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THE FEDERALIST SOCIETY, CONFERENCE: CIVIL JUSTICE AND THE LITIGATION PROCESS: DO THE MERITS AND THE SEARCH FOR TRUTH MATTER ANYMORE?, CONFERENCE DIALOGUE, DAY ONE, LUNCHEON DEBATE: CIVIL JUSTICE AND THE PLAINTIFFS' BAR

Hon. Edward Becker

Theodore Olson

Philip Corboy

LUNCHEON DEBATE: CIVIL JUSTICE AND THE PLAINTIFFS' BAR

THE HONORABLE EDWARD R. BECKER, MODERATOR,*
THEODORE OLSON** &
PHILIP CORBOY***

I. OPENING

THE HONORABLE EDWARD BECKER: This program confronts the overarching question of whether the tort system is working and whether it serves the search for truth. This Debate, entitled "Civil Justice and the Plaintiff's Bar," should help to crystalize these issues. It will be a real treat, I promise you, for we are fortunate to have as our presenters two of America's very best lawyers, Ted Olson and Phil Corboy.

Our first speaker will be Ted Olson, a partner in the Washington office of Gibson, Dunn & Crutcher, who is unquestionably one of the nation's premier appellate litigators. During the last term of the Supreme Court, Mr. Olson argued three cases, which must be some kind of a record for a lawyer in private practice. He argued the Stacy Koon case,[1] now the leading case on review of departures under the sentencing guidelines; the VMI case,[2] the male-only admissions policy case; and the Gasperini case,[3] dealing with appellate review of jury verdicts for excessiveness in diversity cases. These three cases represent only the tip of the iceberg of Mr. Olson's appellate practice. His vita contains a dazzling list of important cases, before the Supreme Court and other appellate courts, of incredible breadth.

Mr. Olson is a graduate of the law school of Boalt Hall, Berkeley, California. He served from 1981 to 1984 as the Assistant Attorney General in charge of the Office of Legal Counsel, which made him the

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*** Founding partner of Corboy & Demetrio. Mr. Corboy has served as President of the Chicago Bar Association and the Illinois Trial Lawyers Association, as well as a member of the American Bar Association's House of Delegates and Chairman of its Section of Litigation.

1. *See* Koon v. United States, 116 S. Ct. 2035 (1996).

2. *See* United States v. Virginia, 116 S. Ct. 2264 (1996).

3. *See* Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211 (1996).

executive branch's principal legal adviser, with a major role in formulating the branch's position on constitutional issues.

Ted Olson has also been a leader in the movement for tort reform. The title of his essay in the January 1994 issue of the *SMU Law Review* was, "The Parasitic Destruction of America's Civil Justice System."[4]

I think it needs words like that to bring out the noted "shrinking violet," the very shy Chicago lawyer who is our other luncheon speaker, Phil Corboy. Mr. Corboy is one of America's most successful, most colorful, and if you represent an insurance company or defendant, most feared plaintiffs' trial lawyers.

Mr. Corboy is probably best known to the public for his role in representing plaintiffs in the Tylenol[5] and the Iowa DC-10 crash cases,[6] but his record of jury verdicts and out-of-court settlements is also dazzling. He has been called by a leader of the Chicago bar, the ultimate personal injury lawyer and the "best of the best" in his field. We really have two of the "best of the best" in this debate today.

Mr. Corboy is a graduate of Loyola Law School, a former head of the Litigation Section of the American Bar Association (ABA), and a former president of the Chicago Bar Association and the Illinois Trial Lawyers Association. He has written countless articles in his field[7] and is a leader in the movement opposing tort reform.

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4. *See* Theodore B. Olson, *The Parasitic Destruction of America's Civil Justice System*, 47 SMU L. REV. 359 (1994).

5. The Tylenol litigation commenced in 1982, after seven people in the Chicago area were killed after ingesting cyanide-laced Tylenol capsules. Johnson & Johnson settled the lawsuits for an undisclosed amount in May 1991, on the day that jury selection was set to begin for trial at Cook County Circuit Court in Illinois. Philip H. Corboy was co-counsel for the families of the victims. *See* Lourdes Lee Valeriano, *Johnson & Johnson Settles Suits Tied to Tylenol Deaths*, WALL ST. J., May 14, 1991, at B6; Andrew Blum & Randall Samborn, *Tylenol Settlement Revives Secrecy War*, NAT'L L.J., May 27, 1991, at 3.

6. *See In re* Air Crash Disaster at Sioux City, 631 N.E.2d 1302 (Ill. App. Ct. 1994).

7. *See, e.g.*, Philip H. Corboy, *Cross-examination: Walking the Line Between Proper Prejudice and Unethical Conduct*, 10 AM. J. TRIAL ADVOC. 1 (1986); Philip H. Corboy & Susan J. Schwartz, *Going the Distance: How to Perfect the Trial Record and Win on Appeal*, A.B.A. J., Apr. 1990, at 80; Philip Corboy, *No: It's Already Covered*, A.B.A. J., Jan. 1992, at 35; Philip H. Corboy, *The Not-So-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed* Restatement (Third) of Torts*: Products Liability*, 61 TENN. L. REV. 1043 (1994); Philip H. Corboy, *Vicarious Liability for Punitive Damages: The Effort to Constitutionalize "Tort Reform,"* 2 SETON HALL CONST. L.J. 5 (1991); Philip H. Corboy, *"Reform" and Constitutional Change*, LITIG., Fall 1993, at 22.

