

How to Fix the **TORT SYSTEM**

A real solution requires pragmatism, not politics.
BusinessWeek's four-point plan would preserve the
benefits and eliminate the excesses. **BY MIKE FRANCE**

Wreck? Injury?

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As Certified by the Texas Board of Legal Specialization.

DALLAS PITCH If only lawyers were as aggressive at notifying winners of class-action settlements

NANCY NEWBERRY

THIS SHOULD BE A TRIUMPHANT moment for Thomas A. Gottschalk. As the executive vice-president for law and public policy at General Motors Corp., he has devoted his long career to battling plaintiffs' lawyers. So you might think Gottschalk would be thrilled about the recently passed Class Action Fairness Act (CAFA), the biggest federal tort reform of his 62-year lifetime. Guess

again. "CAFA will not eliminate many class actions," predicts the steely former litigator. "It was a modest procedural step."

That's the verdict of most of Gottschalk's longtime allies—from the generals to the ground troops—in America's tort war. They portray the U.S. legal system as a dire economic threat that jacks up the price of cars, drives obstetricians out of work, and effectively taxes all Americans' standard of living. Truly tackling these problems, many business leaders believe, requires a whole lot more than CAFA—or anything else on Washington's agenda. In fact, they find inspiration overseas. Gottschalk, for example, wants to borrow an idea from Britain, where the losers of lawsuits pay for the winners' expenses. Other self-described tort reformers want to reduce the role of juries, whack big damage awards, and truly reshape American justice. "The whole tort reform debate in this country is pathetic," grouches Philip K. Howard, founder of the New York legal policy group Common Good.

That's about the only point that all sides agree on. Plaintiffs' lawyers, union leaders, and consumer advocates accuse Howard, Gottschalk & Co. of polluting the policy dialogue with bogus numbers and misleading anecdotes. They offer a radically different view of reality. Citing Vioxx, Enron, Firestone, WorldCom, and other recent scandals, the business community's opponents

argue with equal passion that now is no time to be loosening the restraints on executive misbehavior by eviscerating the role of the courts. "Corporate America wants immunity from misdeeds through tort reform," charges Frederick M. Baron, ex-President of the Association of Trial Lawyers of America (ATLA).

Is either side right? How bad is the American legal system? What's the best way to fix it? These issues, for the first time in years, are squarely on the table. Now that CAFA is on the books, Bush wants to move on to medical malpractice litigation, the asbestos mess, and beyond. The stakes transcend the narrow-sounding issue of tort law—the body of precedents governing personal injuries. The mislabeled "tort reform" debate also touches on antitrust, consumer protection, employment, environmental, and securities law. These all play a key role in determining the safety guidelines for cars, doctors, drugs, food, and construction sites. The cost-benefit choices we make in this arena influence the design of children's toys, the content of 10-Ks, how often office workers must view sexual harassment prevention videos, the amount of money given to asbestos victims, and countless other unique features of U.S. society.

Tort reform, then, is more than simply an economic policy debate. It's also about justice—the ultimate values issue. How people feel about the subject directly depends on how they feel about things like individual responsibility and the public obligations of private companies. Do they attach more blame to McDonald's Corp. for making fattening hamburgers—or to obese teenagers for eating them? "The debate is really about what kind of culture we want to have in America," says Cornell University law professor Douglas A. Kyser. "A lot of deep political issues get discussed through tort law language."

Problem is, much of the discussion has been distorted by hyperbole from both sides. Despite the alarmism from Corporate America, most of the big verdicts that become urban legends are reduced on appeal. Nor is there authoritative evi-

THE STORY OF AN IMPASSE

How we got into the current mess is a tortuous tale, one that has played out in thousands of courtrooms, legislatures, and law schools. Here are the turning points.

▶▶ THE PITILESS ERA (1900-45)

A century ago, courts treated disasters as *acts of God*, and downplayed the role of corporate malfeasance. A stark example: the 1911 Triangle Shirtwaist factory fire, in which 145 died in lower Manhattan (below). Although there was clear negligence—the escape doors were locked—families of the deceased received payments of only \$75 apiece.



