

WHITE HOUSE ACTION ON CIVIL JUSTICE REFORM: A MENU FOR THE NEW MILLENNIUM

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Civil justice reform addresses the fundamentals of both the substantive law and procedural rules of the law of civil wrongs. Law students and lawyers call the law of civil wrongs "tort law;" others may know it as "liability law." For the first 200 years of our nation's history, tort law was generally created by state judges with occasional intervention by state legislatures.¹ Most tort law today continues to be developed by

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1. VICTOR E. SCHWARTZ ET. AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS (10th ed. 2000).

state courts.

From time to time over the past century, Congress also has entered the field.² For example, as far back as 1909, Congress enacted the Federal Employers' Liability Act ("FELA"),³ a statute which defines rights and duties in personal injury cases brought by railroad workers against their employer railroads—FELA is a "tort substitute" for workers' compensation in the railroad field. In 1927, Congress enacted the Longshore and Harbor Workers' Compensation Act,⁴ a FELA-like statute that provides fixed awards to employees or their dependents in cases of employment-related injuries or deaths occurring upon the navigable waters of the United States.

Modern federal liability reform efforts have their roots in a project that took place from 1976 to 1980 under Presidents Ford and Carter. A Federal Interagency Task Force on Product Liability conducted an in-depth research and analysis of state product liability law. The Task Force found that the patchwork of ever-changing product liability laws in fifty-one jurisdictions (fifty states and the District of Columbia) created problems for interstate commerce.⁵ Rather than propose preemption by federal law, however, the Task Force drafted a model law for use by the states.⁶ The Task Force intimated that federal legislation might be needed if the states did not enact the model law in a uniform manner.⁷

The Task Force's "Model Uniform Product Liability Act" served as the basis for legislation in several states, but it was not adopted nationwide.⁸ Furthermore, those states that did enact the "Uniform Act" did so "in a piecemeal fashion," rather than "uniformly."⁹

The inability of states to create clear and uniform product liability law led to a significant attempt by Congress to do the

2. See Victor E. Schwartz et al., *Federalism and Federal Liability Reform: The United States Constitution Supports Reform*, 36 HARV. J. ON LEGIS. 269 (1999) (describing the history of federal tort legislation in light of federalism concerns).

3. 45 U.S.C. § 51 *et seq.* (2000).

4. 33 U.S.C. § 901 *et seq.* (2000).

5. See INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEPT' OF COMMERCE, FINAL REPORT V-19 to V-21 (1976).

6. See Model Uniform Product Liability Act, 44 Fed. Reg. 62,714 (Oct. 31, 1979).

7. See 43 Fed. Reg. 14,612 (April 6, 1978).

8. See Victor E. Schwartz & Mark A. Behrens, *The Road To Federal Product Liability Reform*, 55 MD. L. REV. 1363, 1366 (1996).

9. *Id.*

job by enacting a comprehensive federal product liability law.¹⁰ The general, broad-sweeping legislation failed, but when products liability problems became particularly severe for a particular segment of the economy, Congress passed and President Clinton signed, industry-specific laws into effect. One such law is the General Aviation Revitalization Act of 1994, which helped prevent the demise of the entire civil aviation industry.¹¹ Another example is the Biomaterials Access Assurance Act of 1998, which helped assure that manufacturers of medical devices could obtain the raw materials necessary to make their life saving equipment.¹²

Regardless of one's "feelings" about the wisdom of accomplishing civil justice reform at the federal level, this past experience strongly suggests that most action has and will continue to occur at the state level. But there will, and should be, a federal role based on strong needs and sound policy. Although any issue involving civil justice reform will tend to evoke partisan bickering, if the substance of a proposal is sound, it will appeal to those in either party, or at least to those persons whose minds are not totally closed by political action committee (PAC) dollars and influence peddling.¹³

Political reality dictates that what occurs will depend, in part, on who is President. Based on his prior record, President Bush is likely to embrace reasonable civil justice reform.¹⁴ In contrast, Vice President Gore opposed civil justice reform while in the

10. See Victor E. Schwartz & Mark A. Behrens, *Federal Product Liability Reform in 1997: History and Public Policy Support Its Enactment Now*, 64 TENN. L. REV. 595, 599-601 (1997).

11. Pub. L. No. 103-298, §§ 1-4, 108 Stat. 1552 (codified at 49 U.S.C. § 40101 *et seq.* (2000)); see also *General Aviation Revitalization Act of 1993: Hearing on H.R. 3087 Before the House Subcomm. on Aviation*, 103d Cong. 56 (1993) (statement of Phil Boyer, president of Aircraft Owners and Pilots Association) (stating that the bill presents an "outstanding opportunity" to address the problems in the aviation industry).

12. Pub. L. No. 105-230, 112 Stat. 1519 (codified at 21 U.S.C. §§1601-1606 (2000)).

13. Sherman Joyce & Victor E. Schwartz, *Why No Tort Reform? Follow the Money*, WALL ST. J., Sep. 21, 2000, at A26 (suggesting President Clinton and Vice President Gore promised a veto of—and President Clinton *did* veto—tort reform legislation in exchange for campaign contributions from plaintiffs' attorneys).

14. See, e.g., *Civil Justice Reform*, George W. Bush for President, at <http://www.georgewbush.com/issues/civiljustice.html> (last visited January 12, 2001) (describing then-Governor Bush's record on tort reform in Texas). Then-Governor Bush signed bills limiting punitive damage awards, reforming the Deceptive Trade Practices Act, limiting forum shopping, curbing frivolous lawsuits, reforming medical malpractice, protecting public servants from frivolous lawsuits, and shielding "Good Samaritan" medical volunteers. See *id.*

Senate and continued to receive substantial support from wealthy personal injury lawyers while Vice President and during his Presidential campaign.¹⁵ President Clinton took a more middle-of-the-road position on civil justice reform issues.¹⁶ He signed a number of civil justice measures into law, including the General Aviation Revitalization Act of 1994 and the Biomaterials Access Assurance Act of 1998, mentioned above. The influence of very powerful, wealthy personal injury lawyers contributed to his opposing other civil justice reform efforts, however.¹⁷

This Article addresses the major civil justice reform issues confronting the next Administration and offers some proposals for dealing with those issues. Part I proposes an "Injured Consumer's Bill of Legal Rights," which would provide much needed protection for consumers of legal services. Part II advocates increasing liability protection for school officials in order to stop frivolous lawsuits that interfere with basic educational processes. Part III recommends strengthening Rule 11 of the Federal Rules of Civil Procedure to stop baseless claims and defenses. Part IV provides a fair solution to the problem of multiple imposition of punitive damages. Part V proposes fair and balanced national standards for product liability. Part VI proposes reforming federal class action rules to better serve the legitimate purposes for which the class action was created.