II. MAIN ARGUMENTS

THEODORE OLSON: We are going to talk today about the participation by lawyers, particularly plaintiffs' trial lawyers, in the political process. I would like to give you some numbers. One study, based on Federal Election Commission and state filings records, of trial lawyer political contributions for candidates for state and local offices in Texas, Alabama, and California—three hot-bed states for the tort movement—showed $17.3 million in contributions by trial lawyers to state and local candidates.[8] Ninety-five percent of the fund went to Democratic candidates.[9] The study also estimates that $60 million in contributions were made nationwide by plaintiffs' trial lawyers.[10] Compare that with $5 million from the AFL-CIO.[11] In fact, the plaintiffs' trial bar contributed to political candidates more than the five largest labor unions combined.[12] *Forbes* magazine referred to the plaintiffs' bar as "America's third political party."[13]

The top ten federal Senate and House candidate recipients of trial lawyer money were all Democrats.[14] Of the top fifteen contributing lawyers to political candidates for Alabama state offices—and bear in mind that in Alabama judges are political candidates—each contributed on average $30,000 per year.[15] That is a lot of money per year. Within those top fifteen contributors, for a five-year period in Alabama, the top

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8. *See* Leslie Spencer, *America's Third Political Party?*, FORBES, Oct. 24, 1994, at 60.

9. *See id.*

10. *See id.*

11. *See id.*

12. *See* AMERICAN TORT REFORM ASS'N, CAMPAIGN CONTRIBUTIONS TO CONGRESSIONAL CANDIDATES BY PLAINTIFFS' LAWYER INDUSTRY: 1989-1994, at 2 (1995) [hereinafter 1995 ATRA REPORT] (explaining that plaintiffs' lawyers contributed $30,939,319 for federal races while the five largest labor unions (AFSCME, Teamsters, United Auto Workers, National Education Association, AFL-CIO) in total contributed $29,727,165).

13. *See* Spencer, *supra* note 8.

14. *See* 1995 ATRA REPORT, *supra* note 12, at 5 (listing all Democrats with the exception of Republican Sen. Charles Tanksley of Georgia).

15. *See* AMERICAN TORT REFORM ASS'N, "AMERICA'S THIRD POLITICAL PARTY;" A STUDY OF POLITICAL CONTRIBUTIONS BY THE PLAINTIFF'S LAWYER INDUSTRY 10 (1994) (listing the average contribution rate of $147,763 for a five year period).

lawyer contributed $322,000 per year,[16] the fifteenth highest contributor gave $36,000.[17]

In Texas, among the top fifteen contributors, the average lawyer contribution to state candidates was $46,000 per year.[18] In California, the top contribution rate was $225,000 per year.[19] These are just for the state candidates. The leader was William Lerach, who that year made $800,000 in campaign contributions.[20] As I said, in many of these states, the recipients of those political contributions are judges.

At the presidential level, the *Washington Post* reported earlier this year that lawyers had made more contributions to President Clinton's campaign fund than retired persons, business services, and the real estate industry combined.[21] At that time, the lawyers had contributed forty percent of the contributions received by the top ten contributing groups in the re-election campaign for President Clinton.[22]

Now, I hasten to say that all of those contributions were not necessarily from plaintiffs' trial lawyers, because the collectors of those statistics did not differentiate between law firms on the defense side and law firms on the plaintiffs' side; but, obviously, lawyers have a large role in contributing to the political process.

In 1992, trial lawyers put out letters and fund-raising materials stating that if you contribute to Clinton's campaign fund, there will be no tort reform at the federal level, and if a law is passed by the House and Senate, you can be assured that if you contribute to President Clinton, he will veto such legislation. President Clinton delivered on that promise this year and last year when he vetoed the Private Securities Litigation Reform Act,[23] which was recommended and supported by the Chairman of his

16. *See id.* at 12.

17. *See id.*

18. *See id.* at 11 (listing the average contribution rate of $228,799 for a five year period).

19. *See id.* at 13.

20. *See id.*

21. *See* Ruth Marcus, *Study Traces Sources of Record Fund-Raising by Clinton and Dole*, WASH. POST, Aug. 23, 1996, at A9.

22. *See id.*

23. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (to be codified in scattered sections of 15 U.S.C.).

own party. However, the bill passed over his veto.[24] President Clinton also vetoed the product liability bill,[25] which was not passed over his veto.

Some trial lawyer money, of course, does go to Republican candidates. That is why it was impossible to get cloture, and it was impossible to override the veto of the product liability bill.

Trial lawyers are the largest contributors to political campaigns in this country, and they usually have one objective in mind. On the other hand, other contributors to the campaign process commonly have multiple objectives. For example, corporate money may be interested in bills that have to do with the labor laws, environmental laws, or export controls and things of that nature. A corporation or corporate executive who participates in the political process has a wealth of issues on the table in which they are interested and they may come back again and again for different things; therefore, their influence is diluted. However, when trial lawyers go to a member of the Senate or the House of Representatives, that trial lawyer is able to say, "I have never asked you for anything else, just vote against this bill, don't let the tort reform laws be changed at the national level." That is a very, very potent message when you talk about this amount of money.

Now there is nothing inherently wrong of course with making campaign contributions; it is legal. Everybody does it to promote their own self-interest. The law allows it. Why should not plaintiffs' lawyers invest a portion of the income they derive from the system to keep the goose laying the golden eggs? After all, that system has been very good to the trial lawyers.

Forbes now publishes a list of the nation's twenty-five top earning trial lawyers. In 1994, first place was occupied by Texas lawyer Joseph Jamail, whose income for 1994 was listed at $90 million.[26] Michael Jordan, eat your heart out. The person who was twenty-fifth on the list of trial lawyers came in at $4 million.[27] Mr. Corboy and one of his partners were on that list, but I will not get into those numbers; he can if he wants to.[28]

I compared the top twenty-five lawyers on the income list with the top fifty lawyers on this contribution list. You will be surprised by the results.

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24. *See id.*; *see also* Norman B. Arnoff, *The Securities Litigation Reform Act of 1995*, N.Y. L.J., Oct. 8, 1996, at 3.

25. *See* Common Sense Legal Standards Reform Act of 1995, H.R. 956, 104th Cong. (1995); *see also* 142 CONG. REC. H4425 (daily ed. May 6, 1996) (veto message from President Clinton).

