serves the primary justifications for recognizing the right of parties to proceed as a class. A class action lawsuit may protect defendants from inconsistent duties or obligations.⁴⁴ It may protect the interests of parties absent from the litigation.⁴⁵ Class actions may promote the efficiency that can result from consolidating common claims into one adjudication.⁴⁶ Class actions also allow plaintiffs to spread litigation costs among all the plaintiffs in the plaintiff class.⁴⁷ This allows plaintiffs with small claims to bring lawsuits that may not be economically practicable if brought only by an individual plaintiff.⁴⁸

As I mentioned previously, it is argued that class action lawsuits have contributed to the growing number of costly lawsuits filed in the U.S.⁴⁹ It is believed that a key contribution to increasing tort costs is the rise in class action claims.⁵⁰ From 1997 to 2000, just a three year period, class actions filed against American companies in federal court increased 300%, and class actions filed in state court increased 1,000%.⁵¹ The increase in American tort litigation is further facilitated by what is termed “forum shopping.” This term describes the process by which some plaintiffs’ attorneys attempt to file lawsuits in jurisdictions that are friendly to the interests of plaintiffs and, by reputation, are home to juries that award exorbitant damages.

A notable example of such a jurisdiction is Madison County, Illinois. Madison County is a small rural county in southwest Illinois that has a population of only 259,000 people.⁵² Nevertheless, more class actions are filed in that county than in some of the most populous jurisdictions in the U.S.⁵³ In 2001, 43 class actions were filed in Madison County, and of those, 77% were on behalf of a plaintiff class composed of people from various states across the country.⁵⁴ Between 1998 and 2000, class action suits rose over 1,800%, and over 80% of these filings included classes with plaintiffs from all over the U.S.⁵⁵ Few of the cases filed there involved a defendant from Madison County.⁵⁶ Clearly, the growing number of claims filed in Madison County indicate that plaintiffs’ attorneys have strategically filed their cases in the small county.⁵⁷ This strategy reflects the county’s hospitality toward the lawsuits of a nationwide plaintiff class. The judges of Madison County have no problem with approving, or “certifying,” a multi-state class of plaintiffs.⁵⁸ Moreover, the judicial system in the working class county has no problem giving plaintiffs large awards. A Madison County jury awarded \$250 million to a man who had cancer stemming from exposure to asbestos.⁵⁹ A Madison County judge issued a \$10.1 billion verdict against cigarette distributor Phillip Morris USA for marketing “light” cigarettes as being less dangerous than ordinary cigarettes.⁶⁰ This track record led the American Tort Reform Association, an organization devoted to promoting reform of the tort system, to designate Madison County the worst “judicial hellhole” in the U.S.⁶¹

It is argued that plaintiffs’ lawyers manipulate the class action system to coerce settlements from defendants.⁶² Moreover, many class actions assert claims that are without merit, but because the cases are brought on behalf of thousands - and sometimes millions - of claimants, the potential exposure for companies is enormous, often exceeding their assets.⁶³

It is also argued that class actions deprive defendants of the opportunity of equal bargaining power with plaintiffs. When a group of injured persons are certified as a class, and thus empowered by the court to bring all of their claims together as a class through the claim of the class representative, the class enjoys broad negotiating power.⁶⁴ The class retains strong negotiating power even if their underlying claim is frivolous.⁶⁵ This power arises from the prospect that the jury will award the class an aggregate award that is very large,⁶⁶ and is reflected by the fact that defendants in class action lawsuits seemingly always agree to settle the claim rather than go to trial.⁶⁷

The concern over the remarkable power of the plaintiff class has been articulated by two prominent American appellate judges: Judge Henry Friendly of the Second Circuit Court of Appeals and Judge Richard Posner of the Seventh Circuit Court of Appeals.⁶⁸ They believe that class actions compel defendants to agree to “blackmail settlement,”⁶⁹ as defendants have little choice other than to agree to the plaintiff class’ demands in settlement in order to avoid the award a jury may give the plaintiff class at trial.⁷⁰

While businesses often are the losers in state class actions, plaintiffs are not always the winners.⁷¹ There have been a number of recent high-profile cases in which class members have “won” coupons while their lawyers have been awarded millions of dollars in fees.⁷² A RAND Institute for Civil Justice study of state class action settlements found that attorneys’ fees and administrative costs account for nearly half of any settlement or award.⁷³

Other suggested abuses of the class action system include collusive settlements between plaintiffs’ attorneys and defendants in which class members get little of value - often coupons - and plaintiffs’ lawyers get large fees; payment of “bounties” to a few class members at the expense of other members; and incomprehensible class notices that have led some consumers to sign away their rights.⁷⁴

Finally, it is argued by those supporting reform that adjudication of large, nationwide class actions in state or county courts permits a single judge to override the consumer protection and tort laws of the other 49 states at the request of local lawyers, even though that may not be in the best interests of most of the out-of-state class members.⁷⁵

The following are recent examples of class action lawsuits that have resulted in minimal compensation for plaintiffs and million-dollar fees for their lawyers:

Video rental company Blockbuster agreed in 2001 to settle a nationwide class action that was filed in Jefferson County, Texas. The suit challenged the fairness of Blockbuster’s late fee policy-even though the policy had been fully disclosed to consumers and even though the company had prevailed in similar suits brought in California and Alabama. Under the settlement, customers who paid late fees-actually “extended viewing” fees-were eligible to receive up to \$20 worth of coupons for free video rentals (excluding new releases) and certificates for \$1 off non-food items. Although the total settlement had a face value of \$460 million, Blockbuster estimated that fewer than 10 percent of the coupons would be used, and Blockbuster did not change its current late-fee policy. Plaintiffs’ attorneys collected fees and expenses of \$9.25 million.

A class action was brought in state court in Alabama on behalf of a nationwide class of 700,000 people who had mortgage escrow accounts with the Bank of Boston. A settlement was reached between the named plaintiffs and the defendants that resulted in \$8.5 million in attorneys' fees and a small award for the other class members. To pay the attorneys' fees, however, the class members had a deduction to their accounts of up to \$91. One class member, for example, received an award of \$2.19 but had his account debited \$91.33 to pay the attorneys' fees. So the suit cost him \$89.14.

Despite the fact that the number of plaintiffs in the lawsuit was 4.7 million and despite the fact that some of them lived in states with different laws, a judge in rural Marion, Illinois, decided to allow a jury to hear a complex class action case involving Bloomington, Illinois -headquartered State Farm Insurance Co. The result: a \$1.18 billion award for compensatory and punitive damages against State Farm for not using "original equipment manufacturer (OEM)" parts for repairs to policyholders' cars. (An Illinois appeals court upheld the verdict, reducing the award slightly to \$1.05 billion.) But at least one state requires and some others encourage the use of "non-OEM" parts as a way of keeping repair costs-and thus insurance premiums-down. The jury award averaged just over \$223 per class member; attorneys were expected to reap one-third of the award, or about \$393 million. Because of the case, State Farm-and other insurers fearful of similar suits-have banned nationwide the use of "non-OEM" parts for repairs. According to industry analysts, this has led to increased repair costs, higher premiums for policyholders, and has hurt aftermarket parts manufacturers.

These stories represent a larger trend within the tort system wherein the plaintiffs' attorneys are compensated more than the tort victims. One study estimates the lawyers take 30-50% of class action settlements.⁷⁶ A Congressional Budget Office report from 2003 estimates that tort victims receive on average "46 cents from each direct dollar spent on the system," and the remaining 54 cents went to attorneys and expenses related to insurance.⁷⁷ Presumably, so long as plaintiffs' lawyers stand to gain so much from class action settlements, they will be encouraged to file an increasing number of lawsuits.

In response to the perceived problems caused by such extraordinary liability, the U.S. Congress has considered reforms designed to curtail the problems associated with class action litigation. The Class Action Fairness Act (2004) is summarized by its proponents as follows:

Purpose

- Protect companies against the coercive effects of class action lawsuits filed in state and local courts.
- Protect society from a “litigation tax” imposed on consumers when litigation costs inflate the costs of goods and services.
- Remove the threat of frivolous litigation that prevents companies from introducing beneficial products into society.

Federal Court Jurisdiction

- Under the current class action system, most class actions are heard in state courts. The bill would change the system to allow large interstate class actions to be removed from state court to federal court.
- The bill would recognize the original jurisdiction of a federal court to hear a case whenever (1) any plaintiff and any defendant reside in different states; and (2) the amount in controversy exceeds \$5 million.

Consumer Class Action Bill of Rights

- Coupon Settlements: Judges will scrutinize settlements that give plaintiffs low-value coupons instead of money as all or part of their award to determine that the value of the coupons is reasonable and fair to the plaintiff.
- Protection Against Loss by Class Members: A judge may approve a settlement in which a class member would incur a net loss as a result of payment of attorney’s fees only if the non-monetary benefits substantially outweigh the monetary benefits.
- Protection Against Discrimination Based on Geography: A judge may not approve a settlement where plaintiffs receive a larger share of the award than others because they are from the same geographic area as the court.

Notification to Appropriate State and Federal Officials

- In the Senate bill, class action settlements must be filed with appropriate public officials of the state in which a class member resides and with appropriate federal officials. This notification requirement ensures that government officials are in a position to guard against settlement abuses.

Interlocutory Appeal of Class Certification Decisions

- In the House of Representatives bill, a party has the right to appeal a judge's decision regarding approval of a plaintiff class. This right recognizes the reality that approval places pressure on defendants to settle, and non-approval may force plaintiffs to withdraw their claims.⁷⁸

It is doubtful the U.S. Congress will pass the Class Action Fairness Act in 2004. Despite significant efforts since the fall of 2003 to gain bipartisan support for the reform measure, passage of this specific piece of legislation in 2004, in its current form or in an amended form, is very unlikely at this time.

First, leading senators supporting the Class Action Reform Bill have stated that other measures, including a defense spending bill, must take priority.

Second, the summer months bring a number of congressional recesses and breaks which tend to limit time for debate and squeeze an already tight legislative calendar.

Third, within weeks after an early July recess, the Democratic national convention is scheduled to take place, which further restricts time for meaningful debate. Shortly thereafter, the Republican national convention will be held. The point is, there is not a lot of time left before the focus in Washington turns to the national elections. This year, 33 of the 100 Senate seats are up for election. In addition, elections will be held for the House of Representative positions. And of course, the election for the U.S. president will also take place this November.

As the campaign process heats up and as the November elections near, political jockeying will increase. Many Washington insiders anticipate that there will be breakdowns in some of the coalitions which have been formed including those that have led to bipartisan support of the class action reform measure. Some have suggested that deep down, Republican campaign strategists might not be too upset about the troubled class-action bill in the Senate. If the bill fails, it will give the president and other GOP candidates another weapon to use against the Democrats, especially vice president candidate John Edwards. While Edwards did not make his living off class-action suits, he is still a trial lawyer, so look for "frivolous lawsuits" to be one of Bush's favorite phrases again this year.