▶▶ THE LIABILITY EXPLOSION (1945-80)

Corporate liability expanded gradually in the early decades of the 20th century—and then dramatically after World War II. By the end of the 1970s, massive waves of class actions were hitting Corporate America for damage from such dangers as asbestos, Agent Orange, and the Dalkon Shield (below).

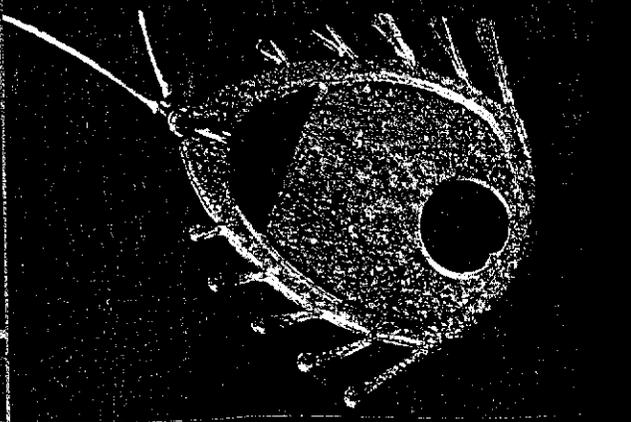


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WHO WILL DELIVER YOUR BABY?

WHO WILL DELIVER YOUR BABY?

SUPPORT Medical Liability Reform



LINING UP Doctors rally in Chicago to call for tort reform

Doctors rally in Chicago to call for tort reform. Evidence that plaintiffs' lawyers are weighing down the economy. This is, in part, because there are no reliable aggregate data about the system (page 77). America's network of federal, state, and local tribunals is sprawling and undigitized. Nobody knows how many cases are filed each year or how they turn out—especially since the vast majority are settled out of court. So any macroeconomic conclusions are speculative. When Bush claims that the annual "litigation tax" in America is \$246 billion, it's a guess.

To the extent that reliable data do exist, they show no signs of broad systemic breakdown. The latest statistics from the Bureau of Economic Analysis indicate that legal services account-

ed for less than 1.5% of gross domestic product in 2003—a slightly lower share than in 1990. That means the legal industry has lagged the overall economy. Such slow growth suggests that lawyers are not reaping a bonanza from winning—and defending—big corporate cases. Moreover, the strong productivity gains in recent years undercut the argument that rapacious plaintiff lawyers are strangling growth.

The debate isn't simply about economic policy. It's about **JUSTICE**, individual responsibility, and business' public obligations

Does this mean there's no case against the tort system? Not at all. Just that the strongest evidence of plaintiffs' lawyer misconduct doesn't rest on broad economic data. Rather, the real crisis lies in the proliferation of specific types of bogus cases—ones in which nobody has been injured, no malfeasance has occurred, or regulators have already taken care of the problem. Despite their claims of being selfless safety advocates, plaintiffs' attorneys in 2005 are analogous to chief executives in 1999: Most of the players are making an honest living. But an unacceptably high percentage of them are stretching the rules.

BusinessWeek's four-part solution to the problem is based on a set of pragmatic principles, with some parallels to those being used to clean up Corporate America. Like CEOs, lawyers should, first of all, be paid for performance. They shouldn't be allowed to take home multimillion-dollar paychecks if clients get pennies. Second, they shouldn't be able to cash in when they're merely piling on to government crackdowns. Third: When attorneys break the rules, the punishment should sting. These days, lawyers who file frivolous suits barely get their wrists slapped. These simple reforms would eliminate the most abusive cases while preserving the rights of victims. In the rare cases where they did not go far enough, such as asbestos, a far more radical change—exiting the courts altogether—may work better.

Surprisingly, the excesses in America's legal system grew out of the country's commitment to free markets and individual-

BACKLASH (1981-2005)

As plaintiffs' lawyers gained power, efforts to rein them in began. A series of insurance crises prompted state legislatures in Florida, Minnesota, and elsewhere to pass modest tort reforms. The federal government joined in with the Private Securities Litigation Reform Act, targeting securities and attorneys such as William Lerach (below), in 1995.