26. *See* Brigid McMenamin, *The Best-Paid Lawyers*, FORBES, Nov. 6, 1995, at 145.

27. *See id.* at 168.

28. *See id.* at 162, 166 (listing Philip Corboy at number 10 and Thomas Demetrio at number 17).

The same people making the most amount of money are making the most contributions.[29] Mr. Lerach, for example, was number thirteen in the top twenty-five earners at $10 million,[30] and he also gave $800,000 to political candidates who oppose tort reform.[31] That is a pretty good return on your investment.

Now there is nothing wrong with these lawyers taking advantage of a system that promotes this sort of behavior. We have evolved a civil justice system in this country that puts enormous incentives out there for people to sue. Mr. Corboy and his colleagues would be derelict in their duty to their clients, and themselves (and their college age children), if they did not participate in this process. As long as Congress, state legislatures, and the courts encourage redistribution of wealth through the tort system and encourage juries to make legislative judgments by sending messages to distant corporate treasuries regarding how hot to brew coffee,[32] how fast to deliver pizza,[33] and how to paint a BMW,[34] then these cases are going to be brought. If the juries continue to bring in judgments based upon an out-of-town corporation's net worth, the punitive damages and the judgments are going to remain big, and those will be the incentives.

Statistics show that less than fifty percent of the tort system goes to benefit the person who may have been victimized.[35] The lion's share goes to the plaintiffs' lawyers.[36] However, to be completely fair, the plaintiffs' lawyers are not the only ones profiting from this system; there are other beneficiaries. We have a cottage industry of professional expert witnesses in this country—I guess "mansion industry" is perhaps a better phrase—that would not exist if we did not have this tort system. There are also law firms that defend these cases. My colleagues often tell me to stop attempting to reform the civil justice system because we are *all*

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29. *See* McMenamin, *supra* note 26, at 145; Spencer, *supra* note 8, at 60.

30. *See* McMenamin, *supra* note 26, at 165.

31. *See id.*

32. *See McDonald's Settles Lawsuit over Burn from Coffee*, WALL ST. J., Dec. 2, 1994, at B6.

33. *See* Parker v. Domino's Pizza, Inc., 629 So. 2d. 1026 (Fla. Dist. Ct. App. 1993).

34. *See* BMW of N. Am., Inc., v. Gore, 116 S. Ct. 1589 (1996).

35. *See* JAMES KAKALIK & NICHOLAS PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION vii (1986) (noting that of the $29 to $36 billion in total expenditures nationwide for tort litigation terminated in state and federal courts of general jurisdiction in 1985, an estimated $16 to $19 billion was spent for various costs of the tort litigation system, not including the net compensation paid to plaintiffs).

36. *See id.* at x fig.s.1.

making a great deal of money. Most of the lawyers are benefitting from this system. That is why, in my judgment, the American Bar Association is so opposed to virtually any kind of meaningful tort reform.[37] And let us not forget the insurance companies, the in-house lawyers, and so forth.

I think of it as tithing. It is not contribution to get into heaven, but a contribution to stay there. So you have to ask yourself, is it fair to criticize trial lawyers for lawfully supporting a system that is good for them and good for the country? Perhaps not, but criticism is warranted if the system is, indeed, bad for the country.

Let me just say a few words about the system. Our tort system, according to most estimates, costs our economy five times what it costs Japan, Germany, or the United Kingdom.[38] The tort tax costs this country an estimated $300 billion, although some people say $100 billion, depending upon what you count.[39] It is difficult to get exact numbers, but we know the amount is huge. One can compare the numbers to the Gross National Product (GNP) and see that, over the past twenty or thirty years, the tort tax has grown at a much faster rate than the GNP.[40] For example, punitive damages in Alabama from 1974 to 1978, which were affirmed on appeal, were over $400,000.[41] Jump ahead fifteen years, and in a comparable four-year interval, the figure jumps to more than $90 million.[42] Moreover, in Texas, between 1968 and 1971, business punitive damage verdicts affirmed on appeal were $85,000.[43] Twenty years later, that figure jumped to $127 million.[44]

I could go on about statistics, but let me give you a few more specific examples. Take a look at Barbour County, Alabama. Almost eighty percent of the tort cases filed in that county seek punitive damages.[45] Moreover, in Alabama as a whole, punitive damages affirmed by the

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37. *See* Martha Middleton, *A Changing Landscape*, A.B.A. J., Aug. 1995, at 60 (quoting a representative of the ABA who called any federal litigation curtailing product liability "an unwise and unnecessary intrusion of massive proportions").

38. *See* Leslie Spencer, *The Tort Tax*, FORBES, Feb. 17, 1992, at 40, 42.

39. *See id.* at 40-42 (discussing the direct and indirect costs of the tort system).

40. *See id.* at 40.

41. *See Dr. Gore and Mr. Slick*, WALL ST. J., Oct. 11, 1995, at A14 (noting punitive damages of $409,385).

42. *See id.* (noting punitive damages of $90,366,527 for the years 1989-93).

43. *See* Brief *Amicus Curiae* in Support of Petitioner, BMW of N. Am., Inc., v. Gore, 116 S. Ct. 1589 (1996) (No. 94-896) (citing S. TURNER, WASHINGTON LEGAL FOUND., PUNITIVE DAMAGES EXPLOSION: FACT OR FICTION B-7 (1992)).

44. *See id.*

45. *See* George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 828 (1996).

Supreme Court of Alabama from 1987 through the first half of 1994 equalled $53.2 million—thirteen dollars per capita.[46]

My submission is not that there is anything wrong with the trial bar participating in the political process. Our system permits it to occur, and if you like this system, then nothing should be done about it. However, if you do not like the civil justice system that they are supporting, and the polls tell us that up as much as seventy-five to eighty-five percent of the people in this country want a change in the tort system,[47] then you need to change the current scheme. But, as long as the legislators are beholden to those people who ask that one request, and who may have been the largest contributor to their election, there will be no such change.

