Session 603

Tort Reform II: The Next Generation

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Commentaries
on
Why Corporate Counsel are Critical to Legal Reform

John H. Sullivan
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Welcome to California, the nation's civil justice test tube. From the lathe that tossed a block of wood and brought strict liability to product law (*Greenman v. Yuba Power Products* (1963) 59 Cal2nd 57) to the taxi that encountered Mrs. Li's car on Alavardo Street and ended contributory negligence (*Li v. Yellow Cab* (1975) 13 Cal3d 804), California seems to have been long driven to shake up legal thinking.

In the same year the California Supreme Court decided *Li* the California Legislature passed the landmark damages and contingency fee limits of the Medical Injury Compensation Reform Act (MICRA). Significantly (especially in light of other states' top courts recent activity), the California Supreme Court in the early 1980s upheld the constitutionality of the Legislature's authority to enact such limitations.

A few years later California brought forth another landmark change when its voters on a statewide ballot approved Proposition 51, which was sponsored by business and local government and brought proportional liability to non-economic damage awards.

Ten years later the state saw another civil justice ballot battle when the high tech industry in California led a fund-raising effort that produced $40 million dollars to defeat Proposition 211, the securities litigation scheme promoted by plaintiffs' lawyer Bill Lerach.

In 1998 trial lawyers raised and contributed an astounding $10.3 million to candidates for statewide offices and the Legislature (Their candidates took the governor and attorney general races and hold the leadership positions in both houses of the Legislature).

This summer, almost as though determined not to let any other state take away its cutting edge, California produced a $4.9 billion jury verdict (*Anderson v. General Motors* (BC11626)) that dwarfs any prior non-class action personal injury award anywhere.

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Commentaries

1. **Experience and Expertise**
Within corporate legal units are smart lawyers with litigation and substantive law expertise. The late, respected California poverty lawyer Ralph Abascal once said he became an appellate and legislative activist because he became tired of rescuing babies one at a time as they floated downstream. He decided to climb up and challenge whomever was throwing them off the bridge. Civil Justice reform needs more lawyers with that approach. We need more ideas for incremental fixes in state laws. Ideas for procedure changes, ideas we can take in California to our Law Revision Commission and Judicial Council. Ideas that no one would label "tort reform," but would nevertheless make the legal system work better and fairer for defendants. Also, some of our best arguments against bad legislation have come from corporate counsel who have given our association the benefit of their direct experience on a particular issue.

2. **Loyalty**
Our association tracks campaign contributions. We trace the dollars given to statewide and legislative candidates and judges from lawyers, law firms, and their political action committees. We look at plaintiffs' lawyers, defense lawyers, and the lawyers who specialize in workers compensation cases. Often, defense lawyers contribute to the same candidates as do personal injury lawyers. At times we've found then on the same side as plaintiffs' lawyers on issues – united against your side. Many business law firms have a good record of supporting business' broad interests in the courts and state houses. Some defense attorneys have been marvelous in helping us oppose bad legislation and promote good. But the driving force in the legal reform battle has to come from loyal corporate counsel. Corporations should make legal reform part of the corporate counsel duty statement. Corporate counsel should lobby for this to happen.

3. **Learn from Firefighters**
Small fires are easier to put out than big ones. That's why firefighters rush superior forces to a fire. This year we waged a major legislative battle to stop a trial lawyer proposal to cripple the use of protective orders. This was not a new threat in this state or elsewhere. Yet it took months of work to generate the ten dozen opposition letters that were vital in stopping the bill last summer. I'd like to see corporate counsel develop a template of bad civil justice proposals in advance, and work with their company's government affairs people to make their firm capable of communicating opposition in any state within weeks of a bill's introduction instead of months. The benefits of weighing in before the other side develops momentum would be enormous.

4. **Critical Mass**
Organizations usually decide whether to engage in an activity by weighing the importance of the desired result against the resources needed to produce it. This makes sense in decisions such as whether to develop a new product or market in a new region. But when it comes to achieving a legal reform, the decision is more complicated. A single company cannot achieve the change on its own. A critical mass of advocates is

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essential. Corporate counsel are vital to working with government affairs people in setting corporate priorities and helping to create a critical mass.