15. See, e.g., Sens. Ernest F. Hollings & Albert Gore, Product Liability Fairness Act, S. REP. NO. 102-215, at 58 (1991) (minority view) (rejecting legislation and stating that "in the past, we have urged our colleagues to reject Federal product liability laws as unwise Federal legislation"); David Byrd, *Why Trial Lawyers Have A Beef with Bush*, NAT'L J., May 8, 1999, at 1258 (quoting Fred Baron, vice president of the Association of Trial Lawyers of America, as saying "Gore has always—and I mean always—been a friend of trial lawyers"); Jerry Seper & Bill Sammon, *Gore Linked to Donation for Clinton Veto*, WASH. TIMES, Sept. 14, 2000 at A1 (reporting that Gore sought a donation from Texas trial lawyer Walter Umphrey in return for a promise that President Clinton would veto a federal product liability reform bill).

16. See, e.g., Bob Van Vorhis, *Clinton's a Surprising Tort Reformer*, NAT'L L. J., Aug. 14, 2000, at A1 (explaining that despite President Clinton's support from trial lawyers, the President signed at least eleven civil justice reform bills into law during his two terms in office).

17. See John F. Harris, *Clinton Vetoes Product Liability Measure*, WASH. POST, May 3, 1996, at A14; *The Lawyers' Veto*, WALL ST. J., May 3, 1996, at A12. The Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, was vetoed by President Clinton and passed on a veto override; the Act was the only law passed over a veto during President Clinton's eight years in office.

I. PROMOTE INJURED CONSUMER'S BILL OF LEGAL RIGHTS

An in-depth study conducted by HALT, a national consumer organization concerned about the legal system's treatment of ordinary Americans, found that injured plaintiffs fared quite poorly under the present legal system, particularly in relations with their own attorneys.¹⁸ One problem HALT found is that lawyers do not provide injured clients adequate information when they sign contingency fee agreements.¹⁹ For example, after a train derailment killed forty-seven people in Alabama, an attorney signed a contingency fee agreement with a Mexican passenger who spoke no English.²⁰ Personal injury plaintiffs often lack the legal knowledge to make a judgment about whether the fee is reasonable in light of the circumstances of their specific case.²¹

Consumer confusion is augmented by lawyer advertisements, which emphasize the word "free" above everything else.²² These advertisements often do not provide the information necessary for a reasonable marketplace decision.²³ Personal injury lawyers also may pressure potential clients to sign agreements after a recent, tragic accident involving loss of a loved one or serious personal injury.²⁴ These "victims" are bombarded by unsolicited, high-pressure contacts from potential plaintiffs' counsel. The Mexican train passenger described above was solicited while in his hospital bed. The husband of a passenger on ValuJet Flight 592, which crashed outside of Miami in May 1996, testified in a congressional hearing that:

[M]embers of the legal profession started their assault [immediately after the crash]. The families had been traumatized and were not able to make rational decisions. They were directly solicited by mail, by telephone and in person. In some instances, they were scared and pressured

18. See WILLIAM FRY, HALT: A CONSUMER ORGANIZATION OF AMERICANS FOR LEGAL REFORM, THE CONTINGENCY FEE SYSTEM: IS IT GOOD FOR THE AMERICAN CONSUMER? 1-2 (1997) [hereinafter HALT REPORT], available at <http://www.halt.org/ResearchReport/conftee.htm>.

19. See *id.* at 2, 3.

20. See Garry Mitchell, *Bar Scrutinizing Lawyer Ads, Solicitations*, MOBILE PRESS REG., Dec. 18, 1993, at A1.

21. See HALT REPORT, *supra* note 18, at 4.

22. See *id.*

23. See *id.*

24. See *id.* at 4-6.

into contingency fee contracts without proper representation or the understanding of what they were doing.²⁵

Although ethics rules require lawyers to explain fee arrangements clearly and at an appropriate time, HALT found that the rules are not enforced.²⁶ The legal profession is self-regulated, with the enforcement of ethical rules left to local bar groups.²⁷ The ethical standards are policed by the same people that are supposed to be monitored. The fox is in charge of the legal chicken coup.

Federal laws protect the vulnerable from similar "overreaching" by funeral directors, used car dealers, banks and lending institutions.²⁸ Consumers are left at sea, however, at a time in life when they most need protection—when they have been hurt and receive substantial pressure from personal injury lawyers.

The Federal Government cannot and should not be involved in regulating individual state bars, but it can protect people who enter the federal court system. Federal law can be a model for states to follow in protecting their own citizens when they enter a state court.

An injured consumer's bill of legal rights in the federal courts should provide at least these basics:

1. *A No-Contact Period*: Injured consumers deserve the right to be left free from unsolicited contact by attorneys (plaintiff and defense) and insurers, or their representatives, for at least forty-five days after an event resulting in personal injury or death. Federal law already exists to protect airline crash victims and their families.²⁹ Victims of other traumatic events (and their families) should be similarly protected. Current law can

25. *Aviation Safety: Treatment of Families After Airline Accidents: Hearing Before the House Subcomm. on Aviation*, 104th Cong. 108 (June 19, 1996) (statement of Richard P. Kessler, Jr., husband of a passenger killed in the crash of ValuJet Flight 592).

26. See HALT Report, *supra* note 18, at 9.

27. See Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 *FORDHAM L. REV.* 247, 250 (1996) (describing the legal profession's incentives for self-regulation).

28. See 16 C.F.R. § 453 (2000) (regulating funeral industry practices); 16 C.F.R. § 455 (2000) (regulating used vehicles dealers); 49 C.F.R. § 580 (2000) (requiring odometer disclosures for the sale of used vehicles); 15 U.S.C. § 1601 *et seq.* (2000) (requiring certain disclosures to consumers in credit transactions).

29. The Aviation Disaster Family Assistance Act of 1996 limited unsolicited contacts by lawyers and insurance company representatives with airline crash victims or their families. See Pub. L. No. 104-264, 110 Stat. 3213 (codified at 49 U.S.C. § 40101 *et seq.* (2000)).

serve as a model for more broad-based legislation, but lobbying by personal injury lawyers has kept the penalties to a minimum. Through such means as air crash legislation penalties for early solicitation should be made harsher, and similar protection should be afforded to anyone injured in interstate commerce. Just as importantly, the laws must be enforced.