PHILIP CORBOY: Judge Becker missed something: he did not tell you that I am a Democrat. That might be surprising since I come from Cook County, Illinois. I am of that type of background where you are born a Democrat, and even if you become wealthy enough to become a Republican, you stay a Democrat.

There are people in our town who really believe that the following discussion took place between college roommates who met each other long after they got out of college. The more successful of the two, a Republican, said to his pal, "Are you still a Democrat?"

"Of course I'm a Democrat," he replied.

"Why are you still a Democrat?"

He said, "Well, my father was a Democrat, my grandfather was a Democrat, and my great-grandfather was a Democrat, and that's why I am a Democrat."

"Well, that sounds silly. If your father was a horse thief, grandfather was a horse thief, and your great-grandfather was a horse thief, would you be a horse thief?"

He said, "Of course not, I'd be a Republican."

So whenever I get into a discussion like this, I love it if the other guy tells me that I am greedy, an ambulance chaser, and a tassle-toed squeezer. I have been called all of those. I started law school fifty years ago this month, and I tried my first lawsuit on November 11, 1950. I remember that because it was Armistice Day, and I did not have to go to work, so I had another day to get ready for the trial.

I have been trying lawsuits ever since. I represent people who are quadriplegic or blind, whose spouses are dead, whose fathers are dead, and whose mothers are dead. Some of them are in vegetative states. Every one of those people has recognized the contribution that I have

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46. *See id.* at 829.

47. *See* Spencer Abraham & Mitch McConnell, *The Next Steps in Real Tort Reform*, WASH. TIMES, May 3, 1995, at A17.

supplied to their wherewithal. I assure you, if there is anybody in this room who loses a wife, loses a husband, loses a leg, loses an eye, or loses a life, they are going to call me, or somebody like me, whether they are a Republican or Democrat.

I have been antagonistic to the changes sought for the simple reason that it would take away people's rights. The term "tort reform" is a euphemism for tort "deform"; it is a euphemism for "pro-defendant system." There is not one area in the anticipated tort legislation—national, local, or state—which in any way gives rights to people. They all take rights away from people; they all diminish the right to recover for pain, suffering, disability, disfigurement, et cetera.

I got a telephone message as I was leaving the office the other day. It was from a man named Mr. Nash. The call was about a *USA Today* article he received in the mail.[48] Here is what Mr. Nash said, "So pleased to hear that Mr. Corboy is continuing the fight against caps in tort reform. I am a former client who was badly burned and lost my wife. If it weren't for Mr. Corboy, I don't know how I would have raised my kids. Thank you." Believe me, I do not remember Mr. Nash.

It is difficult arguing with Mr. Olson. He is a decent man. It is difficult because he is courteous; it is difficult because he is gentle. But, the simple fact of the matter is he is wrong.

If you have a case, and I learned this from the first case I tried, that is tough on the law, you talk about the facts. If you have a case that is tough on the facts, you talk about the law. If you have a case that is tough on the law and the facts, you talk about the other lawyer. Now, I do not know why this is such an issue when it is conceded that lawyers of all stripes, of all branches of our system, have contributed to the present Administration. I assume that they had a lot of reasons to do it. It might be a gender thing or an age thing. This is an age where there are an awful lot of people shy of fifty who would like to see somebody shy of fifty in the presidential office. But, whatever it is, the people that are interested in tort reform are not Mom and Pop school-people. There are several groups labeled "coalitions" that have tort reformers as their primary members. One of them is the Manhattan Institution,[49] in which Peter Huber,[50] who has a tremendous ability to persuade, is very

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48. *See Lawyer on the Front Lines in Battle over Tort Reform*, USA TODAY, Dec. 12, 1995, at 2A.

49. *See* Lyle Denniston, *In Attacking Lawyers, Bush and Quayle Enter Culture War*, BALTIMORE SUN, Sept. 6, 1992, at 51 (describing the Manhattan Institution for Policy Research as a vocal critic of personal injury lawsuits).

50. For Peter Huber's participation in The Federalist Society Conference, see Peter Huber, *Whose Gore Is Stalked?*, 41 N.Y.L. SCH. L. REV. 419 (1997).

active.[51] Its membership includes the Product Liability Coordinating Policy Committee, which has a budget of $3 million a year for the tort reform debate. It has the civil justice reform group and membership of forty general counsel from the nation's largest corporations. One of its greatest spokesmen is our speaker today, Mr. Olson. I am not so sure he appreciates it, but Mr. Olson is defined by many articles and media people as a lobbyist for the anti-tort people.[52] There is also the American Institute of Certified Public Accountants, who are in the anti-tort business, but I do not know why.[53]

Most lobbyists that I have met are very honest, very competent, and very capable. Their job is to raise money for the people they represent and to persuade legislators and sometimes members of the executive branch. What I am suggesting is that these people represent Corporate America, and Corporate America is organized money, and there is nothing wrong with money being organized. There is nothing wrong with people, whose pocketbooks might be affected, being anti-tort. However, that is because they have never been hurt; as soon as they are hurt, they hire people like me.

I have represented everybody in this world that you can think of, from bank presidents to prostitutes, Catholic priests to Rabbis, executives to state senators—you name it. I have represented everyone, college professors, law professors, and doctors. However, I recently fired a client—a Republican state senator. He came to me when he was hurt. His case, a medical malpractice case, was against the medical school where I attended law school, Loyola. I represented him because I believed he was the victim of a tort.

On March 9, 1995, he and all of the other Republicans in our state legislature passed—had the Governor sign—the most draconian tort reform

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51. *See* Denniston, *supra* note 49 (describing Mr. Huber as a critic of challenges to the tort system); *see also* PETER HUBER, GALLILEO'S REVENGE, JUNK SCIENCE IN THE COURTROOM (1991); PETER HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); Peter Huber, *A Preemptive Strike Against the Tort Bar*, FORBES, July 6, 1992, at 104; Peter Huber, *Malpractice Law-A Defective Product*, FORBES, Apr. 16, 1990, at 154.