5. **Tools Left Unused**

Here's an unfortunate example but one that occurs regularly: On a Friday morning a California superior court jury returns a verdict against a corporation. It was huge and it was wrong. Plaintiffs' attorneys immediately hold a news conference they had planned in advance and their front groups have supporting newspaper opinion page articles off their word processors and to the media within hours. On Friday afternoon reporters are tracking me down for comments on a case I've never heard of. Guess whose side got its story out and guess who is still playing catch up. It would seem easy for corporate counsel to work with public affairs on a routine basis on potential major cases to give supporting groups like ours background when a trial begins and to update us when the jury goes into deliberation. The current situation is an opportunity lost, a good tool left in the kit.

6. **Rule of Seven**

I have unscientifically established that an entity will work seven times harder to protect its revenue than to reduce an expense. That explains phenomenon like the current level of plaintiffs' lawyer political contributions and the current status of liability law. How many corporate counsel have presented management with a comprehensive evaluation of current liability costs that are occurring despite the company's doing its best to perform non-negligently? Insurance expenses, management and research time drain, negative publicity – these and more go into the equation. With this information management can determine where legal reform fits as a cost reduction priority (and where fighting trial lawyer-sponsored proposals is a priority to keep costs from increasing). Does it make better economic sense to continue acquiescing to "litigation taxes" or to dedicate some resources to reducing that tax or at least keeping it from getting worse? (See also "Critical Mass.")

7. **Fading Partisanship**

In California, plaintiff's lawyers made a decision years ago to heavily support Democrats and Democratic leadership. This paid off in their helping elect a majority in the Legislature which over the past two decades has heeded their requests. Republicans have taken the opposite side on most civil justices issues – in part reacting to the heavy trial lawyer financial support for their opponents. In California, term limits, appreciation of the benefits of a good business climate, and trial lawyer over-reaching are among the factors blurring this historic split. We in California would not have been able to stop plaintiffs' lawyers' recent proposals without the help of moderate Democrats. Plaintiffs' attorneys have set up a "Republican Trial Lawyer" sub-group, to elect their candidates in traditionally conservative districts. What this means for corporate counsel is that ideas matter! Good arguments matter. The central band of legislators whose vote will determine an issue want to know how a company will be effected and why. Good analysis and arguments will deliver this information. (See also "Experience and Expertise" and "Learn from Firefighters.")

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8. **Federal v. State**
Solutions to liability law and related civil procedure problems do not in any foreseeable future lie totally at the federal or state level. This is so because of the U.S. Constitution, political philosophy, court systems, and about a thousand traditions. For a corporation to decide it is going to focus its reform activity totally on the states or totally in Washington makes approximately the same sense as deciding to type only with one hand.

9. **Like It or Not, California Demands Extra Attention**
As the introduction to these comments implies, a lot of mischief or a lot of good can begin in California. With Courts of Appeal and a Supreme Court producing a large volume of decisions available for citing all over the country....with a trial lawyer industry raising more than $10 million in campaign contributions and helping many of their friends into office...California is all too capable of producing laws that will set unhealthy precedents for every state in the nation.

10. **One Phone Call....One Letter**
This may be a California-only situation, but I believe for a corporation to weigh in effectively -- pro or con -- on important civil justice legislation, its chair, president, or CEO must be involved. That means at least one top level phone call or one letter to the Governor. Our new governor reportedly breakfasted with his top trial lawyer contributors and their association's officers the morning after his election. I believe we are learning that Gray Davis does not think a California legislative issue is really important to a company if its top person is not telling him so.

11. **Consumers of Legal Services**
Balanced, comprehensive legal reform will come when the best legal minds address some vexing issues. To wit: How can procedures make sense when they are designed for developing information and framing issues for a decision event (a trial) that only occurs three per cent of the time (Acknowledgment to Roberta Katz who pointed this out at the ACCA annual meeting a year ago)? How does a process make sense that provides incredibly expensive legal help to a person whose car was hit by an insured driver who admits complete responsibility when an apartment renter cannot afford basic legal advice about changes her landlord wants to make in a revised rental contact? How can a system be justified that delivers billions to persons injured in an auto accident while the family next door cannot afford even the level of health coverage needed for flu shots?

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The Civil Justice Association of California is California's only organization solely dedicated to restoring fairness, balance, predictability and economy to the civil justice system. The Association is committed to reforming liability laws and rules that reduce competitiveness, stifle innovation, inflate prices of goods and services, clog the courts, increase taxpayer costs and cause higher insurance premiums.

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From its offices in Sacramento and with the support of a statewide membership, CJAC seeks needed reforms through legislative and judicial advocacy programs, media relations and public education efforts, substantive research, coordination of members and allies, and, when necessary, sponsorship and support of ballot initiatives.

The Association's members include individuals, small and large businesses, local government entities, health care providers, entrepreneurs, and other trade associations.