2. *Informed Decisionmaking*: Plaintiffs' lawyers should be required to put all fee agreements in writing and to inform their clients on key matters before the fee agreement is signed. These key matters should include the following:

a) *The probability of a successful outcome*. The ordinary citizen is not a sophisticated shopper for legal services. Most injured plaintiffs lack information to make an informed choice in hiring a personal injury attorney.³⁰ They do not know the value of the claim, how much effort and skill will be necessary for any attorney to pursue the claim, or the chance of success.³¹ Personal injury attorneys seldom volunteer information that would remedy this inequality in bargaining power. As former Harvard President and Law School Dean Derek Bok observed: "Most plaintiffs do not know whether they have a strong case, and rare is the lawyer who will inform them (and agree to a lower percentage of the take) when they happen to have an extremely high probability of winning."³²

The contingency fee should be related to the risk that accepting the case presents to the attorney. In cases where there is a good chance that the plaintiff will be awarded damages, the attorney should receive a smaller percentage of the award.

b) *The amount of recovery reasonably expected in that outcome*. Professor Lester Brickman, who has done extensive studies of category fees, has concluded that personal injury victims sometimes pay a breathtaking premium to obtain legal representation:

30. See STAFF OF THE FEDERAL TRADE COMMISSION, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING 11 (1984) ("Many consumers do not believe that they have adequate information about attorneys, their areas of expertise, or their fees to make an informed choice about purchasing legal services.").

31. See William P. Lightfoot, *Discuss Fees Up Front*, TRIAL, Jan. 1995, at 88 (noting that "many clients [of personal injury lawyers] are inexperienced about the issue of attorney fees").

32. DEREK BOK, THE COST OF TALENT 140 (1993).

Other than in cases such as class actions and claims on behalf of minors, when fees are fixed by the courts, contingency fee rates seldom amount to less than one third (33 1/3%) of recoveries when cases are settled without trial, 40% if cases go to trial and 50% if appeals are necessary to sustain the trial judgments. In addition, such fees are often calculated from the gross recoveries of clients; attorneys are thus paid "off the top" and case expenses, often substantial, are reimbursed to counsel, that such clients almost always receive lower (and at times substantially lower) proportions of their recoveries than is indicated by the percentile rates of their contingency fee contracts. Moreover, the contingency fee rates cited above are often floors; evidence exists that many attorneys obtain standard fees of 40% and even 50% as to cases settled before trial. Thus, where payments of both fees and expenses are taken into account, many clients receive less than 50% of their recoveries even if no appeals of their judgments are necessary.³³

Professor Brickman documents that some plaintiff attorneys earn from "\$1,000 to \$5,000 to as high as \$25,000-\$30,000 per hour," and their clients do not even know it.³⁴ One documentary report shows that a contingency fee attorney in Texas earned \$90 million in 1995; another attorney reportedly earned \$40 million; and several others earned more than \$10 million in a single year.³⁵

The contingency fee should be related to the amount of recovery reasonably expected in the case. In cases where the amount expected to be recovered stands to be very large, the attorney should receive a smaller percentage of the award.

c) *The number of hours of legal services likely to be required to secure that outcome.* The Washington Legal Foundation reports that, "[i]n one airline accident case in which there was no issue of liability, a one-third contingency yielded an attorney fee of

33. LESTER BRICKMAN, MICHAEL HOROWITZ & JEFFREY O'CONNELL, *RETHINKING CONTINGENCY FEES* 13-14 (1994) (citations omitted).

34. *Id.* at 22; see also Lester Brickman, *The Asbestos Litigation Crisis: Is There A Need For An Administrative Alternative?*, 13 *CARDOZO L. REV.* 1819, 1834-35 (1992) ("[E]ffective hourly rates in asbestos cases often exceed \$1,000; in some cases, the hourly rates . . . can be as high as \$5,000 per hour."); *Taming Runaway Lawyers*, *WALL ST. J.*, Jan. 24, 1995, at A22 (citing an estimate by Professor Brickman that "contingency fees now run \$13 billion to \$15 billion annually," and calling on Congress to "fix the huge abuse of fees").

35. See *The Top Trial Lawyers*, *FORBES*, Nov. 6, 1995, at 160; see also Peter Brimelow & Leslie Spencer, *The Plaintiff Attorneys' Great Honey Rush*, *FORBES*, Oct. 16, 1989, at 197.

\$383,244 for only 25-35 hours of work, . . . a rate of \$10,000 to \$15,000 per hour."³⁶ In cases where a recovery is produced after a modest amount of time spent on the case by the lawyer, the attorney should receive a smaller award, thus leaving more for the injured party.

d) *The amount of any cost or expenses that the client must bear.* Unfortunately, consumers of legal services are not always told that—in addition to the contingency fee—there may be bills of hundreds of thousands of dollars for so-called “expenses.” This fact should be disclosed to consumers.

e) *The right to be informed of all lawyer-to-lawyer or other fee arrangements concerning the case.* Consumers of legal services should be informed of the amount to be paid to any co-counsel associated with the case or to attorneys who have referred the client under some type of exchange fee agreement. Potential clients should also be informed of the availability and cost of alternative fee arrangements. An hourly fee, even an hourly rate of \$500, might be preferable to a contingency fee arrangement, especially in cases where a positive, substantial outcome is relatively certain, such as airline crash cases.

f) *The right to an accounting.* Injured consumers should have the right to have their lawyer keep accurate records of the time spent on their case, and to be sent periodic reports from their lawyer on the time spent and the progress of the case.³⁷

3. *Independent Review of Disputed Contingency Fees:* In the case of a dispute between lawyer and client, injured consumers should have the right to an objective review of a contingency fee by a court or a bar association, in order to assure that the fee is reasonable and fair. Judges should be given clear guidelines for making a determination about the fairness and reasonableness of a contingency fee; such guidelines would include, for example, how much actual time a lawyer

36. John C. Scully, *Washington Legal Foundation Brings Contingency Fee Reform To The State of Washington* (Wash. Legal Found. Mar. 31, 1992); see also Karen Donovan, *Delaware Court OKs \$4,000-An-Hour Fee*, NAT'L L.J., Sept. 13, 1993, at 15 (reporting on a case in which a judge approved a fee in a shareholder suit that amounted to \$4,000 per hour).

37. See Aaron Chambers, *Lawmakers Seek to Stub Out Fee Claim*, CHI. DAILY L. BULL., Feb. 14, 2000, at 1, 24 (quoting a Tobacco Fee Arbitration Panel decision finding that a law firm involved in tobacco litigation did not record time spent on contingency fee work, which “should have been possible and would have been helpful if outside counsel had given [the panel reviewing the firm’s award] some reasonable estimates of hours and billing rates”).

reasonably spent on a case, and the extent to which the issues of liability and damages were clear.

