GC
LEADERSHIP SERIES

the evolving role of GENERAL COUNSEL

A Roundtable Discussion

KEYNOTE SPEAKER:

Hayward Dan Fisk

Vice President, General Counsel & Secretary

Computer Sciences Corporation

Special Advertising Supplement to The National Law Journal

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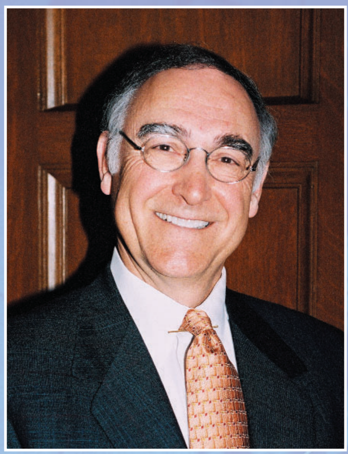
the PANELISTS



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TO THE READER:

There is a growing perception that the American tort liability system has fallen out of balance. While it can and has acted as a positive agent for social change, the plaintiffs' class action bar has been increasingly criticized for recent lapses and excesses. Abusive civil litigation does more than tarnish public perception of our justice system. It can have devastating consequences for businesses, employees, stockholders, and consumers. The situation is exacerbated of late by the growing practice of private plaintiffs firms acting in concert with governmental entities as a surrogate civil enforcement arm — notwithstanding their often competing interests. It also affects the ability of American businesses to compete globally, as our tort liability system stands as the most expensive in the world.

This was the focus of a recent roundtable discussion sponsored by ***The National Law Journal***, an ALM publication, in partnership with **The Directors Roundtable**, a civic group which organizes events globally on issues relevant to corporate directors and their advisors. In this discussion — the latest in our **GC LEADERSHIP SERIES** examining the evolving role of General Counsel — panel members contributed perspectives from their respective areas of expertise and experience in dealing with the challenges and effects of abusive litigation.

The guest of honor for the event was Hayward Dan Fisk, Vice President, General Counsel & Corporate Secretary of Computer Sciences Corporation, a man highly esteemed within the legal, business and civic communities. Mr. Fisk briefed the audience about the significant economic and policy repercussions of civil litigation abuse, from bankrupting socially responsible businesses to deterring research and development of promising new medications. He articulated how civil justice reform is in the public interest, highlighted some of the current efforts to curtail abusive litigation and suggested further measures to reform the civil justice system.

The other panelists, all of whom are partners in major law firms, included: Deborah Koeffler of Mitchell, Silberberg & Knupp, Kevin Sadler of Baker Botts, Jeffrey Rosenfeld of DLA Piper Rudnick Gray Cary, and Timothy Hatch of Gibson Dunn & Crutcher. Ms. Koeffler discussed the many areas of high litigation activity in California in the employment context and advised on ways in-house counsel can avoid such litigation in the first place. Mr. Sadler discussed the relatively recent phenomenon of patent trolls as well as other problems with the patent litigation system, and used recent patent disputes involving E-Bay and Blackberry as illustrations. Mr. Rosenfeld alerted the audience about creative ways the plaintiffs bar is devising to avoid contractual arbitration, highlighted some of the factors that courts consider in deciding whether to uphold an arbitration provision, and advised how to protect arbitration clauses in arms length sophisticated contracts. Mr. Hatch explained how the scope of the False Claims Act has been expanded, noted the enormous motivation the law provides to private citizens to pursue such claims, and cautioned that companies should prepare for more aggressive conduct by plaintiffs and the Department of Justice under the FCA.

In whole, this discussion provides in-house counsel with many suggestions for protecting their companies from abusive litigation. The views expressed are those of the Roundtable participants and not necessarily the views of their firms or companies.

The Roundtable Discussion was held March 29, 2006 at The Jonathan Club in Los Angeles. The text of the panelists' comments has been edited for clarity and brevity and is presented in this special supplement to *The National Law Journal*. It was produced by the marketing department of ALM Media, Inc., independent of *The National Law Journal* editorial staff.

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Computer Sciences Corporatio

MR. FRIEDMAN: Good morning, everyone. I'm Jack Friedman, chairman of the Directors Roundtable, and I'm going to be the moderator today. The Directors Roundtable series recognizes the role that companies take in being good corporate citizens and honors individual general counsels for their leadership and achievements.

Hayward Dan Fisk, Vice President, General Counsel & Corporate Secretary of Computer Sciences Corporation, will be our first speaker. Then we'll hear from Deborah Koeffler of Mitchell, Silberberg & Knupp, Kevin Sadler of Baker Botts, Jeff Rosenfeld of DLA Piper Rudnick Gray Cary, and Tim Hatch of Gibson Dunn & Crutcher. The panelists will discuss various issues regarding the high incidents of civil litigation against corporations.

MR. FISK: After nearly 40 years of experience in the legal profession, it's a good time to reflect on where we are today in American jurisprudence. Our legal profession, a favorite and frequent target of critics, is much maligned and largely unfairly so, in my view. When you look around at who has rolled up his or her sleeves in furtherance of the public interest, in our communities, in civic, charitable, religious, governmental and philanthropic pursuits, very often the "do-gooder" is a lawyer or a lawyer's spouse. Those of us in the legal profession should be proud of that.

Yet, there's a cancer spreading across America adversely impacting the long term interests of our legal profession and more importantly, our system of jurisprudence and the well-being of America. Our society is languishing in litigiousness. In fact, the United States has the distinction of being the most litigious country in the world with one lawyer per every 300 citizens. Higher pursuits have been sacrificed in counterproductive judicial and other legal proceedings, too often spawned by an avaricious plaintiffs' bar in hot pursuit of their next class action or other target. The broad public interest suffers in so many ways, begging for relief . . . in the form of civil justice reform, the topic I've chosen to address with you this morning.

Civil Justice Reform

Civil justice reform is, and should be, an important focus on the national agenda for lawmakers and legal practitioners alike. The plaintiffs' bar is abusing our civil justice system, resulting in adverse impacts on the public interest that are causing broad grassroots and bipartisan attention. Lawsuits are being filed against companies on frivolous or marginal grounds. Class actions force large settlements, and individual suits raise concerns of excessive damage awards. Too often, class lawsuits do not arise out of an intent to remedy wrongs, but rather an intent to exact or extort settlement monies. Defendants succumb to settlements not because they are guilty of proximate wrongdoing, but because they want to avoid the costs of litigation, the risks of large judgments, and the risk of bad press even more harmful to customer and investor relations than the settlement payoffs. Far truer today than in his day and certainly prophetic are the words of Oliver Wendell Holmes, Jr.: "Lawyers spend a great deal of their time shoveling smoke."

While I make no apologies for picking on the avaricious plaintiffs' bar, and with all due respect to well-intentioned friends in the defense bar, the fact is . . . they too profit from this ailing system of American jurisprudence. When the plaintiffs' bar pounds on the front doors of corporate America, the defense bar (with the able assistance of inside counsel) swarms in the back door . . . trial lawyers from both camps profit.

Indeed, civil lawsuits against corporate entities can and do serve legitimate purposes and some grassroots consumer outrage is warranted. The corporate community shares some blame for compromising principles of integrity and good governance. SOX at an estimated compliance cost of approximately $1 million per billion♦ of annual revenue may be unduly expensive and unduly burdensome.[1] In fact, at a recent roundtable of chief information officers, there was a chorus of consensus that SOX compliance and cost/benefit shortfalls have been their "biggest

♦More for small cap companies.

headaches;"[2] but even so, SOX has heightened awareness and should deter improper conduct. What is of paramount concern today is the fact that money, primarily in the form of legal fees for plaintiffs' counsel, is the primary driver of litigation, subjecting the system to abuse. In the immortal words of Benjamin Franklin: "A countryman (or corporation) between two lawyers is like a fish between two cats."

To be sure, some reform is underway. However, the need for wider recognition and responsive action in the face of the growing momentum of such harmful practices is compelling. Lawsuit abuse is bad for businesses, employees, stockholders, consumers, and the nation's ability to compete in the world marketplace. Taxpayers bear the costs of clogged courts and justice suffers. "Due process of law" has become "overdue process of law." What are needed are effective protocols at the federal and state levels. The legal system requires certain evidentiary process and proof, and such requirements have to be enforced in order to maintain stringent standards barring frivolous lawsuits that compensate plaintiffs regardless of liability or actual degree of injury. The current liability system places excessive burdens on responsible defendants, including pharmaceutical companies, the healthcare delivery system, science and technology companies, manufacturers, professionals and others. Simply stated . . . better oversight by judges and legislation to assure adequate public interest safeguards are needed.[3]

I'd be remiss if I did not mention another unhealthy ailment afflicting our public interest — one that deserves an address in and of itself. In fact, former Solicitor General Ted Olson spoke on this subject as the luncheon speaker a year ago in Washington, D.C. at a day's symposium on the "Erosion of the Attorney-Client Privilege"[♦] held by the Atlantic Legal Foundation, which I have served as Chairman for the past eight years or so. The attorney-client privilege and work product doctrine have been under siege. These bulwarks of American jurisprudence need to be protected. Too often waivers forced upon defendants by the government, in civil as well as criminal proceedings, put information in the hands of the plaintiffs' bar, which then uses it to exact extortionate settlements. Entities are deemed to have waived their attorney-client work product privilege vis-à-vis third parties when they produce documents in the course of agency investigations.[4] Fortunately, some courts have recognized this erosion and have ruled that such privileges are not waived when documents are given to the SEC, for example, in the course of its fraud investigations. According to yesterday's Compliance Week report, the U.S. sentencing commission is considering relaxing the rule that makes waiving the privilege a factor in determining whether a business under investigation is "cooperative" and deserves leniency.[5]

Defining the Problem - Ailments Afflicting the Public Interest

The American tort liability system is the most expensive in the world, with total costs more than double the average of other industrialized nations. A recent study conducted by Tillinghast-Towers Perrin found that the U.S. tort system cost $260 billion in 2004, which translates to $900 per U.S. Citizen.[6] This is almost a $30 billion jump from 2003,[7] and the study projects that costs will rise to $315 billion by 2007, outpacing the expansion of the overall economy. According to a 2004 Business Roundtable survey, 24% of CEOs cited litigation costs as their company's greatest cost pressure.[8] Major socially responsible companies have been forced into bankruptcy or are at risk. Class action plaintiffs receive less than 50 cents on every dollar actually awarded to them. The rest goes to cover administrative costs and attorneys fees, causing analysts at the prestigious RAND Institute in Santa Monica to conclude that class actions are frequently irrational and fail to accomplish the stated goals of such litigation.[9] Class action abuses threaten our economic health and hurt consumers and businesses.