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HEALTH INSURANCE ASSOCIATION OF AMERICA

The Harry and Louise Story **HIAA**

Americans need to know how their lives will be affected by legislative proposals: that principle lies at the heart of HIAA's advocacy. To foster this understanding and to explain our industry's perspective, the Association entered a new phase in its advocacy campaign during the autumn of 1993.

This phase of the advocacy campaign intensified the advertising strategy to communicate the Association's position. To articulate the messages we looked to America's real decisionmakers, concerned citizens discussing the critical issues around the kitchen table. Harry and Louise. Ultimately, Harry and Louise gained the attention of the public, the press, legislators, and the White House.

Picture of Harry and Louise

Harry and Louise represented the millions of Americans who were thinking hard about the future of health care and what reform would bring. While committed to universal coverage, Harry and Louise did not like everything they heard coming out of Washington.

"The government may force us to pick from a few health care plans designed by government bureaucrats."

"They choose." "We lose." September 10-29, 1993
TV: CNN,CNN-HLN, D.C., Los Angeles, New York

Much of what appeared on TV came right out of the public opinion research and surveys. We showed the "book" on health care reform when many people didn't even know it existed.

"The government caps how much the country can spend on health care and says: 'that's it.'"

"There's gotta be a better way."

Americans got to know Harry and Louise. They found out that Louise and her partner Libby ran a small business and that they were concerned about the direction of health care reform.

"But what if there's not enough money?"

At Thanksgiving, Harry and Louise showed America that health care was a family matter, that reform would affect every generation.

"And we'll all stay healthy, if Congress does right by reform."
"Sounds like there is a better way."
Spots: "Yes, But," "Partners," "Thanksgiving"
October 10-November 30, 1993

TV: CNN, CNN-HLN, Rush Limbaugh, New York City, Los Angeles, Washington, D.C.

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Local TV: New York, Texas, Kansas, Oklahoma, Connecticut, Michigan, North Dakota, Pennsylvania, Georgia

Modern research allowed us to capture the interest of the country and the ear of the political leaders. Polls and focus groups helped us tailor our communications to many audiences and to refine the messages that appeared in our advertising. In turn, our advertising spots were tested for clarity and impact. Public relations efforts and lobbying reached out to new audiences and allowed our messages to penetrate deeper into the national consciousness. "Mandatory health alliance" became household words!

"I want congress to pass health care reform…but not force us to buy our insurance from these mandatory government health alliances."

"Congress can fix that…cover everyone and let us pick the plan we want."

"Another billion dollar bureaucracy."
"Not force" and "Bureaucrats" – January 13 – February 20, 1994

TV: CNN, CNN-HLN

Local TV: New York, Texas, Kansas, Oklahoma, Louisiana, North Dakota, Georgia, Virginia, North Carolina, South Carolina, Tennessee, Nevada, New Mexico, Mississippi

Viewers remembered HIAA's messages – and polls showed that people who did recall the messages were less likely to be supportive of ill-advised reform measures and were more aware of such elements as the national health board, global budgets, and mandatory health alliances. They understood that the wrong legislation could undermine the quality of care. Our success in reaching the viewers – directly or indirectly, through media coverage of our ads, spurred on the sincerest form of flattery – parody!

"Harry lost his job and also his insurance…"

Even the President and the First Lady tried to upstage Harry and Louise. Their parody was shown at the March 21st Gridiron dinner – and it had the grace to spoof not only Harry and Louise but the Clinton's own massive Health Security Act as well…

Bill and Hillary
Louise: "On page 12,743, no I've got that wrong. On page 27,655, it says eventually we're all going to die."

The next few months saw much activity on Capitol Hill as many versions of health reform emerged. But many of the proposals had flaws. Harry and Louise went back on the air, letting America in on their concerns.

"Rationing – the way I read it."

"Government-controlled health care. Congress can do better than that."

Our community rating spot showed healthy, vigorous Americans, Harry and his younger brother Pat:
"Everyone pays the same rate no matter their age, even if they smoke or whatever. Does it work?"

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"My health insurance went from twelve hundred to thirty two hundred dollars a year."
"Quality" and "Brother" - June 20 – July 24

Local TV: Montana, North Dakota, New York, Georgia, Tennessee, Oklahoma, California, New Mexico, Louisiana, Virginia, Washington, D.C.

The Democratic National Committee showed a bandaged Harry and Louise in bed – boosting our ratings again!