TODAY

Despite more than two decades of stabs at tort reform, the plaintiffs' bar is better financed than ever. It now is reaping the rich harvest of Enron and other corporate scandals. Responding to the call of insurers, car manufacturers, and tobacco companies for more help, Bush signed the Class Action Fairness Act on Feb. 18.



(TOP) JOHN ZICH/REFLENEWS

ism. Modern tort law began with the unprecedented wave of injuries spawned by the Industrial Revolution. A century ago, when a worker lost his arm in a mill or a consumer got poisoned by canned food, he was generally out of luck, as were his dependents. Few people bought insurance back then, and the courts frowned on personal injury suits. The families of the young women who perished in New York's Triangle Shirtwaist Factory Building fire in 1911, to take one classic case, collected wrongful death payments of just \$75 apiece—despite rotten fire hoses, locked escape doors, and other signs of clear negligence.

Starting in the early decades of the 20th century, in piecemeal fashion, U.S. legislators and judges began tearing down the barriers that protected companies against lawsuits. Until 1916, for example, consumers could only sue the distributors that sold defective products, not the manufacturers. That changed when the wooden wheel on Donald C. MacPherson's 1910 Buick Runabout collapsed. In a landmark opinion, New York state court judge Benjamin Cardozo held that Buick Motor Co. owed a duty to the end user—triggering the first of

Lawyers have to do a better job of **COMPENSATING VICTIMS** as well as deterring corporate wrongdoing

many big bangs in corporate liability. The progressives and New Dealers who championed the expansion of tort liability "wanted to create social insurance for the many misfortunes of life, including accidental injury, disability, and unemployment," says Robert W. Gordon, a professor at Yale Law School.

After World War II, tort law received a boost from economists—something that would probably come as a surprise to many businesspeople today. A new generation of scholars such as Guido Calabresi and Richard A. Posner (both now federal judges) started writing law review articles packed with dense equations. They argued that the tort system should be more than simply a method of compensating the victims of misfortune. Instead, it should be a free-market tool for preventing accidents in the first place. In the real world, this usually meant hiking the liability on manufacturers, giving them a financial incentive to improve the safety of their products. The economic theory essentially held that the most socially efficient outcome would be achieved when the cost of the safety improvements matched the cost of being sued.

The result is one of those exceptional American institutions that sometimes causes the rest of the industrialized world to rub

its eyes in wonder: A tort system that functions as both an insurance mechanism and as a form of decentralized regulation. Loud-mouthed, Lear-jetting, billboard-advertising plaintiffs' attorneys have been officially deputized to serve as private-sector adjuncts to the Securities & Exchange Commission (SEC), the Food & Drug Administration (FDA), the National Highway Traffic Safety Administration (NHTSA), and a wealth of other federal and state agencies. "Europeans would be extremely nervous with this kind of arrangement," observes Michael Greve, a German-born tort reform expert at the conservative American Enterprise Institute in Washington.

What do they do in Germany, Belgium, or France when sport-utility vehicles roll over? For starters, the victim's medical expenses are covered by nationalized health care. And lost wages are largely picked up by employers or the government. So nobody needs to go to court to be made whole—and punitive damages aren't allowed. It's basically a no-fault system that renders plaintiffs' lawyers irrelevant, eliminating most of the expensive features of the U.S. adversarial system, such as pre-trial discovery.

That probably sounds great to many in Corporate America. But built into the Western European system is an even greater degree of regulation. Instead of offloading responsibilities to plaintiffs' lawyers, bureaucrats and administrative judges do all the work. "You can substitute for tort law by having more extensive social insurance and relying on regulators to a greater extent," says Mark Geistfeld, an expert in comparative jurisprudence at New York University School of Law. "But it's not like the cost disappears; it just becomes part of the tax base."