Another issue of concern is excessive damage awards in individual cases. In the recent infamous Vioxx case (August 2005), the jury awarded the individual plaintiff $253.4 million, finding pharmaceutical company Merck & Co. negligent in the marketing and design of Vioxx and therefore liable for the death of plaintiff's husband who took Vioxx. $229 million was the amount of punitive damages with $24 million for mental anguish and loss of companionship. Because Texas law places caps on punitive damages to twice the amount of economic damages, the damage award is likely to be cut to less than $30 million, but still a staggering sum. This decision caused Merck's stock to fall 7.7%, erasing $5.2 billion in market value. One cannot help but wonder whether this is just another battle between sound science and the plaintiffs' bar. Merck plans to appeal the decision, claiming its legal strategy will remain "based in sound science."[10] Merck believes that unqualified expert testimony was allowed in its case-i.e., expert testimony not grounded in science. Many such prevailing but unfounded suits against pharmaceutical companies undermine public health and drive up insurance premiums and other business costs.

As an aside, the Atlantic Legal Foundation has been the progenitor changing American jurisprudence by combating junk science in the courts. Indeed, the trilogy of cases decided by the United States Supreme Court beginning with the famous *Daubert* case[11] followed by the *Joiner*[12] and *Kumho Tire*[13] cases are all predicated on briefs submitted by the Atlantic Legal Foundation on behalf of a cadre of Nobel laureates who serve in a stable of amici for the Foundation. As a result, sound science is now fostered in federal and many state courtrooms across the United States. In most courts, plaintiffs can no longer retain so-called experts to testify on any given specious theory that might support the gravamen of their cases. Expert scientific or technological testimony must be peer reviewed and based upon an accepted methodology, viz. sound science, pursuant to a *Daubert* hearing before such testimony is allowed through the gate and into the courtroom.

So what lies ahead for Merck? Estimates of Merck's liability after the initial Vioxx decision range from $4 billion to $55 billion. With nearly 10,000 state and federal Vioxx-related lawsuits pending across the country, it has set aside a huge reserve to fight off these lawsuits.[14] If Merck loses these cases, experts predict it will open the floodgates for more lawsuits and could force drug companies to settle or risk bankruptcy; and with it the carnage of lost jobs, lost tax revenues, investor losses, diminution of competition, and the handicapping of these American businesses with higher costs of doing business, higher insurance premiums and consequentially higher prices for goods and services. Is this really in the public interest? The Natchez Democrat Editorial Board has

[♦]A valuable CD of the proceedings is available at modest cost from the Atlantic Legal Foundation located at 60 East 42nd Street, Suite 2102, New York, New York 10165, *also available at* www.atlanticlegal.org.

recognized Mississippi's tort reform results, especially from the caps placed on medical malpractice damage awards. The state's insurance companies announced a 5% decrease in rates for the upcoming year along with a 10% refund on premiums from the current year.[15]

Much emphasis should be placed on public policy concerns in such cases. To be sure, the media reports bolster the public policy principle that it is irresponsible for companies to make profits by endangering lives. This public point of view should be balanced, however, with the fact that this type of litigation against pharmaceutical companies and other R&D companies can not only do irreparable damage to the defendant, or even put them out of business, but may inhibit other companies from the research and development of painkillers, other more crucial drugs, and life saving or serving products. Is this in the public interest?

Former staff counsel to the Senate Committee investigating the infamous Watergate break-in, Terry Lenzner, Chairman of Investigative Group International, undertook an in-depth investigation and study within the past few years in which he uncovered extensive collusion between short sellers and the plaintiffs' bar . . . a saprophytic relationship in which one fuels and nurtures the interest of the other. Short sellers may drive the price of a stock down creating an opportunity for the plaintiffs' bar to swoop in and sue for damages. Conversely, when a class action suit is filed, it often drives a company's stock price down, thereby profiting short sellers. This is a wrongful assault on America and its system of jurisprudence. Mr. Lenzner has testified before a Congressional committee on this abusive activity. We have seen, as evidenced by recent press reports, some serious attention given by our Department of Justice to questionable, if not nefarious, activities by one or more of the more notorious plaintiffs class actions firms. Even the specter of RICO has been raised.[16]

Another manifestation of such abuse is the harm suffered by corporations and their stockholders where there is a precipitous drop in stock prices. As reported in the *Wall Street Journal*, corporations paid $9.6 billion (up from $2.9 billion in 2004) to shareholders to settle securities class actions lawsuits last year.[17] This includes, perhaps well deserved in these cases, the $6.1 billion paid out by WorldCom Inc. but not the $7.1 billion announced last year and not yet paid in the Enron Corp. fraud scandal. Yet even without them, the remaining $3.5 billion in settlements was the highest ever. Overall, out of 124 class action settlements last year, nine were for over $100 million, the most in any year since the study began in 1997.[18] The median payout in 2005 was about $7.5 million and only two law firms dominated class action litigation-Lerach Coughlin Stoia Geller Rudman & Robbins, and Milberg Weiss Bershad & Schulman.

Pain Relievers & Cures . . . Remedies Available Now, and Prospective Remedies

Remedies Available Now

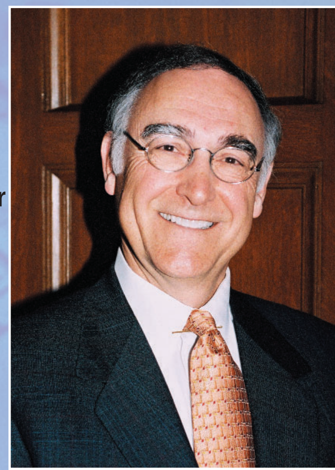
Efforts to limit lawsuit abuse are underway. While excessive damages awards are prevalent, changes to remedies laws are growing. Over 30 states have passed caps on damages. California, a state that has fostered state court class action claims, adopted the Medical Injury Compensation Reform Act of 1975 (MICRA). The Act places restrictions on medical negligence cases by limiting non-economic damages to $250,000, allowing evidence of collateral source payments, limiting attorney contingency fees, and giving the respondent the option to make periodic payments of future damages. Although insurance rates for practitioners in California have escalated 245% in the first 27 years since MICRA's passage in 1975, this compares favorably with the 750% mind-numbing increase in most other states throughout the nation.[19] After MICRA, patients kept a higher percentage of smaller judgments. In fact, MICRA's success at containing medical malpractice liability costs has caught the attention of President Bush, who has urged such legislation as a model for reform at the national level. Reformers have also pushed ahead on other fronts in California. In 2004, Proposition 64 "reformed" California's notorious "Unfair Competition Law,"[20] by eliminating a provision that allowed suits to be filed without a client and without establishing actual injury. Two appellate courts have already ruled that the proposition applies retroactively to all pending litigation.[21]

A landmark decision handed down by the Illinois Supreme Court in August of 2005 redefined its state law governing class actions and damage awards when it held that plaintiffs failed to prove that State Farm Mutual Insurance Company had breached its insurance policies or that plaintiffs were damaged by it.[22] The court reversed a $1 billion plus damage award, finding, among other things, that the expert testimony estimating damages was too speculative and had too great of a potential for inaccuracy, thereby failing to support a damages award, and in fact constituting "an arbitrary deprivation of property in violation of . . . due process rights."[23]

The Class Action Fairness Act was signed into law in March of 2005. In addition to placing restrictions on settlement terms, the Act pushes some new class action cases from state to federal court; federal courts effectively now have original jurisdiction over the most pervasive class actions. Congress enacted the Act to reduce abuses of the class action device that harms class members, adversely affects interstate commerce, and undermines public respect for the judicial system. Congress found that class members often receive little or no benefit from the class actions while the class lawyers are awarded large fees. And because state courts can act in ways that demonstrate bias against out-of-state defendants, plaintiffs' use of state courts to prosecute class actions has harmed defendants. By moving most large, interstate class actions into federal courts, it prevents trial lawyers from forum shopping among state courts notoriously friendly to the plaintiffs' bar.

The changes made by the Act may be as to procedure and remedies, not substance, but in many circumstances, the practical protection for companies in federal courts, vis-a-vis more permissive state courts, can be quite significant. State courts often are more inclined to force settlements by allowing discovery

HAYWARD DAN FISK



is Vice President, General Counsel and Secretary of Computer Sciences Corporation. Over the course of his legal career, he has served on many business and professional boards and received honors for his services to the legal profession. He currently serves on the international Board of the Association of Corporate Counsel, the Civil Justice Reform Committee of The Business Roundtable and the editorial Board of The Computer & Internet Lawyer. He is a long-term member of the Legal Advisory Council of the National Legal Center for the Public Interest, and is Chairman of the Atlantic Legal Foundation in New York City. He has written and spoken extensively in legal journals and before professional groups on various subjects of law and management. Mr. Fisk has a BS degree in Business Administration-Finance and a Juris Doctor of Laws degree from the University of Kansas, and a Master of Laws degree in Corporate Law from the University of Missouri at Kansas City.

"The American public interest, as reflected in its system of jurisprudence, which distinguishes us from all other countries in the world, is ailing and in need of civil justice reform in our courts before we suffocate under the weight of counterproductive, unwarranted litigation that benefits a few litigators at the expense of us all."

DEBORAH P. KOEFFLER

is a partner, former CEO and chair of Mitchell Silberberg & Knupp LLP's Labor and Employment Department where she has practiced 30 years. Ms. Koeffler represents management in union avoidance, collective bargaining, arbitrations and NLRB proceedings, and in employment law counseling and defense ranging from wage/hour, discrimination, harassment, leaves, and retaliation matters to conducting compliance audits, sensitive investigations and planning acquisitions, force reductions, executive issues, and leaves. Ms. Koeffler has been recognized as a top Los Angeles woman attorney by *Los Angeles Business Journal* and a *Southern California Super Lawyer* (Top 50 Women Attorneys) and writes and speaks nationally to attorneys, judges, and executives.

> "Employment class action litigation has burgeoned....[since] many employers continue not to understand or comply with technicalities of certain complex laws — such as wage and hour — which provide generous financial rewards for private enforcement... [It] will continue escalating until employers eliminate the incentives by mastering and complying with the technicalities."

demands which are so burdensome that corporate defendants willingly open their check books to avoid the burden. Corporate documents subject to discovery, particularly emails, because of advances in technology, are growing exponentially every year. Plaintiffs' attorneys know this and know how to take advantage of it. It is generally recognized by class action practitioners that federal judges are more likely to limit burdensome discovery initially to the class certification issue, less likely to certify a class and more likely to grant summary judgment for defendants, and that even plaintiffs who prevail will often obtain a smaller recovery than they would in a plaintiff-friendly state court. Trial lawyers are now expected to file more state-centered claims; especially in California where no procedure exists for appealing class certification before trial — a right that exists in federal court and many other states. Unable to appeal that determination to a higher court, businesses are pressured to settle. This usually begets modern day extortion aided and abetted by our sick system, now administering some relief, but the public interest patient is far from cured.