We think Harry and Louise made a real difference in how Americans think about health care reform and that they helped educate viewers about some very complex concepts. For example, we gave Louise a sister – Helen – who is a teacher. With Helen, we explained how average employees might lose benefits because of ill-advised reforms.

Helen: "Congress may put a benefits tax on any health plan they think is 'too good.'"
Louise: Didn't you settle for lower raised to get those benefits?"

"You know, forty percent of all plans could be taxed."

"Tell Congress, 'No Benefits Tax.'"
"Teacher" and "Quality" – July 22 – August 11

Local TV: District of Columbia, Georgia, Kentucky, Missouri, New York, Ohio, Pennsylvania, South Carolina, Texas, Virginia, Washington

By mid-August, when debate was at its height and new health reform plans – and countless amendments – were proposed in Congress, we brought Bill Gradison into the ads. Interacting with Harry and Louise, Bill explained Medicare Part C, benefits taxes, and health alliances – again – and also hammered home our core message.

Harry: "I don't get it. Congress isn't passing the health care reform America wants."

"Tell Congress, keep working to get health care reform that's right for everyone…private insurance but no government-run health care, no tax on benefits, and no government imposed spending limits."

And Louise and Libby also commented on the benefits tax:

"Congress may load on a bunch of new taxes for their health care plan…"

"Well, this isn't the reform we want!"
"Part C," "Tax," "Mandatory" – August 16, 17, 18; 23, 24, 25

TV: CNN (twice each night) and "New Taxes," August, CNN

Will Harry and Louise be back? It depends. We think Congress can get it right. Although the delay on comprehensive reform is regrettable, we know its part of the price we pay for sound legislation that relies on the public/private partnership. We'll work for that – and we'll continue to raise the issues that trouble not only our industry but millions of Americans as well.

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From September of last year through mid-August of 1994, HIAA has placed roughly 13.5 million dollars of television, radio, and print advertising. Only 11 percent of this money has been devoted inside the Washington, D.C. media market.

In terms of the "public policy process," if proponents of the President's plan could not build majority support faced with "soft" advertising that raised simple and fundamental questions, it suggests that we have materially made a contribution to the process by not allowing such a substantial piece of legislation pass without a full airing of its consequences.

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TORT REFORM II: THE NEXT GENERATION

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1. Subrogation and Remoteness
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A. **What is the Trigger?**

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American Corporate Counsel Association
Tort Reform II: The Next Generation
Victor E. Schwartz Outline (cont'd)

IV. PATH III: JUDICIAL NULLIFICATION OF LEGISLATION: The Major Threat to State Liability Reform

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B. **The Bad News – 90 Cases Overturned; The Latest in Ohio: *State ex rel. Ohio Trial Lawyers v. Sheward*, 1999 WL 617856 (Ohio Aug. 16, 1999)**

C. **Judicial Extremism Under Separation of Powers –Judges Who Believe That Only Courts Can Limit Liability and Damages**

V. SUPREMACY OF THE JUDICIAL BRANCH

A. **Regulation Through Litigation – The Dream of Robert Reich: "The Era of Big Government May Be Over, But The Era of Regulation Through Litigation Has Just Begun," *USA Today*, 2/11/99, p. 15A.**

B. **Taxation Through Litigation**

VI. CONCLUSION: HOW ACCA MEMBERS CAN HELP SOLVE THE PROBLEM

A. **Win the Public Mind**

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2. Private Attorney Retention Sunshine Act
3. Fairness in Litigation Act

E. **Support The Federal Fairness in Litigation Act, S. 1269**

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Achieving Civil Justice:
Ground Rules for Making Progress and Learning from Past Mistakes

Victor E. Schwartz[i]

Executive Summary

Past attempts to advance civil justice efforts have been plagued by many problems. First, the overall message was lost in "legalese" and average voters could not decipher why the issue mattered to them and their families. Second, there was discord within the business community over strategy and the lack of a common goal. Third, many industries believed that they were immune from the long arm of government and that they could not be a target because they were not an "unpopular defendant." This paper analyzes the history of tort reform efforts and gives a roadmap for the success of future reform. The American Legislative Exchange Council's "Disorder in the Court" project, a joint effort of ALEC's Civil Justice and Tax and Fiscal Policy Task Forces, serves a crucial role in achieving civil justice reform, by educating legislative members on the growing use of litigation to create public policy. The author explains why this project will have broader implications than any other civil justice reform effort.