That's why comparisons between the U.S. and other countries are misleading. Britain, Germany, and Japan all have fewer lawyers per capita than America—a fact critics of the U.S. love to cite. But these countries don't ask their attorneys to engage in business regulation, and they have more restricted notions of individual rights. As a result, tort changes that call for importing a big idea from overseas miss the larger context. Making courtroom losers pay their opponents' legal expenses only works in Britain because it is part of a larger whole that also includes nationalized health insurance.

Throwing out big chunks of the U.S. system, therefore, isn't a grand solution. Sure, it's theoretically possible to eliminate punitive damages or adopt other European-style reforms without bringing aboard their entire social safety net. But it almost certainly wouldn't end there. One way or another, the American

A FOUR-PART PLAN FOR LITIGATION REFORM

There's no need to toss out the whole system. Instead, the rules need to be changed to cut down on bogus cases—ones in which nobody has been injured, no malfeasance has occurred, or regulators have already taken care of the problem.

More on Tort Reform, Only at Businessweek.com

Taking the Cure: Our own four-step plan for improving the legal system in an easy-to-use slide show.

A conversation with Richard E. Anderson of medical malpractice insurer The Doctors Co., who sees the push to litigate as a "parasitic form of venture capitalism."

The View from the States: While Congress grapples with federal reform, states are taking matters into their own hands.

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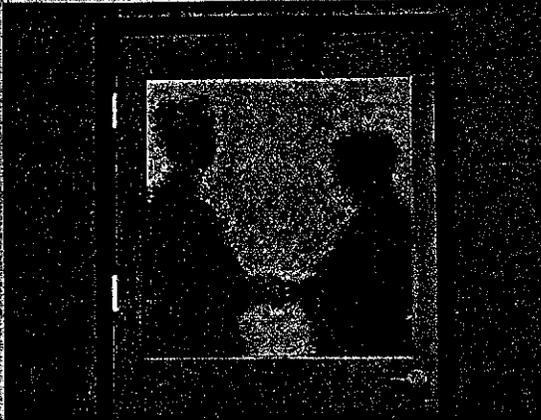
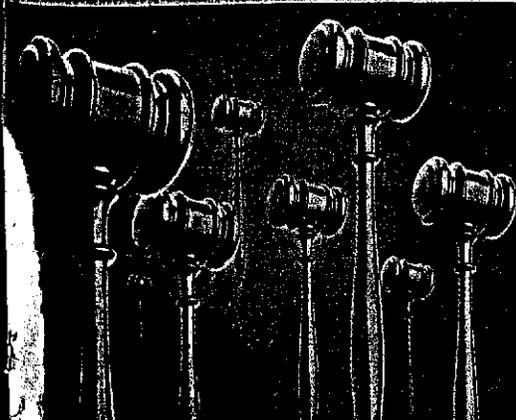
PAY FINE
HERE

PAY FOR PERFORMANCE

Plaintiffs' lawyers sometimes earn millions while clients get pennies. Attorneys should make money only to the extent that their clients do.

PUNISHMENT THAT STINGS

Lawyers who file frivolous suits usually get waste slaps. Judges need to make them pay fines or some of the other side's expenses.



CURB THE DUPLICATION

When regulators bust companies for wrongdoing, plaintiffs' lawyers often get easy, low-stake, redundant lawsuits that need to end.

EXITING THE TORT SYSTEM

When all else fails, problems can be kicked from the courts into specialized tribunals with less cumbersome procedural rules.

public will demand that the Firestones and Enrons of the world be held accountable for tire blow-outs and financial blowups. Radical reductions in corporate liability would undercut the accountability of genuinely bad actors. It wouldn't take long before the public would cry out for more regulation. This is one reason why the AEI's Greve thinks it could be foolhardy for medical-device makers to lobby for broad legal immunity for products approved by the FDA. "As soon as the agency made a mistake and 14 people died, there would be hysteria, and the whole approval process would be shut down," he predicts. "You need a sensible mix of public and private enforcement."