The public interest is also served by discouraging lawsuits against pharmaceutical companies where the real cause of any affliction is attributable to misuse of the drug by doctors or patients. Michigan passed a law in 1996 making drug suits difficult by shielding drugmakers from liability if the drug was approved by the FDA prior to being placed on the market. Similar "shield laws" exist in Utah, New Jersey, Oregon, Colorado, and Arizona. Plaintiffs can win damages only if they prove a company withheld or misrepresented information about a drug or product that would cause the regulator to withhold or otherwise withdraw its approval. Such laws limiting liability fairly restrain the cost of doing business in industries that spend millions of dollars on research and go through rigorous screening. Do such constructs not serve the broad public interest? Such laws deserve serious consideration if not emulation. Regulators, of course, need to be careful and diligent to assure that standards are set at levels that fairly serve the broad public interest.

Another systematic ailment begging for relief is state alignment with the plaintiffs' bar. State attorneys general, under the banner of "consumer-protection," have brought numerous claims against corporations with the help of plaintiffs' lawyers. In such cases, national lawmaking is accomplished through interstate collaboration between networks of state governors, legislators, attorneys general, trial attorneys, and regulators.[24] This is bad precedent because even if the cases brought against companies appear weak as a matter of law, they may still win in the court of public opinion. Several states including Colorado, Texas, and Virginia, have passed laws prohibiting state attorneys general from hiring outside counsel to litigate on the state's behalf under contingency fee contracts, a systemic ailment begging for relief.

Prospective Remedies - Frivolous Lawsuits

Years ago during the administration of George Bush Sr., I served with then Vice President Quayle, Attorney General Barr, and Ted Olson, our recent former Solicitor General, on a special committee for Civil Justice Reform. With a mission to foster the broad public interest, we had developed a modification of the English rule through which under appropriate circumstances, plaintiffs would risk responsibility for defendant's legal fees for having burdened the defendant with a frivolous filing. This effort unfortunately died on the vine with the installment of the Clinton Administration, which had a commonly recognized close affinity with the well-funded, highly proactive plaintiffs' bar. Today, this effort might be revived, with the passage of the Lawsuit Abuse Reduction Act of 2005 (LARA), H.R. 420, meant to "amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability."[25] The legislation is said to help further deter frivolous lawsuits by placing the cost of defending junk lawsuits on the lawyers who file them. It also aims to reduce forum shopping by limiting the filing of personal injury claims to venues where plaintiffs live or were injured, or the venue of the defendant's place of business.

Prospective Remedies - Medical Malpractice Reform

A malpractice liability reform bill, S. 354, is presently under consideration in the U.S. Senate. A companion bill, H.R.5, passed in the House. The bill is intended to "improve patient access to health care services and provide improved medical care by reducing the excessive burden the liability system places on the health care delivery system."[26] This legislation would regulate lawsuits for health care liability claims by, among other things, setting a 3-year statute of limitations, limiting non-economic damages to $250,000, adopting the comparative negligence liability theory, limiting contingency fee arrangements, and limiting the amount and circumstances under which punitive damages can be awarded. Another similar bill has been introduced in the House, H.R. 3359, which is meant to "limit frivolous medical malpractice lawsuits, to reform the medical malpractice insurance business in order to reduce the cost of medical malpractice insurance, to enhance patient access to medical care, and for other purposes."[27]

A Stanford University study reveals that California's liability reforms, if enacted across the nation, would save the health care system $50 billion a year in defensive medicine costs.[28] A correlation exists between states that have adopted caps on non-economic damages and lower insurance premiums and the critical recruitment and retention of medical practitioners. This demonstrates that some of the costs of the tort regime can be mitigated through reform.[29] An estimated $50 billion per year, as I said, is spent on unnecessary test procedures designed only to guard doctors and hospitals against malpractice claims.[30] A recent report in the Quarterly Journal of Economics estimates that limiting unreasonable jury awards could cut healthcare costs by 5-9%, which would save $70-126 billion in healthcare costs per year. Saving this money would lower the cost of healthcare coverage and permit an additional 2.4 - 4.3 million Americans to obtain medical insurance.[31]

Asbestos exposure claims have also surged since 1995. A series of multimillion dollar damage awards to asbestos plaintiffs caused major companies to seek reorganization in bankruptcy court in 2000 and 2001. The media has focused intently over the past several months on Senator Arlen Specter's asbestos reform legislation. We've all seen the TV advertisements pandering for plaintiffs. Currently, there is no economic disincentive for these "mass filer" law firms to continue screening exposed workers and unloading thousands of unimpaired claims in the court system. A recent editorial in the *Detroit News* is illuminating:

> The idea that anyone could sue a company because of possible exposure to injury — not an actual injury — is absurd. Yet it happens every day in America with the filing of bogus asbestos claims brought by unscrupulous lawyers looking to make a quick buck on the backs of the auto industry and other manufacturers.
>
> What's worse, it appears that many of the diagnoses for asbestos-related diseases are bogus themselves. That's the finding of a Mississippi judge who dismissed more than 4,000 claims because the secondary doctors who read X-rays to support initial findings of cancer and other breathing problems rubber-stamped most of the cases without properly reviewing them.
>
> Clearly the fraud and abuse of the system call for a change which Congress can achieve with the passage of the $140 billion asbestos relief fund . . . .[33]

Similarly, a federal judge in Texas accused doctors and lawyers of legal and medical fraud, ruling that thousands of silicosis claims had been manufactured for money.[34] This ruling will have an impact on hundreds of thousands of asbestos and silica claims across the country. The Justice Department has commenced a criminal investigation and the Senate Commerce Committee has initiated a civil investigation of the plaintiffs' bar following reports of fabricated evidence and fraud. Asbestos lawsuits have already driven 77 American companies into bankruptcy. Yet, many victims are still waiting for compensation, while the payouts to people who have not shown any symptoms of being sick are notorious. Nearly 60% of the $70 billion paid in settlements has gone to lawyers' fees and administrative costs.[35] Republican Senator Specter and Democratic Senator Leahy in promoting the reform legislation have said that if it is not approved, "the 'elephant mass' of asbestos litigation will just continue to grow to the enrichment of a few who have already profited well."[36] I agree with the good senators and the Business Roundtable that without passage of this legislation, the system will continue to jeopardize American businesses and fail asbestos victims who are most in need of relief, while enriching the plaintiffs' bar.

Asbestos and silicosis scams may be unraveling, but the trial bar simply moves on to other targets, such as lead paint, the soup du jour. In February 2006, a state court jury in Providence, Rhode Island found three companies liable for creating a "public nuisance" by selling lead paint many decades ago. The jury apparently heard no evidence about an injured party, nor were they informed of a specific house or building that constituted the nuisance. The mere presence of lead paint was itself deemed a danger to public health, whether or not it was safely contained. Moreover, in finding liability, it was not necessary to prove that the companies in fact ever sold or manufactured paint in Rhode Island. The Motley Rice law firm put forth the legal reasoning and marketed its lead paint strategy to the state government, which agreed to pay the trial lawyers 16 2/3% of whatever settlement is reached. Indeed, as the *Wall Street Journal* exclaims:

> The bizarre tort theory in Rhode Island is terrible news for the paint business and the thousands of people it employs, and it has potential ramifications for other industries that make lawful products that years later turn out to have health or safety problems. It also demonstrates once again that *'liability' in America has become completely untethered to either legal precedent or basic fairness.*[37]

Congress should ensure that the system provides fairness to both victims and defendant companies, reduces transaction costs, preserves resources for the truly ill victims, and provides defendants with financial predictability. California has over 2,000 asbestos cases still pending in the northern part of the state. The San Francisco courts are said to be attracting forum-shopping litigators by "rapidly processing multiple cases without sufficient inquiry into the merits of each. . . ."[38] Legislatures in Georgia, Florida, Ohio and Texas have recently enacted reforms to restore some fairness and alleviate unwarranted congestion in state courts.[39]

Securities class action settlement payouts may be nearing their peak, according to a study conducted at Cornerstone Research.[40] Many of the cases being settled today were filed after the stock-market downturn in 2000. It takes an average of 2-4 years for class action cases to be resolved; such lawsuits against U.S. companies fell 17% in 2005. The amount of investor losses also declined. Therefore, settlements in the next few years may be much smaller, at least in the aggregate. Although, the pending $7.1B Enron settlement, the $2.4B settlement of the Nortel earnings-manipulation scandal and the $1.6B AIG settlement imposed on AIG for accounting improprieties alleged by the SEC and New York officials, beg the question.

Prognosis & Opportunity

The policies underlying tort litigation have been subverted, as meritless class actions weaken the deterrent effect of legitimate claims. We need to limit the tort system to redress bonafide wrongs by those who fairly bear responsibility. Spiraling caseloads and the high costs of litigation impose a burdensome tax on free enterprise and the public in America that handicap American businesses in the global marketplace, adversely impact the creation and duration of higher technology jobs in America, harm investors and generally disserve the broad public interest. While many policy leaders in America are unduly influenced by the well-heeled, well-funded, politically proactive plaintiffs' bar, others have come to realize that the ailments inflicted by these systematic abuses, nourished and perpetuated by the trial bar, require real remedies in the public interest. In the immortal words of Abraham Lincoln: "What kills a skunk is the publicity it gives itself." Progress has been made. More is needed. Real progress needs more than endless discussion or Congressional debate. Reforms need to be enacted - procedural, remedial, and substantive rules of law, with teeth . . . wisdom

teeth. Responsible reform will help the U.S. remain a leader in the global economy.