Unfortunately, consumer groups other than HALT have neither sought nor supported an Injured Consumer's Bill of Legal Rights. Some have speculated that the personal injury bar itself has funded a number of these organizations.³⁸ Whether or not that is true, the injured consumer is both weak and unprepared in today's market for personal injury legal services. A glance at any "yellow pages" directory in any city in the United States tells us why—the advertisements are, at best, devoid of meaningful information and, at worst, directly misleading.³⁹

The next Administration has an opportunity to right this clear wrong and bring fundamental fairness to injured consumers who enter the federal court system. The federal courts can also act as a beacon for the states to encourage them to protect injured consumers from overreaching by personal

38. See Dan Morain, *Ex-Allies Now Split over Anti-Lawyer Measures*, L.A. TIMES, Mar. 4, 1996, at A3 (noting that consumer activist Harvey Rosenfield took at least \$279,000 from trial lawyers in 1993 and 1994 to fund his nonprofit organization "Network Project"); see also Thomas B. Edsall & Stephen Barr, *Battle Lines on Y2K Liability Catch Gore in Cross-Fire*, WASH. POST, May 7, 1999, at A2 (observing that consumer groups are allied with trial lawyers).

39. See, e.g., 2000-2001 BELL ATLANTIC YELLOW PAGES, WASHINGTON, D.C., at 698 (2000) ("Annual Multi-million Dollar Recoveries"; "Free Initial Consultation, No Legal Fee Unless Recovery"); *id.* at 696 ("Free Consultation"; "No Recovery—No Legal Fee"); *id.* at 702-03 ("INJURY HOTLINE If You Have a Phone . . . You Have A Lawyer"; "No Fee or Expense Unless you Win!"); 1996-97 AMERITECH YELLOW PAGES, AURORA, ILL., at 287 (1996) ("speak with us before the insurance company, aggressive, aggressive—we get results . . . PERIOD. No fee until You win"); 2000-01 BELL SOUTH YELLOW PAGES, MOBILE, ALA., at 67 (2000) (advertising "No Recovery—No Fee For Personal Injury Cases"—and no mention of the costs to be added upon recovery); *id.* ("We come to You. Free Consultation in Your Home or Hospital Room"); 2000-01 BELL SOUTH YELLOW PAGES, JACKSON, MISS., at 55 (2000) (announcing "Injured? One call . . . that's all!" "I'll go after every dollar you deserve"—with no mention of the percentage of the award to be paid to plaintiffs' counsel); 2000-01 PACIFIC BELL YELLOW PAGES, SAN FRANCISCO, CALIF., at 73 (2000) ("Your Case Can Soar to the Highest Limits!"; "Our Fee is a Percentage of the money we collect for you"); *id.* at 108 ("Our judgments/settlements include: 26 million—brain injury, 5 million—auto/big rig, 2.3 million—medical malpractice, 2 million—wrongful death, 1 billion—Int'l Human Rights"); 2000-01 SOUTHWESTERN BELL YELLOW PAGES, HOUSTON, TEX., at 174 (2000) ("No attorney fees, court costs, or expenses until you recover. We will help you recover every dollar you have coming."). In New York, a telephone book ad claims in huge letters that the attorneys have recovered "OVER \$125 MILLION FOR THEIR CLIENTS." At the bottom of the page, in letters one-tenth as large, comes the fine print: "We Advance All Legal Expenses Which Are Payable At Conclusion Of Case. Fee Determined On Net Recovery. If No Recovery, Disbursements are Payable By Client." 2000-01 BELL ATLANTIC YELLOW PAGES, NEW YORK, N.Y., at 833 (2000).

injury lawyers in state courts.

II. STOP BASELESS LAWSUITS AGAINST TEACHERS AND PRINCIPALS

Surveys conducted of elementary and high school principals show that baseless lawsuits are a virus eating away at efforts to educate our children. A recent survey by the American Tort Reform Association found twenty percent of principals spent between five and ten hours per week in meetings or documenting events in an effort to avoid litigation; six percent of respondents reported spending ten to twenty hours per week in the same manner.⁴⁰ If the bulk of cases against elementary and high schools were legitimate, there would not be a problem, but such is not the case.⁴¹ Some personal injury lawyers realize that school districts are ill prepared to defend legal claims. These lawyers appreciate that it is often cheaper for a school district to settle a baseless lawsuit than to fight it in court. Our current system leaves school principals without proper legal weapons; they often must surrender. Taxpayers and children bear the cost.

Where schools are federally funded, principals and teachers should be given legal protection against baseless lawsuits. Strong sanctions should be imposed on lawyers who bring baseless claims. Lawyers should be required to pay the total costs borne by the school district for any case that has been dismissed. Regardless of whether the next Administration receives financial support from the personal injury bar, this is one area where a bipartisan effort should stop lawsuit abuse.

Teachers and principals also need adequate protection from baseless lawsuits when schools engage in fair and even-handed disciplinary programs for delinquent students. Then-Governor

40. AMERICAN TORT REFORM FOUNDATION, LIABILITY SURVEY OF SCHOOL PRINCIPALS (1999); see also Press Release, American Tort Reform Foundation, *School Liability Concerns Reach Presidential Debate* (Oct. 20, 2000), available at <http://www.atra.org/press.html>.

41. One principal responding to the American Tort Reform Foundation survey noted that his school was sued because a student failed to make the honor roll. See *id.* Similarly, in suburban Chicago, Warren Township School District 121 was sued by a high school student because a disciplinary rule provided that students caught driving under the influence would be kicked off the varsity basketball squad. The student claimed the rule violates the Americans with Disabilities Act, which defines alcoholism as a medical condition. See Amanda Vogt, *Ineligible Athlete Sues High School*, CHI. TRIB., Sep. 9, 1999, at 1.

Bush endorsed this principle in a Teacher Protection Act.⁴² Bush's proposal would shield school officials acting in their official duties from unmeritorious federal lawsuits when they enforce reasonable rules.⁴³ Principals and teachers must not be handcuffed by an out-of-control tort system when it comes to providing proper discipline and protection to students who are in school to learn, not to fight. Such legal protections can be part of a more general federal effort to improve education.

III. STOPPING BASELESS CLAIMS AND BASELESS DEFENSES

Although special legislation is needed to protect primary and secondary schools from lawsuit abuse, more general legislation would be useful to help assure that frivolous lawsuits and frivolous defenses are not accepted in any federal court. This would improve our legal system, cut wasted judicial time, and save administrative costs in the federal court system. Most importantly, it will kill a fundamental plague that has infested our civil justice system: lawsuit abuse.

