WHEN BAD COMPANIES HAPPEN TO GOOD PEOPLE†

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The risk is obvious. Who will be held responsible and how? We can eliminate juries and eviscerate the civil justice system, letting the free market rule, or we can root out such dangers through adequate regulation and our courts. If unnecessary risks like these were avoided by responsible behavior, trial lawyers like me would be out of business. It is a pleasure to be in such distinguished company and to have been asked to participate in this Symposium on "Risk and Responsibility in the Twenty-First Century."

This is an awesomely large and complex topic to address—even for the collective wisdom assembled here. There are clearly sociological, philosophical, economical, and various other interpretations that experts on this panel and others who have written extensively on these issues can attempt to apply far better than I. I come to this gathering as an American citizen, a husband and parent, and an unrepentant trial lawyer, who is concerned about these issues in terms of the well-being of my family and the preservation of the civil justice system, both of which I fear are threatened by misguided interpretations of risk and responsibility in our society.

Regardless of our backgrounds, there are rather obvious contradictory meanings in these words that we could and probably should consider: Risk—the possibility of loss . . . or the opportunity for a favorable return on an investment. Responsibility—obligation . . . or reliability and dependability. What I think we are really talking about today are all these things. What obligations do we as individuals and those artificial creatures called corporations have? How reliable should we be in doing what we do and what we promise to do? And what are and should be the dangers that we are willing to assume in our own lives—and that we impose on others as we try to make a living or profit?

In 1533, Martin Luther instructed his congregation that: "'Everyone should conduct his trade, craft and business in such a way that he overcharges no one, cheats no one with false wares, is satisfied with a fair

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profit, and gives people something worthwhile for their penny.'"[1] Many of us would agree that that is a pretty good definition of good corporate citizenship. I, for one, think that is what risk and responsibility are all about in the corporate world of the twenty-first century.

While there are those who believe that the free market regulates itself, I have a contrary view. They may believe that the risk a business takes in producing a good or offering a service—the investment it makes and the profit it hopes to make—somehow assures that it will be responsible in offering products and services of the safest and highest quality. Certainly, logic tells us that, absent price considerations and given a choice, consumers would unquestionably and invariably choose quality and safety over substandard and dangerous. Although there are many responsible companies that do put people over profits, it does not take a rocket scientist, a brain surgeon, or too much observation by the rest of us to realize that is just theoretical poppycock to presume that all corporations are so ethical.

Over the nearly two and a half centuries of the American experiment, we have found that three things are especially important to assure the protection of the American people when bad companies happen to good people, or when bad companies happen to good businesses, because businesses also may victimize other businesses. One of these protections is indeed that the management of companies recognize—or discover after the fact—that their responsibility is not just to profit, but also to not expose their clients or customers to undue risk, whether it is the loss of their dollars or their physical injury. Second is government regulation: the Food and Drug Administration, the Consumer Product Safety Commission, the Environmental Protection Agency, the Equal Employment Opportunity Commission, the Occupational Safety and Health Administration, the Securities and Exchange Commission, and so forth. I would point out that a number of these regulatory agencies were the product of conservative, pro-business, Republican administrations. Finally, there is our civil justice system. The much-maligned civil justice system is the ultimate guardian against the imposition on another of unjustified risk and is the ultimate enforcer of responsible behavior.

We teach our children: "You break it, you fix it." Should we expect any less of our corporate citizens? The United States, of course, has the

1. J. Victor Thompson, *Ethics in Business Leads to Prosperity*, CJS FORUM, Dec. 11, 2006, http://www.ajustsociety.org/press/forum.asp?nav=publications&cjs ForumID=1036.

most open and fair system in the world—the best, period. Who could deny it? But today certain powerful interest groups do deny it. They would have people believe that our justice system is a big part of what is wrong with America.

Indisputably, our democracy is the freest and strongest on earth. Our economy is the envy of the world. Indisputable . . . except by those who concoct mythical lawsuit anecdotes, generalize from the occasional aberrant case, or simply make up phony statistics to allege that there is a litigation explosion in America. An explosion that has all but extinguished innovation and invention, that has made every citizen and every business fearful of being sued and going bankrupt, and that has destroyed American competitiveness in the world.

It is a remarkable assertion given that, when it is not wearing its so-called "tort reform" hat, the Chamber of Commerce and its members routinely boast of America's corporate prowess and preeminence, as do the Chambers and economic development agencies of each and every state. A remarkable assertion, indeed, given the fact that the United States is commonly considered one of the most competitive economies in the world. Our nation produces more patents, more inventions, and more creativity than any other on earth.

But, no matter. Somehow the common law legal system that has developed over decades poses a profound danger to society and, especially, to the gross national product. Judges and courts are not to be trusted. The judgments of juries—our friends, neighbors, co-workers—are to be feared. Trial lawyers are maligned as enemies of the state. I am maligned as an enemy of the state. The chairman and CEO of one of the nation's largest insurance companies actually called us "terrorists."[2]

You have seen the advertisements. They actually started with the insurance industry in the 1950s. If you are old enough to remember *Life* magazine and the *Saturday Evening Post*—like Governor Vilsack—you may actually recall that the industry in its own name first sponsored anti-civil justice advertising propaganda targeting jurors. "'[R]uled by emotion rather than facts, [jurors] arrive at unfounded or excessive awards—verdicts occasionally even higher than requested!,'" the ads said, before reminding potential jurors that "'you pay for liability and damage suit

2. Boston College, Carroll School of Management, Plaintiff Lawyers Called 'Terrorists,' http://www.bc.edu/schools/csom/cga/executives/events/greenberg.html (last visited Mar. 6, 2008) (highlighting statements made during a speech by Mark Greenberg, who is the chairman of American International Group (AIG)).

verdicts whether you are insured or not.'"[3] That was before the corporate powers changed their methods after the defining strategy memorandum written by Lewis Powell a few months before he was appointed to the U.S. Supreme Court.[4]

Since then, there have been front groups and "think tanks" (as opposed to the insurance, chemical, asbestos, and other industries) principally taking on trial lawyers or personal injury lawyers. One of the most influential and enduring of those groups has been the Manhattan Institute, founded by the late CIA Director William Casey. The plan was to create a body of "evidence" proving a "crisis" for which "we all pay a price." The tirades against lawyers supposedly manipulating the system out of greed, pursuing lottery-like winnings for undeserving (and/or uninjured) clients, have recently reached crescendo levels. It would be virtually impossible not to hear the irate cable talk show hosts and read the editorials. All of them demean our legal system, the work of lawyers, and the independence of judges. Ultimately, however, they continue to call into question the intelligence and objectivity of juries.