2. Asbestos Litigation

Asbestos litigation is another major contributor to American tort litigation. Given their massive numbers, asbestos lawsuits are a unique form of litigation and present unique problems. First, before I evaluate these problems in depth, I will provide a brief background of asbestos litigation and the associated costs. Second, I will give an overview of proposed federal legislation aimed at solving the problems associated with asbestos litigation.

Asbestos is a fiber that was used from the 1930s through the early 1970s as a

source of insulation and as a fire retardant.⁷⁹ The practical benefits of this product led to its extensive use in commercial, industrial, and residential settings.⁸⁰ It is estimated that about 27 million American workers in high-risk industries were exposed to asbestos between 1940 and 1979.⁸¹ Inhalation of asbestos can lead to the accumulation of asbestos in the lungs, which results in an increased risk for lung cancer, cancer of the chest and abdominal linings (mesothelioma), and lung scarring that can be fatal.⁸² It has been argued that as the usage of asbestos increased, asbestos manufacturers concealed knowledge of dangers associated with inhalation of asbestos fibers.⁸³ In addition, it has been argued that asbestos companies did not improve safety standards or provide warning of the dangers of asbestos fibers, which may have further diminished some of the dangers presented by asbestos.⁸⁴ Consequently, the number of potential asbestos lawsuits increased, and a basis for punitive damage awards was established.⁸⁵

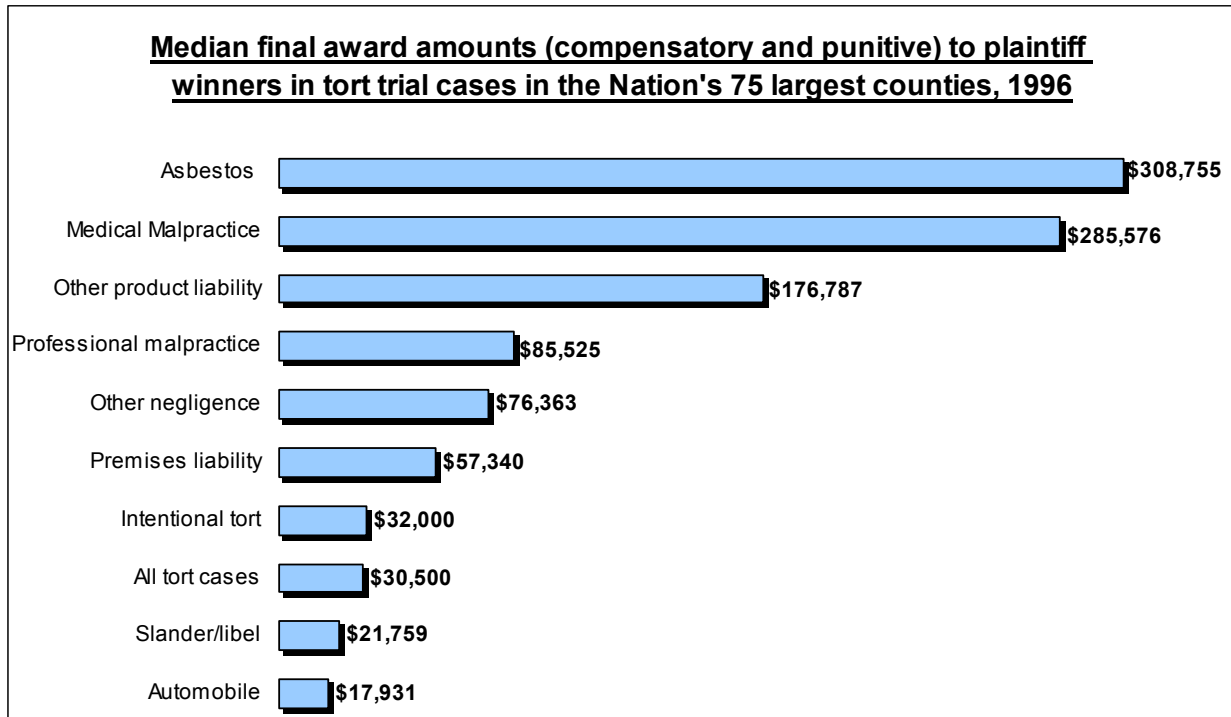
A substantial number of workers affected by their exposure to asbestos filed lawsuits, and many of the injured workers won substantial awards.⁸⁶ However, since plaintiffs file asbestos claims when their chest x-rays are merely “consistent with” symptoms of asbestos exposure in order to comply with statute of limitations requiring claims to be filed within a certain amount of time, many individuals who have never actually had an illness caused by exposure have also filed asbestos claims.⁸⁷ By the year 2000, the overwhelming majority of plaintiffs who filed asbestos claims had not exhibited any signs of asbestos-related illness and may never do so.⁸⁸ Over the last decade, 65% of asbestos compensation was paid to individuals who did not have cancer.⁸⁹

The result of the influx of asbestos claims into the court system is a massive backlog in American courts that results in the delay of awards to those suffering from asbestos exposure.⁹⁰ Diseases caused by asbestos exposure are “at the heart of the longest-running mass tort litigation in U.S. history.”⁹¹ Even though likely plaintiffs are aging, the popular use of asbestos ceased many years ago, and the number of deaths caused by mesothelioma each year declined in the 1990s, asbestos litigation in the U.S. is increasing.⁹² A study by the RAND Institute indicates that more than 600,000 plaintiffs in the U.S. have filed lawsuits seeking damages relating to injuries caused by asbestos exposure.⁹³ As of 2003, over 300,000 asbestos claims were pending in courts at both the state and federal levels.⁹⁴ The number of asbestos claims is so massive that in the years 2001 and 2002, the increase in asbestos liability was the single greatest cause of the rise in tort claims in those years.⁹⁵

The flooding of court dockets caused by asbestos litigation has led to unique procedural management of asbestos claims by the courts. The combination of a large number of asbestos claims, together with large damage awards, has created a vicious cycle. To accommodate the vast numbers of asbestos claims in their dockets, courts have adopted the “procedural shortcut” of consolidating numerous asbestos claims into one trial.⁹⁶ In these consolidations, the claims of plaintiffs with disparate levels of injury (in fact some plaintiffs are without any injury) are joined into one trial against defendant corporations with different levels of fault.⁹⁷ A single jury is then charged with hearing evidence of all of these claims, and then must sort out the liability among the numerous

parties.⁹⁸ Rather than take the risk that a jury will assign liability without consideration of the unique levels of liability of the particular defendants, defendant corporations facing even frivolous claims agree to settle the claims against them.⁹⁹ Thus, consolidation of asbestos claims, designed to accommodate the massive influx of asbestos claims filed in the courts, gives an incentive to plaintiffs to file additional claims because defendant corporations may be willing to settle even weak cases against them.¹⁰⁰

In addition to a large number of plaintiffs and claims, asbestos litigation is also subject to large damages awards.



The U.S. Department of Justice calculates the median final award in an asbestos case, including both compensatory and punitive damages, to be \$308,755.¹⁰¹ Comparatively, the same study calculates the median final award judgment for all tort cases to be \$30,500.¹⁰² Moreover, in the Department's evaluation of award amounts, the final median damage award in asbestos cases is greater than the median damages awarded in every other type of litigation the Department measured (which included medical malpractice, other product liability, and professional malpractice cases).¹⁰³ Additionally, like litigation generally, asbestos litigation is economically wasteful. Over half of the funds spent on asbestos litigation by defendants and insurers goes into the coffers of lawyers and expert witnesses.¹⁰⁴

It is widely believed that the costs of asbestos litigation have a detrimental effect upon the economy. It has cost American businesses billions of dollars. The RAND study shows that by the year 2000, asbestos litigation cost businesses more than \$54 billion.¹⁰⁵ To put this figure into perspective, Hurricane Andrew, which devastated the southeast U.S., cost insurers \$21 billion.¹⁰⁶ The attacks of September 11, 2001, cost insurers \$43 billion.¹⁰⁷ The RAND study predicts that in

the coming years, 500,000 to 2.4 million asbestos claims could be filed.¹⁰⁸ At this rate, asbestos litigation will cost insurers \$130 billion, and costs for both insurance companies and defendant companies could be up to \$200 billion.¹⁰⁹

These costs have forced large numbers of companies into bankruptcy. Thousands of companies have been named as defendants in asbestos cases, and dozens of companies have filed for bankruptcy because of asbestos litigation liabilities.¹¹⁰ It is estimated that since 1982, asbestos litigation has caused almost 70 companies to file for bankruptcy,¹¹¹ and since the year 2000, 16 defendants in asbestos cases have filed for Chapter 11 bankruptcy.¹¹² It is estimated that asbestos bankruptcies have resulted in the loss of 60,000 jobs.¹¹³ Even employees of bankrupt companies, who have retained their jobs are injured by asbestos liability, as many employees of these companies have lost 25% of the value of their pensions.¹¹⁴ Moreover, financial markets are closed to companies that could be subject to bankruptcy caused by asbestos liability, resulting in “capital costs” of \$2.4 billion and 30,000 jobs every year.¹¹⁵

But the asbestos litigation crisis is not just a problem for business.¹¹⁶ Victims of asbestos-related diseases also are paying a price.¹¹⁷ It is argued that they are being under-compensated because many of the more recent asbestos cases include plaintiffs who show no symptoms from exposure to asbestos.¹¹⁸ Those claimants are taking part of the compensation that should go to the real victims of asbestos.

The problem has been recognized by the U.S. Supreme Court, which struck down asbestos class action cases in 1997 and 1999 as “too large and diverse to be represented in a single action.”¹¹⁹ Justice David Souter wrote, “The elephantine mass of asbestos cases ... defies customary judicial administration and calls for national legislation.”¹²⁰

Asbestos litigation reform is pending at the federal level. The proposed legislation, known as the Fairness in Asbestos Injury Resolution (FAIR) Act (2004), would create a trust fund to be financed by manufacturers and insurers that would compensate individuals who suffer from asbestos-related injuries.¹²¹ Those who have asbestos injuries would be compensated out of the trust fund within six months after passage of the legislation.¹²² Those who suffer from severe conditions such as mesothelioma or terminal illness would have the highest priority in the distribution of the trust funds.¹²³ However, in exchange for this compensation, asbestos victims would give up their right to file asbestos lawsuits.¹²⁴ The FAIR Act is summarized by its proponents as follows:

Purpose

- Create an alternative, fair and efficient system to resolve claims of asbestos injury.
- Create an asbestos compensation system that compensates those who are truly sick.