Frivolous lawsuits are rampant in American courts:

- In Florida, a woman is suing Universal Studios for \$15,000 for "extreme fear, emotional distress and mental anguish" because the theme park's annual haunted house was too scary.⁴⁴
- A woman in Knoxville is seeking \$125,000 in damages against McDonald's. She claims that a hot pickle dropped from a hamburger, burning her chin and causing her mental injury.⁴⁵
- The family of a man who died on a fishing trip sued the Weather Channel for \$10 million, claiming that the man relied on the channel's forecast for his safety.⁴⁶

The above examples are amusing to read—until one remembers that each story wasted the valuable time and resources of the courts and defendants who had to respond to

42. George W. Bush, *The True Goal of Education*, Address at Gorham, New Hampshire (Nov. 2, 1999), <http://www.georgewbush.com/News>.

43. *See id.*

44. Tim Barker, *Universal Fall Leads to Lawsuit*, ORLANDO SENTINEL, Jan. 5, 2000, at C1.

45. *See* Randy Kenner, *Lawsuit on Hot Pickle Draws Attention Around the Globe*, KNOXVILLE NEWS-SENTINEL, Oct. 10, 2000, at A1.

46. *See Storm Death Is Not Weatherman's Fault*, N.Y. POST, Mar. 29, 1999, at 84.

the claims. Rule 11 of the Federal Rules of Civil Procedure is supposed to address such frivolous claims and defenses in federal cases. Unfortunately, it was made more tepid by the Federal Rules Advisory Committee a number of years ago.⁴⁷ When the United States Supreme Court reviewed the work of the Federal Rules Advisory Committee, the Court did not do so in any meaningful way, as the Justices themselves acknowledged.⁴⁸ Although Congress had seven months to consider the weakening of Rule 11, it lacked the time and commitment to review what had been done.⁴⁹

Unfortunately, as a practical matter, the Federal Rules Advisory Committee destroyed what already had been a relatively weak protection against frivolous lawsuits. Rule 11 had provided that a lawyer would have to pay the other side's legal fees generated in opposing a frivolous claim or defense. Under the current version of Rule 11, persons bringing frivolous claims are given a goodwill grace period to avoid any sanctions.⁵⁰ This allows personal injury lawyers and defendants bent on delay to at least troll for frivolousness.⁵¹ This loophole should be closed.

In the past, some civil rights and civil liberty groups have

47. Proposed Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 577-84 (1993).

48. See *id.* at 505. Justice White stated his view that because the Advisory Committee spends a great deal of time considering the revisions, the Court's role is to "transmit the Judicial Conference's recommendations without change and without careful study as long as there is no suggestion that the committee system has not operated with integrity." *Id.*

49. This was especially true in the Senate, where the Judiciary Committee chose to await passage of the House bill rather than proceeding with its own. The House Bill was not passed until Nov. 3, 1993. When the Senate adjourned on Nov. 24, 1993, the bill had not been voted on. Under the Rules Enabling Act, Congress has seven months to act on the proposed rules; if Congress does not act, the proposed rules become law. See 28 U.S.C. § 2074(a) (2000). As Congress failed to act, the amendments became law as of December 1, 1993. For a discussion of the circumstances surrounding Congress's consideration of the changes, see Hon. William J. Hughes, *Congressional Reaction to the 1993 Amendments to the Federal Rules of Civil Procedure*, 18 SETON HALL LEGIS. J. 1 (1993), and Leslie M. Kelleher, *The December 1993 Amendments to the Federal Rules of Civil Procedure—A Critical Analysis*, 12 TOURO L. REV. 7 (1995).

50. See FED. R. CIV. P. 11(c)(1)(A) (providing a 21-day "safe harbor" provision during which a party may amend or withdraw a challenged pleading).

51. As Justice Scalia noted in his dissent from the transmission of the new rules to Congress, "[u]nder the revised Rule, parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: If objection is raised, they can retreat without penalty." 146 F.R.D. at 508.

opposed strengthening sanctions against frivolous claims.⁵² Their concern is that a strengthened Rule 11 will hinder the ability of plaintiffs' attorneys to raise novel legal claims. A carefully drafted rule, however, could include language aimed at curbing frivolous lawsuits while not discouraging innovative legal arguments.

A leading plaintiffs' lawyer has said that the fundamental problem with the current system is not the law, but judges who fail to dismiss baseless cases.⁵³ This is an area where both plaintiffs and defendants can agree. As governor of Texas, President Bush has already recognized this fact, but it should be an essential part of his Administration's efforts to improve our legal system.

IV. ADOPT RATIONAL RULES FOR MULTIPLE IMPOSITION OF PUNITIVE DAMAGES

Every parent knows that you do not punish a child more than once for the same wrongdoing. Common sense says as much. Our criminal justice system has embraced this fundamental concept and has safeguarded defendants against "double jeopardy."⁵⁴ People are not to be punished more than once for the same crime.

Nevertheless, our civil justice system allows people to be punished again and again for the same wrongdoing.⁵⁵ Apart from fundamental unfairness to defendants, it can also hurt claimants. For example, at least twenty-five companies that have made asbestos-containing products are now in bankruptcy.⁵⁶ Multiple imposition of punitive damages helped put them there. Once those companies are in bankruptcy, claimants who have been hurt and have economic needs must have their claims put in abeyance until the bankruptcy has

52. See Kelleher, *supra* note 49, at 61.

53. John Coale, Esq., Address Before the American Corporate Counsel Association (Oct. 2000).

54. U.S. CONST. amend. V ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb. . .").

55. See Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOKLYN L. REV. 1003, 1029-31 (1999).

56. See *Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 62 (1999) (statement of Christopher Edley, Jr.), available at <http://www.house.gov/judiciary/edle0701.htm>.

ended. Hundreds of thousands may not be fully compensated because a few individuals collected a huge punitive damage windfall.⁵⁷

An experienced federal judge, liberal and pro-plaintiff in his leanings, the Honorable Lee Sarokin, foresaw this problem.⁵⁸ Judge Sarokin observed, "[E]ach jury is told how many persons have been injured or have died or are likely to do so as a result of the defendant's conduct. Those statistics undoubtedly play a substantial role in the jury's decision to award punitive damages and in determining the amount to be imposed."⁵⁹

In other words, each jury is told about a defendant's total wrongful behavior, not simply its wrongful conduct with respect to the plaintiff in a particular case. In subsequent cases, new jurors are told the same story. Judge Sarokin realized that even if he were to strike a punitive damages claim in his court, he could not prevent multiple punishments from being inflicted in other courts.⁶⁰