Still, I am proud to stand before you as an officer of the court, a trial lawyer. I am proud to argue that our civil justice system—based on the right to a trial by a jury of our peers—has been absolutely essential for the past 200 years and is absolutely essential for the next 200. The attacks on our civil justice system are not trivial. This is not just politics as usual. The radical changes proposed in the name of so-called tort "reform" would profoundly undercut our nation's bedrock. They would, I believe, lead to unnecessary risk of physical and financial danger for our citizens . . . and to far less personal and corporate responsibility. That is why I choose to defend the civil justice system.

I begin my case with the Constitution, which establishes the right to a trial by jury in all criminal cases.[5] The Seventh Amendment extends that

3. Stephanie Mencimer, *False Alarm: How the Media Helps the Insurance Industry and the GOP Promote the Myth of America's "Lawsuit Crisis"*, WASH. MONTHLY, Oct. 2004, at 18, 20.

4. Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chariman, Education Committee, U.S. Chamber of Commerce (Aug. 23, 1971), *available at* http://reclaimdemocracy.org/corporate_accountability/powell_memo_lewis.html; *see also* Jerry Landay, *The Powell Manifesto: How a Prominent Lawyer's Attack Memo Changed America*, MEDIA TRANSPARENCY, Aug. 20, 2002, http://www.mediatransparency.org/story.php?storyID=21.

5. U.S. CONST. art. III, § 2, cl. 3.

right to civil cases.[6] Do those who would take away our right to a jury trial know that it is enshrined in the Constitution itself? With their wealth and power, they can handle the politicians, the bureaucrats in Washington D.C. and our state capitals. But they are afraid of jurors, who are serious and dedicated and not easily fooled. Jurors fundamentally cannot be bought at any price. For those of us who work in the courthouse, the dedication of jurors is an inspiration and an admonition. They invariably do the right thing. And, I have a little trade secret to reveal: they almost always do. Every lawyer, win or lose, and every judge will tell you that the jury almost always gets it right. That is proven in study after study—like the one a few years ago in the *Dallas Morning News* in my hometown in which judges were virtually unanimous in their praise for the wisdom and dedication of jurors.[7] Should we not be profoundly careful before we undermine a Constitutional right that has served us so well? I have the wisdom of the Founders on my side. The so-called tort "reformers" do not.

Now let me fast forward to the classic case of risk versus responsibility—the Ford Pinto case.[8] Those of you over fifty probably recall the story. Those who are younger probably do not, but you likely have heard of it even if you have trouble believing it is true. Early on, Ford executives and engineers realized that the gas tank on the Pinto exploded when hit from the rear.[9] They made a few very conscious calculations. Redesigning and fixing the car would cost Ford $137 million; paying for the 180 lives they estimated might be lost, as well as the injuries, would run about $49.5 million.[10] It would be about $90 million cheaper to pay for incinerating occupants of the Pinto than building a safe car.

Ford decided to save money—and they put that conscious calculation in writing, making it one of the most flagrant cases ever of putting profits before people. Harsh, but true. In 1972, an angry jury assessed punitive damages—punishment for near criminal behavior—against Ford of $125 million, one of the first such big punitive damage awards.[11] Trial lawyers exposed the proof of this callously greedy decision by Ford, and Ford

6. U.S. CONST. amend VII.

7. Allen Pusey & Mark Curriden, *Judges Rule in Favor of Juries: Surveys by Morning News, SMU Law School Find Overwhelming Support for Citizen's Role in Court System*, DALLAS MORNING NEWS, May 7, 2007, at 1J.

8. Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Ct. App. 1981).

9. *See id*. at 359–62 (describing the car's flawed design, unsuccessful crash tests, and management's awareness of the defect).

10. *Id.* at 361.

11. *Id.* at 358.

stopped making the Pinto.

There is another, more recent poster-child for this kind of death-inviting risk assessment: British Petroleum. Reinvented and rebranded as the model of an expanding and caring modern corporation committed to environmentalism and quality while it was gobbling up other oil companies around the globe, BP was actually cutting payrolls and slashing investments in plants, maintenance, and safety to finance its 1990s spending sprees.[12] Then disaster struck. Refineries and the work that makes them run are notoriously dangerous.[13] Local officials at the BP Texas City refinery repeatedly had been rebuffed in their appeals for upgraded machinery and safety equipment.[14] On March 23, 2005, aging equipment and poor safety precautions led to an explosion that killed fifteen workers and injured more than 200.[15]

OSHA fined the company $21.3 million, the largest penalty of its kind ever levied.[16] Why? Instead of putting excess cash into requested maintenance and safety, BP executives had ordered the company to "bank the savings."[17] BP had led the industry in the number of refinery deaths from 1995 to 2005, and over that entire decade, there was a fire a week at the Texas City plant.[18] Disaster was imminent. BP executives hoped the Terry Schiavo case would steal the Texas City headlines, and one complained about having to visit the accident site at the beginning of his scheduled vacation.[19] His email about his hardship trip read: "I arrived in Texas City at 3 a.m. with [BP CEO] Lord Browne and we spent the day there—at the cost of a precious day of my leave."[20]

But that was only callous. BP, like Ford, had calculated the value of human life in the event of a disaster. A memo, using the Three Little Pigs as a metaphor, indicated a life would be worth $20 million, and observed that "The big bad wolf blows once per piggy lifetime."[21] Better to bank the

12. Mimi Swartz, *Blackmail, Sex, and Corporate Secrets*, CONDÉ NAST PORTFOLIO, Sept. 2007, at 236, 239.
13. *Id.* at 240.
14. *Id.* at 241.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 260.

profits than spend them on maintenance and safety. Brent Coon, the plaintiff's attorney who secured the release of documents for his client, rightly questions whether BP had "a moral compass."[22]

You know, of course, about the dangers of asbestos and the lawsuits of the past several decades. Companies manufactured and sold that so-called "magic mineral" for decades—well over half a century, in fact—after they knew that it is a profoundly dangerous carcinogen, that eventually leads almost invariably to horribly painful deaths. No preventive measures for their employees who worked with the stuff. No product warning labels for their consumers. Nothing except lies and cover-ups for decade after decade after decade, with the full complicity of the insurance industry. In 1966, a high ranking executive at an asbestos company even wrote: "My answer to the problem is: if you have enjoyed a good life while working with asbestos products why not die from it?"[23] That kind of statement does not go over too well with me, and it did not go over too well with jurors. No wonder the asbestos industry wants a government bailout to keep it out of court.