ALEC's "Disorder in the Court Project"

The American Legislative Exchange Council's (ALEC) Civil Justice and Tax and Fiscal Policy Task Forces are spearheading a new ALEC effort to answer the growing use of litigation to create public policy. Whether judicial nullification of legislation, litigation challenging educational funding, the creation of new causes of action, or the spread of mass-injury litigation, there is an ominous trend of using litigation and the courts to by-pass legislatures, the elected representatives of the people. These efforts not only threaten the economic health of entire industries, but they also subvert our nation's cherished doctrine of separation of powers.

The goal of ALEC's "Disorder in the Court" project is to educate members on the threat these developments pose to their legislative authority. Through research papers, conference workshops, Issue Briefings in the states, and an ALEC Academy, the project will explore legislative solutions to this problem. ALEC has created an Ad-Hoc Disorder in the Court Committee, open to interested ALEC members, to address this increasingly important issue.

Part I. Where We've Been and Where We're Going

The American Legislative Exchange Council's "Disorder in the Court" project has broader public policy implications than any prior civil justice reform effort. This initiative, fostered also by the American Tort Reform Association and supported by groups as far ranging as the U.S. Chamber of Commerce and the National Association of Wholesaler-Distributors, goes to the very core of the role of judges in our society.

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Are judges to have their principal role in deciding cases and interpreting legislation and resolving specific disputes between parties? Or should judges go beyond those roles and act as regulators of industry and tax collectors who override the views of legislators who have declined to regulate and tax?

Former Secretary of Labor Robert Reich's view is clear: judges should take an active role as regulators. In an op-ed article published in *USA Today*, he stated, "The era of big government may be over, but the era of regulation through litigation has just begun." And as the Americans for Tax Reform's President Grover Norquist has observed, when judges regulate, they also tax. For example, if courts create new ways to impose liabilities on gun manufacturers, the price of their products will inevitably rise, and a new tort tax will have been imposed on future purchasers of these products.

Senator Larry Craig of Idaho has indicated that those who have opposed increasing taxes have been <u>too</u> successful. Those who want tax increases now want judges to become a revenue-raising arm of the government – or substitute taxmen.

This new era of potentially unchecked judicial power to regulate and tax comes in at least three forms. First, some judges are twisting or ignoring longstanding legal principles to allow actions against unpopular defendants, such as manufacturers of tobacco, guns, and lead paint. For example, some courts have created something called the "quasi-sovereign doctrine," through which they would grant states "super plaintiff" status. In effect, the "quasi-sovereign doctrine" eliminates industry's tort defenses, such as assumption of the risk or contributory negligence, and allows states to satisfy the tort element of causation by establishing a general statistical correlation between an activity and public health expenditures.

Second, some judges are writing opinions that create new ways to seek a monetary recovery in a court of law. Perhaps the best example is the approval by some courts of claims for medical monitoring of potential – but not yet apparent – injuries. While such claims may invoke sympathy, they trump a cardinal rule of our system of justice, that a claimant must be <u>injured</u> before a court allows a jury to give him or her a cash award.

Last year, the Supreme Court of Louisiana allowed claims for medical monitoring and overruled 240 years of prior law. The court's decision could have created potentially billions of dollars in new liability for business. However, ALEC members, and others in the Louisiana legislature, realized that the role of creating new law belongs to the legislature, not the courts. The Louisiana legislature overruled what the court had done and restored the longstanding principle that courts are only open to people who have suffered an actual injury.

The third way the courts have invoked their legislative power is by nullifying civil legislative justice reform efforts. Almost ninety judicial decisions have done so, often invoking state constitutional provisions, thus insulating their rulings from review by the United States Supreme Court. Some courts have gone so far as to say that that they are the "exclusive" branch of government that can determine what the law of damages should be in their state.

ALEC's "Disorder in the Court" project is intended to preserve, and in some cases to restore, the rightful role of the legislature in making public policy. Legislatures should control the level of taxes and should empower administrative agencies to regulate. They have the skills, the ability and the tools to do so. Both history and logic are on the side of state legislatures.

Part II. Making Progress by Avoiding Past Mistakes

This "Disorder in the Court" initiative, however well grounded in sound public policy, could falter if it does not learn from the experiences of the past. What can be done to help the "Disorder in the Court" project be successful?

I. Communicate with the Public, Not Just Lawyers

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Liability reform issues can get so complicated that the only ones who understand them are lawyers. Tort or civil justice reform public relations efforts sometimes succumb to "lawyer talk." In effect, you have lawyers talking to each other; lawyer lobbyists talking to politician lawyers; corporate lawyers talking to outside counsel; outside counsel talking to inside counsel; and so on. They use words such as "joint and several liability," which mean absolutely nothing to people who vote.