Although our nation still has far to go, early results are promising. One route to reform is to revisit our substantive rules of law and make more stringent the elements needed to be proved for successful claims. A major tort reform proposal signed into law in the last decade is the 1998 Securities Litigation Uniform Standards Act, which limits securities class actions to cases where there is an allegation of misrepresentation or omission "in connection with the purchase or sale of a security." On March 21, 2006, the U.S. Supreme Court held that this law applies only to the actual purchase or sale of a security, and customers who simply hold onto their shares allegedly as a result of a fraudulent misrepresentation cannot sue.[41]

Especially helpful is the U.S. Supreme Court's decision in the securities fraud class action against Dura Pharmaceuticals Inc., decided on April 19, 2005. The Court held that an inflated stock purchase price cannot by itself constitute or proximately cause the relevant economic loss needed to allege and prove "loss causation."[42] Plaintiffs now have the burden of proving that defendants' allegedly false and misleading statements were the proximate cause of the plaintiffs' economic losses by showing that the subsequent price decline is attributable to fraud rather than extraneous factors. If the market price later declines, factors other than the alleged fraud (such as general market conditions, different developments in the issuer's business or recent news about other companies in the industry) might have caused the decline. The decision will likely reduce case loads and damage awards, and sends a clear message to trial courts that proving loss causation is the plaintiff's burden. The Court recognized that allowing a plaintiff to forgo giving any indication (in the complaint) of the economic loss and proximate cause, would bring about the very sort of harm the securities statutes seek to avoid…, namely the abusive practice of filing lawsuits with only a faint hope that discovery might lead to some plausible cause of action. Securities laws were not intended to provide investors with broad insurance against market losses, but rather to protect them against those economic losses that misrepresentations actually cause. This decision definitely treats one symptom of our nation's infection and is the right step toward curing it.

Another approach is to place remedies limitations on claims. Most of the remedies limitation proposals have focused on the following topics: 1) Limits on the recovery of non economic damages; 2) abolition of the collateral source rule; 3) limits on punitive damages; 4) recovery of defense attorney's fees from plaintiffs; 5) abolition of joint and several liability; 6) periodic payments of judgments; and 7) limits on plaintiff's attorney contingent fee rates (percentages).

For example, in the area of damage awards, where states do not have caps on certain types of damages, they can take away the power of juries to award unwarranted damages, or in the alternative, require showing of actual malice, intentional wrongdoing or gross negligence for large damage awards. Governor Schwarzenegger, in his efforts to give California a fresh start by sweeping away lawsuit abuse, attempted to reform punitive damages in the state by proposing that as much as 75% of all punitive damage awards go to the state, rather than to claimants or their attorneys-the theory being that punitive damages should deter egregious conduct rather than compensate injury.[43] With all due respect to the Governor's good intentions, this would be bad policy because it would align the State's economic interests with the plaintiffs' bar and exacerbate the abuse. A better proposal is for punitive damages to be awarded with limitations only once for every "single act or omission," which prevents multiple juries from punishing the same conduct more than once. A higher standard of proof (beyond reasonable doubt) for punitive damages should also be considered.

Another suggestion for halting lawsuit abuse would be for each state to eliminate the doctrine of 'joint and several liability' which holds the defendant with the deepest pockets liable for the entire amount of the award, as it is unfair and encourages frivolous lawsuits. In fact, the Florida State House Committee approved a measure in January of 2006 to eliminate the doctrine of joint and several liability, and the Florida Senate Judiciary Committee passed a joint and several liability reform bill last week. To confront the issue of forum shopping, states can limit the jurisdiction of local courts to business activities occurring in their own states and give manufacturers who face multi-state litigants the right to choose to be tried in the state where the manufacturer is located.

Eighteenth century British lawyer, writer, statesman and philosopher Edmund Burke was surely correct when he noted in Parliament just before the American Revolution that Americans are a "litigious lot." Indeed, it seems to be ingrained in our culture. There is nothing wrong with litigating genuine disputes in an effective and orderly legal system - one that protects parties through fair dispute resolution in a forum not predisposed to favoring well-heeled plaintiffs' lawyers bent on exacting or extorting settlements from corporate defendants with, or without, the capacity to deal with unduly burdensome discovery demands . . . electronic and otherwise.

Margaret Chase Smith once said: "One of the basic causes for all of the trouble in the world today is that people talk too much and think too little." Well . . . I know I've talked too much, but I hope I've stimulated you to at least think a little. And even though thinking may be unfamiliar territory for some who may therefore get lost in thought, I know that such is not the case for this sophisticated audience. The time has come for action. The American public interest, as reflected in its system of jurisprudence, which distinguishes us from all other countries in the world, is ailing and in need of civil justice reform in our courts before we suffocate under the weight of counterproductive, unwarranted litigation that benefits a few litigators at the expense of us all. I close with a quote from the late Edward R. Murrow: "All I can hope to teach my son is to tell the truth and fear no man . . . The only thing that counts is the right to know, to speak, to think-that, and the sanctity of the courts. Otherwise it's not America." Thank you for your kind attention.

MS. KOEFFLER: I will talk about civil justice reform in high risk employment litigation from a different perspective: Prevention. Employment class action litigation has burgeoned. By rough count, about 15% of all the class action cases reported by BNA's Class Action Reporter over the last two years were employment cases. Why so high a percentage?

A key reason is that many employers continue not to understand or comply with technicalities of certain complex laws — such as wage and hour — which provide generous financial rewards for private enforcement. Numbers of class actions and the variety of technical violations they assert will continue escalating until employers eliminate the incentives by mastering and complying with the technicalities.

Although this is obvious, current litigation trends suggest that even large and sophisticated businesses have not given employment law compliance issues a high priority, which perhaps this discussion will influence by making two key points: (1) noncomplying employers are being increasingly targeted for multi-party litigation which is very expensive to defend and yields damages and costs grossly disproportionate to the original violation, and (2) fortunately, those adverse consequences are relatively easy to prevent.

What factors contribute to the mounting risks of non-compliance?

One is that class-type litigation is fostered by statutes — at least in California — designed to encourage private, representative enforcement actions. One such statute is California's Business and Professions Code Section 17200, which treats an employer's unlawful practices as "unfair competition" which can be prosecuted by an affected party in a representative action, provided class action requirements are satisfied. Section 17200 is a joy to plaintiffs because it: (a) provides a four-year statute of limitations, which can revive statutory claims governed by three year limitations periods; (b) imposes liability even though an employer thought its conduct was lawful; and (c) provides for injunctive relief and "restitution" which can approximate damages, such as requiring the payment of overtime to employees misclassified as exempt.

The companion to Section 17200 is the California Private Attorney General Act (PAGA) (Labor Code Sections 2698, 2699), which deputizes aggrieved employees to enforce much of the Labor Code on behalf of themselves and former and present employees, by giving them bounties of 25 percent of all collected penalties, plus attorney fees and costs. Where the Labor Code does not specify a penalty, PAGA creates a penalty of $100 per employee, per pay period, for the first violation, increased to $200 for subsequent violations, in addition to other remedies that are provided by state and federal law.

PAGA was amended in 2004 in minor ways to reduce the most frivolous claims and provide for notice to the employer and government of certain claims and, in some situations, a very short time to cure. But the teeth remain in PAGA. Representative actions may still be brought for violations of the Labor Code's requirements on wage/hour, hiring inquiries, occupational health & safety, drug/alcohol rehabilitation, layoffs, and much more.

While both Section 17200 and PAGA cases must comply with class action requirements, that should not give much solace to employers. The California Supreme Court created formidable hurdles to defeating a trial court's certification of a class in *Sav-On Drug Inc. vs. Superior Court,* 34 Cal. 4th (2004). In summary, the Supreme Court held that except for an abuse of discretion, class certification by a trial court will be deferred to despite the detailed factual differences between class members on

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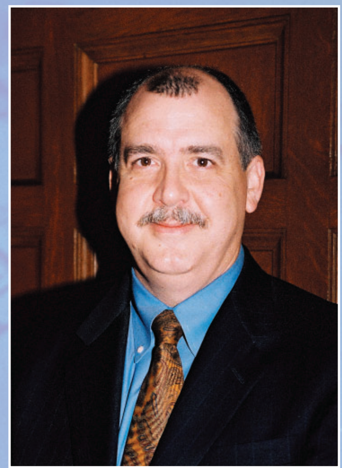

is a partner in the Austin law firm of Baker Botts L.L.P. Kevin Sadler focuses on civil litigation, representing major energy and technology firms in the defense of tort, contract, and statutory claims, including class actions. Mr. Sadler also represents clients in labor and employment matters (including discrimination claims, noncompetition agreements, and trade secret disputes), and helps clients respond to investigations by state and federal agencies with jurisdiction over civil matters. Mr. Sadler is the author of numerous speeches and articles relating to employment discrimination and workplace investigations.

"The last big revisions to the patent statutes were almost fifty years ago. Maybe it's time for some changes. Why are we going to let a patent troll shut down a Blackberry or E-Bay just because he has a patent that some [trial] judge — who [isn''t an expert in] patent law — construed and that some [lay] jury decided was infringed?"

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partner at DLA Piper Rudnick Gray Cary. is a commercial litigator focusing on complex business disputes, entertainment, telecommunications and information technology, environmental/toxic tort, financial services, franchise and distribution, insurance coverage, labor and employment, product liability, real estate, and intellectual property (trademark, copyright, trade dress, and trade secret infringement), as well as unfair competition and related business torts. He has been involved extensively in major multi-party complex litigation and has negotiated settlements of numerous matters without litigation.

> "[W]hile contractual arbitration is still alive and well in California, the plaintiffs' bar is out there trying to develop new and creative ways to get around arbitration provisions....So how do we preserve our arbitration provisions in arms length sophisticated contracts?"

determinative matters (such as duties and responsibilities in an exempt status case).

Financial considerations are a second motivation to treat employment law compliance as a priority. Making wrong judgments in the wage/hour area, not complying with nuanced obligations created by the California Labor Code, or enforcing other impermissible practices that affect large numbers of employees can be very costly. Most protective employment legislation provides for awards of attorneys fees, costs and interest. But, additionally, many of these claims spawn related statutory violations, which are being very effectively trawled for by plaintiffs' counsel.

For example, if employees are misclassified as "exempt from overtime," they can receive, in addition to unpaid overtime for up to four years, penalties for other forms of non-compliance arising out of the same misclassification, including failure to create time-keeping records, failure to record and thus prove meal periods were taken, failure to create and maintain itemized wage statements, plus interest, attorney fees and costs.

Now plaintiffs' counsel "triage" cases to find the litigation gems, of which *Cortez v. Purolator Air Filtration Products*, 23 Cal. 4th 163 (2000) is illustrative. While the plaintiff's claim of wrongful termination was weak, counsel's discovery of an incorrectly established 4/10 workweek fueled an overtime class action for hours worked in excess of eight per day. Similarly, plaintiffs are evaluating and suing in the class actions for all the repercussions of misclassifying employees as exempt. Class claims filed at the end of 2005 against IBM — billed as the largest class action ever brought — contend that the unpaid wages arising out of alleged misclassification as exempt also caused underpayment of contributions to 401(k) and the IBM personal pension plans in violation of ERISA.