- Provide economic stability by curtailing the excessive litigation that has flooded court dockets, bankrupted companies, and threatened the jobs and pensions of employees.

Administration of Claims Through a Trust Fund

- Means of Compensation: Asbestos claims are taken out of the tort system and compensated on a no-fault basis in accordance with medical criteria and corresponding claim award values.
- Benefit to Victims: Payment to victims through the trust fund is designed to compensate them more expeditiously (over a period of three years) and eliminates the need for expensive and lengthy litigation.
- Benefit to Defendants and Insurers: Provides defendants and insurers more certain economic conditions and stability. Future liability is more predictable than liability under the tort system – as long as payments are made into the Fund, contributing parties are not subject to asbestos claims within the tort system.

Funding of the Trust

- Mandatory Contributions from Defendants and Insurers: A trust fund would be financed by defendant corporations and insurers over 27 years.

Time Requirements

- Asbestos victims must file their claims within four years from the date they knew or should have known of the claim.¹²⁵

In April of this year, this proposed reform measure failed to overcome a filibuster raised by Democratic senators on a vote of 50-47.¹²⁶ This is ten votes short of the 60 votes required to overcome a filibuster, end debate on the bill, and force a vote on the bill in the Senate.¹²⁷ The Senate could not come to an agreement on the size of the trust fund and the amount of distribution to individual claimants.¹²⁸ Some senators, led by Senator Joseph Biden of Delaware, a Democrat, have insisted that an asbestos claimant should be entitled to retain the right to litigate his or her asbestos claim in court if the trust fund should become insolvent.¹²⁹

Passage of the FAIR Act in 2004 is very unlikely. Negotiations were conducted last spring between “stakeholders,” including defendant companies in asbestos litigation, insurers, labor unions, and plaintiffs’ lawyers. Talks broke down over the issue of the amount of the trust fund to be established for purposes of compensating victims. Business groups would not agree to a fund any larger than \$116 billion, with an additional \$12 billion in contingency funding in the event the trust was exhausted. Labor unions pressed for a larger fund, insisting that previous proposals have been too small to

cover the claims of workers and individuals sickened by asbestos. As of May 2004, labor unions demanded \$134 billion with a \$15 billion contingency.

The prognosis for an agreement and passage of the asbestos reform measure in 2005 also is uncertain, and likely, will be dependent on the outcome of the November 2004 elections. It is believed that if President Bush is reelected and the House and Senate remain in Republican control, there will be a major push in 2005 to pass the asbestos reform measure. If John Kerry is elected president, and the House and Senate remain Republican-controlled, however, there will be an interesting political fight over the issue, with a possible veto by Kerry based on strong Democratic ties to labor unions and trial lawyers. It is believed that if John Kerry is elected president and either the House or the Senate becomes controlled by the Democrats, passage of asbestos reform legislation in 2005 will be very unlikely.

3. Firearm Litigation

The recent wave of tort reform proposals also includes efforts to prohibit certain lawsuits against manufacturers and distributors of firearms.¹³⁰ The firearm industry has been the target of litigation. In 1999, the City of Cleveland, Ohio brought a \$150 million lawsuit against the firearm industry.¹³¹ In April of this year, a federal judge ruled that the City of New York may go forward with the lawsuit it brought against the gun industry.¹³² New York is trying to prevent gun manufacturers and sellers from distributing guns in a manner that allows criminals to obtain them and facilitates the creation of a public nuisance.¹³³ In all, about 25 municipal governments have sued the firearm industry for the negligent distribution of guns, which allegedly makes them obtainable by criminals, and the failure to provide safety features.¹³⁴

To address the increasing number lawsuits filed against the firearm industry and to protect it from the prospect of financial ruin, Congress recently considered legislation designed to shield the gun industry from devastating lawsuits.¹³⁵ The legislation would have protected sellers and distributors from civil liability, except when a firearm was sold or distributed in a defective condition or in an illegal manner.¹³⁶ This bill was passed by the House of Representatives¹³⁷ but failed in the Senate.¹³⁸ The bill was rejected by a 90-8 vote after its main sponsor, Republican Senator Larry Craig of Idaho, along with the National Rifle Association (an organization devoted to promoting gun rights), withdrew their support from the measure.¹³⁹ Senator Craig felt the bill was no longer worth voting for after amendments were added to it by other senators.¹⁴⁰ The amendments that caused the bill's primary sponsor to withdraw his support were provisions that closed a loophole allowing for gun purchases at gun shows without background checks; allowed off-duty or retired police officers to transport concealed weapons from one state to another; and extended the ban on assault weapons that is due to expire this September.¹⁴¹

4. Purveyor Of Food Lawsuits

A fourth area of potential reform at the federal level relates to lawsuits brought against the food industry. At the start of my presentation, I noted that fast food companies now find themselves fending off lawsuits brought by individuals who seek to

hold suppliers of food liable for their poor health that resulted from consumption of the food. Lawsuits alleging that the food industry is responsible for an individual's obesity force food companies to incur millions of dollars in legal fees.¹⁴² Such costs do not result in a corresponding benefit to American health. Physicians testifying before the Senate Judiciary Subcommittee on Administrative Oversight and the courts noted that such liability will not effectively address the obesity problem in the U.S.¹⁴³

On March 11, 2004, the House of Representatives passed a bill, entitled the Personal Responsibility in Food Consumption Act, designed to curb food litigation, by the margin of 276-139.¹⁴⁴ The bill bars lawsuits against manufacturers, distributors, marketers, and advertisers of food (as specially defined in the legislation) when the prospective plaintiff alleges liability resulting from obesity or weight gain.¹⁴⁵ The ban would not apply to suppliers of such food when they knowingly and willfully infringe upon statutory or regulatory provisions regarding the manufacture, distribution, marketing, or advertisement of food.¹⁴⁶ The legislation also would not shield purveyors of food from a breach of contract or warranty claim relating to food.¹⁴⁷ A similar bill, introduced by Republican Senator Mitch McConnell,¹⁴⁸ is now before the Senate Judiciary Committee.¹⁴⁹ If the bill is passed by the Senate, it is very likely that President Bush, who criticizes the "junk lawsuits" produced by the American tort system, will sign it. This legislation may help the troubled American tort system. A representative of the Tillinghast-Towers Perrin consulting firm testified that protecting the food industry from obesity lawsuits would help manage legal costs in the U.S.¹⁵⁰ Thus, in the area of food litigation, beneficial tort reform legislation may be passed, at some point, but not likely in 2004.

B. State Tort Reform Legislation – Overview

There has been progress in the U.S. with respect to improving the U.S. tort system by way of reforms at the state level. I will briefly discuss state tort trends and then provide a survey of some of the specific subject areas that tort reform at the state level has addressed. In this regard, I will discuss reform in the areas of joint and several liability, noneconomic damages, collateral sources, product liability, class action lawsuits, comparative fault, and appeal bonds.

1. General Overview

The tort systems across the states are not uniform. It is apparent that some states impose greater costs on businesses than others, and some states are better than others at controlling the costs of the tort system.

The 2004 State Liability Systems Ranking Study was conducted for the U.S. Chamber Institute for Legal Reform among a national sample of in-house general counsel or other senior litigators to explore how reasonable and fair the tort liability system is perceived to be by U.S. business.¹⁵¹ Interviews conducted between December 5, 2003 and February 5, 2004 with 1,402 senior corporate attorneys found that some states stand out as leaders in creating a fair and reasonable litigation system, but the majority (56%) of those surveyed give an overall ranking of fair or poor to the state court liability system

in America – compared to 65% in 2003.¹⁵² Further, and perhaps more importantly, an overwhelming 80% report that the litigation environment in a state could affect important business decisions at their company, such as where to locate or do business.¹⁵³

According to the U.S. businesses surveyed, the states doing the best job of creating a fair and reasonable litigation environment are Delaware, Nebraska, Virginia, Iowa, and Idaho.¹⁵⁴ The bottom five are Mississippi, West Virginia, Alabama, Louisiana, and California.¹⁵⁵

- For overall treatment of tort and contract litigation, the top five states are: Delaware, Nebraska, Virginia, Iowa, and Utah.¹⁵⁶ The bottom five states are: Mississippi, West Virginia, Alabama, Louisiana, and California.¹⁵⁷
- For treatment of class actions, the top five states are: Delaware, Iowa, South Dakota, Idaho, and Nebraska.¹⁵⁸ The bottom five states are: West Virginia, Alabama, Louisiana, California, and Illinois.¹⁵⁹
- For punitive damages, the top five states are: Delaware, Virginia, Iowa, Indiana, and Idaho.¹⁶⁰ The bottom five states today are: Mississippi, Alabama, West Virginia, California, and Illinois.¹⁶¹
- For judges' impartiality, the top five states are: Delaware, Iowa, Nebraska, New Hampshire, and Virginia.¹⁶² The bottom five states are: Mississippi, West Virginia, Alabama, Louisiana, and Texas.¹⁶³

The study also asked respondents to name the most important issue that state policymakers who care about economic development should focus on to improve the litigation environment in their state.¹⁶⁴ The leading two issues named were reforming punitive damages (cited by 25% of respondents in 2004, compared to 8% of respondents in 2003) and tort reform (cited by 17% of respondents in 2004, compared to 19% of respondents in 2003).¹⁶⁵

In the 2004 survey, the respondents were asked which five local jurisdictions have the least fair and reasonable litigation environments.¹⁶⁶ The worst jurisdiction was Los Angeles, California (mentioned by 16% of the attorneys), followed by the New York Greater Metropolitan Area, Madison County, Illinois, and San Francisco, California (each cited by 9% of the respondents), and Cook County (Chicago) in Illinois (cited by 6% of the respondents).¹⁶⁷

In recent years, tort reform has been very active on the state level. In fact, greater progress in the area of tort reform has been achieved in state government than on the federal level for the reasons I previously discussed. By May 1, 2003, more states considered and passed tort reform legislation than at any time since the entire year of 1995.¹⁶⁸ Since 1996, Alaska, Alabama, Arkansas, Colorado, Florida, Iowa, Louisiana, Montana, Ohio, and Texas have enacted substantial tort reform measures.¹⁶⁹ In 2003

alone, the state of Arkansas enacted eight legislative reforms of its tort system, Colorado enacted nine, and Texas enacted nineteen tort reforms.¹⁷⁰

2. Principles And Concepts Subject To Reform

a) Joint And Several Liability

Joint and several liability is a legal doctrine that makes each of the parties who are responsible for an injury liable for all the damages awarded in a lawsuit if the other parties responsible cannot pay. If fewer than the full number of parties are sued for a claim, the ones that are sued can claim a proportion of the damages award from the rest. Thus, a plaintiff may recover the full amount of an award from any defendant. Thus, if one defendant has no money to pay the judgment - that is, the defendant is poor and thus "judgment proof" - while another defendant is a wealthy corporation, a plaintiff can apply the doctrine to the wealthy defendant, who is then required to pay not only his share of the judgment, but the poor defendant's share as well.