52. *See* Glenn Collins, *A Tobacco Case's Legal Buccaneers*, N.Y. TIMES, Mar. 6, 1995, at D1; Marcia Coyle, *New Jury Verdict Role for Courts*, NAT'L L.J., July 8, 1996, at A22; Anthony Ramirez, *Consumer Crusader Feels a Chill in Washington*, N.Y. TIMES., Dec. 31, 1995, § 3, at 10.

53. *See Accounts Change a Rule*, N.Y. TIMES, Jan. 16, 1992, at D6 (noting an AICPA rule change which "could make it harder to sue accountants for wrongdoing").

bill in the country.[54] Name any diminution of plaintiff's rights, and we have got it: a $500,000 cap on compensatory damages, a $250,000 cap on punitive damages, joint civil liability gone, no product liability suits can be filed without an expert's expert opinion that the product is faulty, and a twelve-year statute repose. I hope that a year from now we can come back and tell you that the law has been found unconstitutional. I am certainly not sitting back and waiting; we are fighting it. So far, we have won in three trial courts, and it will probably go before the supreme court of our state very soon. Hopefully, then, it will become a federal problem again; in the meantime, we are laboring under it.

This state senator also voted for tort reform in a way that was only prospective. But, when he went for the bill, he did not make it at all retroactive. He made sure he was protected and then took away from the populace, from the citizenry, the opportunity to seek compensatory damages. Future damages are limited to $500,000, but he stands to receive $2 to $2.5 million if he wins his lawsuit.

The American Tort Reform Association (ATRA) showed that trial lawyers gave $30 million in contributions in a five year period.[55] According to ATRA, my firm gave $200,000. Although that sounds like a lot of money, it is over a five year period.[56] We have thirty lawyers in our firm, so that amounts to $500 per person, or $125 per year per attorney. I cannot really say that this is going to sway the President of the United States or even a state legislator.

Therefore, you are right. The ability and the responsibility of those of us who believe that you are entitled to contribute, not to personal coffers but to campaign funds, is certainly in direct relationship to how we feel. There is a spokeswoman for Philip Morris who said that we give to people who think the way we think. If this were not true, I certainly would not have given any money at all to any legislator in the country. I have even contributed to people I do not know, most of them Democrats. However, two of them were not Democrats; one was a man named John

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54. *See* H.B. 20, P.A. 89-7, 85th Gen. Assembly, 1995 Ill. Legis. Serv. 224 (West). The Civil Justice Reform Amendments, which, in part, limit punitive damages to three times economic damages, create $500,000 caps on noneconomic damages and abolish joint liability when one or more defendants cannot pay a judgment. *See id.*

55. *See* 1995 ATRA REPORT, *supra* note 12, at 1 (noting that "[b]etween January, 1989 and December, 1994, individual plaintiff's lawyer contributions reviewed to all Congressional candidates totaled $18,066,433. . . . This figure, combined with ATLA PAC receipts of $12,872,886 over the same period . . . comes to $30,939,319 in total contributions from plaintiff's lawyers for Federal races.").

56. *See id.* at 4 (listing the "Top 50 Plaintiff's Lawyer Contributions," including $199,600 from the law firm of Corboy & Demetrio of Illinois).

Fox of Pennsylvania, and the other was Henry Hyde, Chairman of the Judiciary Committee.

In any event, there is a fellow named Bud Shuster of the Ninth Congressional District of Pennsylvania, who in the last election received contributions totalling $109,250 from 205 people.[57] It does not sound like much, only $532 per person, but ninety-three of those people came from out of state. This is a man that is legislating in the state of Pennsylvania. One of the people that contributed $2000 to his campaign is a fellow by the name of Ted Olson, a lawyer from Washington, D.C.[58] I do not know how many Ted Olsons there are in Washington, D.C., but Bud Shuster is an ardent tort reformer who has been a legislator for twenty-four years. He is on the Infrastructure and Transportation Committee, yet he acquires money from all over the country from people who are interested in his vote for tort reform.

Now, I do not suggest for one moment that there is anything wrong with people supplying money to legislators who think the way they do. It is an absolute cover-up. With luck, I will continue to contribute money to Democrats for a long time.

III. REBUTTALS

MR. OLSON: Okay, it was me, but I did not contribute to Bud Shuster because of the tort issue. I did so because he is a good friend of mine.

We are, however, in agreement on one thing, that there is nothing wrong with making political contributions to people who support the kind of causes that you support. I am not advocating a change that would prevent people from contributing to their political candidates.

I merely think that the American people need to know how much power is being exercised by a relatively small number of people to preserve the status quo, because contrary to what Mr. Corboy says, it is not just big corporations that support tort reform. In fact, big corporations, although they try to get involved, are very ineffective at contributing to political candidates because the officers of big corporations have many legislative interests. Their interests are spread across the

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57. *See Federal Election Commission's Individual Contributions Report*, Aug. 2, 1996, at 1, *available in* LEXIS, Cmpgn Library, Memfin File. For the 1995-96 election cycle, as of Aug. 2, 1996, Shuster's campaign received $451,876 from 664 listed individuals, of which approximately 46%, or approximately 304 individuals, were from outside Shuster's home state of Pennsylvania. *See id.* The total includes some individuals who are listed twice, including two $1000 contributions from Theodore B. Olson. *See id.*

58. *See id.*

board from environmental issues, to labor issues, to taxes. The civil justice system is just one small thing.

It is very difficult to raise any money from corporate executives because they are not in the same income bracket as plaintiffs' lawyers; they do not get their names listed in *Forbes* unless they are CEOs. The important thing is that people across the country—and I have seen what I regard as legitimate polls that say people that are liberal, conservative, old, young, Democrats, Republicans, labor, management, stockholders and so forth—are disturbed by the civil justice system.