A third motivation is the likelihood of being targeted is increasing from a snow-ball effect of well-publicized multi-million dollar recoveries against employers in many states. In 2001, a jury in *Bell v. Farmers Insurance Exchange*, awarded $90 million, which grew to a $200 million settlement after an unsuccessful appeal. Reports of that case and many more are a common staple of the first page of the business section of the *LA Times*, keeping attention focused on the nuances of wage/hour law and the bounties violations can yield. A wave of litigation targeting the administrative exemption has hit numerous industries, and many companies within each. Similarly, ongoing waves of litigation throughout the USA are challenging the "executive" exemption for retail managers, "inside salesman exemption" in the financial industry, and "computer professional exemption" in the electronic gaming and software companies, to name a few.

Wal-Mart cases are providing national education on what it means to "take lunch", one of the heavily litigated wage/hour issues in many states. Currently, Wal-Mart is defending class actions in 30 states for alleged meal break violations. A California jury in a Section 17200 case, *Savaglio v. Wal-Mart*, on December 22, 2005 gave Wal-Mart employees a holiday gift of $57 million of compensatory damages for missed meals and $115 million of punitive damages, for a grand total of $172 million. The missed meals claims were brought under the California Labor Code which requires an hour of pay for each meal missed, each day, for each employee. An open issue in California, that may bear on this verdict, is whether the required hour of pay for each missed meal is "wages" or a "penalty", with implications for both the applicable statute of limitations and the availability of punitive damages. But, even without the punitive damages, the remaining $57 million verdict is an object lesson in the importance of complying with meal requirements under applicable states' laws.

Also contributing to the snowball effect is collaboration by segments of the plaintiffs' counsel in information sharing through their bar groups, — the National Employment Lawyers Association, Workplacefairness.org, Lawyers Committee for Civil Rights, to name a few — and in bringing coordinated class actions across the U.S. against targeted companies, which Wal-Mart is currently experiencing. Several plaintiffs' employment law firms are cooperating in this campaign against employers, particularly in the wage/hour area, just as product liability attorneys waged coordinated efforts in tobacco, breast implant cases and tire cases.

As a fourth reason to focus on employment law compliance, Unions also have been bringing claims of violations of wage/hour and other protective legislation as an organizing tool in the garment, janitorial and health care industries. This tactic creates adverse publicity against the targeted employer, portrays the union as the employees' avenger, credits the union if any recoveries for the employees ultimately occur, and applies continual pressure on the employer to submit to the efforts to organize its employees.

To further foster the self-interests of unions, plaintiffs' counsel, and employees in bringing multi-party employment litigation and unionizing, all three groups contribute to the many industry and employer-based web sites and chat rooms which now exist, where they provide wage/hour education, teach employees how to create evidence of violations and to seek the representation of unions and attorneys, with appropriate links.

What are high impact employment issues that can be avoided?

Wage and hour: As this discussion has highlighted, wage/hour cases are probably the most pervasive form of employment class litigation today, and can yield material recoveries arising from the wide-spread application in the workforce of unlawful practices. The "devil is in the detail" of these laws, which are counter-intuitive, over 70 years old in many cases and archaic. Many wage/hour provisions do not fit contemporary jobs or lives well and even sophisticated employers often do not know or understand the intricacies. Frequently an entire industry has evolved wage/hour approaches to fit its unique circumstances that are consistent, but also wrong.

Companies which employ people in several states run substantial risks by applying uniform wage and hour practices. Illustrative are just some of the differences between California and the Fair Labor Standards Act, the federal law which several states apply, concerning: criteria for exempt status; overtime for daily and consecutively worked days; recordkeeping requirements; meal and rest periods; calculation of the hourly rate of a salaried non-exempt employee, and; alternate work week arrangements. In all of these examples, California imposes more onerous obligations than federal law.

California Labor Code Compliance: Since the PAGA encourages employees to bring representative actions, California employers must know the nuances. A simple mistake can be expensive and, once again, uniformity of practice across states can produce unexpected consequences. A simple example is using an employment application which asks about convictions of any crime, without limiting the inquiry on marijuana convictions to the last two years, as is required by California. The penalty is $100 per pay period, per "aggrieved employee" who prepared the application.

Outsourcing/Joint Employers: Businesses may believe that they bear no responsibility for employment law compliance on behalf of employees whose services are being provided to them by an out-sourcer. However, that is not the case when the customer becomes a joint employer of the service provider's employees. Alleged joint employment is the basis for a pending seven-state wage/hour class action, *Zavala vs. Wal-Mart*, brought on behalf of undocumented workers of janitorial companies who were assigned to clean Wal-Mart stores. Among the claims is that Wal-Mart is accountable as a joint employer for denied meal periods and overtime pay of employees of the janitorial companies.

Independent contractors: Misclassifications as an independent contractor can lead to wide-ranging violations of many employment obligations, ranging from wage/hour, health and safety, workers compensation, discrimination, and leave laws, to name a few.

Temporary employees: Microsoft settled a class action a few years ago for $96 million which claimed that "temporary" workers had evolved into regular employees entitled to coverage under the terms of Microsoft's own benefit plans. A similar action was brought in *Glaser vs. Seattle* for denying benefits to public employees whose "temporary" status had lasted years. Employers who disqualify temporary workers from valuable perquisites while employing them for long periods are vulnerable to these types of claims. Areas of concern are personnel policies or practices that affect many, such as the system for setting wages, reductions in force, selection practices in hiring, transfers and promotions, leaves of absence policies, and practices that may intrude on privacy (like substance testing, medical examinations, and searches of property and computer records).

The "Top 10" Preventative Actions

First, audit policies and practices for high risk issues. This means digging into details. What is being done may be different than the stated policy. Cover each of the high risk areas already discussed. It may not be fun, it can take some time, but it beats the alternatives.

As a corollary, due diligence for transactions involving the acquisition of a work force should also audit the details of state and federal employment law compliance.

Second, evaluate when policies and practices should be tailored to unique state law requirements. The dramatic differences highlighted earlier between California and federal wage/hour law also apply to many other employment regulations, exemplified by special California requirements for: pregnancy leaves in addition to FMLA leaves; more protected categories (sexual orientation, gender identity, age over 40, cancer in remission); broader definition of "disability" (federal, to be a disability, the condition must "substantially" limit "major" life activity vs. California, where it merely needs to "limit" a "life activity"); different WARN provisions on the number of employees to trigger coverage and WARN notices, and; specific training obligations to prevent sexual harassment.

Third, convince others in decision-making positions of the importance of coming into compliance. In the wage and hour area, considerable resistance is confronted in many businesses in reclassifying from exempt to non-exempt status. The reasons range from both supervisory and employee morale issues associated with the switch to "hourly" and "going on the clock", to concerns about how to implement changes without provoking litigation, to the costs. Resistance also arises when competitors are not coming into the same compliance.

Fourth, coordinate roles, expertise, and "need to know" between line management, human resources, and legal department. Many cases arise because of lack of coordination.

Fifth, evaluate policies for clarity and ability to apply them. Some employers create policies approaching the CFR for length and complexity. Managers will not be able to follow them, and juries will hold you to them.

Sixth, train people who implement policies or practices. Many wage/hour and other high impact cases arise due to misapplication of expectations at the management or supervisory level.

Seven through ten: Audit, audit, comply, comply.

Much of today's employment litigation can be prevented. Just take control. Thank you.

MR. SADLER: I have been tasked with talking to you about technology law and, in

particular, I want to share some thoughts with you about patent law. Now, I am not a patent lawyer. I'm a trial lawyer, and because of the increased use of patents as business weapons, I've become involved in a number of patent cases on both the plaintiff's and the defendant's side in the last several years.

I think of a patent as a fence with a "keep out" sign. The origin of patents is in our constitution. Our founding fathers thought so highly of invention and innovation that they included it in the founding documents of this country. But some folks say there are problems with this system. Too many things are getting patented. You can patent anything and then sue anybody for it, and the law provides very powerful weapons to patent holders.

You can get an injunction; and that probably drove Blackberry to fork over in excess of $600 million because they were worried about being slapped with an injunction that would shut down its business. Businesses may accumulate patents as defensive portfolios even if they have no interest in practicing the invention or building anything. That's probably something the founding fathers didn't contemplate. Today the U.S. Supreme Court will hear argument in the E-Bay case, which addresses whether a patent holder, who has won a jury trial on infringement, can get a forward-looking injunction that would require the defendant, E-Bay, to shut down part of the features that they offer on their system.

So what do we have? Do we have a broken system, a system ripe with lawsuit abuse and so-called patent trolls, or do we have a pretty good system that merely needs some tinkering and better enforcement? Well, let's look as some more issues.

There is a parallel system for enforcing patents, and the recent RIM/Blackberry case pointed this out. You can have a situation where a patent holder prevails in an infringement case at trial and on appeal, and then the patent office later determines that the patent, or certain claims in the patent, never should have been allowed in the first place.

Now there is case law that permits the trial judge to stay litigation pending the outcome of the patent office action, but that's discretionary, and it takes a long time for things to wind through district court. In the meantime, you have uncertainty weighing on the business; is it going to go forward, are the Blackberry's going to be unplugged, what's going to happen? It's an odd parallel system, and defense lawyers are increasingly using these reexamination actions to challenge the very existence of the patent — not in the civil court patent case, but at the patent office. A problem however, using Blackberry as an example, is that the company to which Blackberry paid $600 million gets to keep the money even if it is later determined that the patent was invalid or some of the patent claims should not have been allowed. That's a neat deal for the patent holder, not so neat if you are Blackberry.

Another problem is that patent cases are litigated in federal court before a judge who is a generalist. Not in a special court before a judge who has a Ph.D. in engineering from MIT. Let me tell you, as someone who's not a patent lawyer, these things can get mind-numbingly technical. And then we present the facts, not to a panel of distinguished scientists, but to the same jury that we would pick for a slip and fall case. That's the system we have set up. Is it a good system or is it a system that is ripe for confusion and abuse?

We sometimes forget that there are rules in place to deal with abusive litigation. Federal Rule 11 provides that anybody who brings a lawsuit without a reasonable basis in law or fact can be sanctioned. 28 U.S.C. 1927 provides for sanctions for vexatious litigation. Do we use that? Maybe that's a solution to some of these abusive patent cases.