The right way to reform the U.S. tort system is not to put most plaintiffs' lawyers on the streets but to ensure that they do a better job at their two key roles: compensating victims and deterring corporate wrongdoing. The crisis is not that ambulance chasers are wrecking the economy, but that too many entrepreneurial personal-injury attorneys have found illegitimate ways to earn money. Tort reformers aren't directly attacking this problem. Instead of cracking down on exploitative lawyers, the critics often try to solve the problem by punishing their clients. For instance, the White House's main idea for reducing the cost of medical malpractice litigation is to place an arbitrary \$250,000 ceiling on pain-and-suffering recoveries, which

against Intel Corp., which awarded 500,000 people the right to claim a \$50 discount off a new microprocessor. Only 150, or 0.0003%, took advantage of the offer. The plaintiffs' lawyers, meanwhile, walked off with nearly \$1.5 million. Hundreds of similar tales could be told. The Intel case highlights the single most scandalous thing about the American tort system: the low percentage of people who truly benefit from class actions. The problem is not confined to the notorious episodes, like Intel, in which people are awarded coupons. Many alleged "victims" don't even bother to collect hard cash. A still unpublished study by James D. Cox and Randall S. Thomas, professors from Duke University and Vanderbilt University law schools, indicates that even sophisticated institutional investors claim less than 30% of the money they could get from securities-fraud class actions.

It's no mystery why this happens. Defendants want to keep redemption rates low—and many plaintiffs' lawyers don't care. Their fees are set when deals are signed and pegged to a high theoretical number of claimants. Judges, meanwhile, are way too busy to bird-dog settled disputes. This distorted set of incentives produces unintelligible award notices buried deep in newspapers, burdensome forms to fill out, and short claim periods.

Solution: Reverse the economics of class-action settlements. Plaintiffs' lawyers should be paid after victims collect their

would hurt the most severely injured malpractice victims, such as those blinded or paralyzed. That would also shortchange blue-collar workers, the elderly, and others who couldn't receive big compensation for lost earnings.

This is the wrong approach. The big mistake of the last century was not excessive compassion. The fact that America offers the most compensation worldwide for intangible emotional injuries is a tribute to the country's best humanitarian impulses. In retrospect, the thing that the legal theorists overlooked was that tort law would become a big business. Invited to become private corporate cops, way too many plaintiffs' attorneys crashed the party. The challenge now is to weed out the parasites without compromising fundamental values. Here's how:

1. Pay for Performance

THIS FIX would eliminate a big chunk of the most abusive cases. The main target would be cases like a 1996 false advertising suit



FRENCH JUSTICE Juries don't hear injury cases.

A TALE OF TWO SYSTEMS

Western Europeans smoke, take Vioxx, and buy Firestone tires, too. But when they get injured, claims are handled far differently. Here's a simplified summary of the key differences between their system and ours.

	EUROPE	U.S.
MEDICAL EXPENSES	National insurance plans cover most health costs.	Private coverage means more uninsured citizens and higher personal exposure.
EMOTIONAL AND PUNITIVE DAMAGES	Payments for emotional distress restricted. Punitives nonexistent.	Potential for lottery-like winnings for a small percentage of victims.
JURIES	Payment rulings made by administrative judges with fee schedules.	Justice is dispensed by ordinary citizens. No scientific or business expertise required.
CONTINGENT FEES	<i>Qu'est-ce que c'est?</i>	Plaintiffs' lawyers rake in 33% to 40% of their clients' winnings.

... and how they play out for all involved

SIZE OF AWARDS	Much smaller. Even extreme emotional distress does not lead to larger awards.	Much bigger. Thanks to sympathetic juries, multimillion-dollar verdicts common.
SPEED OF PAYMENT	Faster. No adversarial process. Less room for pretrial maneuvering or appeals.	Slower. It can take years for victims to recover their money.
LAWYER POPULATION	Much smaller. Very few call themselves plaintiffs' attorneys.	More than 1 million, some 10% to 15% of whom represent plaintiffs.
PUBLICITY	Less elaborate pretrial discovery equals fewer smoking guns.	Battles that should be won in court are won in press—but public learns more.

money—not before. This would have two benefits. First, it would make them more aggressive about getting the word out to class members. Second, and more important, it would filter out a high percentage of the system's silliest claims. One of the main reasons people don't bother to collect class-action benefits is that they don't perceive any injury in the first place. And if people don't think they've been hurt, it's often a strong sign that the case isn't worth bringing.