For example, imagine that you have been injured in an auto accident where another driver rear-ended your car. Imagine that your lawyer was successful in proving that the driver of the car, Defendant 1, was negligent by not stopping his car in time to avoid a collision with your car. Imagine further that your lawyer also proved that the manufacturer of the car, Defendant 2, was negligent by installing faulty brakes. Unfortunately, Defendant 1 is bankrupt and unemployed, and, while negligent, he cannot possibly afford to compensate you for your injuries and damage to your car. However, Defendant 2 is a very wealthy corporation, capable of paying large judgments. Under the concept of joint and several liability, the judge will require Defendant 2, the car's manufacturer, to pay the entire judgment. In other words, Defendant 2 must pay both his portion of the judgment and Defendant 1's portion. Among the arguments made in support of joint and several liability are the following:

- joint and several liability enables an injured person to hold those at fault accountable;
- joint and several liability provides victims with the best opportunity for being fully compensated;
- without joint and several liability, many innocent people would be unfairly limited in their attempt to recover damages; and
- joint and several liability preserves accountability in law.

Joint and several liability has recently been modified by a number of states as part of an effort to reform their tort systems. Since 1996, such reform was enacted in Arkansas, Florida, Iowa, Louisiana, Minnesota, Ohio (twice), Pennsylvania, Texas, and Utah.¹⁷¹ As a result of many of these reforms, joint and several liability will apply in these states only when parties bear at least a certain percentage of the liability.¹⁷² For instance, the Florida legislation limits joint and several liability when a plaintiff bears

some responsibility for the injury to \$200,000 when the defendant is anywhere from 10-25% responsible for the injury; to \$500,000 when the defendant is anywhere from 25-50% responsible; and to \$1 million when the defendant is over 50% responsible.¹⁷³ The law also caps a defendant's joint and several liability when a plaintiff is not partially at fault for his injury.¹⁷⁴ Under the Texas reform, the defendant pays only his assessed percentage of liability, unless the defendant is over 50% responsible for the injury.¹⁷⁵ It is worth noting that such reforms are subject to the constitutional review of a state's highest court. In 1995, the Illinois legislature passed a law that barred application of joint and several liability for all damages.¹⁷⁶ The Illinois Supreme Court held that this reform contravened the state constitution, and struck it down as constitutionally invalid.¹⁷⁷ The joint and several liability reforms of Ohio and Wisconsin were also held invalid by the respective supreme courts of those states.¹⁷⁸ Nonetheless, the reforms that are not adjudged constitutionally invalid by state supreme courts reduce the number of instances when a defendant may be held joint and severally liable for a plaintiff's injury.

b) Non-economic Damages

The term "non-economic damages" means subjective, non-monetary losses, which typically include damages for pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation. Economic damages, on the other hand, are objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities. To allow negotiating room (and to pay their contingency fee), lawyers will typically ask for three or four times more in non-economic damages than a plaintiff's actual economic losses.

States typically have jury instructions defining what non-economic damages are and instruct jurors how to value such damages if found. Jury instructions often instruct jurors to measure an award of non-economic damages by the reasonableness of the award in the light of all the circumstances of the case. In considering the reasonableness of an award, jury instructions often indicate that jurors may take into consideration whether the element of damage is temporary or permanent and whether in the future it can or will be averted or relieved.

For example, Illinois law defines "economic loss" as tangible damages, such as damages for past and future medical expenses, loss of income or earnings, and other property loss.¹⁷⁹ Illinois law defines "non-economic loss" as intangible damages, including pain and suffering, disability, disfigurement, loss of consortium, and loss of society.¹⁸⁰

Despite courts' general jury instructions, no hard and fast rules exist for calculating non-economic damages. Any of the following may be used: former rulings, some of the publications for lawyers that record average damages or rules of thumb, which vary anywhere from five to six times the economic damages.

Recent tort reform measures in various states have resulted in changes to the states' laws, including mandatory limits (caps) on awards for non-economic damages. For example, some states have placed caps on the amount of non-economic damages that may be awarded in certain types of cases, which range from \$100,000 to \$750,000.

State legislation limiting the availability of non-economic damages has been passed in a number of states. Since 1995, this type of tort reform has been enacted in Alaska, Colorado, Idaho, North Dakota, and Texas.¹⁸¹ These reforms often place a cap on the amount of non-economic damages that may be awarded, such as the Idaho legislation that limits non-economic damages in personal injury cases to \$250,000.¹⁸² However, such damages are curtailed in other ways. The Colorado reform statute, passed earlier this year, permits the award of non-economic damages in breach of contract cases only when the contract authorizes such an award.¹⁸³ However, as I mentioned above, these laws must comply with state constitutional law. The Illinois Supreme Court invalidated an Illinois reform that limited non-economic damage liability to \$500,000 as unconstitutional.¹⁸⁴ The Ohio Supreme Court struck down a statute that confined a defendant's liability within the range of \$250,000 to \$500,000 (unless plaintiff could show he suffered a permanent severe disability) as noncompliant with the separation of powers requirements of the Ohio Constitution.¹⁸⁵ Clearly, though they face the scrutiny of constitutional courts, state legislatures are striving to make it more difficult to recover excessive damage amounts for noneconomic injury.

c) Collateral Sources

In states that follow the collateral source rule, any compensation to an injured party from a source other than the injuring party does not get deducted from the total amount of damages awarded to the injured party. The primary purpose of the rule is to prohibit defendants from being able to count any monies paid by other companies to injured parties as a way to offset the damages owed.

This rule applies to damage to persons and to property. Generally, under the collateral source rule, discussing these payments is not permitted at trial, and no evidence of the payments can be introduced as evidence. Examples of collateral sources are benefits from the plaintiffs':

- Health insurance;
- Medical insurance;
- Property insurance;
- Workers Compensation benefits;
- Disability benefits; and
- Life insurance.

However, if the defendant's insurance company pays the plaintiff, that amount is not subject to the collateral source rule, and can be deducted from the total amount owed. Even though the collateral source rule protects plaintiffs from deductions on total damages, plaintiffs may have to repay their compensation source out of their total recovery amount. For example, many medical providers require liens on personal injury damages.

Exceptions to the collateral source rule include instances where plaintiffs receive some compensation but fail to seek treatment or return to work. Some states place damages restrictions on medical malpractice cases, and in those cases, evidence of collateral compensation is also permissible.

Finally, although collateral source compensation may not be introduced at trial for the purpose of reducing the total amount of damages, the defendant is generally permitted to investigate the source and amount of collateral compensation.

Numerous reform statutes, most notably in the context of medical malpractice, now reject the collateral source rule and allow the jury to consider such insurance payouts and deduct them from the defendant's liability.

A wave of tort reform in the area of the collateral source rule occurred in the late 1980s. For instance, between 1986 and 1987 alone, the states of Alabama, Colorado, Illinois, Iowa, Michigan, Missouri, New York, and Oregon all enacted reforms of collateral source compensation.¹⁸⁶ However, this type of reform is vulnerable to constitutional attack, as the state courts of Florida, Georgia, Kansas, Kentucky, and Ohio held such legislation unconstitutional.¹⁸⁷ Largely, these statutory reforms either permit collateral source payments to be admitted into evidence,¹⁸⁸ or allow awards to be offset by collateral source payments.¹⁸⁹ Thus, collateral source reforms, although not as recent a development as some of the other tort reforms we discuss today, are fairly widespread and bear significant uniformity among enacting states.

d) Product Liability

Defective or dangerous products are the cause of many thousands of injuries every year." Product liability law," the legal rules concerning who is responsible for defective or dangerous products, is different from ordinary personal injury liability law.

Product liability refers to a manufacturer or seller being held liable for placing a defective product into the hands of a consumer. Responsibility for a product defect that causes injury lies with all sellers of the product who are in the distribution chain. Potentially liable parties include: the manufacturer; a manufacturer of component parts; the wholesaler; and the retail store that sold the product to the end consumer.

In general terms, the law requires that a product meet the ordinary expectations of the consumer. When a product has an unexpected defect or danger, the product cannot be said to meet the ordinary expectations of the consumer. A number of states have adopted

the strict products liability doctrine set forth in Section 402A of the Restatement (Second) of Torts. In a Section 402A products liability case, a plaintiff must show that "a product was sold in a defective condition unreasonably dangerous to the user or consumer, and that the defect was the proximate cause of the plaintiff's injuries." Therefore, in order for there to be any recovery, the plaintiff must demonstrate not only the defective state of the product, but also that the defect was a substantial cause of the plaintiff's injuries.

There is no federal product liability law. Typically, product liability claims are based on state laws, and brought under the theories of negligence, strict liability, or breach of warranty. In addition, a set of commercial statutes in each state, modeled on the Uniform Commercial Code, contain warranty rules affecting product liability.

In recent years, the states of Colorado, Florida, Indiana, Iowa, Texas, Maine, and Ohio have passed product liability reform measures.¹⁹⁰ For example, Ohio, Florida, Iowa, and Texas laws provide for statutes of repose in product liability cases.¹⁹¹ Unlike a statute of limitations, which starts to run when an individual first knew or should have known of his injury, a statute of repose starts to toll when a specific event occurs, such as the manufacture of a product, regardless of whether an individual has discovered his injury.¹⁹² Thus, if the period of repose expires prior to an individual's discovery of his injury, his claim will be time barred under the statute of repose.

The Ohio and Texas statutes of repose provide a time bar of 15 years,¹⁹³ while the Florida reform measure provides a statute of repose of 12 years for products with a useful life of 10 years or less, and a 20 year statute of repose for airplanes and commercial vessels.¹⁹⁴ The Florida product liability reform measure also bars actions in which the product was improperly used or if it provided a warning that would, if followed, prevent the injury.¹⁹⁵

The Illinois reform measure, which provided for a statute of repose of 12 years after sale of the product or 10 years after sale to a consumer, was declared unconstitutional by the state's supreme court.¹⁹⁶ The Ohio reform, which adopted a 15 year statute of repose, was also held to be unconstitutional.¹⁹⁷

Product liability reform is not limited to providing for a statute of repose. The Colorado statute bars product liability claims in which the injury could have been avoided if the product were properly used or if its instructions were followed.¹⁹⁸ The Indiana law provides for a rebuttable presumption of a product's safety when the product complies with government safety guidelines or complies with "state of the art" safety guidelines.¹⁹⁹ The Maine law protects manufacturers by excluding evidence of measures taken to improve or repair the injury-causing product as probative of negligence.²⁰⁰

Clearly, state legislatures are now willing to consider a variety of measures designed to limit product liability, though these efforts do not always survive constitutional scrutiny.

e) **Class Action Lawsuits**

Earlier, I discussed the rising number of class actions suits in the U.S. and their adverse impact upon the American economy. Reform of the class action system has recently been considered on the federal level, but it did not pass in the most recent Congressional session. However, class action reform has been adopted on the state level.