In connection with this odd system where we present very technical cases to lay judges and lay juries, we have an appeals system set up which is somewhat specialized. Patent cases are appealed to a special circuit court made up of appellate judges who have some expertise in patent law. It's a pretty decent system but there are currently efforts to tinker with it. One senator has proposed as part of the reforms to the immigration system to assign immigration appeals to the federal circuit. So, however crazy you think our system is of too many patents and too much litigation and patent trolls, it can be made worse.

I've mentioned this concept of patent trolls. Trolls are individuals or small companies — small as in an inventor and a lawyer — who hold a patent but don't build anything using the patent. Then they go around and sue people for infringement or they send demands for licensing revenues. Some companies don't want to fight it, so they pay to get a license. That was the situation in the Blackberry case. Most of the big companies — Microsoft, Cisco — surprisingly have come out against patent trolls. But remember this concept of a patent isn't something Congress just invented; it's in our Constitution. And the Supreme Court decided about a hundred years ago that if you want to build a fence around the table and put up the keep out sign and you otherwise pass all the requirements of the statute, you don't have to do anything. You can keep that table blank, you don't have to build anything, you don't have to use your invention, but you have the right to keep out other people. That's the essence of the property right of a patent. Now we read editorials attacking this concept of allowing people to secure a patent without requiring them to use it. But altering that would be a very, very fundamental change in the concept of patent law.

The last big revisions to the patent statutes were almost fifty years ago. Maybe it's time for some changes. Why are we going to let a patent troll shut down Blackberry or E-Bay just because he has a patent that some judge — who doesn't know anything about patent law — construed and that some jury decided was infringed?

What's the answer? Compulsory licensing in lieu of injunctions? I don't think the Supreme Court is going to strip patent holders of the right to an injunction. I think the court will note that the patent statute says the trial court "may" grant an injunction, and that "may" means it might, it might not. But stripping the right of injunction may not be such a brilliant idea unless you replace it with something like compulsory future licensing. You can't get your injunction, we'll only give you royalties. That would be a fundamental change, if that's what we want to do.

These are important questions and I ask you to think about them because you're all involved in businesses that in one shape or form are touched by the system. You hold patents, you're worried about your competitors who hold patents, you have products under license. It's a system that does make a difference to business. I hope we can think about whether we need to change the system fundamentally, just tinker with it, or simply enforce the rules and laws we currently have on the books. What we do may very well fundamentally affect the way you do business.

MR. ROSENFELD: My name is Jeff Rosenfeld and I'm a partner at DLA Piper Rudnick here in Los Angeles. I'm here to tell you that while contractual arbitration is still alive and well in California, the plaintiffs' bar is out there trying to develop new and creative ways to get around arbitration provisions.

One of those ways is the relatively recent application of the doctrine of unconscionability to arms length sophisticated contracts. Unconscionability applies to adhesion contracts. Those are contracts that contain standardized language which is typically imposed on a "take it or leave it" basis. The mere fact that such a contract is offered to a party who has less bargaining power than the party preparing the contract is not enough to find a contract unconscionable. In order to avoid enforcement of an arbitration provision on the basis of unconscionability, it must be shown that there was both procedural unconscionability and substantive unconscionability. Procedural unconscionability refers to the manner in which the contract is negotiated. It usually involves oppression or surprise. In essence, it is the absence of a meaningful choice. The element of surprise exists when you find terms that are hidden in an overly complex form. Substantive unconscionability exists when you find one-sided contract terms. The focus is whether there is a mutuality of obligation, and the standard typically is whether the terms of the contract "shock the conscience."

So how do we preserve our arbitration provisions in arms length sophisticated contracts? First, always try to give the other side an opportunity to comment on the draft of your agreements. It is also important to document the negotiation as much as possible, not only in the contract itself, but in external documents as well.

I would avoid the use of pre-printed forms. Courts hate pre-printed forms. Courts may use this as one factor in refusing to enforce an arbitration provision.

Choice of law provisions can be helpful, but they are not the ultimate answer. This is a public policy issue. Attempting to contract around California policy probably is not going to be very effective.

As I mentioned earlier, mutuality. The terms should apply to both parties, not just one. Courts will look carefully at this issue when it comes to the substantive aspects of unconscionability.

Trying to bar certain remedies or trying to bar discovery will weigh against you as the party attempting to enforce the arbitration provision. Be careful of "looser pays" provisions. They are not per se unlawful but combined with some of these other factors, they could prove problematic

Make sure to include severance provisions.

Provide for a stay or an exception for claims which might not be subject to arbitration. Also, use broad but clear language that governs the scope of claims subject to arbitration.

Finally, watch out for pre-litigation waivers generally. Many of you probably have contract forms that include a jury waiver. Not only are they unenforceable, they are a factor the courts will consider in determining the one-sidedness of the contract. There is some authority that suggests that including an unlawful provision in a contract might in and of itself give rise to a California Business and Professions Code Section 17200 claim. If these provisions are in your contracts, it would be a good idea to remove them.

MR. HATCH: I'm going to speak about a recent, very troubling development relating to the False Claims Act and what that development might mean for corporate counsel, especially counsel to companies that do business with the government or that receive government funds, either directly or indirectly — which, I suspect, is most of you. The False Claims Act, or the FCA, is one of the government's most effective and powerful tools in combating fraud. It prohibits the knowing presentation of false or fraudulent claims for payment to the government, and allows private individuals, who are known as relators, or whistle blowers, to bring actions on behalf of, and in the name of, the government. If a company is liable under the FCA, the damages can be quite substantial. Under the Act, anyone who knowingly submits a false claim to the government is liable for three times the actual damages, plus a $10,000 penalty or forfeiture for every false claim submitted. As you can imagine, these penalties or forfeitures can add up fast when each invoice or receipt of government funds is treated as a separate claim.

Relators are encouraged to and rewarded for bringing these actions. If there is a recovery, whether or not the DOJ intervenes and takes over prosecution of the action, and whether or not the recovery is in the nature of a judgment or a settlement, the relator is entitled to as much as 30 percent of the recovery as a bounty. Additionally, relators may be entitled to recover their attorneys' fees.

The consequences of these actions can be very significant for a company. Not only might the company have to pay substantial forfeitures and treble damages, but it could be excluded from doing business with the government or from participating

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a partner in the Los Angeles office of Gibson, Dunn & Crutcher, joined the firm in July 1987. Mr. Hatch has assisted numerous clients in the defense aerospace, health care and education industries in responding to the full array of issues raised by government fraud investigations and in litigating the type of disputes that often arise in connection with fraud allegations and investigations. Mr. Hatch received his undergraduate degree in 1977 and his law degree in 1980 from the University of Wisconsin. Following law school, Mr. Hatch served in the Army General Counsel's Office in the Pentagon, where he concentrated on national security matters. During that time, he received a Master of Arts in government with a certificate in national securities studies from Georgetown University.

"Regardless of how extensive and effective your compliance [and HR] program is, there are always going to be instances of non-compliance ...[and] there will always be disgruntled employees, who are a breeding ground for lawyers seeking to recruit relators to bring *qui tam* actions."

in the program pursuant to which government funds are made available. In many cases, especially with regard to smaller companies, this is equivalent to the corporate death penalty.

Obviously, this gives relators and the government great leverage to extract — or if I can use the word extort — lucrative settlements from companies defending FCA actions. Thus, it's not surprising that courts have traditionally limited the scope of the FCA. Specifically, over the past decade or so, courts have fairly consistently made clear that routine breaches of contract, routine statutory or regulatory violations and mistakes, are not actionable under the False Claims Act. Courts have used various bases to reach this common sense result — some have introduced a materiality element; some have required that the contractual or regulatory provision at issue be a prerequisite to or condition of payment by the government; and others have focused more on the intent element and required that the alleged bad acts by the defendant rise to the level of a lie or deceit.

Increasingly, however, relators and the Department of Justice have been seeking to bring within the scope of the FCA what many consider to be garden variety contract breaches and regulatory violations. In making these arguments, relators and DOJ have relied primarily on two theories.

First, they argue that every time a company submits a claim to the government, or accepts government funding, it is certifying, either expressly or implicitly, that it is in compliance with all of the underlying requirements relating to that contract or government program. They claim that if a company is not in full compliance, then it submitted a false claim, and all the money it receives from the government is therefore subject to FCA liability.

Second, some relators and DOJ lawyers have attempted to advance a promissory fraud theory of FCA liability. Under this theory, they argue that the company should be liable for fraud if it entered into an agreement with the government knowing that it was not going to comply with one or more provisions of that agreement, regardless of how far removed that particular provision might be from the ultimate government's funding or payment decision.

Until recently, most courts have tended to reject these arguments, properly recognizing that the FCA was intended to root out fraud, and these cases don't involve fraud. Very good authority relating to these issues exists in the 1st, 2nd, 4th, 5th, 7th, 9th and DC Circuits.

But in a recent case, *United States ex rel Main v. Oakland City University*, the Seventh Circuit arguably placed much of the sound jurisprudence in jeopardy. In that case, Oakland City University, in order to accept its students' federal financial aid checks, had to be eligible to participate in Title IV programs, such as Pell grants, guaranteed student loans and other related programs. In order to become eligible, it had to enter into a boilerplate agreement called a Program Participation Agreement or PPA under which the university agreed to comply with many hundreds of rules and regulations regarding Title IV programs and other statutes. Importantly, the university did not receive any federal funding simply by completing that form. However, the school's completion of the form made it eligible to participate in Title IV programs and thereafter receive federal funds.

In this case, the relator did not claim that the university overcharged the government or that there was anything false in its claims. Instead, the relator alleged that the university should be held liable because when it signed the underlying agreement it never intended to comply with one of the requirements set forth in the boilerplate agreement. Reversing the District Court's dismissal of the complaint, the Seventh Circuit, in an opinion written by Judge Easterbrook, held that the relator had stated a cause of action under the FCA. Relying primarily on a promissory fraud theory, Judge

Easterbrook found that a company could be held liable under the FCA if it entered an agreement or sought to become eligible to participate in a government program but did not intend to comply with at least one of the conditions of participation, regardless of how far removed the condition was from the ultimate funding decision.

Perhaps the most troubling aspect of this decision is the clear road map the court provided to relators on how to withstand a motion to dismiss. According to the Seventh Circuit, all a relator has to do to withstand a motion to dismiss — and gain tremendous leverage against a defendant — is allege a contractual breach or regulatory violation, and that the defendant did not intend to comply with the provision at issue at the time it entered the contract or became eligible to participate in the government program.

Unfortunately, there is no reason to believe that *Main's* holding will be limited to the education context. In my opinion, all companies that do business with the government or participate in government funding programs should be very concerned about this decision.