A little-noticed provision of the recent Class Action Fairness Act instituted this pay-for-performance rule for coupon settlements, which account for approximately 10% of all class settlements. The reform now needs to be extended to the much broader world of cases in which people get cash or goods in kind—like toasters or tires.

An equally important move would target cases that require al-

most no work. Consider the dozens of suits filed against Christie's International PLC and Sotheby's Holdings Inc. for price-fixing in 2000. Because the U.S. Justice Dept. dug out plentiful evidence of a joint conspiracy to prop up the sales commissions that the two premier auction houses charged clients, the private filings were slam dunks. While the plaintiffs' lawyers helped distribute money to victims, they did not deserve their typical 33% share of the take. So U.S. District Judge Lewis A. Kaplan of Manhattan came up with a creative plan: forcing plaintiffs' lawyers to bid for the job in a reverse auction. The firm that promised to give the biggest sum to the victims won. This is one of the best ways ever devised to ensure that the tort system effectively fulfills its compensation function. More judges should follow Kaplan's lead.

2. Penalties That Sting

THE CHRISTIE'S-SOTHEYBY'S story raises a point often overlooked: The players in the best position to resolve the problem are often judges, not legislators. Judges can figure out when attorneys in their courtrooms are acting in bad faith. In contrast, politicians can only police the system from afar by rewriting laws, which always produces unintended consequences.

One fix: Give judges stronger tools to punish renegade lawyers. Before 1993, it was mandatory for judges to impose

sanctions such as public censures, fines, or orders to pay for the other side's legal expenses on lawyers who filed frivolous lawsuits. Then the Civil Rules Advisory Committee (CRAC), an obscure branch of the courts, made penalties optional. This needs to be reversed, either by the CRAC or by Congress.

Simply rewriting the rules only solves part of this problem, though. An equally important step is for judges to rise to the challenge and use their disciplinary powers. For too long, a cozy, protect-the-guild mentality has protected exploitative attorneys from serious punishment. So the cost of filing baseless harassment lawsuits has never approached the rewards of cashing in on them. The tough regime should apply on both sides of the bar. Judges have also been far too relaxed about punishing defense attorneys who destroy documents—a tactic that's every bit as serious as filing frivolous cases.

3. Curb the Duplication

THE THIRD REFORM targets one of Corporate America's biggest complaints: duplicative litigation. This problem arises in a wide variety of settings. Think of the lawsuits involving cigarettes, Vioxx, or the Windows operating system. The companies at the center of the storms—Philip Morris (now Altria Group), Merck, and Microsoft, respectively—each faced administrative inquiries, individual cases, and class actions filed by private lawyers, state attorneys general, and federal regulators.

The U.S. system encourages this type of overlapping enforcement—and it's O.K. if every player contributes something unique to the ultimate solution. But that isn't always the case. After the National Highway Traffic Safety Administration an-

nounced that it was investigating alleged suspension problems with Dodge Durango trucks, plaintiffs' lawyers filed five class actions asking the company to recall the vehicles. Chrysler voluntarily agreed to do so—and then had to spend money fighting tort lawyers claiming credit for the move. Three of the cases have been dismissed.

Corporate America's preferred solution to the duplication problem is so-called preemption—getting Congress to declare that agency approval of, say, a particular drug blocks subsequent private litigation. That would be fine if agencies had perfect foresight. But as the Vioxx episode proves, they don't. "When you preempt, you make a decision about future cases for all time," says D. Bruce Hoffman, formerly deputy director of the Bureau of Competition at the Federal Trade Commission

IN THIS DEBATE, IT'S WAR BY ANECDOTE

When George W. Bush takes aim at the failings of the tort system, he likes to point out what he says are its huge economic costs. On Feb. 18, as he signed the Class Action Fairness Act into law, the President cited a favorite statistic: "Junk lawsuits have driven the total cost of America's tort system to more than \$240 billion a year—greater than any other major industrialized nation."