Over the last several years, a number of states passed class action reform. Specifically, the states of Alabama, Colorado, Georgia, Ohio, and Texas passed such reform between 1998 and 2003.²⁰¹ These statutes provide various modes of reform. Under the Georgia legislation, detailed procedures for class actions are provided along with specific factors that warrant a court's decision to decline jurisdiction in a lawsuit brought by a nonresident.²⁰² The Alabama, Colorado, Ohio, and Texas reforms provide for the appeal of a judicial order certifying a plaintiff class, or in other words, an order permitting class action litigation.²⁰³ The Texas law also requires that attorney fees in such litigation be based on time and cost rather than as a percentage of any recovery.²⁰⁴

f) **Appeal Bonds**

An appeal bond is a bond posted with a court by a party against whom a judgment has been rendered. The bond stays the execution of the judgment, pending appeal to a higher court. An appeal bond guarantees that the appellant will pay the original judgment (sometimes with interest) if the appeal fails or is denied. The bond requirement is often a statutorily defined percentage of the judgment amount.²⁰⁵

Appeal bonds are a product of a time before billion dollar damage awards.²⁰⁶ With the advent of exorbitant damage awards, appeal bonds can be set at such high levels that defendants may be financially barred from pursuing their right to an appeal.²⁰⁷

States are actively adopting appeal bond tort reform. In 2002, Indiana, Michigan, and Ohio passed appeal bond reform measures.²⁰⁸ In 2003, Arkansas, California, Colorado, Florida, Idaho, Kansas, Louisiana, Missouri, New Jersey, North Carolina, Oregon, Pennsylvania, Tennessee, Texas, and Wisconsin adopted appeal bond reform.²⁰⁹ These statutes limit the amount a defendant must pay to establish the right to appeal.²¹⁰ However, the state statutes provide caps at varying levels. For instance, the Arkansas reform limits a defendant's bond at \$25 million, while the California reform caps a defendant's appeal bond at \$150 million.²¹¹ This year, the Illinois Supreme Court modified an Illinois rule that required a losing defendant to show it had the money to cover the damages award assessed against it.²¹² The amended version allows judges to reduce the bond amount if they think the money is not reasonably available.²¹³ This reform comes after Phillip Morris, a tobacco company, was ordered to post a \$12 billion bond before it could appeal a lawsuit brought by Illinois smokers.²¹⁴

C. **Judicial Reform**

Punitive damages are assessed separately from compensatory damages,²¹⁵ and are "awarded in a lawsuit as a punishment and example to others for malicious, evil or

particularly fraudulent acts.”²¹⁶ In order to receive punitive damages, a plaintiff must show that a defendant performed some intentional or reckless act that deserves to be punished.²¹⁷ Generally, a defendant’s willful and wanton conduct justifies an award of punitive damages.²¹⁸ Wanton behavior is the “unreasonable or malicious risk of harm” without regard for the consequences. Willful conduct is intentional, though it need not be malicious.²¹⁹ Examples of behavior that meets this standard are fraud, intentional misrepresentation or concealment of information that leads to injury, or unreasonably risky action that does not account for the safety of others.²²⁰

On April 7, 2003, the U.S. Supreme Court in *State Farm Mutual Automobile Insurance Company v. Campbell* invalidated a \$145 million punitive damages award against the defendant, who was found liable for only \$1 million in compensatory damages.²²¹ The Supreme Court’s decision was hailed by the business community as a watershed event in punitive damages litigation.²²² The case arose out of a car accident, allegedly caused by State Farm’s policyholder, Curtis Campbell.²²³ The driver of one vehicle was killed and the driver of another vehicle was seriously injured.²²⁴ The injured driver and the estate of the deceased driver each sued Campbell, claiming that his unsafe attempt to pass several vehicles caused the accident.²²⁵ Both plaintiffs offered to settle within policy limits, but State Farm rejected the offers and litigated the case.²²⁶ Each plaintiff received an award against Campbell that exceeded his policy limits.²²⁷ After State Farm declined to bond the portion of the judgment that exceeded the limits, Campbell assigned 90% of any recovery for bad faith to the plaintiffs and their lawyers.²²⁸ State Farm meanwhile appealed the judgment and, after it was affirmed, paid it in full.²²⁹

In the ensuing bad faith litigation, the trial court allowed Campbell (and his wife, who also sued) to introduce evidence that State Farm had a policy of encouraging claims handlers to use improper means to reduce claims payments.²³⁰ The evidence included some old claim manuals and other company documents, expert testimony placing the plaintiffs’ spin on those documents, and the testimony of several former employees from around the country about particular practices, most of which involved the handling of first-party claims for property damage to vehicles.²³¹ There was almost no evidence of improper failure to settle third-party claims against insureds and, indeed, State Farm put on evidence showing that Campbell’s case was the only Utah case in 15 years in which an insured suffered an excess verdict where the company did not immediately pay the judgment or settle the case.²³²

The jury found State Farm liable for bad faith, fraud, and intentional infliction of emotional distress.²³³ The jury awarded \$911.25 in economic damages (the amount the Campbells paid their personal lawyers after the verdict to negotiate the assignment agreement with the judgment holders), \$2.6 million in damages for mental anguish, and \$145 million in punitive damages.²³⁴ The trial court ordered a remittitur of the compensatory damages to \$1 million and the punitive damages to \$25 million.²³⁵ State Farm appealed, and the Campbells cross-appealed on the issue of the proper amount of punitive damages.²³⁶ Relying on the evidence of the alleged policy of improperly reducing claims payments, evidence that State Farm had suffered a \$100 million punitive

award in a case in Texas that allegedly had not been reported to headquarters, and the very substantial size of State Farm's surplus, the Utah Supreme Court reinstated the full \$145 million punitive award.²³⁷ The U.S. Supreme Court then granted certiorari to determine whether the reinstated award was unconstitutionally excessive.²³⁸

By a 6-3 vote, the Supreme Court determined that the \$145 million punitive award was unconstitutionally excessive and strongly suggested that anything beyond a 1:1 ratio to compensatory damages – *i.e.*, \$1 million – would be unwarranted.²³⁹ The Supreme Court held that this punitive damage award was excessive and in violation of the Due Process Clause of the Fourteenth Amendment.²⁴⁰ The Supreme Court indicated that punitive damages generally should not exceed a low multiple of compensatory damages.²⁴¹ The Court said that in a case like *State Farm*, any ratio higher than 1:1 likely would be excessive, and that ratios above 4:1 would rarely pass constitutional muster.²⁴² Double-digit ratios hardly ever would, except in those few cases with small compensatory damages and highly reprehensible conduct.²⁴³

Preliminary data indicates that *State Farm* has reduced the amounts of punitive damages that reviewing courts have upheld.²⁴⁴ However, *State Farm*'s full potential to bring rationality to punitive damages litigation has yet to be completely recognized.²⁴⁵ Many courts remain reluctant to reduce punitive awards to the low multiples of compensatory damages suggested by *State Farm*.²⁴⁶ Excessive awards of punitive damages continue to plague the business community.²⁴⁷ Trial lawyers continue to attempt to inflame the passions of juries, suggesting to them that they "send a message" to corporate headquarters, resulting in excessive verdicts.²⁴⁸

V. IMPLICATIONS ON INSURANCE RISKS WITHIN THE U.S. MARKET

There has been substantial progress in the U.S. with respect to improving the U.S. tort system by way of reforms, primarily at the state level. Further meaningful reforms at the state level are likely. Meaningful reform at the federal level has not been achieved, and in all likelihood, may not be achieved in the near future.

The goal, of course, is to improve the U.S. tort system so that it is less costly, more efficient, and more effective in administering fair and appropriate awards. As I previously stated, for the business community, including insurers of risks within the U.S., what is needed is a greater level of predictability. At this time, predictable results are not necessarily always easy to achieve from an insurance industry standpoint because there are so many uncertain variables relevant to tort litigation: place of venue, predisposition of judges, sympathetic juries, and of course, inconsistent laws, including those with respect to punitive damages, joint and several liability, non-economic damages, and class action lawsuits. Regardless of the facts of a particular claim and the nature of the accident, these variables operate to produce award outcomes that are not always predictable.

As I stated at the outset of my presentation, insurance companies cannot rely entirely on tort reform to achieve optimal predictability. Rather, greater predictability can be best achieved through processes which insurance companies control. Specifically,

insurance companies operating in the U.S. market can achieve a somewhat greater level of predictability by obtaining a greater understanding of the risks that are being underwritten and by effectively handling those risks, which manifest into claims or losses.

A. Underwriting Implications

With respect to underwriting implications, there is probably nothing more fundamental to the objective of predictability as it relates to the insurance business than understanding the risks that are being underwritten and providing coverage consistent with that understanding.

While perhaps an obvious point, risks must be properly assessed and evaluated during the underwriting process. First, risks must be known: the nature of an insured's business, the place of business, the scope of operation, the areas of operation, the scope and manner of product distribution, and claim history. Relevant, accurate, and meaningful data about a prospective insured's business operations, as well as the business operations of current insureds seeking renewals, must be collected through appropriate applications, surveys, and questionnaires.

I can tell you from experience in litigating insurance coverage disputes between insurance companies and their insureds that relevant, accurate, and meaningful applications, surveys, and questionnaires used during the underwriting process not only enable insurers to better evaluate a potential risk, but also protect insurers at the other end, when a claim or lawsuit is presented by an insured for coverage arising out of business conduct, operations, or practices which were not contemplated during the underwriting process. Misrepresentations made by an insured in the application or renewal process may serve as grounds to rescind a policy or deny coverage. Equally strong as a coverage defense is an insured's failure to report known losses. Of course, insurance coverage issues including policy rescission, the "known loss" doctrine, and policy interpretation are subjects for a later presentation.

Second, it is critical to identify and implement the use of the most appropriate and effective coverage forms, endorsements, and exclusions so that the scope of coverage provided to an insured is consistent with the scope of coverage intended to be provided to an insured. Coverage forms are constantly being revised. It is important to make sure that underwriters are using the most appropriate forms. This also applies to the use of endorsements and exclusions, such as pollution exclusions, punitive damage exclusions, and asbestos exclusions. There is no reason to wait for asbestos litigation reform to take place in order to avoid exposure from asbestos litigation. Instead, coverage for asbestos-related claims can be precluded from coverage with an asbestos exclusion. The use of certain forms and endorsements is subject to state insurance department approval.