The detrimental impact of multiple punitive damages exists even in cases which are settled, rather than tried. A federal appellate judge astutely recognized this problem when he wrote:

[T]he potential for punitive awards is a weighty factor in settlement negotiations and inevitably results in a larger

57. See *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151, 1155 (5th Cir. 1990) ("If no change occurs in our tort or constitutional law, the time will arrive when [a defendant's] liability for punitive damages imperils its ability to pay compensatory claims. . . ."); *Bishop v. General Motors Corp.*, 925 F. Supp. 294, 298 (D.N.J. 1996) ("Indeed, one of the many cogent criticisms of punitive damages is that multiple punitive [damage] liability can both bankrupt a defendant and preclude recovery for tardy plaintiffs."); *Froud v. Celotex Corp.*, 437 N.E.2d 910, 914 (Ill. 1982) (Sullivan, J., concurring), *rev'd*, 456 N.E.2d 131 (Ill. 1983) ("[I]t cannot be denied that the specter of the destruction of companies, and even individuals, as a result of punitive damage awards is a threatening, present reality.").

58. See *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1055 (D.N.J. 1989), *vacated in part*, 718 F. Supp. 1233 (D.N.J. 1989), *rev'd on other grounds sub nom.*, *Juzwin v. Asbestos Corp.*, 900 F.2d 686 (3d Cir. 1990), *cert. denied*, 498 U.S. 896 (1990).

59. *Id.* at 1056.

60. See *Davis v. Celotex Corp.*, 420 S.E.2d 557, 566 (W.Va. 1992) (noting that, "because asbestos trials are held nationwide" where punitive damages can be awarded, "it is doubtful that one state's ruling would necessarily bind other jurisdictions"); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 480 (N.J. 1986) ("At the state court level, we are powerless to implement solutions to the nationwide problems created by [multiple punitive damages awards]."); David Lafferty, Note, *Juzwin v. Amtorg Trading Corp.: Multiple Assessments of Punitive Damages in Toxic Tort Litigation*, 8 PACE ENVTL. L. REV. 647, 665 (1991) (concluding that the problem of multiple punitive damages awards "cr[ies] out for congressional action").

settlement agreement than would ordinarily be obtained. To the extent that this premium exceeds what would otherwise be a fair and reasonable settlement for compensatory damages, assets that could be available for satisfaction of future compensatory claims are dissipated.⁶¹

State legislatures cannot solve this problem, although a few have tried. For example, Missouri prevents multiple imposition of punitive damages within its borders,⁶² but it cannot stem the tide of filings for multiple punitive damage claims in other states. State action addressing the unfairness and multiple imposition of punitive damages has the unfortunate "side effect" of augmenting forum shopping. If some states limit punitive damages and others do not, plaintiffs' lawyers will naturally seek to file cases in jurisdictions with no restrictions on the number of times a person can be punished for the same action.

These fundamental facts make clear that the problem of multiple imposition of punitive damages can only be solved by the United States Supreme Court or Congress. The problem is completely intertwined with interstate commerce. But, the U.S. Supreme Court appears unlikely to solve the problem of multiple punishments any time soon.⁶³ Indeed, the Florida Supreme Court has asserted that "[a]ny realistic solution to the problems caused by [multiple punitive damages awards] in the United States . . . can only be effected by federal legislation."⁶⁴

61. *Dunn v. Hovic*, 1 F.3d 1371, 1398 (3d Cir. 1993) (Weis, J., dissenting), modified, 13 F.3d 58 (3d Cir. 1993), cert. denied sub nom., *Owens-Corning Fiberglas Corp. v. Dunn*, 510 U.S. 1031 (1993).

62. See MO. ANN. STAT. § 510.263(4) (1999) (allowing defendants in most tort actions to file a post-trial motion requesting a credit of prior awards arising out of the same conduct). Florida does not permit punitive damages to be awarded more than once for the same act or course of conduct unless the court determines by clear and convincing evidence that the amount of punitive damages previously awarded was insufficient to punish the defendant. In that situation, the court may permit a jury to consider an award of subsequent punitive damages. Any subsequent awards must be reduced by the amount of any earlier punitive damages awards. See FLA. STAT. ANN. § 768.73(2) (1999).

63. See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 472 (1993) (Scalia, J., concurring in the judgment) ("State legislatures and courts have ample authority to eliminate any perceived 'unfairness' in the common-law punitive damages regime. . . .").

64. *W.R. Grace & Co. - Conn. v. Waters*, 638 So. 2d 502, 505 (Fla. 1994); see also *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 865-66 (Iowa 1994) ("We do not disagree that the problem of successive punitive damages awards in mass tort cases arising from the same conduct is a serious one. . . . We believe neither our action nor legislative action in Iowa will curb the problem of multiple punitive damages awards in mass tort litigation.").

Republican Senate Judiciary Committee Chairman Orrin Hatch, the Democratic Vice Presidential Candidate-Senator Joseph Lieberman, and others have made attempts to address the problem, but wealthy personal injury lawyer PACs have blocked their efforts. If legitimate consumer groups recognize that the wealthy personal injury lawyers do not represent consumer interests on this issue and join in the effort to end multiple punishments for the same wrong, perhaps Members of Congress would have the will to stand up to the personal injury lawyer PACs and solve the problem.

If the new Administration is objective and fair in its initiatives, it will stop multiple punishments and construct rules that will be fair to all parties. Sometimes one punishment may be inadequate for a particularly heinous act, particularly if an initial case lands in a jurisdiction that heavily restricts the amount of punitive damages. There are also times when an initial trial does not bring out all the wrongdoing, and serious and substantial culpable acts are later discovered. As Senator Hatch has recognized, legislation must accommodate these concerns, but must create a fair system that prevents people from being punished multiple times for the same basic wrong. If an Administration is not compromised by money from wealthy personal injury lawyers, it will put an end to the unfairness of punishing people numerous times for the same conduct.

V. PRODUCT LIABILITY

Over twenty years ago, the European nations recognized that having diverse rules on product liability among different countries makes no sense. Safety is not a subjective "local" item; it is an objective goal and a national concern. A lawnmower's design should be judged by principles of design and warning safety that are uniform throughout the country.