Finally, this case is also troubling because it undermines the authority of government agencies to handle and resolve contractual regulatory and statutory issues on a case by case basis. In *Main*, for instance, the Deputy Secretary of the Department of Education had established as a matter of department policy that a violation of the provision at issue did not cause monetary damage to the government and should not result in a school being rendered ineligible to participate in Title IV programs. The Seventh Circuit effectively strips the agency of its power to enforce its own regulations and allows self-interested relators to substitute their judgment for that of the agency responsible for the federal programs.

At this point, it's too early to tell whether other courts will accept the reasoning in *Main* or how far they will extend its holding. Nevertheless, companies should prepare for more aggressive conduct by relators and the Department of Justice under the FCA.

MR. FRIEDMAN: You've identified a potentially troubling situation. What can or should companies do to attempt to avoid or mitigate their potential FCA exposure if, in fact, other courts follow the lead of the 7th Circuit?

MR. HATCH: There is no easy or obvious answer to your question.

Regardless of how extensive and effective your compliance program is, there are always going to be instances of non-compliance and regardless of how effective your HR department is, there will always be disgruntled employees or former employees, who are a breeding ground for lawyers seeking to recruit relators to bring *qui tam* actions.

Thus, to some extent, if you do business with the government or are a recipient of government funds, defending these type of lawsuits will, unfortunately, continue to be a cost of doing business.

I do, however, have a couple of thoughts:

1. Continue and enhance your company's compliance efforts. Not only will an effective compliance program help reduce the number of FCA claims brought, and help in the defense of those actions that are brought, but an ineffective compliance program can be used by DOJ or relators to support their FCA claim against you. In fact, DOJ recently intervened in an FCA action against a managed care company and one of the key allegations supporting its claim that the company submitted false claims for payment is that the company's compliance program was not adequate or effective. This case is pending in the Eastern District of Pennsylvania and the DOJ's complaint withstood a motion to dismiss. Obviously, this is a frightening proposition — that the mere submission of an invoice to the government or the receipt of funds from the government, during a period in which your compliance program is alleged by DOJ to be ineffective, is a sufficient basis for potential FCA liability.

2. Most administrative settlements with federal agencies, in connection with contract disputes or regulatory violations, typically contain carve outs for FCA liability. If *Main* takes hold in other jurisdictions, it may be prudent to re-visit this issue and to try to insist that FCA liability be included in the administrative settlement or that other language be included to help defend against a potential FCA action. While DOJ may resist this, some of the agencies that administer the contracts or programs may be more receptive and even help put pressure on DOJ as they do not want relators or, for that matter, DOJ mucking around in how they administer and enforce their contracts and programs. I wish I could be of more help.

MR. FRIEDMAN: I think an important question here, in general, is what type of changes should be on the agenda for the business community, whether it's legislative, judicial, or regulatory. Another consideration is what the key organizations in each field are doing.

Does anybody have a question?

AUDIENCE MEMBER: Dan, what states, in your opinion, have the worst climates for business litigation?

MR. FISK: The U.S. Chamber of Commerce just conducted a poll through the Harris Group and found that the five worst states for the business community, listed in order are: West Virginia, Louisiana, Illinois, California, and Texas.

MR. FRIEDMAN: Which groups are most active in, say California, and on a national level?

MR. FISK: Let's start with national. I would give very high marks to the Business Round Table — I'm a little prejudiced there because I serve on their steering committee for civil justice reform. Additionally, the U.S. Chamber of Commerce is doing a superb job. They put out a weekly bulletin for subscribers on what's going on across the nation, in terms of improving the business climate from a

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"American business has been overwhelmed in recent years with so many rules and regulations...and people are not prioritizing what's important. So the problem is, even for those who want to regulate business a lot, you have to pick and choose what's important, because it's just getting impossible to do all these good things."

jurisprudence perspective.

The Association of Corporate Counsel has been quite proactive. In particular, they picked up the ball on the erosion of the attorney-client privilege and have made a difference there. I think the symposium that the Atlantic Legal Foundation kicked off a year ago spawned a lot of interest and served as a catalyst. Bill Ide, a current member of the Board of Directors of the Atlantic Legal Foundation and a former president of the American Bar Association, and former general counsel of Monsanto, headed up a steering committee task force for the American Bar Association to promote the protection of the privilege, which the ABA made its highest priority last year.

MR. SADLER: When we talk about frivolous lawsuits, or lawsuit abuse, I'm reminded that we have rules that provide for sanctions if you bring a lawsuit that doesn't have any reasonable basis in law in fact. Why are those rules not enough to solve the problem? Is it that they're essentially discretionary on the part of the litigants? Should courts be required to conduct an inquiry at the end of every case to determine whether there was reasonable basis to bring the case, and if it finds that there wasn't one, impose attorneys' fees?

MR. FISK: I think it's partly because of the collegiality of the profession. Judges are a bit hesitant to put the hammer down on counsel, like they should, where it's clearly a frivolous case; although, there have been some that have shown real courage in doing so, like Judge Janice Jacks in Texas and the judge in Mississippi that I mentioned earlier. That's encouraging. Let's hope we see more of that.

On the other hand, we are seeing a number of state court judges who clearly are too cozy with the plaintiffs' bar. I have heard stories of them having breakfast together in chambers on an ex parte basis. Those types of things fly in the face of American jurisprudence, in terms of the traditional bulwark of fairness and reliability that makes our country unique.

MS. KOEFFLER: Speaking anecdotally, judges' sanction practices under Federal law, Rule 11, and California's CCP Sections 128.5, 128.6 and 128.7 vary widely as do the benefits arising from sanctions. As Dan mentioned, judges may be resistant to awarding sanctions for a variety of reasons. In our state courts, one concern might be that developing a reputation as a heavy sanctioner can prejudice attorneys whose input is sought when a judge seeks to be elevated to the appeals court, reelected or hired to be a mediator or private judge after retirement from the bench. Judges might also believe that sanctions generate more ill-will and can contribute to escalation of misconduct. Additionally, the amount of the money awarded is unrelated to the expense associated with attorney misconduct.

In the context of certain types of litigation, such as class or representative cases discussed earlier, the financial motivation to bring these cases ensures increased filings. Turning plaintiffs' lawyers into law enforcers in part because of under funding of state agencies is contributing to the wide-spread employment litigation, at least in California. The intention of the California Private Attorney General Act was to motivate compliance with the law,; but even after the 2004 amendments, it also

remains a means of leveraging settlements to avoid the disproportionate attorney fees that these cases yield to plaintiffs' counsel for relatively small individual recoveries for employees. I think this type of litigation motivation must be eliminated from the law and the state should assume its own responsibilities for law enforcement.

MR. ROSENFELD: I agree with all that's being said here. I think there are a multitude of reasons why state court judges don't use the tools that exist at their disposal now. But I think this costly litigation against Corporate America needs to be stopped at the legislative level. The recent reformation to 17200, for instance, which is everybody's favorite statute in California, just isn't enough. Quite frankly, it's not even a Band-Aid. Requiring an injury in fact in order to bring a 17200 claim is nothing. Plaintiffs' lawyers will find people who will fit the bill. The problem is taking the incentive away from plaintiffs' lawyers. If the legislature was to reduce the amount of attorneys' fees and not grant discretion to the courts to increase fees, it would reduce the profit motive for the plaintiffs' lawyers and consequently might reduce the number of lawsuits, or at least make them more manageable and less costly. But that's a big bite politically in California, and I think it's going to be very difficult to do. The plaintiffs' bar is very strong.

MS. KOEFFLER: An interesting question is what value and cost to the state has occurred by exchanging inexpensive administrative enforcement for private litigation. Maybe the business community should commission bona fide research into the financial and compliance consequences of the PAGA, such as comparing the costs and consequences of state-funded administrative enforcement vs. enforcement through private litigation and the impact of each enforcement approach on the willingness of businesses to locate to and remain in California.

MR. FISK: The Rand Institute in Santa Monica is perfect for that kind of a study. They have an Institute for Civil Justice there, and it's non-partisan. They have the best and brightest doing research there. That's the type of thing that probably ought to be underwritten by the corporate community and others to serve the public interest.

MR. HATCH: Dan, obviously the state legislatures can be very helpful in civil justice reform. But there does seem to be an inherent tension based on the state's reliance on plaintiffs' attorneys in representing states in any number of actions, whether it be tobacco or lead paint cases. Moreover, as I understand it, under PSLRA, plaintiffs now are often going to be governmental entities at the state or local level because they are going to be the largest shareholder based on their pension fund. Do you think that there is going to be a tension and a conflict between potentially reform-minded legislators and state officials who have an interest in perpetuating the system and trying to maximize recoveries?

MR. FISK: Absolutely. I think it's a subterfuge through which states are able to tax the corporate community indirectly where they can't tax them directly.

MR. HATCH: In response to Kevin's suggestion about a mandatory Rule 11 review, I understand that is part of the PSLRA, and that it's supposed to happen in all securities class actions. But I've been told by my partners who practice in that area that that rarely happens. So I'm not sure if procedural fixes like that really are going to be effective. I fear that as long as sanction provisions such as Rule 11, or the PSLRA, or even the False Claims Act, continue to have such a high standard, you're not going to see very much progress in that area. And I think the focus really has to be on the standard that would generate some type of sanction or attorney fee provision.

MR. SADLER: On the subject of conflict or tension, using Texas as an example, the vast majority of the legislators are lawyers. So it's going to be tough to get an anti-lawyer bill through where the vast majority of the legislators are lawyers. That's one problem.

Another problem — and this is not true of all states, but it's certainly true in Texas — is that the attorney general is an elected position. And as we all know, it can be a popular position for an elected official to bash corporate America. So that's an additional problem where you have a state attorney general who is able to use as a political platform high stakes litigation against corporate America.

MR. FRIEDMAN: Besides academics, who can educate the public as to the costs or other consequences of these problems with the civil justice system?

MR. FISK: The business community needs to do much more. There is a common misconception that the business community is out there spending a lot of money to influence public thinking in these areas when, in fact, it is not. The truth is, the plaintiffs' bar is far better financed, better organized, and more proactive. Corporations today, in the very competitive global marketplace we find ourselves in, are focused on controlling budgets, not spending money. Unfortunately, I think there is too much short-term and not enough long-term thinking in that regard.

A couple of years ago there was an initiative for California to reduce contingency fees to 25 percent across the board. The plaintiffs' bar flipped out. How many people in the public do you think knew about that?