I note two specific areas which I have had the opportunity to litigate on numerous occasions. The first concern issues involving additional insured status. Jurisdictions across the U.S. interpret the scope and application of additional insured endorsements, including vendor endorsements and general contractor/subcontractor endorsements,

differently. Therefore, it is very important that the appropriate and current endorsements are used. Given the volume of construction defect cases in the U.S. as well as the volume of product liability cases, significant savings can be realized by insurers and their insureds if risks can be effectively shifted or tenders can be denied by virtue of the use of appropriate additional insured endorsements.

Another area, the application and scope of personal injury and advertising injury coverage, has been the subject of significant litigation. Courts have broadly interpreted the scope of such coverage under older forms to apply to a variety of intellectual property claims which, in most instances, were never intended to be covered. More current commercial general liability forms and commercial excess umbrella forms have been drafted to narrow the scope of coverage and in fact, in many instances, specifically exclude coverage for intellectual property claims. Therefore, it is very important that the most current forms be used, otherwise the exposure from having to defend and indemnify commercial tort disputes, including intellectual property claims, will be significant.

A third aspect of effective underwriting involves communication between underwriting representatives and claims handling representatives. It is important that underwriters be advised on a very regular basis as to the implications of underwriting practices. Whether it be issues concerning the scope of coverage, the application of coverage defenses, or the outcome of specific cases, underwriters would benefit from the knowledge of claims handling experiences.

B. Claims Handling Practices

As is the case with the subject of underwriting practices, the subject of claims handling practices is very difficult to address in short order. This is true, in part, because there are significant philosophical business differences, which impact how an insurance company approaches claims handling. For example, there is the “always fight to the end” approach, the “settle quick and cut the losses” approach, and of course, something in between. It is not my place, nor do I have the time to address these philosophical differences. What I would like to discuss, however, are certain concepts and tools, which should be considered in handling claims – again, with the goal of enhancing predictability as to costs, efficiency, and the administration of fair awards.

First, practice the fundamentals. Seasoned claims professionals will tell you that there is nothing more important than thoroughly investigating a claim and knowing the facts. The critical information gathered during the initial phases of investigating a claim significantly impact the appropriate strategy to be taken with respect to claim resolution.

Second, be proactive and not reactive in claims handling. One of the most significant advantages that a plaintiff and his attorney has is that for up to two years prior to filing a lawsuit, they have often investigated and developed the relevant facts and are well on their way to implementing a litigation strategy, all prior to the time that a lawsuit is filed. There is no reason to sit back and wait for a lawsuit to be filed if there is knowledge of an incident that will likely give rise to a lawsuit. Where appropriate, hire an investigator or an attorney to begin an investigation to evaluate the facts and assess

liability and exposure so that the insurance company can take equal advantage of that period of time to develop a strategy. It may be the case that efforts made prior to the filing of a lawsuit can create opportunities to settle a claim, thereby avoiding the costs of formal litigation.

Third, consider whether the insurance policy applies to the loss. As part of a fair and complete claim evaluation, all relevant insurance coverage issues should be considered. In many instances, there may not be coverage issues. Often, however, coverage issues do exist. These issues may include consideration as to who is an insured, whether a claim involves an occurrence, whether certain bodily injury and property damages exclusions apply to limit or preclude coverage, and whether certain personal and advertising injuries exclusions apply. These issues must be evaluated for purposes of determining whether a defense obligation exists, whether a reservation of rights letter should be issued, or whether coverage should be denied.

As I discussed earlier, one very important issue to consider at the start of any case is whether a particular risk can be shifted to some other party. Often, this can be achieved through asserting a defendant's rights as an additional insured under another party's liability policy. In addition, this can be accomplished through the enforcement of indemnification agreements. It should be noted, that in certain circumstances a party may agree to defend and indemnify another party even in the absence of a formal indemnification agreement. For example, I was recently involved in a case where I represented the U.S. subsidiary of a Japanese corporation that supplied component parts to a U.S. auto maker. In that particular case, a lawsuit was filed against the U.S. automaker and the supplier alleging product design and manufacturing defects following a motor vehicle accident. There was no formal indemnification agreement between the automaker and the supplier, but on behalf of the supplier, we requested that the automaker agree to defend and indemnify the supplier. In support of our request for a defense and indemnity, we argued several points. First, the ultimate liability rested with the automaker for defects in its product. Second, the automaker had control over engineering and design specifications. Third, from a practical standpoint, it was appropriate for the automaker to control the defense of both the automaker and the supplier so as to avoid inconsistent defense positions and finger pointing.

Fourth, there are certain innovative tools that should be considered in certain cases – focus groups, mock trials, and jury consultants. I have had the opportunity to work with some very talented focus group consultants in relation to lawsuits pending in numerous jurisdictions across the U.S. The idea of a focus group is to present the facts of a case to three, four, or five focus groups, each group consisting of 8 to 14 individuals, and have those focus group participants provide feedback in the form of their impressions as to how they understand and interpret the facts. The idea of focus groups originates from the marketers of consumer products who, before launching a new product, are interested in knowing how consumers will respond to their products. The information or data collected affects how they will market their products. The same idea applies to focus groups used in litigation. The idea is to understand how prospective jurors will interpret and appreciate the facts; to understand what facts are important to jurors.

Ideally, focus groups are conducted early in a case because the information or data obtained during this process allows the insurer and defense counsel to appropriately shape and plan a defense strategy and ultimately can impact decisions with regard to whether to take the case to trial or whether to settle. Interestingly, while a good number of plaintiffs' attorneys use focus groups on a regular basis, few defense attorneys have adopted this litigation tool as part of their regular litigation strategy.

Fifth, consideration should be given to alternative dispute resolution (ADR) processes, including mediation and arbitration. I have participated in successful mediations involving a wide variety of claims, including breach of contract, false advertising, product liability, wrongful death, and insurance coverage disputes in states including North Carolina, Florida, Illinois, Washington, California, Colorado, and Hawaii. It is my experience that with respect to certain cases, mediation can be extremely effective in reducing costs and achieving outcome predictability. Success at mediation is dependent on adequate preparation by all parties, reasonable expectations by all parties, and the selection and use of an effective mediator.

Sixth, selection of effective counsel is critical. There are many very effective lawyers practicing in the U.S. The most effective lawyers are the ones who are able to formulate an appropriate litigation plan at the start of a case and then implement that plan through the end, whether through settlement or trial. A reasonable goal is to identify several very effective attorneys in each state. It may be the case, however, that in certain situations, the most appropriate attorney for a case pending in Florida is an attorney from Pennsylvania or perhaps the best attorney for a case pending in Iowa is an attorney from Colorado. There may be strategic and economic reasons to retain certain attorneys on a national basis to handle certain types of claims based on product knowledge, as well as familiarity with clients, witnesses, and the relevant legal issues.

I recently handled a relatively complicated case in North Carolina arising out of a very tragic motor vehicle accident. In the middle of a clear, sunny day, a delivery truck and an automobile collided head-on, resulting in the deaths of the two young women occupying the automobile. Information obtained at the scene of the accident indicated that both vehicles had deviated from their respective lanes and crossed the center line resulting in a head-on collision right on the center line. The initial police and accident reconstruction reports suggested that the truck was traveling in excess of 90 mph, well above the speed limit, but also, that the women's car had deviated somewhat from its lane prior to the accident. Relatively sophisticated accident reconstruction evaluations left unresolved issues concerning possible vehicle defects, pre-accident conduct by the drivers, and most importantly, the specific cause or causes of the vehicles leaving their respective lanes. If it were established that the truck was traveling at such a high rate of speed, there would very likely be a finding of gross negligence, precluding any argument by the defense of contributory negligence on the part of the driver of the passenger car. Therefore, a determination as to the truck's pre-accident speed, as well as pre-accident travel patterns of both vehicles was necessary. In addition, various alternative accident causation theories needed to be explored, including possible vehicle design or malfunction arguments. Prior to the filing of a lawsuit, the relevant facts were fully

investigated, experts were retained to evaluate various accident theories, as well as possible vehicle defect theories, and numerous defense arguments were developed. In addition, focus groups were conducted to explore how a jury would respond to the relevant facts and various defense arguments. The focus groups provided significant feedback as to the importance of certain evidence and the strength of various defense arguments. Recognizing the risks associated with litigating a case with a potential for significant exposure, the case was mediated and ultimately settled well below the projected exposure value - all before suit was filed.

VI. CONCLUSION

As I stated at the beginning of my presentation, U.S. tort reform is a large subject involving complex legal, economic, public policy, and social issues. I have only briefly touched upon these issues in an attempt to address the implications on insurance risks within the U.S. market. I hope my observations have been of interest to you. I certainly appreciate having the opportunity to talk with you this evening.

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¹ BLACK'S LAW DICTIONARY 774-75 (5th ed. 1990).

² *Oh, Temptation*, THE ECONOMIST (Aug. 1, 2002), available at www.economist.com/opinion/displayStory.cfm.

³ *Id.*

⁴ Archie Carroll, *The Coffee Spill Heard 'Round the World*, BUSINESS AND SOCIETY (3d ed. 1996).

⁵ TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2003 UPDATE, TRENDS AND FINDINGS ON THE COSTS OF THE U.S. TORT SYSTEM 5-6 (2003) [hereinafter TILLINGHAST-TOWERS PERRIN (2003)].

⁶ *Id.*; TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2002 UPDATE, TRENDS AND FINDINGS ON THE COSTS OF THE U.S. TORT SYSTEM (2002) [hereinafter TILLINGHAST-TOWERS PERRIN (2002)].

⁷ TILLINGHAST-TOWERS PERRIN (2002), *supra* note 7, at 7.

⁸ *Id.* at 2.

⁹ TILLINGHAST-TOWERS PERRIN (2003), *supra* note 6, at 1.

¹⁰ *Id.* at 7.

¹¹ TILLINGHAST-TOWERS PERRIN (2002), *supra* note 7, at 1.

¹² COUNCIL OF ECONOMIC ADVISORS, WHO PAYS FOR TORT LIABILITY CLAIMS? AN ECONOMIC ANALYSIS OF THE U.S. TORT LIABILITY SYSTEM 1-2 (April 2002) [hereinafter COUNCIL OF ECONOMIC ADVISORS].

¹³ *Id.* at 10-11.

¹⁴ TILLINGHAST-TOWERS PERRIN (2003), *supra* note 6, at 3.