I could cite a lengthy list of such cases, of course, but I have no intention of demonizing corporations. Frankly, I know how that feels. I do not appreciate being demonized as a trial lawyer. There are plenty of excellent, law-abiding companies in America—the large majority. There are also a great number of law-abiding executives—the large majority. I have friends and relatives who work for the companies, large and small, that drive our economy. But there are the misdeeds—sometimes shameful deeds. Negligent practices can and do too often cost lives.

As a result of past exposure to asbestos, hundreds of thousands of Americans have died or will die in the near future.[24] How many crooked executives have robbed their employees of their jobs, their health insurance, and their pensions? Far too many. And some of the names are now part of economic history. I recently had the dubious pleasure of deposing the now imprisoned Bernie Ebbers. Literally millions of Americans owned stock in Enron, for example, and lost at least $40 billion.

22. *Id.* at 241.

23. Letter from E. A. Martin, Director of Purchases, Bendix Corp., to Noel Hendry, Canadian Johns Mansville Co. (Sept. 12, 1966), *available at* http://reports.ewg.org/reports/asbestos/documents/pdf/BX-091266.pdf.

24. EWG Action Fund, The Asbestos Epidemic in America, http://reports.ewg.org/reports/asbestos/facts/fact1.php (last visited Mar. 20, 2008) (stating that nearly 10,000 Americans die from asbestos-related diseases each year and estimating 100,000 more deaths in the next decade).

And when Enron began its downward spiral and the executives were bailing out on their investments and selling their stock, their employees and retirees—many of whom lost their life savings—were not so lucky. The stock in their retirement accounts was frozen, and they were unable to sell.

Should all these practices not be stopped and punished? Should the victims or their surviving families not receive compensation for their losses? Just as our criminal justice system protects us from armed robbers and murderers, our civil justice system must protect us against those whose actions may be just as costly and fatal, but not, technically, "criminal." It should punish those who act with utter disregard for the health and well-being of the rest of us. It should do what it can to restore the health and well-being—or financial losses—of those who have been injured through no fault of their own. Surely we all agree on this, so the only question is, protect us how? Punish the wrongdoers how? Should it be with the justice system as it has worked for more than two centuries, or with some replacement its enemies propose?

As we consider this, remember that no investigative journalist broke the Pinto story. No government regulators or Ford competitors. And certainly no Chamber of Commerce or think tank. It was the civil justice system—specifically, plaintiffs' attorneys who unearthed the documents detailing Ford's callous calculation. Only then did Ford quit making the Pinto and other automakers were forced to examine their cars and business practices. As a direct result, our vehicles and highways are much safer today. They are safer because of seatbelts, airbags, and child safety seats—all fought tooth-and-nail by the manufacturers and all now standard equipment because of the civil justice system and trial lawyers. Balcony railings are stronger and safer, thanks to the justice system. And there are back-up beepers on trucks.

A.H. Robins no longer sells the Dalkon shield IUD. Nearly 90,000 women were sterilized or otherwise injured by that product, known to be defective by A. H. Robins.[25] And, by the way, after A. H. Robins was forced to take the Dalkon shield off the U.S. market, it sold the products overseas in countries where consumer protection and the jury system are virtually unknown.[26] Was that the responsible thing to do?

25. Morton Mintz, *A Crime Against Women: A.H. Robins and the Dalkon Shield*, MULTINATIONAL MONITOR, Jan 15, 1986, at 1, 7.

26. *Id.* at 4.

Incidentally, the Consumer Product Safety Commission reported recently that companies notified the agency ninety-seven times in 2006 that they were exporting to other countries with far more lenient standards toys, lighters, fireworks, clothing, chemicals, carpets, and pacifiers that failed to meet U.S. safety standards.[27] That is almost twice as many times as in 2002.[28] How revealing it is that companies prohibited from endangering American consumers are willing to expose foreigners to those unacceptable risks?

How about football helmets? Some of those who think there is too much litigation point to the fact that there were once lots of companies in America making football helmets and now there are only two. In 1991, *Sports Illustrated* published a report titled "The Safest Season."[29] It was the first season in sixty years in which no football player at any level had died of head injuries, due in part to heightened safety standards inspired by lawsuits against equipment manufacturers.[30] So, because of lawsuits—challenges to the risks unnecessarily imposed by manufacturers—there are two companies making safe football helmets instead of a dozen making unsafe helmets. I think most parents and grandparents, and most coaches and athletes would agree that corporate responsibility makes good sense in this instance.

Thanks to the tort system and trial lawyers, children's sleepwear that catches fire can no longer be sold here. And, do you think we would be so concerned about recalling millions of lead-painted toys made in China if the civil justice system were not in place to say that such toys are an unacceptable risk to our children? The list goes on and on and on. Plaintiffs, their lawyers, and the judges and juries to which they took their cases have been a powerful force for positive change in America. Remember, we are not talking about companies that were surprised by their exploding gas tanks, their cancer-causing products, or their defective machines. In all too many cases, they knew about these dangers—sometimes for decades—and chose profits over people. Some that did not know, should have.

Ask yourself, would Mattel and other purveyors of children's toys have been engaging in a more intelligent and responsible investment risk if

27. Renae Merle, *Products that Miss Safety Standards Sent Overseas by U.S. Companies*, WASH. POST, Sept. 1, 2007, at D1.