The European nations also recognized that a fair and reasonable trade policy means having one set of product liability laws for Europe. As a practical matter, the European Community has achieved that goal. Europe and Australia now operate under a single, uniform product liability law.⁶⁵

65. See Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for

Similarly, Japan's first-ever product liability law took effect in July 1995.⁶⁶

These international competitors express astonishment that an advanced country like the United States, eager for trade, maintains a product liability system that spews forth fifty-one sets of different and constantly changing product liability rules. Our own country has recognized that national goals are the centerpiece of product safety—that was the premise for the creation and the continuation of the Consumer Product Safety Commission.⁶⁷

The idea of having national uniform product liability laws is not new. Congress has struggled with the issue of having a national product liability law since 1980, but it has failed to reach any satisfactory resolution.⁶⁸ Politics on both sides—big business and personal injury lawyers—have bogged down all efforts. One reason for Congress's failure to act was the lack of any resource for formulating rules. Now there is one—the American Law Institute's *Restatement, (Third) of Torts: Products Liability*.

This *Restatement* project took over five years. It surveyed and analyzed case law from the past four decades. The project benefited from the wisdom of some of the most learned American professors, judges, and prominent practicing lawyers on both sides of the bar.⁶⁹ While the effort has been criticized,

Defective Products, 85/374, 1985 O. J. (2.210) 29.

66. See Product Liability Law, Law No. 85 of 1994 (Japan). For a general discussion of Japan's product liability system, see Mark A. Behrens & Daniel H. Raddock, *Japan's New Product Liability Law: The Citadel of Strict Liability Falls, But Access to Recovery Is Limited by Formidable Barriers*, 16 U. PA. J. INT'L BUS. L. 669 (1995).

67. See Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq.* (2000); see also National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 *et seq.* (2000) (repealed by Pub. L. 103-272, 108 Stat. 1379 (1994)); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (2000); Occupational Safety and Health (OSH) Act, 29 U.S.C. § 651 *et seq.* (2000); Federal Hazardous Substances Act, 15 U.S.C. § 1261 *et seq.* (2000); Poison Prevention Packaging Act, 15 U.S.C. § 1471 *et seq.* (2000); Flammable Fabrics Act, 15 U.S.C. § 1191 *et seq.* (2000); and the Medical Device Amendments of 1976, 21 U.S.C. § 360c *et seq.* (2000), to the Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. § 301 *et seq.* (2000).

68. See Victor E. Schwartz & Mark A. Behrens, *A Proposal for Federal Product Liability Reform in the New Millennium*, 4 TEX. REV. L. & POL. 261, 264-67 (2000) (describing the history of national product liability legislation).

69. See Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability—The American Law Institute's Process of Democracy and Deliberation*, 26 HOFSTRA L. REV. 743, 743, 752-56 (1998) (describing the ALI personnel responsible for developing the *Restatement*).

the criticisms have come both from plaintiff and defense lawyers, which strongly suggests that those who drafted the "Black Letter" of this new *Restatement* "got it right." The authors may not have made it perfect, but the *Restatement* does provide a resource for national product liability rules.

As with multiple imposition of punitive damages, there is a clear need for product liability reform legislation at the federal level. United States Department of Commerce data indicates that, on average, over seventy percent of the goods manufactured in a particular state are shipped and sold out of state.⁷⁰ Insurers recognized this fact years ago and set insurance rates based on nationwide, not individual state, data.

Despite the interstate nature of product liability, some in Congress have suggested that states should try to resolve the problem.⁷¹ For over two decades, the states have tried. The result has been even more unpredictability and a greater lack of uniformity. State efforts have been seriously compromised by judicial decisions—engineered by personal injury lawyers—that have nullified legislative efforts.⁷² These forces have tossed the product liability problem back into Congress's court.

Members of Congress may have rational apprehension about attempting to enact a federal product liability law, but with impetus from an Administration that seeks to have *fair* rules, reform may be achievable.

VI. REFORM CLASS ACTIONS SO THAT THEY SERVE LEGITIMATE PURPOSES

A. Place Interstate Class Actions in Federal Court

Class actions have legitimate purposes. First, they allow claimants to pursue collectively claims that, because of their insufficient worth, would not be pursued individually. The power to join many small claims may create a claim that is

70. See BUREAU OF THE CENSUS, COMMODITY TRANSPORTATION SURVEY, tbl.1, at 1-7 (1977).

71. Sen. Ernest F. Hollings, Product Liability Fairness Act of 1995, S. REP. NO. 104-69, at 56 (1995) (minority report) (noting that product liability has traditionally been "the province of the states" and arguing that the federal government should not intervene).

72. Victor E. Schwartz et al., *Tort Reform Past, Present and Future: Solving Old Problems and Dealing with "New Style" Litigation*, 27 WM. MITCHELL L. REV. 237, 238-40, 244-50 (2000).

economically viable. Second, class actions may reduce unnecessary costs and bring about efficiency in multi-state litigation. If a number of cases are substantially similar and ask substantially similar questions that have common answers, and if those questions outweigh differences among claims of those in the purported class, class actions may be appropriate. A good example in the personal injury area might be a hotel fire.

The legitimate purposes behind class actions, however, have been obfuscated by problems such as improper certification and settlements in which plaintiffs recover little or nothing. This fact was made clear in a Senate Judiciary Committee report on a class action reform bill in the 106th Congress.⁷³

The Committee report found that class action filings are on the rise. While federal class action filings over the past ten years have increased by 300 percent, filings in state courts have grown more than three times as fast, increasing more than 1000 percent over the past ten years.⁷⁴ The Senate Judiciary Committee found that this onslaught of state class actions has been facilitated by judges who do not act as gatekeepers to distinguish between proper and improper class actions.⁷⁵

For example, the Committee found that class actions have been certified by some state judges, even without notification to defendants.⁷⁶ Some state courts end up with jurisdiction over these *faux* class actions because plaintiffs' lawyers have manipulated their cases to gain access to that state's system. These plaintiffs' lawyers avoid neutral federal forums by naming nominal defendants or aiding nominal plaintiffs, thus destroying the basic federal jurisdictional requirement that all plaintiffs and all defendants must come from different states if a class action is to be heard in federal court.⁷⁷

73. See Class Action Fairness Act of 2000, S. REP. NO. 106-420, at 14-19 (2000).

74. See *id.* at 15 (citing *Analysis: Class-Action Litigation—A Federalist Society Survey*, CLASS ACTION WATCH, (Vol. 1, No. 1, 1999)); DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAINS, 19 (Executive Summary 1999); see also Advisory Committee Working Papers, (vol. 1) at ix-x (May 1, 1997) (memorandum of Judge Paul V. Neimeyer to members of the Advisory Committee on Civil Rules).

75. See S. REP. NO. 106-420, at 16 (2000) (finding state court judges to be "lax about following the strict requirements of Rule 23").

76. See *id.* at 18, 19 (discussing so-called "drive-by" class certification cases, "in which a class is certified before the defendant has a chance to respond to the complaint, or in some cases, has even received the complaint").