It's an attention-getting figure. But like every other number that's tossed around in this debate, it's misleading. Bush's source for his recent comment is Tillinghast-Towers Perrin, an actuarial consultant to the insurance industry. In a 2004 study on tort-system costs, Tillinghast tallied everything from no-fault fender-bender claims to the salaries of insurance company CEOs to calculate that the tort system as a whole is a \$246 billion enterprise. Junk lawsuits weren't even mentioned. "There's no way to split the number between junk lawsuits and legitimate lawsuits," says Russ Sutter, the primary author of the report Bush cited. "We've seen examples on both sides of the debate misstating numbers."

That might be because there aren't any good numbers to go on. As policymakers weigh profound changes to the nation's legal system, they're working largely in the dark. No one collects and aggregates data from all of the nation's 15,500-plus courtrooms. The result is a war of anecdotes waged by ideologues of all stripes—and an arms race to produce the killer statistic that will attract the media, sell the public, and shape policy. Take the average size of medical-

malpractice payouts. The Physician Insurers Assn. pegs it at some \$350,000, based on information supplied by about half its members, representing 25% of the market. But the Consumer Federation of America, using claims data collected by the National Association of Insurance Commissioners (NAIC) from all 50 states, counters that the

LAWMAKERS ARE IN THE DARK

There's no centralized data bank to track lawsuits, so estimates of say, medical-malpractice damages diverge wildly

The average size of payouts?
Depends on whom you're asking

\$350

THOUSAND
Physician
Insurers Assn.

\$30

THOUSAND
Consumer Fed. of
America

average payment is closer to \$107,500. It's even lower—\$30,000—when the Federation factors in the 70% of medical-malpractice claims that are dropped or dismissed and result in no indemnity payment.

Medical-malpractice insurers also use their own claims data to show an increase in the number of million-dollar-plus awards. But they can't say for certain whether the trend is the result of growing economic

damages—to compensate for higher average wages and escalating medical costs—or the consequence of ballooning pain-and-suffering awards. If it's the former, a congressional proposal to cap pain-and-suffering payouts could be misguided. A September study by the NAIC concluded that existing medical-malpractice insurance data are useless for determining the makeup of payouts or the reason behind rising claims.

As for jury awards, are they really getting bigger? The Justice Dept.'s Bureau of Justice Statistics says median awards in civil torts have actually decreased, from \$65,000 in 1992 to \$37,000 in 2001, the most recent year for which the agency has numbers. But the bureau sampled data from only 45 of the nation's 3,100 counties. The study gives a fairly accurate picture of trial outcomes in urban courts, BJS statistician Thomas Cohen says, but "does it give a picture of trials in rural or semi-rural jurisdictions? No." And all measures of jury verdicts miss big awards that are cut down on appeal.

Another missing piece: More companies have begun to self-insure or rely on indemnity plans established by state governments—meaning they don't report claims or payouts to anyone. Consultant Tillinghast estimates that about 30% of commercial tort costs are covered by the self-insured alone, up from 6% three decades ago. No one knows in aggregate how those plans are faring.

When lawmakers debate changes to other major institutions, such as Social Security or the tax code, they rely on blue-ribbon panels and bipartisan task forces. The tort-reform polemic, in contrast, has been based on factoids and statistics drummed up by vested interests. Calling for a government study might sound like typical Washington stall tactics, but with each side accusing the other of lying, a study could turn down the heat—and allow a real debate.

—By Lorraine Woellert in Washington

and now in private practice. Winning preemption "should be a very steep hill [for companies] to climb."

A better solution is a package of more modest reforms. The first one would be eliminating punitive damages for injuries caused by products that have been approved by regulators. The long and involved process of winning over the FDA or NHTSA should, at a minimum, insulate managers from claims that they deserve huge financial penalties for wantonly disregarding the public good (unless executives lied to bureaucrats). A second idea is giving judges explicit authority to reject class actions that duplicate ongoing regulatory initiatives. That will require a mechanism for ensuring that judges find out whether an agency is reviewing issues raised in class actions—something that's missing now. The committee that sets rules for civil litigation, or Congress, needs to fix these problems.