¹⁵ *Id.* at 19.

¹⁶ *Id.* at 14.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ "Malpractice Myths, Bob Herbert, NEW YORK TIMES, June 21, 2004.

²¹ NEWS BATCH, TORT REFORM, available at <http://www.newsbatch.com/tort.htm>.

²² CBS News.com, *House Passes "Cheeseburger Bill,"* at <http://www.cbsnews.com/stories/2004/03/10/health/main605157.shtml>.

²³ NEWS BATCH, *House Vote on Banning Fast Food Lawsuits*, Mar. 10, 2004, at <http://newsbatch.com/arch304-fastfoodvt.html>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

-
- ²⁷ *Id.*
- ²⁸ Joseph Perkins, *Opinion: The Buckraking Trial Lawyer*, THE SAN DIEGO UNION-TRIB., Jan. 23, 2004.
- ²⁹ *Id.*
- ³⁰ *Id.*
- ³¹ Greg Gordon, *Campaign Finance; Fellow Lawyers are Big Backers of Edwasd's Bid*, STAR-TRIB., Jan. 31, 2004.
- ³² *Id.*
- ³³ See, e.g., MANHATTAN INSTITUTE FOR POLICY RESEARCH, LEGAL REFORM, at <http://www.manhattan-institute.org/html/clp.htm>.
- ³⁴ See David A. Hyman, *Medical Malpractice and the Tort System: What Do We Know and What (If Anything) Should We Do About It?*, 80 TEX. L. REV. 1639 (2002).
- ³⁵ Laura Nader, *The Life of the Law*, 36 VAL. U. L. REV., 655, 670 (2002).
- ³⁶ MARTINDALE-HUBBEL, CLASS ACTIONS: WHAT YOU NEED TO KNOW, available at <http://www.praielaw.com/articles/article.asp>.
- ³⁷ FED. R. CIV. P. 23(a) (West 2004).
- ³⁸ MARTINDALE-HUBBEL, CLASS ACTIONS: WHAT YOU NEED TO KNOW, *supra* note 42.
- ³⁹ FED. R. CIV. P. 23(a).
- ⁴⁰ *Id.*
- ⁴¹ *Id.*
- ⁴² *Id.*
- ⁴³ *Id.*
- ⁴⁴ NEWBERG ON CLASS ACTIONS § 1:6 (4th ed. 2003).
- ⁴⁵ *Id.*
- ⁴⁶ NEWBERG ON CLASS ACTIONS § 1:1.
- ⁴⁷ *Id.* at § 1:6.
- ⁴⁸ *Id.*
- ⁴⁹ TILLINGHAST-TOWERS PERRIN (2002), *supra* note 7, at 3.
- ⁵⁰ Jim Copland, *The Tort Tax*, WALL ST. J., June 11, 2003.
- ⁵¹ *Id.*
- ⁵² John H. Beisner & Jessica Davidson Miller, *Class Action Magnet Courts: The Allure Intensifies*, 5 CIV. JUST. REP. 1 (2002).
- ⁵³ *Id.*
- ⁵⁴ *Id.*
- ⁵⁵ Copland, *supra* note 56.
- ⁵⁶ Lloyd Milliken Jr., *Fixing the Broken Class Action Lawsuit System*, RES GESTAE (July/August 2003).
- ⁵⁷ Beisner & Miller, *supra* note 59, at 2.
- ⁵⁸ *Id.*
- ⁵⁹ Martin Kasindorf, *Robin Hood is Alive in Court, Say Those Seeking Lawsuit Limits*, USA TODAY, March 8, 2004, available at http://www.usatoday.com/news/nation/2004-03-07-tort-lawsuits_x.htm.
- ⁶⁰ *Id.*
- ⁶¹ *Report Names Madison County Top "Judicial Hellhole" in U.S.*, ST. LOUIS BUS. J., Nov. 6, 2003, available at <http://stlouis.bizjournals.com/stlouis/stories/2003/11/03/daily59.html>.
- ⁶² INSTITUTE FOR LEGAL REFORM, *Issues – Class Action*, available at <http://www.legalreformnow.com/issues> [hereinafter *Issues - Class Action*].
- ⁶³ INSTITUTE FOR LEGAL REFORM, *Issues – Asbestos*, available at <http://legalreformnow.com/issues/asbestos.cfm>.
- ⁶⁴ George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 521 (1997).
- ⁶⁵ *Id.*
- ⁶⁶ *Id.*
- ⁶⁷ *Id.*
- ⁶⁸ Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1357 (2003).
- ⁶⁹ *Id.*
- ⁷⁰ *Id.*

-
- ⁷¹ *Issues – Class Action*, *supra* note 69.
- ⁷² *Id.*
- ⁷³ *Id.*
- ⁷⁴ *Id.*
- ⁷⁵ *Id.*
- ⁷⁶ *The Lawsuits of Madison County*, THE ECONOMIST (June 20, 2003), available at www.economist.com/agenda/displayStory.cfm.
- ⁷⁷ CONGRESSIONAL BUDGET OFFICE, THE ECONOMICS OF U.S. TORT LIABILITY: A PRIMER (Oct. 2003).
- ⁷⁸ (1) S.2062, 108th Cong. (2004); (2) CLASS ACTION FAIRNESS COALITION, Class Action Fairness Act: Protecting the Rights of Plaintiffs and Defendants; (3) THOMAS LEGISLATIVE INFORMATION ON THE INTERNET, *Bill Summary & Status for the 108th Congress*, available at <http://thomas.loc.gov/cgi-bin/bdquery>.
- ⁷⁹ Environmental Health Center, *Asbestos*, available at <http://www.nsc.org/ehc/indoor/asbestos.htm>; American Bar Association, *Tort Law: Asbestos Litigation*, available at <http://www.abanet.org/poladv/priorities/asbestos.html> [hereinafter *Asbestos Litigation*].
- ⁸⁰ Thomas E. Willging, TRENDS IN ASBESTOS LITIGATION, FEDERAL JUDICIAL CENTER (1987).
- ⁸¹ *Asbestos Litigation*, *supra* note 87.
- ⁸² *Id.*
- ⁸³ Willging, *supra* note 88.
- ⁸⁴ *Id.*
- ⁸⁵ *Id.*
- ⁸⁶ *Asbestos Litigation*, *supra* note 87.
- ⁸⁷ *Id.*
- ⁸⁸ *Id.*
- ⁸⁹ *Id.*
- ⁹⁰ *Id.*
- ⁹¹ Steve Hantler, *Toward Greater Judicial Leadership on Asbestos Litigation*, 41 CIVIL JUST. FORUM 2 (April 2003).
- ⁹² *Id.*
- ⁹³ RAND INSTITUTE, *News Release: RAND Study Shows Asbestos Claims Rise Dramatically; Cost of Claims Filed by 600,000 People Now Tops \$54 Billion*, Sept. 25, 2002.
- ⁹⁴ Patrick M. Hanlon, *Asbestos Legislation: Federal and State*, SJ031 ALI-ABA 549, 552 (2003).
- ⁹⁵ TILLINGHAST-TOWERS PERRIN (2003), *supra* note 6, at 3.
- ⁹⁶ Mark H. Reeves, *Makes Sense to Me: How Moderate, Targeted Federal Tort Reform Legislation Could Solve the Nation's Asbestos Litigation Crisis*, 56 VAND. L. REV. 1949, 1952 (2003).
- ⁹⁷ *Id.* at 1952-53.
- ⁹⁸ *Id.* at 1953.
- ⁹⁹ *See Id.* at 1951-53.
- ¹⁰⁰ *Id.* at 1952-53.
- ¹⁰¹ U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN: TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 1996 (August 2000).
- ¹⁰² *Id.*
- ¹⁰³ *Id.*
- ¹⁰⁴ Hanlon, *supra* note 102, at 554.
- ¹⁰⁵ RAND INSTITUTE, *supra* note 56.
- ¹⁰⁶ Hantler, *supra* note 99, 101, at 4.
- ¹⁰⁷ *Id.*
- ¹⁰⁸ RAND INSTITUTE, *supra* note 56.
- ¹⁰⁹ Hantler, *supra* note 99, 101 at 4.
- ¹¹⁰ INSTITUTE FOR LEGAL REFORM, *Issues – Asbestos*, available at <http://legalreformnow.com/issues/asbestos.cfm> [hereinafter *Issues – Asbestos*].
- ¹¹¹ Hanlon, *supra* note 102, at 553-54.
- ¹¹² Hantler, *supra* note 99, at 5.
- ¹¹³ Hanlon, *supra* note 102, at 554.
- ¹¹⁴ *Id.*

¹¹⁵ *Id.*
¹¹⁶ *Issues – Asbestos, supra* note 70.
¹¹⁷ INSTITUTE FOR LEGAL REFORM, *Issues – Class Action*, available at www.legalreformnow.com/issues/.
¹¹⁸ *Id.*
¹¹⁹ *Id.*
¹²⁰ *Id.*
¹²¹ AMERICAN TORT REFORM ASS'N, SUMMARY OF 2004 FEDERAL LEGISLATION (May 20, 2004)
¹²² Jesse Holland, *Senate Considers Asbestos Fund*, April 19, 2004, CBSNEWS.COM, at <http://www.cbsnews.com/stories/2004/04/19/health/main612537.shtml>.
¹²³ *Id.*
¹²⁴ *Id.*
¹²⁵ (1) S.2062, 108th Cong. (2004); (2) CLASS ACTION FAIRNESS COALITION, Class Action Fairness Act: Protecting the Rights of Plaintiffs and Defendants; (3) THOMAS LEGISLATIVE INFORMATION ON THE INTERNET, Bill Summary & Status for the 108th Congress, available at <http://thomas.loc.gov/cgi-bin/bdquery>.
¹²⁶ SUMMARY OF 2004 FEDERAL LEGISLATION, *supra* note 130.
¹²⁷ *Id.*
¹²⁸ *Id.*
¹²⁹ *Id.*
¹³⁰ Sabrina Eaton, *Senate Defeats Bill Prohibiting Lawsuits Filed Against Gun Makers*, CLEV. PLAIN DEALER, Mar. 3, 2004.
¹³¹ *Id.*
¹³² *New York City's Gun Lawsuit Gets Green Light for Trial; Judge Rejects Gun Industry's Motion to Dismiss*, U.S. NEWswire, Apr. 13, 2004.
¹³³ *Id.*
¹³⁴ *Id.*
¹³⁵ Joe Johns & Craig Boffman, *Senate Kills Bill Protecting Gun Makers*, CNN.COM, Mar. 3, 2004, available at www.cnn.com/ALLPOLITICS/03/02/senate.guns/index.html.
¹³⁶ *Id.*
¹³⁷ *Guns and Courts*, AM. CITY & COUNTY 10, Apr. 1, 2004.
¹³⁸ Johns & Boffman, *supra* note 144.
¹³⁹ *Id.*
¹⁴⁰ *Id.*
¹⁴¹ *Id.*
¹⁴² *Politics & Policy: Senate Subcommittee Considers Bill to Ban Lawsuits*, AMERICAN POLITICAL NETWORK, Oct. 17, 2003 [*hereinafter* *Politics & Policy*].
¹⁴³ *Id.*
¹⁴⁴ SUMMARY OF 2004 LEGISLATION, *supra* note 130.
¹⁴⁵ *Id.*
¹⁴⁶ *Id.*
¹⁴⁷ *Id.*
¹⁴⁸ *Politics & Policy, supra* note 151.
¹⁴⁹ SUMMARY OF 2004 LEGISLATION, *supra* note 130.
¹⁵⁰ *Politics & Policy, supra* note 151.
¹⁵¹ HARRIS INTERACTIVE INC., *State Liability Systems Ranking Study, Executive Summary* (Mar. 8, 2004).
¹⁵² *Id.*
¹⁵³ *Id.*
¹⁵⁴ *Id.*
¹⁵⁵ *Id.*
¹⁵⁶ *Id.*
¹⁵⁷ *Id.*
¹⁵⁸ *Id.*
¹⁵⁹ *Id.*
¹⁶⁰ *Id.*
¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Other top issues were limitation of class action suits (cited by 6% of respondents in 2004, compared to 3% in 2003), speeding up the trial process (cited by 3% of respondents in 2004, compared to 2% of respondents in 2003), judicial competence (cited by 3% in 2004, compared to 5% in 2003), limitation of liability settlements (cited by 3% in 2004, compared to 5% in 2003), the elimination of unnecessary lawsuits (3% both today and in 2003), and the issue of fairness and impartiality (cited by 3% in both 2004 and 2003).