28. *Id.*

29. *Scorecard, The Safest Season*, SPORTS ILLUSTRATED, April 29, 1991, at 16.

30. *Id.*

they had just made sure those toys they bought from China on the cheap were safe? So envision our country without a powerful tort system. What would replace it? Corporate goodwill? That would be ideal, but is unlikely to be universally applied. Government oversight? Already we know—and see additional evidence every day—that the FDA and the CPSC and all the rest have too few inspectors, investigators, and scientists . . . and too little enforcement authority.

The answer, as tort "reform" advocates know so well is: Nothing. That is their plan. Picture David v. Goliath. Now picture David without his slingshot. That is the utopia the tort "reformers" dream about. Yet that is the perfect free-market world where capital is expended in the smallest measures and at the least risk to produce the greatest income, and where the only responsibility is to the shareholders or business owners. That is what happens when bad companies happen to good people and those bad companies go unchecked.

In my defense of the jury system, I have the Constitution and a lot of recent experience on my side. The "reformers" know this, so they try to change the subject. "Lawsuits are destroying the economy!," they scream. "Litigation is costing our businesses billions and hurting our competition in the global marketplace!" "They are chasing away our doctors and inspiring fear in everyone." This argument amazes me, because it is so easily refuted by the fact that the American economy is incomparably the most dynamic in the world. It is the envy of every other country. Especially over the past century, American innovation and entrepreneurship has brought us the most useful, productive, and profitable goods and services anywhere. Just in my fifty or so years, we have gone from slide rules and manual adding machines to calculators; manual typewriters to electric ones and then computers; black and white television that was barely more than radio with pictures to color TVs spreading across our walls; dial telephones tied to the wall to Blackberries that can be used everywhere.

Precisely what is the damage caused by the civil justice system? Is it possible that the watchdog role of the civil justice system actually helps the economy by prodding businesses to be better corporate citizens? It is not only possible, it is manifestly true—an inconvenient fact the "reformers" hope you do not stop to think about.

To help you forget the amazing power of our economy, they yell about jobs: "Companies are going bankrupt because of lawsuits! Jobs are being lost!" I like this argument, too—a favorite regarding asbestos litigation—because it is so easy to expose. On the other side, you will hear

that Johns-Manville and seventy-eight other asbestos companies were driven into bankruptcy by asbestos lawsuits. Well, it is true that there have been almost eighty asbestos company bankruptcies. But in the corporate world, "going bankrupt" generally means filing for Chapter 11 protection. As most of you know, it is an accounting ploy. Those were reorganization bankruptcies. Those companies did not go out of business—they made arrangements to pay their asbestos liabilities and most of them went right back to business. To make my point, I will simply point out that there was merely an insignificant decrease in the number of people employed by these companies,[31] and annual sales remained constant as well.[32] Not what the average American thinks bankruptcy entails. But that is what we hear: companies going "bankrupt," because it is a scary word, and the scaremongers know it is hard for the truth to catch up with the lie. There are no statistics anywhere to back up the claim that asbestos litigation—or any other litigation—has cost thousands of jobs in the United States. It is simply not true.

Also, there is no statistic anywhere to back up the claim that civil tort lawsuits have inhibited innovation or competitiveness. It just is not so. Consider, for example, that the Council on Competitiveness has reported, in every year since 1986 for which complete data is available, that American scientists and engineers earned more than half of all patents issued worldwide—a clear indication of entrepreneurial robustness.[33] Real private investment in plants and equipment likewise continues to increase by healthy margins annually.

The U.S. pharmaceutical industry—a premier critic of the civil justice system and its supposedly stifling effect on research and the development of new drugs—spent $31.5 billion for research and development in the last year for which figures are available.[34] Unfortunately, the industry spent twice that amount marketing drugs, including those like Merck's Vioxx that

31. GEORGE J. BENSTON, FINANCIAL ANALYSIS OF COMPANIES THAT FILED FOR CHAPTER 11 BANKRUPTCY IN 2000 AND 2001 AS A RESULT OF ASBESTOS OBLIGATIONS 7 (2003), http://reports.ewg.org/reports/asbestos/documents/pdf/Benston4_14_04.pdf.

32. *Id.* at 5.

33. COUNCIL ON COMPETITIVENESS, COMPETITIVENESS INDEX: WHERE AMERICA STANDS 67 (2007), http://www.compete.org/images/uploads/File/PDF%20Files/Competitiveness_Index_Where_America_Stands_March_2007.pdf.

34. Marc-André Gagnon & Joel Lexchin, *The Cost of Pushing Pills: A New Estimate of Pharmaceutical Promotion Expenditures in the United States*, PUB. LIBR. SCI. MED., Jan. 2008, at 29, 31.

the company knew at the time was life-threatening.[35]

Consistently number one in the competitiveness rankings of the World Economic Forum, a global group of business and government leaders, the United States fell temporarily to second place (behind Finland) in 2003.[36] It was not litigation or the civil jury system that were blamed—rather, the report cited to our weakening public institutions and macroeconomic environment.[37]

Indeed, the civil justice system historically has played an important positive role in the U.S. economy by pushing businesses to produce and sell the best and safest possible products. American University Law Professor Mark Hager has testified that "our products, because of their superior reputation for safety, due in part of the effects of product liability . . . have a superior reputation in the international marketplace . . . and it would be a grave risk to our international competitiveness to toy with the tort system that helps bring about that competitive advantage."[38] But it is not only academics who hold such a view. Victor Thompson, President of Bulwark Capital Corporation and former head of the Global Fixed Income Group of State Street Global Advisors in Boston, recently wrote:

> Ethical conduct attracts capital, and capital allows for wealth-producing investment. In the global economy, capital is mobile and risk is priced. As investors perceive more risk of being cheated, they will charge more for others to use their capital and likely offer less of it. Therefore, investors have good reason to seek out countries with less corruption.[39]

What he means is that fewer Enrons equals more investor confidence.

35. *See id.* (estimating that U.S. drug companies spent about $57.5 billion on marketing in 2004).

36. Press Release, World Economic Forum, United States in Second Place Behind Finland in Global Competitiveness Report (Oct. 10, 2003), http://www.weforum.org/en/media/Latest%20Press%20Relseases/PRESSRELEASES 252.