I would hire Mr. Corboy too if I was injured. I would hire Mr. Corboy to see how much I could get in the way of punitive damages if I spilled a cup of coffee on myself, too. Why not? That is like a ticket to the lottery.

Mr. Corboy operates from the presumption that this legislation is taking away people's rights because it affects their ability to get large punitive damages or one hundred percent liability from someone who is one percent at fault, and that the system does not have any other victims. The defendants in those cases are people, they have rights. The stockholders have rights; they innocently invest in companies and wind up paying the punitive damages. The municipalities that get sued for punitive damages, and the taxpayers who pay those punitive damage awards and excessive verdicts, have rights.

There is some room for improvement in the system to protect all of the people in this country. If you focus on one victim in one case and say he or she should get $70 million in order to punish the stockholders of that company, who may be school teachers or retired persons who simply invested in that corporation, it does not make any sense to me. My point here is not to criticize the trial lawyers; my point is to make sure that the people of this country know what the facts are, so that they can exercise their judgment if they believe the tort system in this country does not work.

The other problem not mentioned by Mr. Corboy is that our tort system is causing it to become difficult to get certain types of products. You do not see diving boards in municipal swimming pools anymore. It is trivial, but I think it is symptomatic, that in New York they have taken all of the jungle gyms out of the playgrounds because of tort claims.[59] Connecticut municipalities are closing parks and bike trails because of the liability crisis.[60] There are products that are used for implants, heart valves, and other uses that are becoming less and less available because

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59. *See* Douglas Martin, *That Upside-Down High Will Be Only a Memory; Monkey Bars Fall to Safety Pressures*, N.Y. TIMES, Apr. 11, 1996, at B1.

60. *See* Fred Musante, *Liability Costs Curb Recreation*, N.Y. TIMES, Sept. 22, 1996, § 13 (Conn.), at 1.

of the tort crisis. One *New York Times* headline, in December 1995, reflected the fact that most of the money for research in new birth control methods is tied up because of the litigation frenzy associated with any kind of birth control.[61]

Mr. Corboy immediately segued from that into an attack upon the people who oppose the tort system as it presently exists, instead of dealing with the fact that many people, irrespective of their point of view, believe that the tort system should be changed. The American people—something like eighty-three percent according to a recent poll—believe that our current tort system has major problems and needs serious improvement.[62] That is clearly a system that needs correction, and if the people of this country know who has the biggest stake in keeping it the way it is, it will help them vote or put pressure on their legislators to change it.

MR. CORBOY: I am going to ask a rhetorical question. I hope I am right. I do not know of any municipality in this country that can be sued for punitive damages. Think about that and answer it yourself. I do not know any state that can be sued for punitive damages. They are immune.[63]

Let us talk about the suggestion that punitive damages are a terrible blight. Take a look at the law article in the *Wall Street Journal*, which is not exactly a plaintiff's house organ, in which they found that punitive damage awards to be modest and very rare.[64] Where did the study come from? It was from the National Center for State Courts at Cornell University.[65] They came to the conclusion that punitive damages are a very rare thing. The American Tort Reform Association and its siblings and offspring, the Manhattan Institute, make the studies.

Right now there is a young fellow from my firm who is running for the state legislature. The job pays $45,000 a year, so I do not know how he is going to live. However, the Republican Party took a poll and bragged afterwards that the people in that jurisdiction believed that a Republican should be elected. The poll question was as follows: "Would

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61. *See* Tamar Lewin, *Fears, Suits and Regulations Stall Contraceptive Advances*, N.Y. TIMES, Dec. 27, 1995, at A1.

62. *See* Abraham & McConnell, *supra* note 47.

63. *See generally* Joel E. Smith, Annotation, *Recovery of Exemplary or Punitive Damages From Municipal Corporation*, 1 A.L.R. 448 (4th ed. 1996) (discussing treatment in various jurisdictions and noting generally that "while courts have not favored the recovery of punitive damages against a municipal corporation" the presence of a statute expressly authorizing or denying recovery is a controlling factor).

64. *See* Edward Felsenthal, *Punitive Awards Are Called Modest, Rare*, WALL ST. J., June 17, 1996, at B4.

65. *See id.*

you vote for a clean-cut, nice young man whose father was a policeman who just died and who has contributed much to the community, or would you vote for an ambulance-chasing lawyer who works for one of the largest law firms in Chicago, and who does nothing but take a third of the clients' monies?"

Studies prove exactly what you want them to prove. Maybe the statistic that I am about to tell you is wrong too, but it came from the Center for Responsive Politics. It showed that the pro-tort reform political action committees contributed $22 million to the United States Senate. The American Trial Lawyers Association of America contributed $930,000.[66]

Trial lawyers do a pretty good job for corporate America. They do a wonderful job when they are representing organized money. For example, they convinced juries in sixty-five percent of the malpractice cases in Illinois that patients should not recover from doctors.[67]

Corporate America has a pretty good thing, and it is suggesting that jurors do not know what they are doing, judges do not know what they are doing, appellate court judges do not know what they are doing, supreme court judges do not know what they are doing—everyone is wrong. Everybody is wrong except Corporate America. I looked at the stock market this morning, which is pretty high. Corporate America is doing pretty well, despite this tort system.

What is it that is in need of change? This need comes from Corporate America's desire for more money. They want more money for their shareholders and, therefore, for their executives. Now there is nothing wrong with wanting more money, but the simple fact of the matter is that there is nothing wrong with the tort system.

Every once in awhile, there is an aberrational result. Take the McDonald's case for example.[68] It is a perfect example of how the system works. The woman was found twenty percent negligent, so they

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66. *See* Center for Responsive Politics, Press Release, Liability Amendments Benefit Health Care Industries 1 (May 2, 1995) (on file with the *New York Law School Law Review*) (noting that over five years ATLA contributed $930,750 to Senate candidates, while interests that "would gain if amendments to the products liability bill" became law, including health care professions, institutions, service providers and pharmaceutical and medical device manufacturers contributed more than $11,540,688 over the same period).