Similarly, debates about the "separation of powers" principle mean a lot more to lawyers than they do to laypersons.

If "Disorder in the Court" is to be successful, blue and pink collar, tax-burdened citizens must understand that it is to their benefit to have the legislatures make the law and leave the courts to interpret the law. Right now, ordinary citizens might see some benefit emerging from the bond between the courts and the state attorneys general against the tobacco industry. It's raining money – but it's not their money. Some people feel the same way about litigation against the gun industry. Those perceptions have to change. For that change to occur, however, we need more focus on the wording of the message in order to connect better with the public.

II. Avoid The Danger Of "I Am Better Than He Is"

"Disorder in the Court" began, in part, with the states' lawsuits against tobacco. The state attorneys general, in lock-step with plaintiffs' lawyers, stated that tobacco was their sole target. They thought they could get judges to change the law and give to the states greater rights to recover than those of the individual smokers, so long as they hit hard at a very unpopular defendant. Very recently, in response to a question posed by U.S. Senator Mitch McConnell, Attorney General Reno stated that if the courts agreed with the Department of Justice's view about Medicare reimbursements, tobacco would be the government's sole target now and in the future; other industries, such as guns, automobiles, liquor or lead paint, would not become the next targets.

But changes in the law that help plaintiffs are never confined to one group of defendants. If left untouched, the newly-established liability principles can apply, and will be applied, against other industries. If other industries believe otherwise, and convince themselves that they are immune from the expansions of tort law imposed on tobacco, ALEC's "Disorder in the Court" project could fail. For example, persons in the gun industry could convince themselves that their products are in some ways different from tobacco because guns can be used safely.

Similarly, persons in the alcohol beverage industry might say that their products are different from tobacco and guns because their products may even have health benefits and, if they are used properly, would not cause harm. Persons in the chemical and automobile industries might say their products are different yet because our society could not survive without them.

This type of thinking, "I am better than he is," is precisely the path the plaintiffs' lawyers would like the non-tobacco industries to follow. What makes plaintiffs' lawyers apprehensive, on the other hand, is that industries other than tobacco and guns may realize now that the precedents that might be established against so-called "unpopular defendants" can be used against more "politically accepted" industries in the future.

III. Pursue Common Goals With Unity

A similar problem that has plagued some prior civil justice efforts is discord within the business community about specific legislation – big business versus small business, insurers versus insured, one industry versus another. For the "Disorder in the Court" project to work effectively, there must be common goals and unity from the beginning of the effort, all the way through its successful

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conclusion. The business community must adopt the principle that particular remedies should be supported by everyone, even though they may benefit one industry more than another.

Examining a specific situation illustrates the importance of a unified effort. Recently, U.S. Senator Mitch McConnell introduced a bill entitled "Fairness in Litigation Act," S. 1269. Fundamentally, this bill says that an individual's rights to sue should be primary. Thus, the government's right to recover for expenses incurred on account of an injured individual should be no greater than the rights of that individual. This legislation could provide an immediate benefit to the gun industry, but not to automobile manufacturers. Nevertheless, the concept that the government could have a greater right than an injured individual to recover in tort could spell problems for the automobile industry (as well as many others) in the future. The fact that remedial legislation might not provide an immediate benefit for some segments of the business community should not cause certain industries to relent in their efforts to pursue the fundamental goal of ensuring that legislatures are the vehicle for the creation of new law, not the courts.

IV. Follow-through, Follow-through, Follow-through

Civil justice reform initiatives appear to have their greatest strength at the time of annual association meetings that address the topic. Everybody feels good at these meetings; people get "energized" to go out and get the job done. Nevertheless, over the years, many good ideas have fallen to the wayside after annual meetings. Simply put, there was no follow-through. For example, ALEC's Separation of Powers Act was intended to establish study commissions that would place both heat and light on decisions by state supreme courts that have nullified state tort reform. The Separation of Powers Act was overwhelmingly approved by ALEC's Board and membership. But more needs to be done after annual meetings to help assure that the Separation of Powers Act is embraced by state legislatures. In short, if the enthusiasm at annual meetings is allowed to dim and the follow through fails to live up to expectations, success will be elusive.

V. Conclusion

There are only four recipes in this "cook book" – communicate with the public, not lawyers; avoid the danger of "he is worse than I am;" pursue common goals with unity; and follow-through. If these recipes are used, it becomes an achievable goal to end "Disorder in the Court" and sustain the legislature's right to make law.■

Appendices

Private Attorney Retention Sunshine Act

Section 1. {Title}
This act may be known as the Private Attorney Retention Sunshine Act.