37. *Id.* Additionally, we have recently witnessed infrastructure problems, and I hope we will not ignore the government's role. Perhaps you would have been as troubled as I was after the tragic collapse of the interstate highway bridge in Minneapolis—along with the revelation that thousands of other bridges are at risk—to see newspaper articles like Michael Laris, *Maryland, Virginia Diverted Bridge Money; Funds Were Used to Widen Roads, Fix Streetlights*, WASH. POST, Aug. 28, 2007, at B1.

38. S. REP. NO. 105-32, at 78 (1997).

39. Thompson, *supra* note 1.

In a commentary about "morality and the marketplace," focusing on Enron and its victims, Ken Connor, the former president of the Family Research Council, a conservative Christian organization, has asked whether "the new credo of American business" has become: "If we don't cheat, we can't compete."[40] He answers that hypothetical by saying:

> A just society understands and affirms the importance of accountability and responsibility. The two run hand in hand. If we fail to hold wrongdoers accountable for the consequences of their actions, their wrongdoing will increase. Wrongdoers should be fully accountable for compensating their innocent victims for the damages suffered as a consequence of their wrongdoing. Absent such accountability, America and the world will lose confidence in America's markets and our preeminent role in the world economy will pass to someone else.[41]

Then there is the allegation by the National Federation of Independent Business (NFIB) and Common Good, the organization our panelist Phillip Howard founded at the corporate law firm of Covington & Burling, that seemingly all American citizens and small businesses are afraid they will be sued. Might their propaganda and membership recruitment be inspiring that fear? Respected reporter Stephanie Mencimer recently wrote about congressional testimony by NFIB Legal Foundation executive director Karen Harned.[42] Harned said her members were plagued by "the fear of getting sued, even if a suit is not filed."[43] A poll of her members proved it, she said.[44] Mencimer observed that the occasion might represent "the first time that a trade association has complained to Congress about the effectiveness of its very own PR."[45] Indeed fear of lawsuits is one of the emotions the NFIB has spent fifteen years and millions of dollars promoting to its members and advertising in the media.

Mr. Howard was the principal inspiration and source for a cover story

40. Ken Connor, *"If We Don't Cheat, We Can't Compete": Morality and the Marketplace*, IDEAS IN ACTION, Aug. 2, 2007, http://www.centerforajustsociety.com/press/article.asp?pr=2463.

41. *Id.*

42. STEPHANIE MENCIMER, BLOCKING THE COURTHOUSE DOOR: HOW THE REPUBLICAN PARTY AND ITS CORPORATE ALLIES ARE TAKING AWAY YOUR RIGHT TO SUE 170 (2006).

43. *Id.*

44. *Id.*

45. *Id.*

in *Newsweek* a couple of years ago titled "Civil Wars: Doctors. Teachers. Coaches. Ministers. They all share a common fear: being sued on the job."[46] Although the article features people who were never in fact sued—and under the law could never have been sued— the article says without a shred of evidence that "Americans will sue each other at the slightest provocation."[47] The fact is that the only time most people come in contact with a lawyer or the civil legal system is when they are getting a divorce. President Roosevelt was right that "We have nothing to fear, but fear itself." It is just that some people with special interest agendas like the NFIB and Mr. Howard's Common Good are in the business of scaring people into opposing their own best interests.

But what about all this "jackpot justice"? There seems to be a lot of that. It is another catchy phrase for headlines and TV advertisements. I ask all the parents among you to think about this: if your child dies after a heart and lung transplant because the blood type is inexcusably incorrect—the well-known case of Jésica Santillán at Duke University—would all the money in the world in compensation be a "jackpot"?[48] Or, say a woman has both breasts removed unnecessarily because the pathologists switched her biopsy slides with those of another woman who actually had breast cancer.[49] Has this mother of two "hit the jackpot" if her compensation is any sum whatsoever? I am tempted, but I will spare the squeamish males here the details of a couple of dozen cases of men who qualified for the jackpot by having their private parts mistakenly removed. One of former Senator John Edwards's clients perhaps said it best: "I can assure you, when I visit my daughter's grave, I don't feel like I have 'won the lottery.'" Those who make quips about "jackpot justice" or victorious plaintiffs "winning the lottery" should be ashamed.

"But these cases are so complicated," they claim. "Runaway juries are swayed by emotion. They are handing out money like candy." I see.

46. Stuart Taylor Jr. & Evan Thomas, *Civil Wars: Doctors. Teachers. Coaches. Ministers. They All Share a Common Fear: Being Sued on the Job: Our Litigation Nation—And a Plan to Fix It*, NEWSWEEK, Dec. 15, 2003, at 43. The issue's cover stated: "Lawsuit Hell: How Fear of Litigation Is Paralyzing Our Professions."

47. *Id.* at 44.

48. *See* Randal C. Archibold, *Girl in Transplant Mix-up Dies After Two Weeks*, N.Y. Times, Feb. 23, 2003, at 1 (discussing the circumstances that led to the death of Jésica Santillán).

49. *See* Paul Gustafson, *Wisconsin Woman Sues over Needless Mastectomy*, STAR TRIB. (Minneapolis-St. Paul), Apr. 10, 2003, at 3B (reporting that Linda McDougal filed a malpractice lawsuit after receiving an unnecessary mastectomy).

Think back with me, when George W. Bush was first running for President, he announced that, during his tenure as Governor of Texas, not one jury had made a mistake that resulted in the execution of an innocent person. And remember, in Texas, as in other states, only a jury can decide capital cases because the decision is so important. President Bush believes those average Texans are fully qualified to sit in judgment in a capital murder case, determining the most important decision any of us could ever possibly have to make—whether someone lives or dies. But, according to President Bush and many of his friends in the tort "reforming" corporate world, somehow those same people are not qualified to sit in judgment on a corporation that knowingly manufacturers a dangerously defective product. They are not qualified to hear the case against a doctor whose malpractice has resulted in life-altering injury or death. They are not qualified to sit in judgment of Enron executives.

Here is the bottom line: would you, right now, sign an agreement that limits your compensation to $250,000 for any harm that any individual, any doctor or any corporation could possibly do to you and your family? Be honest, please, because that is what tort reform is all about—protecting the wrongdoers at the expense of those they injure.