MS. KOEFFLER: : Plaintiff's "stories" have frequently been the subject of popular movies like *Norma Rae*, *Erin Brokovich, A Civil Action*, and *The Client*. Think of the movies about toxic torts, insurance companies who don't pay for medical treatment, and sexual harassment. Each of those movies have had real stories to tell.

But business also often has an important story to tell, that would place issues in the much more complex environment in which they actually arise. What about the displacement of employees that has been occurring as major industries that were the economic back bone of Los Angeles' economy have left under the burden of regulations and cost-of-living? Part of that story are the roles regulation and litigation have in compromising the attractiveness of LA as a place to move and retain business. Business would benefit from having its own documentary film makers — its "Roger Moore" — to tell its stories, although surely with more balance and as much human interest.

MR. FRIEDMAN: Because in Bangalor you can hire 12 people for the amount of money paid to one LA employee.

MS. KOEFFLER: Absolutely. In the computer industry, for example, businesses are not just relocating work to India, but are also "near-shoring" it to Canada, Mississippi, Missouri, and Wisconsin, to name a few.

Some bad, unintended consequences have arisen out of well-intentioned legislation, often which governs at the lowest common denominator, and leaves not only employers, but also their employees, without choices that would make all of their personal circumstances more satisfactory.

MR. FRIEDMAN: People have to remember that a hundred percent of every dollar that business takes in goes to the people sooner or later. It might be that we invest it for now, but it's going to eventually go to people, 98 percent of which are workers and about two percent are shareholders. The issue, basically, is that American business has been overwhelmed in recent years with so many rules and regulations. And what's happened is that people are not prioritizing what's important. So the problem is, even for those who want to regulate business a lot, you have to pick and choose what's important, because it's just getting impossible to do all these good things.

MR. FISK: A year ago last fall I was invited to debate the plaintiffs' bar at UCLA Law School and we got into Section 17200 and some of the issues we have addressed this morning. In the context of a latent defect in a U.S. manufactured vehicle, one student asked, "Shouldn't there be heavy punitive damages assessed against big companies like General Motors to change conduct?" Well, look at what's happened to General Motors and Ford. At one time GM was the largest company in the world. Today it is struggling to stay alive because of bogus cases, horrendous damages decisions and big pension benefits and other handicaps that have become too much of a burden. Ford is a similar story. So we need to look at the broader public interest and some of our policies and practices and the construct for American jurisprudence in the U.S.

MR. FRIEDMAN: Let me thank everyone here today, especially Dan and the panelists. I think that this has been a very valuable discussion for the business community. ■

[1] To provide a representative sample of the Fortune 1000 clients, Charles River Associates requested survey data from each of the Big 4 firms, using a sample of 96 randomly selected clients from a firm's Fortune 1000 clients. From those samples, each firm was requested to provide detailed information related to 24 of the 96 firms originally selected. *Sarbanes-Oxley Section 404 Costs* and *Implementation Issues: Survey Update*, CRA International, Dec. 8, 2005.

[2] Laura Sullivan, "CIOs Bemoan Sarbanes-Oxley's 'Big Impact, Little Benefit'," InformationWeek news (March 17, 2006), *at* http://www.informationweek.com/news/showArticle.jhtml?articleID=183700825.

[3] See Interview of William "Bill" Ide, "The National Legal Center Performs Another Public Service - Examining the Unintended Consequences of the Post-Scandal Reforms," Metropolitan Corporate Counsel Vol. 13, No. 7, at 34 (July 2005).

[4] *See, e.g.*, In re Qwest Communications International, Inc. Securities Litigation, D. Colo., Civil Case No. 01-cv-01451-REB-CBS (Consolidated), 2/2/06. In other circumstances in the past, the SEC has taken the position that when a company shares confidential and privileged information with its auditors, it waives any work product protection with respect to that information. A recent case in the Southern District of New York, *Merrill Lynch & Co., Inc. v. Allegheny Energy Inc.*, 2004 WL 2389822 (S.D.N.Y. Oct. 26, 2004) (No. 02 CIV. 7689 (HB)) does not support this notion. The court held that the production by Merrill Lynch of certain investigative reports to Deloitte & Touche did not result in a work product waiver... the reasoning being that when parties share a common interest, sharing work product should not result in a waiver. In this case, even though the auditor could, in some circumstances, be viewed as an adversary (because of its public function to independently ensure the accuracy of a company's financial reports), there was no tangible adversarial relationship.

[5] Compliance Week, "Sentencing Panel Rethinks Waiver Policy," March 28, 2006, *at* Complianceweek.com.

[6] Liam Pleven, "Math Divides Critics as Startling Toll of Torts is Added Up," Wall Street Journal, March 13, 2006.

[7] *U.S. Tort Costs: 2003 Update*, Tillinghast-Towers Perrin, December 2003.

[8] Business Roundtable Civil Justice Reform Coordinating Committee Meeting, Key Points on Legal Reform, June 4, 2004.

[9] *See, e.g.*, Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond 'It Just Ain't Worth It': Alternative Strategies for Damage Class Action Reform*, 64 Law & Contemp. Probs. 137 (2001) (funded by Rand Institute for Civil Justice).

[10] *See* Del Jones, "Vioxx verdict of $253M likely to prompt more suits," USA Today, Aug. 20, 2005.

[11] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

[12] General Electric Co. v. Joiner, 522 U.S. 136 (1997).

[13] Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

[14] Jones, *supra* note 10; Heather Won Tesoriero, "Court Upholds Vioxx Class Action," Wall Street Journal, A3 (April 1, 2006).

[15] Editorial, "Mississippi Tort Reform Finally Taking Effect," Natchez Democrat Editorial Board, Feb. 27, 2006.

[16] Two partners at Milberg Weiss Bershad Schulman LLP under investigation for alleged illegal payments to plaintiffs in securities lawsuits, and there are talks of a RICO case against the firm itself. *See* Josh Gerstein, "U.S. Readies Case Against Milberg-Weiss," New York Sun, Feb. 27, 2006.

[17] Paul Davies, "Class Action Pay Settlements Soar," The Wall Street Journal, Feb. 7, 2006.

[18] *Id.*

[19] *Cleaning House: Governor Swarzenegger looks to give California a fresh start by sweeping away lawsuit abuse*, A Report on the Lawsuit Industry in California, 2005 by Trial Lawyers Inc. California, *available at* http://www.triallawyersinc.com/ca/print08.html.

[20] Cal. Business and Professions Code Sec. 17200 *et seq.*

[21] *See* Branick v. Downey Savings & Loan Assoc., 24 Cal. Rptr. 3d 406 (Cal. App. 2005); Benson v. Kwikset Corp., 24 Cal. Rptr. 3d 683 (Cal. App. 2005).

[22] Avery v. State Farm Mut. Auto Ins. Co., Ill. Sup. Ct. No. 91494 (Aug. 18, 2005).

[23] *Id.*

[24] Phil Carlton & Jocelyn Dyer, *The Newest New Federalism: The 50 States vs. Business*, State Capital Global Law Firm Group - Special Report to Business, *available at* http://www.statecapitallaw.org/publications/newfederalism.htm.

[25] This is the official title of the bill, otherwise known as the Lawsuit Abuse Reduction Act of 2005. The last action taken on this bill was on October 31, 2005, when it was received in the Senate and referred to the Committee on the Judiciary.

[26] This is the official title of the bill, otherwise known as the HEALTH Act of 2005. The last action taken on this bill was on February 17, 2005, when introductory remarks were made on the measure.

[27] This is the official title of the bill, otherwise known as the Medical Malpractice and Insurance Reform Act of 2005. The last action taken on this bill was on July 29, 2005, when it was referred to the Subcommittee on Health, for a period to be subsequently determined by the Chairman.

[28] Medical Liability Monitor's annual rate survey. This survey is consistently cited by the U.S. General Accounting Office, Department of Health and Human Services, innumerable newspapers and trade journals and is regularly used to influence legislation in Congress and many state legislatures.

[29] H.R. Rep. No. 107-693, pt. 1, at 16 (2002) (quoting Dep't of Health & Human Servs., Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing Our Medical Liability System 12-13 (July 24, 2002)).

[30] Daniel Kessler & Mark McClellan, "Do Doctors Practice Defensive Medicine?", Quarterly Journal of Economics 353, May 1996.

[31] Daniel Kessler & Mark McClellan, "Do Doctors Practice Defensive Medicine?", Quarterly Journal of Economics 353, May 1996, *cited in* Addressing the New Healthcare Crisis: Reforming the Medical Litigation System to Improve the Quality of Healthcare, U.S. Department of Health and Human Services, March 3, 2003 and Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs By Fixing Our Medical Liability System, July 24, 2002.

[32] Lisa Girion, "Firms Hit Hard as Asbestos Claims Rise," Los Angeles Times, Dec. 17, 2001.

[33] *Approve Asbestos Fund to Stop Lawsuit Abuse*, Editorial Opinion, Detroit News, Feb. 6, 2006.

[34] Wade Goodwyn, "Silicosis Ruling Could Revamp Legal Landscape," National Public Radio, March 8, 2006. Thousands of silicosis diagnoses that were manufactured for money were revealed before a congressional committee as medical experts and law professors tore apart the validity of national asbestos and silicosis litigation. The doctors refused to answer whether they would certify the accuracy of their diagnoses, claiming the Fifth Amendment. *See* Ann Knef, "West Virginia Doctors Take the 5th in Congressional Hearing over Asbestos and Silicosis Litigation," West Virginia Record, March 10, 2006; "Silicosis Claim-Up," Opinion, Wall Street Journal, March 13, 2006.

[35] Editorial, *The Senate Fails on Asbestos*, The Chicago Tribune, Feb. 17, 2006.

[36] *Id.*

[37] Opinion, "The Motley Legal Crew," The Wall Street Journal, at A14, Feb. 27, 2006 (emphasis added).

[38] Trial Lawyers Inc. Report, *supra* note 19.

[39] ABA Litigation News, January 2006 Vol.31, No.2 at p.6.

[40] *See* Davies, *supra* note 17.

[41] Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, No. 04-1371, 547 U.S. __ (2006), 2006 WL 694137. The appellate decision is available at 395 F. 3d 25 (2d Cir. 2005).

[42] Dura Pharm. v. Broudo, 544 U.S. 336 (2005).

[43] Trial Lawyers Inc. Report, *supra* note 19. The Manhattan Institute has examined 'Trial Lawyers, Inc.' since 2003, causing the $40 billion litigation industry to be called "a hulking Goliath, not the plucky David it fancies itself." Deroy Murdock, Commentary, "Trial Lawyers Make America Sick," Scripps Howard News Service, Feb. 28, 2006.

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