4. Exiting the Tort System

THESE THREE CHANGES would solve many of the tort system's genuine problems, but not all of them. There are rare issues that need to be removed from the courts—with all of their elaborate procedural rules—and directed into specialized administrative tribunals. One of them, clearly, is asbestos. Aggressive plaintiffs' lawyers are overloading the judiciary with thousands of dubious cases that don't even involve sick people. Congress' plan to create a trust fund to handle this problem makes sense.

Asbestos is the easy case. The tougher one is medical malpractice. Evidence of massive systemic malfunction is starting to accumulate. Only about 2% of the people who are genuinely injured even bother to file lawsuits, according to most studies. When people do go to court, only 40% of every dollar spent on litigation goes to victims. Then there's the spreading damage to doctors. For some specialists, medical malpractice premiums can eat up between 20% and 50% of annual income. That's why neurosurgeons are avoiding trauma cases and orthopedic surgeons are eliminating emergency room calls.

The steady drumbeat of problems has prompted many physicians, lawyers, and politicians to support the idea of special health courts. They would have dedicated judges, a panel of neutral experts, and medically trained staff. Because pretrial discovery would be limited, the cost of filing cases would decline. The theory is that this would induce more injured people to make claims, and that they would get their money faster.

But there's a big trade-off—no emotional or punitive damages. To ensure consistency, health court awards would be based on a European-style damages schedule. In Britain, for example, damages paid for quadriplegia range from \$311,000 to \$387,000, depending on a patient's residual movement, depression, pain, and age. What's more, victims won't get to tell their story to a jury. That worries consumer advocates, who fear that the health-care industry would find a way to control these courts. "The jury is the only unit of government that is nonpartisan and not elected. It doesn't have to answer to anybody," says Barry Boughton, a lawyer with Public Citizen.

That's a powerful objection. Before reengineering American justice, we should get more information about the problem and experiment with some modest steps. One would be giving juries considering emotional damages guidance about what other juries have done in similar cases. Studies have shown that this would cut down on the unpredictable verdicts that torment



BUSINESS WISH LIST

Tort overhaul is high on the political agenda for the first time in years, with Corporate America pushing several bills through Congress this year.

➤ **MEDICAL MALPRACTICE** Legislation would limit pain-and-suffering payouts at \$250,000, cap attorney fees, and require courts to reduce compensation awards for expenses already covered by health insurance and the like. But the bill is no slam-dunk. For every doctor put out of business by malpractice insurance premiums, consumer advocates will have a horror story about a patient harmed by error or negligence.

➤ **ASBESTOS** Business, labor, and the trial bar have spent years trying to establish a \$145-billion fund to compensate asbestos victims and move tens of thousands of claims out of state courts. But the fragile coalition is splintering as the fix tries to be all things to all people. Disputes over the fund's financing and price tag will deep-six the effort.

➤ **FRIVOLOUS LAWSUITS** The Lawsuit Abuse Reduction Act would fine lawyers who file frivolous cases and require judges to refer repeat violators for disciplinary action. The measure is backed by heavyweights such as the National Federation of Independent Business and could be a dark horse this term.

➤ **OBESITY** The restaurant industry wants legislation to bar people from suing eateries for weight gain and associated health problems. The so-called cheeseburger bill doesn't have the heft to compete with higher priorities and probably won't win a floor vote. —Lorraine Woellert

doctors and insurers. Another step: publicizing data on how often doctors have been sued for malpractice or disciplined by their states' medical boards.

These moves do not go as far as advocates like Common Good's Howard would like. But they surpass anything on the table. There is, ultimately, no perfect way to balance the interests of everybody who has a stake in the medical malpractice debate—or any of the other broad issues subsumed under the tort reform banner. Any rule changes that protect doctors or drugmakers, by definition, would limit the rights of some victims. The guiding principle for tort reform should be to target bad lawsuits as narrowly as possible. That's the only way to balance the enormous values at stake. ■

—With Lorraine Woellert in Washington and Michael J. Mandel in New York