But what about all the "frivolous" lawsuits? That is always the adjective. First, let me agree that there are some bad lawsuits. There are even some outright bad lawyers just like there are bad carpenters, accountants, doctors, or professors. Do those who try to use the rare bad lawyer or ridiculous lawsuit to discredit the entire justice system want to use the rare incompetent doctor to discredit the entire healthcare profession? Should one crooked CEO discredit the entire Fortune 500? Certainly not.

The truth is that neither the medical profession nor the business community has anything like the elaborate system of checks and balances that our judges have at their disposal. It is too bad they do not. Judges have full authority to throw out lawsuits without merit and they do. The judge guides the jury every step of the way. The judge can set aside a jury verdict that is manifestly wrong or excessive. The verdict can be appealed to a higher court. For example, there was recently a case in the Washington, D.C., in which an administrative law judge—a lawyer who should have known better—filed a multi-million lawsuit against a neighborhood dry cleaner for losing a pair of his suit pants.[50] I hate to

50. Marc Fisher, *Lawyer's Price for Missing Pants: $65 Million*, WASH. POST, Apr. 26, 2007, at B1.

second-guess a judge, but for that case to be filed anywhere but small claims court, seeking compensation for the trousers would seem frivolous to me. Had I been the judge, I would have thrown it out quicker than butter melts on hot corn. The judge did not, but the jury did. The system worked as it should.

Nevertheless, we are told, bogus cases have flooded the courts. Here is an inconvenient fact for the critics, courtesy of a past-chair of the American Bar Association's Tort and Insurance Practice section—a group that includes plaintiff and defense lawyers: the rate of federal lawsuits per capita has not changed since the year 1790.[51] Not 1970—1790. Here is another inconvenient fact: on the state level, thirty-five states have been able to provide good statistics to the National Center for State Courts. In those states, tort filings—the majority of which are auto cases—have declined by twenty-one percent since 1996.[52] The Bureau of Justice Statistics in the Department of Justice also found that the median inflation-adjusted award in tort cases dropped 56.3% between 1992 and 2001.[53] On the other hand, contract cases—mostly businesses suing other businesses—increased by twenty-five percent.[54] They are the real growth industry in the legal profession. Yet, remarkably, we have barely heard a word about those cases clogging the courts or the need for limiting corporate access to the courthouse.

I recently came across a case in which a division of Scott Paper sued Proctor and Gamble (P&G) for misleading consumers about the powers of "Bounty" paper towels. P&G had claimed that "Bounty" is the "quicker picker-upper."[55] Scott Paper said no way and sued P&G.[56] That vital case would be unaffected by tort "reform," but the lumberjack injured by a defective chainsaw while cutting the tree used to make those dueling paper towels would be affected a great deal. Strange, is it not? The number of

51. Frank J. Murray, *'Jackpot Justice' Gets Best Defense*, WASH. TIMES, July 18, 2000, at A1.

52. COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 13 (2006), http://www.ncsonline.org/D_Research/csp/2006_files/EWSC-2007WholeDocument.pdf.

53. THOMAS H. COHEN & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001, at 9 & tbl. 11 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc01.pdf.

54. COURT STATISTICS PROJECT, *supra* note 52, at 12.

55. *See* LAURA B. BENKO & ATILLA BENKO, BUY THIS BOOK OR WE'LL SUE YOU 196 (2001) (highlighting the paper towel case as an example of a comically frivolous lawsuit).

56. *Id.*

contract cases—business cases—is growing dramatically, while tort case filings are declining, but it is only the tort cases that are clogging the system and costing the companies so much money to defend themselves. Scott Paper can sue P&G about their respective paper towels, but it is only the tort cases that are "frivolous." What about Fox News suing Al Franken for using "Fair and Balanced" on his book cover?[57] Victoria's Secret took Victor's Little Secret all the way to the Supreme Court.[58] Hormel, which makes the canned meat SPAM, sued the Muppets' Jim Henson Productions for naming a movie character Spa'am.[59] You get the picture.

We might conclude that the corporate interests that are paying for all the propaganda complain only when injured people or their survivors sue for damages. Meanwhile, businesses should have the right to sue each other all they want. Do not get me wrong. Just because these "business versus business" suits take up much of our courts' time and resources, and even though some of them may seem trivial, I do not think legislatures should limit them. Our courts and juries can do that just fine. Let me repeat—I am not here to demonize corporations, but to ask for fairness.

As you may suspect, this question relates to a very real case that has been mythologized repeatedly over the last decade. Everyone thinks he knows the details of the McDonalds coffee case, but few actually do. I hope this audience may be the exception, but some salient points are worth making. Stella Liebeck suffered third degree burns, was hospitalized for more than a week, and had to endure skin grafts after the coffee she had bought at the golden arches spilled in her lap as she sat in a parked car struggling to get the lid off so she could add cream and sugar.[60] No, she was not driving. And this had happened before . . . and for a reason. More than 700 other customers had been hospitalized with second- and third-degree burns from McDonalds's coffee.[61] Why? The company intentionally sold its brew at a temperature thirty-five degrees higher than the industry recommends—a temperature the company knew would burn through all the layers of skin.[62] And what the jury heard, but perhaps you

57. Fox News Network, LLC v. Penguin Group (USA), Inc., 2003 WL 23281520, at *1 (S.D.N.Y. Aug. 20, 2003).

58. V Secret Catalogue, Inc. v. Moseley, 537 U.S. 418 (2003).

59. Hormel Foods Corp. v. Jim Henson Prods., Inc., 63 F.3d 497, 500–01 (2d. Cir. 1996).

60. Andrea Gerlin, *A Matter of Degree: How the Jury Decided that a Coffee Spill Is Worth $2.9 Million*, WALL ST. J., Spet. 1, 1994, at A1.