Section 2. {Definitions}
For the purposes of this Act, a contract in excess of $1,000,000 is one in which the fee paid to an attorney or group of attorneys, either in the form of a flat, hourly, or contingent fee, and their expenses, exceeds or can be reasonably expected to exceed US $1,000,000.

Section 3. {Procurement}
Any state agency or state agent that wishes to retain a lawyer or law firm to perform legal services on behalf of this state shall not do so until an open and competitive bidding process has been undertaken.

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Section 4. {Oversight}
No state agency or state agent shall enter into a contract for legal services exceeding one million dollars ($1,000,000) without the opportunity for at least one hearing in the legislature on the terms of the legal contract in accordance with Section 5.

Section 5. {Implementation}

A. Per the requirement of {Section 4}, any state agency or state agent entering into a contract for legal services in excess of $1,000,000 shall file a copy of said proposed contract with the clerk of the House of Representatives, who, with the approval of the President of the Senate and the Speaker of the House of Representatives, shall refer such contract to the appropriate committee.

B. Within 30 days after such referral, said committee may hold a public hearing on said proposed contract and shall issue a report to the referring state agency or agent. Said report shall include any proposed changes to the proposed contract voted upon by the committee. The state agency or state agent shall review said report and adopt a final contract as deemed appropriate in view of said report and shall file with the clerk of the House of Representatives its final contract.

C. If the proposed contract does not contain the changes proposed by said committee, the referring state agency or agent shall send a letter to said clerk accompanying the final contract stating the reasons why such proposed changes were not adopted. Said clerk shall refer such letter and final regulations to the appropriate committee. Not earlier than 45 days after the filing of such letter and final contract with said committee, the state agency or agent shall enter into the final contract.

D. If no proposed changes to the proposed contract are made to the state agency or agent within 60 days of the initial filing of the proposed regulation or any amendment or repeal of such regulation with the clerk of the House of Representatives, the state agency or agent may enter into the contract.

E. Nothing in this Act shall be construed to expand the authority of any state agency or agent to enter into contracts where no such authority previously existed.

F. In the event that the legislature is not in session and the attorney general wishes to execute a contract for legal services the Governor with the unanimous consent of the Speaker of the House, and the President of the Senate, may establish a five-member interim committee consisting of five state legislators, one each to be appointed by the Governor, the Speaker of the House, the President of the Senate, and the minority leader in each house of the legislature to execute the oversight duties as set forth in paragraphs B-E of this section.

i. identical deadlines and reporting responsibilities shall apply to the Attorney General and this interim committee as would apply to a standing committee of the legislature executing its duties set forth in paragraphs B-E.

Section 6. {Contingent Fees}

A. At the conclusion of any legal proceeding for which a state agency or agent retained outside counsel on a contingent fee basis, the state shall receive from counsel a statement of the hours worked on the case, expenses incurred, the aggregate fee amount, and a breakdown as to the hourly rate, based on hours worked divided into fee recovered, less expenses.

B. In no case shall the state incur expenses in excess of $1,000 per hour for legal services. In cases where a disclosure submitted in accordance with paragraph (a) of this section indicates an hourly rate in excess of $1,000 per hour, the fee amount shall be reduced to an amount equivalent to $1,000 per hour.

{Severability Clause}
{Repealer Clause}
{Effective Date}

Approved 01/11/99 by ALEC Board

Separation of Powers Act

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Summary
The Separation of Powers Act clarifies that when a state Legislature adopted the common law of England or the state's territorial or colonial court at the time of statehood and then delegated to the courts the power to develop that body of law in accord with the interests and public policy of the state, the legislative intent was to provide the courts with laws of reference until and unless the Legislature enacted rules to either complement or replace the common law. The Act reaffirms that, except for any causes of action that were specifically granted constitutional protection at the time of statehood, the Legislature may alter or abrogate any pre-statehood or post-statehood common law causes of action.[1]

Model Legislation

Section 1. {Short Title} This Act shall be known and titled as the Separation of Powers Act.

Section 2. {Legislative Intent}

A. The Constitution of {Insert State} vests the Legislature with the authority to create laws in light of the public interest. [Cite applicable provision of state's constitution.] The Constitution enabled courts to adjudicate cases by applying the laws enacted by the Legislature to the facts of those cases. [Cite applicable provision of state's constitution.]