77. See *id.* at 13.

Personal injury lawyers know that if they can persuade a judge to certify a class action, they will hold a powerful hammer to make the defendants settle, regardless of the merits of the case. Judge Posner of the U.S. Court of Appeals for the Seventh Circuit has observed that certification of class actions “forc[es] these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability.”⁷⁸

A state court’s rubber stamp of a class action certification is unfair to defendants. As the Senate Judiciary Committee demonstrated in these cases, however, plaintiffs’ counsel often end up with millions of dollars in fees and the purported “class action clients” end up with very little of value.⁷⁹ The Committee’s report cites examples, such as the well-known Bank of Boston class action litigation, in which an Alabama state court judge approved a settlement that awarded up to \$8.76 to individual class members while giving the plaintiffs’ lawyers more than \$8.5 million in fees.⁸⁰ The judge allowed the award to be divided equally among the plaintiffs and fees debited directly from their bank accounts. Ultimately, plaintiffs ended up with a credit of \$8.76 or less and a debit of \$80 on their bank statements.⁸¹

In contrast, federal courts have been careful about certifying class actions. They examine whether common questions of fact predominate over claimant-specific questions. Federal courts also scrutinize whether plaintiffs’ attorneys truly represent the interests of their purported class.

One method of improving the current system is to make changes in the laws governing federal court removal and diversity-of-citizenship jurisdiction to eliminate much of the gamesmanship and abuse afflicting the current class action system.⁸² Congress is now considering “Class Action Fairness”

78. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995), cert. denied, 516 U.S. 867 (1995).

79. See S. REP. NO. 106-420, at 16 (2000).

80. See *id.*

81. See *id.*

82. See Victor E. Schwartz et al., *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 510-514 (2000) (describing abuses, suggesting reforms, and advocating passage of the “Class Action Fairness Act of 1999”); Victor E. Schwartz et al., *Fair Federal Forums Should Decide Interstate Class Actions*, CLASS ACTION LITIG. (BNA), Vol. 1, No. 8, Aug. 11, 2000, at 285.

legislation that would amend the federal diversity jurisdiction statute to grant federal courts original jurisdiction to hear interstate class actions when any member of a class is a citizen of a state different than any defendant: a change from "complete diversity" to "minimal diversity."⁸³

This expanded jurisdiction would not include disputes that are: (1) *intrastate cases*—cases that are truly local in nature; (2) *limited scope cases*—cases involving fewer than 100 class members or where the aggregate amount in controversy is less than a set limit (\$1 million in the House bill, \$2 million in the Senate bill); and (3) *state action cases*—cases where the primary defendants are states or state officials, or other government entities against whom the district court may be foreclosed from ordering relief.

The proposed legislation would also amend the federal removal statute to allow large, interstate class actions to be removed to the federal courts. First, unnamed class members (plaintiffs) would be allowed to remove to federal court class actions in which their claims are being asserted. Under current rules, only defendants are permitted to remove. The legislation would allow unnamed class members to act if they are concerned that the state court has not or will not protect their interests.

Second, parties could remove without the consent of any other party. As stated, current removal rules, which apply only to defendants, require the consent of all defendants to remove an action. The proposed change would prevent plaintiffs' lawyers from adding "sham" or "friendly" defendants to the case who can prevent other defendants from obtaining a more impartial federal forum for their claims.

Third, removal to federal court would be available to *any* defendant, regardless of whether the defendant is a citizen of the state in which the action was brought.

Fourth, the current bar to removal of class actions after one year would be eliminated, although the legislation retains the requirement that removal occur within thirty days of notice of

83. In the 106th Congress, the House of Representatives passed H.R. 1875, the "Interstate Class Action Jurisdiction Act of 1999," on September 23, 1999, by a vote of 222-207. The Senate Judiciary Committee favorably reported S. 353, the "Class Action Fairness Act of 2000," as amended, on June 29, 2000, by a vote of 11 to 7. 146 CONG. REC. 85 (2000).

grounds for removal.

The Senate class action reform bill would also require that any written notice to the class contain a “short summary written in plain, easily understood language” and provide other information about the content of the notice. For example, if the notice is sent to inform class members of a proposed settlement, the notice would have to explain the benefits of the settlement, the rights the class members will lose by entering into the settlement, the obligations imposed on the defendants, and certain information about their attorneys’ fees. These reforms would ensure that class members are aware of their rights and that lawyers cannot draft intentionally misleading or obscure notices that hide counsel-friendly “coupon settlements” that do not serve the class members’ interests.

B. Give Citizens a Right to Choose Their Class Action Lawyer

Moving cases that have true bearing on interstate commerce in federal courts will not, however, end class action abuse. Some state courts will find a way to open their doors to junk class actions. One method of reducing this possibility is to develop model state legislation that would give citizens a fundamental right to choose their lawyer. If plaintiffs’ lawyers want to bring a class action, they would have to fully inform those who might be embraced within the class. The plaintiffs’ lawyers would have to inform their potential clients of what they would get if they were to win their suit, and how much the plaintiffs’ counsel would receive. This requirement is likely to put an end to so-called “coupon litigation,” where plaintiffs’ lawyers make out like bandits and their alleged “clients” receive little of real value. Under the present system, individuals may be placed in class actions unless they affirmatively decide to opt out.⁸⁴ This new “choose-your-lawyer” approach would have purported class members choose to “opt in” to the class action.

In its role as supervisor of the federal courts, the federal government can provide citizens with a right to choose their lawyer. Legislation in this area need not cover all class actions, but it should cover those—like the coupon cases—that have shown to be filled with abuses.

84. See FED. R. CIV. P. 23(c)(2).

Class actions should once again serve their right and noble purpose in America. Class action abuse, where might makes right and a few personal injury lawyers get very rich, should be brought to an end.

CONCLUSION

There are major problems facing the civil justice system today that are of sufficient concern to require action at the federal level. Mistreatment of uninformed consumers of legal services, legal protection for educators, sanctions to deter the filing of baseless claims, product liability reform, reasonable limits on multiple imposition of punitive damages, and curbs on class action abuse are among the most pressing issues demanding fair and balanced legislation. Most federal legislation should be limited in its application to the federal courts. Where there is a need for action and states cannot achieve reform on their own, however, federal legislation should address both state and federal court litigation. This situation arises because of the need to protect elementary and high school teachers and principals from baseless lawsuits, to prevent multiple imposition of punishment for the same wrongful conduct, and to have a clear and coherent national product liability law.

The next Administration will have both the opportunity and the responsibility to address these issues. It will do so if it is guided by the public interest, and not by special interest groups and PACs.