61. *Id.*

62. *Id.*

did not, was McDonalds' executives testifying that they thought these hospitalizations were a trivial matter and had no intention of changing their practices just to keep customers from suffering third-degree burns.[63] Liebeck actually never wanted to sue—she tried to alert McDonalds to the dangers of its coffee and sought payment of her medical bills of $800, but was rebuffed.[64] The jury found McDonalds's cavalier conduct reprehensible and initially awarded punitive damages of $2.7 million, [65] which was later reduced by the judge and a subsequent settlement. By the way, the week after the verdict, McDonalds lowered the temperature of its coffee.[66]

Liebeck's lawyers, like most plaintiff's and personal injury lawyers, worked on a contingency fee basis. She paid them nothing at the start of the case, nothing, in fact, until the case was successful, until all appeals had been considered, and the final settlement was reached. If her case had failed, she would not have paid them one penny. The "reformers" say such an arrangement is unfair. Why? That is easy. The contingency fee is the key to the courthouse. Without such an arrangement, most ordinary citizens could never get a foot in the door. They certainly could not afford to pay the hourly rate that companies pay their lawyers. They could not afford to pay a legal team for the tens of thousands of hours of work required to sue Ford over the Pinto's exploding gas tank, or to sue W.R. Grace and Beatrice Foods for the environmental pollution case in Woburn, Massachusetts, that was the subject of the book *A Civil Action*.[67] Remember that bestseller from 1995? Maybe you saw the movie, starring John Travolta as the main lawyer for the eight families in Woburn.[68] Remember how it all turns out? After nine years of litigation, the families were awarded $8 million—a mere slap on the hand for the two huge corporations and a pittance for the eight families, after so many years. And the lawyer? He went broke and started selling surf boards in Hawaii. His law firm split up. But that is how it goes with contingency fees. The risks for the trial lawyers are enormous—one reason that cases without merit simply do not make common sense. Sometimes, though, the rewards are big. Most of the time they are not.

63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. JONATHAN HARR, A CIVIL ACTION (1995).
68. A CIVIL ACTION (Touchstone Pictures 1999).

Newspapers do not report everyday verdicts of a few thousand dollars any more than they report the merger of companies worth only a few hundred thousand dollars. It is true that there are some very wealthy plaintiffs' lawyers in this country, but the hypocrisy here is unbelievable. Every city in this country has numerous large white-shoe law firms—corporate lawyers, basically—and every partner in these firms is wealthy, earning several hundred dollars an hour, minimum—hundreds of thousands, if not millions, of dollars a year. But it is always the lawyers whose only clients are men and women injured through no fault of their own who are vilified for being "greedy." All I ask is that we be fair about this.

Common sense tells us that contingency fees protect the system from frivolous lawsuits. I cannot waste my time or invest my money on a case I do not think has real merit. The contingency fee is one reason there are fewer tort cases than other kinds of civil cases. Put it this way: Who is more likely to file a silly case, a corporate lawyer paid hundreds of dollars an hour or a plaintiff's attorney who is not paid a penny until she wins the case and all of the appeals, possibly years in the future?

Finally, inescapably—medical malpractice. According to a now-famous 1999 study by the Institute of Medicine, at least 44,000 people, and perhaps as many as 98,000, die each year in the United States because of preventable medical errors.[69] These fatalities—the equivalent of a jumbo jet crashing every day—which the Institute of Medicine says cost our society as much as $29 billion a year, constitute the eighth leading cause of death in this country—higher on that grim list than AIDS, breast cancer, and even car wrecks.[70] The New England Journal of Medicine—one of the most widely-read and respected publication in the field—reports that nearly half of all patients in this country receive less than "recommended care."[71] But rather than working to stop these tragic errors, the insurance companies, the doctors, the hospitals, and the HMOs would rather stop the victims of all those errors from filing the few lawsuits that actually do get filed.

I would actually like to stop here to applaud two encouraging

69. INST. OF MED., TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 26 (Linda T. Kohn et al. eds., 1999).

70. *Id.* at 27.

71. Steven M. Asch et al., *Who Is at Greatest Risk of Receiving Poor-Quality Health Care?*, 345 NEW ENG. J. MED. 1147, 1150 (2006) (finding that only 56.6% of females and 52.3% of males receive the recommended level of care).

developments. First is Medicare's decision to stop paying hospitals for the additional costs occasioned by commonly-acknowledged preventable medical errors.[72] Medicare will no longer pay hospitals to retrieve tools or sponges left in patients after operations. It will not pay for harm caused by incompatible blood or air embolisms, or treatment of bedsores developed in the hospital, injuries caused by falls in the hospital, infections caused by prolonged use of catheters in the bladder or blood vessels, or surgical site infections after coronary bypass surgery. Assuming the costs are not passed on to the patients, this is an important first step in eliminating unnecessary medical injuries. The policy should also be applied to payments to doctors who may be responsible for those preventable medical errors and their consequent costs.

The second goes back to 1984. The American Society of Anesthesiologists, with the help of the University of Washington Medical School, decided to do something responsible about its high medical malpractice risks and the high medical malpractice premiums of its members. It undertook a closed claims study—looking at what happened to malpractice claims and, more importantly, why the errors occurred.[73] The result was protocols and practices that reduced anesthesia-related deaths from one in 10,000 cases to one in 200,000.[74] It has also kept the average anesthesiologist's liability insurance premium steady at $18,000 between 1985 and 2002.[75] Bravo! A responsible act that reduced unnecessary risk for patients. Why, we have to wonder, does every medical discipline and facility not follow this good example?

Just think of how many of those preventable injuries could actually be prevented. I, for one, am grateful that when I recently had rotator-cuff surgery one shoulder was marked "WRONG" and the other "RIGHT." If only the patient who had the wrong leg amputated or the cancer patient

72. Robert Pear, *Medicare Says It Won't Cover Hospital Errors*, N.Y. TIMES, Aug. 19, 2007, at 1.

73. JOINT COMM'N ON ACCREDITATION OF HEALTHCARE ORGS., HEALTH CARE AT THE CROSSROADS: STRATEGIES FOR IMPROVING THE MEDICAL LIABILITY SYSTEM AND PREVENTING PATIENT INJURY 19 (2005), http://www.jointcommission.org/NR/rdonlyres/167DD821-A395-48FD-87F9-6AB12BCACB0F/0/Medical_Liability.pdf

74. *Id.*

75. PUBLIC CITIZEN, ANESTHESIOLOGISTS' EXPERIENCE SHOWS PATIENT SAFETY EFFORTS DO MORE THAN DAMAGE CAPS TO REDUCE LAWSUITS AND INSURANCE PREMIUMS 2 (2004), http://www.citizen.org/documents/Anesthesiologists.pdf.

who had the non-cancerous lung removed had been so lucky.

