
Volume 65

Issue 6 *The 2015 Pound Symposium – The "War" on the U.S. Civil Justice System (Co-Sponsored by the Pound Civil Justice Institute and Emory University School of Law)*

Article 14

2016

The Role of Influence in the Arc of Tort "Reform"

Georgene Vairo

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/elj>

Recommended Citation

Georgene Vairo, *The Role of Influence in the Arc of Tort "Reform"*, 65 Emory L. Rev. 1741 (2016).
Available at: <https://scholarlycommons.law.emory.edu/elj/vol65/iss6/14>

This Articles & Essays is brought to you for free and open access by Emory Law Scholarly Commons. It has been accepted for inclusion in Emory Law Journal by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

THE ROLE OF INFLUENCE IN THE ARC OF TORT “REFORM”[†]

Georgene Vairo^{*}

To begin, I’d like to thank Rich Freer and the Pound Civil Justice Institute, first, for bringing this distinguished group together, and second, for inviting me to participate in this important symposium. Much of what I want to say has already been said today. What I hope to do is to put my thoughts together in a package that will be a bit interesting to you.

Obviously—and this has been said all day long—protecting citizens’ rights to access to justice is essential to our democratic system of government. What I want to do today is to share some thoughts with about how political, judicial, and commercial influences have contributed to tort reform and related developments. I begin with a slide with a picture, partly because I want to be like Judith Resnik, and also because when I thought about what I wanted to speak about, I recalled a TV commercial I saw around 1979 when I graduated from law school. There was an empty playground in the commercial, with a chain link fence around it, and no kids in sight. This ad was brought to us by the insurance companies of America, and the paraphrased message was: Greedy plaintiffs lawyers are bringing frivolous lawsuits, cities are being forced to pay exorbitant settlements, leading to insurance premiums going up and up and up, forcing cities to close the playgrounds.

Even though I was not an academic yet, I knew there was something wrong with this picture and that the empty playgrounds probably had less to do with greedy lawyers and more to do with corporate interests. My theme really is not a novel one because Steve Daniels already talked about that this morning, and many have written for decades now¹ about how the public relations campaign waged by commercial and political entities led to a narrative that turned the

[†] This Essay is based on remarks delivered at the Pound Civil Justice Institute/Emory University School of Law Symposium held at Emory School of Law on October 15, 2015. It has been lightly edited for clarity and updated with citations. Professor Vairo’s full remarks are available online. EmorySchoolofLaw, *Tort “Reform” and Its Impact on the Development of U.S. Law*, YOUTUBE (Oct. 22, 2015), <https://www.youtube.com/watch?v=wVrZGICBEsA> (beginning at 17:40).

^{*} David P. Leonard Professor of Law, Loyola Law School, Los Angeles, CA. The author is grateful for and acknowledges the research and support provided by the staff and editors of the *Emory Law Journal*.

¹ See John T. Nockleby, *How to Manufacture a Crisis: Evaluating Empirical Claims Behind “Tort Reform,”* 86 OR. L. REV 533 (2007).

public against the plaintiff's bar, which in turn created a climate that provided cover for state and local legislators, judges, and rule-makers, to enact laws and rules that impede access to justice.

Of course, no talk about tort reform can begin without a quote from Shakespeare's *Henry VI*: "The first thing we do, let's kill all the lawyers."² There has been a lot of debate about exactly what Shakespeare meant. Was he referring to lawyers as mere parchment pushers who worked to the detriment of the people? Or was he talking about lawyers as a bulwark against tyranny? No matter what Shakespeare meant, I think we can probably agree that right now the modern translation of this quote is "Let's kill all the plaintiffs' lawyers until we need one."

When we think about the evolution of tort reform, we see the seeds of that evolution in the 1960s—there was a tremendous expansion of public and private rights in the early 1960s and on into the 1970s. On the federal statutory level, we saw the Equal Pay Act of 1963,³ Title VII,⁴ and the Voting Rights Act of 1965,⁵ enacted. Regarding private rights, we saw Chief Justice Roger Traynor of California writing a series of opinions that eventually led to strict products liability law being recognized by courts around the country. We also saw a very important procedural development in 1966: the amendment to Rule 23, which allowed for expanded use of damages class action suits.⁶ Rule 23(b)(3), together with the expansion of public and private rights, struck a one-two punch against corporate America. Another important development around this time was *Bates v. Arizona*, the 5–4 decision of the Supreme Court which allowed lawyer advertising and provided the opportunity for more entrepreneurial lawyering and the like.⁷ All of these developments led to the tort reform reaction. Although the tort reform movement had been going on since the 1950s, it really accelerated after these developments.