¹⁶⁶ *State Liability Systems Ranking Study, Executive Summary, supra* note 160.

¹⁶⁷ *Id.*

¹⁶⁸ Dean Scott, *Business Turns to States for Help on Lawsuits*, KIPLINGER BUS. FORECASTS, May 1, 2003.

¹⁶⁹ AMERICAN TORT REFORM ASS'N., 1996-2003 STATE TORT REFORM ENACTMENTS.

¹⁷⁰ AMERICAN TORT REFORM ASS'N., 2003 STATE TORT REFORM ENACTMENTS.

¹⁷¹ AMERICAN TORT REFORM ASS'N.; 1996-1997, 1999, 2002-2003 STATE TORT REFORM ENACTMENTS.

¹⁷² *See, e.g.*, AMERICAN TORT REFORM ASS'N., 1996- 2003 STATE TORT REFORM ENACTMENTS.

¹⁷³ AMERICAN TORT REFORM ASS'N., FLORIDA REFORMS, available at <http://www.atra.org/states/FL>.

[hereinafter FLORIDA REFORMS].

¹⁷⁴ *Id.*

¹⁷⁵ AMERICAN TORT REFORM ASS'N., TEXAS REFORMS, available at <http://www.atra.org/states/TX>.

[hereinafter TEXAS REFORMS].

¹⁷⁶ AMERICAN TORT REFORM ASS'N., ILLINOIS REFORMS, available at <http://www.atra.org/states/IL>.

[hereinafter ILLINOIS REFORMS].

¹⁷⁷ *Id.*

¹⁷⁸ AMERICAN TORT REFORM ASS'N., OHIO REFORMS, available at <http://www.atra.org/states/OH>

[hereinafter OHIO REFORMS]; AMERICAN TORT REFORM ASS'N., WISCONSIN REFORMS, available at

<http://www.atra.org/states/WI>.

¹⁷⁹ 735 ILCS 5/2-1115.2(a).

¹⁸⁰ 735 ILCS 5/2-1115.2(b).

¹⁸¹ AMERICAN TORT REFORM ASS'N., 1996, 1997, 2003 STATE TORT REFORM ENACTMENTS; AMERICAN TORT REFORM ASS'N., COLORADO REFORMS, available at <http://www.atra.org/states/CO> [hereinafter COLORADO REFORMS]; AMERICAN TORT REFORM ASS'N., NORTH DAKOTA REFORMS, available at <http://www.atra.org/states/ND>; TEXAS REFORMS, *supra* note 184.

¹⁸² AMERICAN TORT REFORM ASS'N., 2003 STATE TORT REFORM ENACTMENTS.

¹⁸³ COLORADO REFORMS, *supra* note 190.

¹⁸⁴ ILLINOIS REFORMS, *supra* note 185.

¹⁸⁵ OHIO REFORMS, *supra* note 187.

¹⁸⁶ AMERICAN TORT REFORM ASS'N., ALABAMA REFORMS, available at <http://www.atra.org/states/AL> [hereinafter ALABAMA REFORMS]; COLORADO REFORMS, *supra* note 190; ILLINOIS REFORMS, *supra* note 185; AMERICAN TORT REFORM ASS'N, IOWA REFORMS, available at <http://www.atra.org/states/IA>

[hereinafter IOWA REFORMS]; AMERICAN TORT REFORM ASS'N, MICHIGAN REFORMS, available at

<http://www.atra.org/states/MI>; AMERICAN TORT REFORM ASS'N, MISSOURI REFORMS, available at

<http://www.atra.org/states/MO>; AMERICAN TORT REFORM ASS'N, NEW YORK REFORMS, available at

<http://www.atra.org/states/NY>; AMERICAN TORT REFORM ASS'N, OREGON REFORMS, available at

<http://www.atra.org/states/OR>.

¹⁸⁷ FLORIDA REFORMS, *supra* note 182 ; AMERICAN TORT REFORM ASS'N, GEORGIA REFORMS, available at <http://www.atra.org/states/GA>;

AMERICAN TORT REFORM ASS'N, KANSAS REFORMS, available at

<http://www.atra.org/states/KS>; AMERICAN TORT REFORM ASS'N, KENTUCKY REFORMS, available at

<http://www.atra.org/states/KY>; AMERICAN TORT REFORM ASS'N, OHIO REFORMS, *supra* note 187.

¹⁸⁸ *See, e.g.*, ALABAMA REFORMS, *supra* note 195.

¹⁸⁹ *See, e.g.*, ILLINOIS REFORMS, *supra* note 185.

¹⁹⁰ AMERICAN TORT REFORM ASS'N, 1996, 1999, 2003 STATE TORT REFORM ENACTMENTS; IOWA REFORMS, *supra* note 204.

¹⁹¹ AMERICAN TORT REFORM ASS'N, 1996, 1999, 2003 STATE TORT REFORM ENACTMENTS.

¹⁹² 54 C.J.S. *Limitations of Actions* § 4, at 20-21 (1987).

¹⁹³ AMERICAN TORT REFORM ASS'N, 1996, 2003 STATE TORT REFORM ENACTMENTS.
¹⁹⁴ AMERICAN TORT REFORM ASS'N, 1999 STATE TORT REFORM ENACTMENTS.
¹⁹⁵ *Id.*
¹⁹⁶ ILLINOIS REFORMS, *supra* note 185.
¹⁹⁷ OHIO REFORMS, *supra* note 187.
¹⁹⁸ COLORADO REFORMS, *supra* note 190.
¹⁹⁹ AMERICAN TORT REFORM ASS'N, INDIANA REFORMS, *available at* <http://www.atra.org/states/IN>.
²⁰⁰ AMERICAN TORT REFORM ASS'N, 1996 STATE TORT REFORM ENACTMENTS.
²⁰¹ AMERICAN TORT REFORM ASS'N, 1999, 2003 STATE TORT REFORM ENACTMENTS.
²⁰² *Id.*
²⁰³ *Id.*
²⁰⁴ AMERICAN TORT REFORM ASS'N, 2003 STATE TORT REFORM ENACTMENTS.
²⁰⁵ *See* NATIONAL ASS'N OF MUTUAL INS. CO., *Appeal Bond Reform*, at <http://namic.org/PrintPage.asp?ArticleID=6440>; David. W. Clark, *Life in Lawsuit Central: An Over-View of the Unique Aspects of Mississippi's Civil Justice System*, 71 Miss. L. J. 359, 380 (2001).
²⁰⁶ *Appeal Bond Reform*, *supra* note 214.
²⁰⁷ *Id.*
²⁰⁸ AMERICAN TORT REFORM ASS'N, 2002 STATE TORT REFORM ENACTMENTS.
²⁰⁹ AMERICAN TORT REFORM ASS'N, 2003 STATE TORT REFORM ENACTMENTS.
²¹⁰ *Id.*
²¹¹ *Id.*
²¹² Ginny Skalski, *Supreme Court Changes Posting Requirements for Appeal Cases*, ASS'N PRESS, June 15, 2004.
²¹³ *Id.*
²¹⁴ *Id.*
²¹⁵ AON, *Punitive Damages*, at http://www.aon.com/us/busi/risk_management/risk_transfer/punitive_damages.jsp.
²¹⁶ *Punitive Damages*, LAW.COM, at <http://dictionary.law.com/definition2.asp?selected=1690&bold=%7C%7C%7C%7C>.
²¹⁷ Paul Shearer, *Punitive Damage Awards, Caps, and Standards*, OLR RESEARCH REPORT (Nov. 2003).
²¹⁸ *Id.*
²¹⁹ *Id.*
²²⁰ *Id.*
²²¹ INSTITUTE FOR LEGAL REFORM, *Issues – Punitive Damages*, *available at* <http://www.legalreformnow.com/issues/punitive.cfm> [hereinafter *Issues - Punitive Damages*].
²²² Evan M. Tager, *Making Effective Use of State Farm v. Campbell in Punitive Damages Litigation: A One-Year Retrospective*, MAYER BROWN, ROWE & MAW 1.
²²³ *Id.*
²²⁴ *Id.*
²²⁵ *Id.*
²²⁶ *Id.*
²²⁷ *Id.*
²²⁸ *Id.* at 1-2.
²²⁹ *Id.* at 2.
²³⁰ *Id.*
²³¹ *Id.*
²³² *Id.*
²³³ *Id.*
²³⁴ *Id.*
²³⁵ *Id.*
²³⁶ *Id.*
²³⁷ *Id.*
²³⁸ *Id.* at 2-3.
²³⁹ *Id.* at 3.
²⁴⁰ *Id.*

²⁴¹ *Issues - Punitive Damages, supra* note 230.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ INSTITUTE FOR LEGAL REFORM, *Issues – Noncompensatory Damages, available at* <http://legalreformnow/issues/damages.cfm>.

²⁴⁸ *Id.*