Now, I ask you—again—would you sign an agreement that no matter what a doctor or a hospital does to any member of your family, you will accept a maximum of $250,000 in "pain and suffering" compensation for life-altering injuries? Would that number suit you as just compensation to your family in the event of life-ending medical negligence? How about a whopping $500,000? No matter how egregious the negligence? No matter the degree of disfigurement or life-long disability? No matter how many times this same doctor had butchered other patients in the past? Be honest now, because this is what medical malpractice "reform" is all about.

But are malpractice suits not responsible for skyrocketing liability insurance premiums for doctors? Is this not why doctors go out on those well-publicized strikes or even leave the profession? We have all read the stories. First, in those states that have mandated caps for jury awards in malpractice cases, liability premiums for doctors have not gone down. If you have any doubt about this, please check it out. I could just quote the president of the American Tort Reform Association, who said several years ago, in a fit of frankness, "[W]e wouldn't tell you or anyone that the reason to pass tort reform would be to reduce insurance rates."[76] This is amazing, because the insurance lobby is trying to manipulate doctors and everyone else into believing just that.

Second, when measured against medical inflation, compensation in malpractice cases has been flat for over a decade according to a study first conducted in 2002 and updated annually by Americans for Insurance Reform, a coalition of over 100 consumer groups.[77] Meanwhile, the rates the insurers charge doctors keep going up. Why? The business practices and inherently cyclical nature of the insurance industry. This is a complex problem. Doctors' insurance premiums are too high, but the answer is not to restrict the legal rights of American families.

The truly tragic aspect of this whole story is that about five percent of doctors are responsible for over half of all malpractice settlements. How can this be? They are protected. The insurance companies know who these doctors are because they handle the claims against them. Other

76. JAY M. FEINMAN, UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW 73 (2004).

77. Press Release, Americans for Insurance Reform, New Americans for Insurance Reform Study Refutes Insurance Industry's Explanation for Rising Medical Malpractice Rates (Oct. 23, 2003), http://www.insurance-reform.org/pr/story021023.html.

doctors know because word spreads. And the hospitals know, of course. They all know—everyone—except the patient and the family. We do not know, and we are the ones who will pay the price when these bad doctors make their next mistake.

The next time you get the chance, ask the liability insurance companies why they do not base their premiums on the individual doctor's track record. Right now, wonderful doctors with no claims pay exactly the same rate as terrible doctors with multiple claims. This is the system we should change. Bad doctors would be forced out of the profession, good doctors would not be punished for the mistakes of others, and all of us would be safer when we go to the hospital. Tens of thousands of people would not die every year from medical errors. But it is easier to go after the lawyers. It is easier to go after their clients.

I would be remiss, however, if I did not at least briefly address the latest effort to undercut the civil justice system. Once again, it is Mr. Howard's group at the forefront. He proposes that we totally eliminate juries in medical malpractice cases and replace them with what he generously calls Health Courts. They are not really courts at all, and would be all but ruled by the insurance and medical industries. We would be trading in the tried and true wisdom and good judgment of American juries. You see, Mr. Howard and Common Good do not trust juries. They would be replaced by a worker compensation-like system similar to the one used in France, which, unlike the United States, has universal health care coverage that the AMA and Mr. Howard's clients would surely consider "socialized medicine."

One final point on risk and responsibility: We are approaching another anniversary of that awful day we will always remember—September 11th. The next day, as the airlines secretly dispatched their lobbyists to Capitol Hill to secure immunity for any responsibility they may have had for lax security or their opposition to armoring cockpit doors, the trial lawyers of America took a different position. We said the risk of terrorist attack was one that no one could foresee, but that it was our common cause to respond. We declared a moratorium on any possible lawsuits related to the attacks. We asked Congress to provide for the victims and their families a compensation fund paid for by the American people. When that fund was established, trial lawyers publicly promised to represent each and every eligible family absolutely without cost. When all was said and done, thousands of volunteer lawyers from across the country, operating through Trial Lawyers Care—the largest and most successful pro bono legal representation program in history—had represented 1,745

victim families without charge. We saw our responsibility and lived up to it. It is telling that the legal counsel of the American Tort Reform Association actually attacked us for doing so.

There is no flood of frivolous lawsuits. Runaway juries have not taken over the courthouse. The large awards you read about are very few and very far between. The civil justice jury system is the best way we have to guarantee, insofar as humanly possible, that the risks taken by businesses and individuals to earn greater profits do not impose unacceptable risks on customers, clients, employees, or society. It is the best way we have to assure that, if companies and individuals do not live up to their responsibilities, they are held responsible under the law by citizen juries. These are the facts, but the facts are under-funded. They have a hard time competing with the well-funded fiction bought and paid for by the corporate special interests who would effectively slam shut the doors to the courthouse—slam them shut to ordinary Americans, that is.

The proponents of tort reform have only one goal: to protect those with economic and political resources—themselves—from those without such resources. My attitude is a little different. I am pretty sure the Fortune 500 will always be able to take care of itself. I am a bit more worried about the rest of us. Tort reform discredits everyone who serves on a jury. It is amazing, when you really think about it they are trying to convince you that your judgment, and the judgment of your fellow citizens who hear all of the evidence on both sides, just cannot be trusted. They are trying to convince you that you have become a source of oppression. They are trying to convince you that America is a vibrant, humane society despite our civil justice system, which is so terribly flawed.

I respectfully disagree. I believe in jurors. I believe in judges. I even believe in lawyers. I believe in the safeguards built into the civil justice system. I support the truly conservative principle that it should be left alone to function as it has for over two centuries—faithfully and well. Finally, in spite of all that I have said, I do believe there are too many tort lawsuits in America. The reason, however, is not that our citizens or their attorneys are too litigious, but because there are too many people who are hurt by the negligence or irresponsibility of others—because there are too many bad companies happening to good people.