67. *See 1995 Calendar Year Summary and Index of Malpractice Trials*, COOK COUNTY JURY VERDICT REP. (1996) (on file with the *New York Law School Law Review*) (noting a defendant winning percentage of 67.3% for physicians and hospitals).

68. *See* Diana Griego Erwin, *Life is Not Without Risks*, L.A. DAILY J., Aug. 29, 1994, at 6.

cut her verdict twenty percent immediately.[69] That is a pretty good system. Why? Because she had a cup of coffee between her legs, and she opened the cup of coffee and the scalding coffee burned her.[70] I wonder if you would suggest that third degree burns over a seventy-nine year old woman's thighs was a lottery. I do not know how much you would pay for that, but I certainly would not pay one dollar, $250,000, $500,000 or $2 million. The court cut the punitive damages to $480,000 and then Corporate America settled the case.[71] Now, they did not settle the case because they thought they were going to win on appeal. Additionally, the suit did not put McDonald's out of business; they have served another billion and a half hamburgers since then. So I respectfully suggest there is nothing wrong with the system that a little bit more understanding could not help.

I assure you again that if somebody in this room is hurt, they will go to Barry Nace,[72] and Barry Nace would do exactly what I would do for you: try to get you the most money that you are entitled to. When I say, "most money," that is a pejorative term. What I mean is to get what you are entitled to for your injuries, no more and no less, without the interference of the federal government telling you what you should do in your state.

IV. AUDIENCE DISCUSSION

JUDGE BECKER: I told you that you were in for a treat, and I was right. We will open the floor for questions to either or both of our debaters.

QUESTION: Should these questions not be properly left to the state legislatures rather than the federal government?

MR. CORBOY: Well, I am a Madisonian Federalist. I believe we should have a federal government, but one that keeps its hands off of the states' rights. Yes, I come from a state right now where, as soon as the Republican legislature was taken away by the electorate and the Chief Executive Office of our state was given to the Republicans, a tort system

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69. *See* Robert A. Clifford, *Justice System Corrects its Outrages*, CHI. TRIB., Sept. 29, 1994, at 24; *McDonald's Makes Out-of-Court Settlement in Hot-Coffee Case*, CHI. TRIB., Dec. 2, 1994, at B1.

70. *See* Erwin, *supra* note 68, at 6.

71. *See* Clifford, *supra* note 69, at 24.

72. Mr. Barry Nace is a well known plaintiffs' attorney and former president of the American Trial Lawyers Association of America. *See* Barry Nace, *Science and Civil Justice: A Recent Oxymoron*, 41 N.Y.L. SCH. L. REV. 393 (1997)

was implemented that is going to change the mores of our community. They believe that the laws of Illinois, even though they are draconian, are what the people in Illinois want. I do not have any idea what the laws in Alabama are, although I would like to have some cases down there. I have no idea what the laws of Texas are, although I just had a case in Texas. The tort system is indigenous to the state in which the tort either takes place or, because of venue laws, where a defendant can be sued.

The Republican legislators in the federal government want to federalize the tort system, but they do not want to make a federal question out of it.[73] You know, if you are not given the right to go to the federal court, cases will stay in the state courts but they will be saddled with federal law. Now, I do not know what the federal government's purpose is in having a federalization and still have the litigation remain in the state.

MR. OLSON: One good thing that has come from this debate over federal legislation to correct the excesses of certain aspects of the tort system is that we have discovered a whole new class of people that were never historically Federalists but all of a sudden have found states rights. The plaintiffs' trial bar is now a lot more interested in states rights. I think that it is important to understand, for example, that out of state corporations are regularly being punished in Alabama for doing business there. The former Chief Justice of the West Virginia Supreme Court put it well when he said, "I sleep well at night when I am able to redistribute money from an out of state corporate treasury to the citizens of my state who vote in my election."[74]

What we have in the excesses of the tort system are efforts by one state to control its own products and how things are done in the state, distorted by what is happening someplace else. In the Supreme Court decision this last term involving BMW,[75] the state of Alabama had decided to punish BMW because it sold cars under certain legal standards that were enacted by other states. Essentially, Alabama was attempting

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73. *See* Neil A. Lewis, *House G.O.P. Quits Tort Reform Plan*, N.Y. TIMES, Mar. 7, 1996, at A1 (calling the plan "a sweeping overhaul of the nation's civil litigation system" and noting that it would, for the first time, set nationwide standards "in both state and Federal courts").

74. *See Quotes*, A.B.A. J., Dec. 1, 1988, at 26. West Virginia Supreme Court of Appeals Justice Richard Neely was quoted: "As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families and their friends will re-elect me." *Id.*

75. *See* BMW of N. Am., Inc., v. Gore, 116 S. Ct. 1589 (1996).

to punish BMW for perfectly lawful conduct elsewhere.[76] The framers of our Constitution expected Congress to regulate interstate commerce to prevent the states from using their power to abuse and discriminate in just this manner.

QUESTION: I am addressing this to Mr. Corboy. I teach law at George Mason and will give you a hypothetical question. A client comes to you who has a case in which you estimate that the injuries would be worth $25 million if you could get a jury verdict. However, also based on your experience and your associates' research, you believe there is only a ten percent chance of winning—a very weak case—but, on the other hand, you are a very experienced trial lawyer with great rhetorical skills. You might be able to persuade the jury. With only a ten percent chance of winning, the economic value of the case is $2.5 million, and your cut is at least $800,000 or maybe a little less after expenses. My question is: do you take this case and, if so, do we have a sound court system involving "loser pays" rules that would encourage attorneys to take cases with high economic values that are essentially speculative?

MR. CORBOY: Sure I would take the case. There is a person that has been injured and there is a viable defendant, whether vicariously or with money in its bank, who has to respond to the judicial system. Ninety-six percent of the cases in this country are settled,[77] and my guess is that this case would be one of them. However, if it were settled in my office, we would not charge $800,000. It is that simple.