B. After the Constitution of [name of state] was adopted, the Legislature encated[applicable code section] to provide the courts of [name of state] with the authority to refer to the common law in adjudicating cases. The common law consisted of case holdings rendered by English courts prior to the Revolution of 1776 or by the [colonial or territorial] courts before the Legislature was empowered to create the laws of the state or common law principles existing at the time a territory became a state]. The purpose of [applicable code section] was to permit the courts to continue to apply the common law that was in existence at the time of statehood and develop it in the interest of the public policy of the state unless it was abrogated or altered by the Legislature.[2]

Section 3. {Effect on Pending Action}

An action or proceeding commenced before this Act takes effect is not affected by this Act but all actions or proceedings commenced after that date shall conform to this Act.3

Section 4. {Effective Date}

Endnotes

1. "From the time of the country's inception, state legislatures have abrogated common law causes of action and enacted statutes where the common law no longer adequately addressed certain areas of law. Notwithstanding the holdings of some courts that legislatures cannot abrogate pre-statehood causes of action, many legislatures have successfully abrogated common law causes of action. For example, thirty-four states, two territories and the District of Columbia abrogated the majority of the common law applicable to contracts for the sale of goods when they enacted the Uniform Negoitable Instruments law which was promulgated by the National Conference of Commissioners in 1896. Similarly, six states and one territory further eroded the common law applicable to the sale of goods by passing the Uniform Sales Act promulgated in 1906.

2. By passing the Uniform Negotiable Instruments law and the Uniform Sales Act, the state legislatures effectively repealed the landmark commercial case decided by Lord Mansfield, one of England's leading commerical judges. Thus, states which repeal a common law cause of action are continuing a practice followed by many state legislatures from the earliest days of the country's independence." Proceedings of the 20th Annual Conference of Commissioners on Uniform State Laws, Bliss, page 130 (1948).

Thirty-seven states have "open court" provisions in their constitution. These provisions generally state that courts shall be open to every person and provide a remedy for their injuries. 27 Iowa Law Review 1202 (1964). Some state courts have interpreted the open court provisions as permitting courts to create post-statehood causes of action. The open court provision has also been construed by some courts as prohibiting the Legislature from abrogating pre-statehood common law causes of action and, in some instances, from abrogating post-statehood common law causes of action. Id. In states without an open court provision or where the open court provision has not been construed as prohibiting the Legislature from abrogating pre-statehood or post-statehood causes of action, the following paragraph may be inserted:

"C. The Constitution of {name of state} does not provide the courts with authority to create new causes of action. When the Legislature adopted the common law that was in existence prior to statehood, it did not intend to vest the courts with the authority to create new causes of action or to permit them to independently set forth the public policy of the state. It is the intent of the Legislature to reaffirm that the courts shall not create new causes of action or use the common law adopted by [applicable code section] to alter, modify or evolve the pre-statehood common law causes of action into new causes of action."

Following the last sentence of this paragraph, states that have common law causes of action that are constitutionally protected may want to insert the following: "except for [cite specific common law causes of action that are constitutionally protected.]"

In states without an open court provision or where the state court has construed the open court provision as not prohibiting the Legislature from abrogating common law causes of action, the second sentence of paragraph C can be deleted and the following language inserted to prohibit courts from creating new common law causes of action:

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"The courts shall not create a new cause of action or otherwise alter, modify or evolve a common law cause of action adopted herein to address an issue before the courts."

[3.] States that choose to abrogate all post-statehood common law causes of action may want to include a provision establishing a study commission. The commission will study which post-statehood common law causes of action are affected by the amendment and make recommendations to the Legislature regarding those causes of action that the commission suggests be reincorporated into the state's law by statute. This commission may permit a more thorough understanding of which causes of action are being abrogated, thus foreclosing concerns that might be raised by some. States that choose this option may want to insert the following paragraph in the Act:

"Section 4. {Study Commission} The Legislature shall appoint a Commission to study which post-statehood common law causes of action are abrogated by this amendment and to make recommendations to the Legislature regarding those causes of action which the commission believes should be reincorporated in the {Insert State} law by way of statute."

Historically, legislatures have had the right and duty to create and enacte laws without any improper interference from the courts. The U.S. Constitution and state constitutions vest authority in the legislatures to make public policy because the legislative process involves public hearings at which all views are presented and debated. In contrast, courts only review the narrow arguments of the parties before the court, which are necessarily restricted to the interests of those two parties. Legislatures, not courts, are the appropriate forum for developing law which raises broad policy issues, such as the creation of new legal causes of action.

The American Legislative Exchange Council

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