Most lawyers I think, at least the ones I have come in contact with, have the responsibility of making sure that equity results. I have had exactly one case in my life that was settled for $25 million, and the fee was not one-third of $25 million, believe me. The lawyers that I know would certainly reduce the fee commensurate with what they believed an equitable percentage would be. My guess is they would charge one-half of one-third or, perhaps, twenty percent.

The reference to "loser pays" is a hot idea today, but it is dead in Florida.[78] Florida tried it, but insurance companies found that, when

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76. *See id.* at 1593.

77. *See* Jack Marshall, *The Lawyer's Role in the Structured Settlement Era: Duties, Rules, and Perils*, 43 FEDLAW 10 (1996) (noting that "[a]ttorneys deal in settlements; 95 percent of all cases are settled").

78. *See* FLA. STAT. ANN. § 57.105 (West 1996) (providing for an award of attorney fees only when "[t]he court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party"); *see also* Phillip H. Snaith, *Attorney's Fees Under Florida Statute 57.105: Caselaw Development*, 10 NOVA L. REV. 156, 173 (1985) (noting that the primary purpose for the statute was to deter unfounded litigation;

they won a lawsuit, they were unable to collect the legal fees back from the plaintiff. Most plaintiffs cannot afford their own lawyer, let alone pay the expenses of the insurance company's lawyer. On the other hand, when the plaintiff won the insurance companies had to pay the plaintiff's legal fees, so "loser pays" died. The legislation was taken off the books the next session. "Loser pays" does not work because plaintiffs do not have the money to pay when they lose.

MR. OLSON: I want to respond to something that Mr. Corboy said earlier about punitive damages against municipalities. The fact is that, unless I am mistaken, in most jurisdictions you can recover punitive damages from municipalities. The case that stands out most in my mind involved East St. Louis, Illinois, where an individual was drunk, put in the jail, and then injured by fellow prisoners. He won a large punitive damage verdict.

JUDGE BECKER: Why are plaintiffs' fee arrangements not disclosed to jurors and what would be the effect if you unbundled the fee from the award?

MR. OLSON: I suppose the plaintiffs' lawyers would say you should also disclose the defense lawyer's arrangements for his fees. What would happen if you unbundled and allowed the recovery of attorney's fees in these cases? I do not know what the effect would be. I suspect that it would result in smaller attorney's fees. I do not know what a jury is thinking when it awards the kind of verdicts that Mr. Corboy has been successful in recovering.

MR. CORBOY: It certainly would not be one-sided. I see no relevancy in suggesting that the jury should know that my opponent is getting $500 an hour. This is not a proper way to prejudice the jury. It is a function of all lawyers to prejudice the jury in their favor. Let us use whatever word we want, but that is our function. However, there are rules that you must follow. Judges do not allow you to improperly prejudice the jury, but it would seem to me that disclosing the amount of the fee would be discourteous to a defendant, and I say that in a very mild fashion.

If the plaintiff was entitled to a $100,000 recovery, and a twenty-five percent rule applied that was disclosed to the jury, they may add twenty-five percent to the $100,000. It does not seem right for the plaintiff or the defendant to characterize the fees of the lawyer as being too much, and

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however, "since it has itself presented such fertile ground for litigation, it has not yet achieved this end").

then assert that since the defendant can afford $500 or $100 an hour, he should receive more than he is entitled. I do not think it is a relevant inquiry of the jury.

QUESTION: Would that experiment in Florida have been more successful if the plaintiff and the plaintiff's lawyer were jointly and severally liable for the attorney's fee award.

MR. CORBOY: What about the defendant's lawyer? Why discriminate against the plaintiff's lawyer? "Loser pays" means the loser pays. Why should not the defense lawyer, if your logic has any validity, also be responsible on a fee basis? I do not see the relevancy. Incidentally, ninety-six percent of the cases are settled. We are talking about four percent of the cases in which shifting of fees may be a potent way of settling more cases.

MR. OLSON: The figures that I was using excluded wrongful death cases.[79] Alabama is the only state in the United States that uses punitive damages as the method of recovery in wrongful death cases,[80] but we took those cases out of the figures.

I have a chart that shows punitive damage awards affirmed on appeal over a seven-year period, 1987 to 1993, in Georgia, Mississippi, Tennessee and Alabama. The total amount in that period was $7 million in Georgia, $3 million in Mississippi, $5 million in Tennessee, and $101 million in Alabama.[81] I suspect that if there is a possibility for a plaintiff to bring the lawsuit in any one of the four states, the plaintiff would be crazy not to bring the case in Alabama. This is probably why the *BMW* cases[82] were being brought in Alabama and not in the neighboring states.

Again, as far as the settlement figure, it is very difficult to get empirical data. I am sure that in Barbour County, Alabama,[83] where practically everybody has either been a punitive damage plaintiff or is related to someone who has been, and where fifty-two percent of the cases brought are by the same law firm, the immense jury awards affect a settlement in every single case.

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79. *See supra* notes 41-42 and accompanying text.

80. *See* ALA. CODE § 6-11-20 (1996) (limiting punitive damages in civil cases to wrongful death tort actions).

81. *See* Life Ins. Co. of Georgia v. Johnson, 684 So. 2d 685, 714 app. A (Ala. 1996).

82. *See* BMW of N. Am., Inc., v. Gore, 116 S. Ct. 1589 (1996).

83. *See supra* notes 45-46 and accompanying text.

MR. CORBOY: The potential for recovery stimulates a settlement somewhere in the range of ten or fifteen percent of the time if the lawyer knows what he is doing. If the lawyer does not know what he is doing, the case is going to go to trial, and they are going to lose or have a ninety percent chance of losing. Obviously, the settlement climate or the jury verdict climate has something to do with the amount of settlements in any jurisdiction.