So why the tort reform war? The stock answers—mostly coming from Dan Quayle and the Contract with America⁸—were that we have to cut costs for

² WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 2, sc. 2.

³ Pub. L. No. 88-38, 77 Stat. 56.

⁴ 42 U.S.C. § 2000a.

⁵ Pub. L. No. 89-110, 79 Stat. 437.

⁶ FED. R. CIV. P. 23(b)(3).

⁷ 433 U.S. 350, 384 (1977).

⁸ The Contract with America was a document signed by members of the United States Republican Party in September 27, 1994, during a congressional election campaign. *Contract with America*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/Contract-with-America> (last visited Mar. 11, 2016). The Contract outlined legislation the Republicans promised would be enacted if they became the majority party in

corporations and help them compete in the international arena. Equally importantly, they argued that we needed to decrease insurance premiums and protect the public. But there also seems to have been a political agenda underlying all of this—the idea being that if we get the public against plaintiffs’ lawyers, there may be less claiming and weaker results for plaintiffs in the cases that were filed, which would eliminate plaintiffs’ lawyers as a source for funding democrats. We also saw a move to fund campaigns to elect tort-reform-oriented judges—especially at the state supreme court level—as well as reformist legislators.⁹

How was this public relations war waged? Well, the Chamber of Commerce and its network of interrelated friends piled on: the Citizens Against Lawsuit Abuse (CALA), Law Litigation Abuse Watch, and so forth. The important thing to understand is that these organizations were primarily underwritten by not only large businesses but also by various conservative political organizations, or conservatives such as the Koch brothers. Their budget was humongous. Billions of dollars have been spent on this public relations war with major companies around the country contributing at least a million dollars to the cause per year.¹⁰

The public relations campaign was very effective at getting the press to expand the narrative and delivering this narrative to the public. It may be no surprise that the *Wall Street Journal* would be calling for tort reform, but other mainstream press were using the same kinds of phrases: “jackpot justice,” “runaway juries,” “the litigation explosion,” and so forth.¹¹

Congress. *Id.* The Contract’s provisions included conservative stances on issues such as shrinking the size of government, promoting lower taxes and greater entrepreneurial activity, and both tort reform and welfare reform. *Id.*

⁹ Joanne Doroshov, *The Secret Chamber of Commerce and Its “Tort Reform” Mission*, HUFFINGTON POST (Mar. 18, 2010, 5:12 AM), http://www.huffingtonpost.com/joanne-doroshov/the-secret-chamber-of-com_b_337634.html.

¹⁰ See Jim Vandehei, *Business Lobby Recovers Its Clout By Dispensing Favors for Members*, WALL ST. J. (Sept. 11, 2001, 12:01 AM), <http://www.wsj.com/articles/SB100015411979219346>; David C. Johnson, *The Attack on Trial Lawyers and Tort Law*, CTLA FORUM, Jan.–Mar. 2004, at 8, 9 (quoting a statement from the former president of the American Association for Justice, who said, “It is no secret that, for more than three decades, business interests have invested billions of dollars to sell the public a distorted view of a legal system that is justifiably envied throughout the world. They say rampant litigiousness requires tort ‘reform’ that restricts the legal rights of injured people, not those of businesses suing businesses, which account for most litigation. What they seek, really, is corporate welfare-assurance that their misdeeds will be paid for not by them, but by others”).

¹¹ Nockleby, *supra* note 1, at 535; see also Paul H. Rubin, Opinion, *Tort Reform Saves Lives*, WALL ST. J., Oct. 8, 2005, at A7.

We even began to see a proliferation of websites—my favorite one: lawyersstink.com. All of this led the tort reform movement to turn away from the courts, which typically are responsible for administering the tort regime, to legislators to rein in those courts. By 1986, there were forty-one states that elected or enacted some form of tort reform.¹² Just as one example, between 2000 and 2003, we saw nine states enact non-economic damages caps in professional liability cases.¹³ By 2004, the number of non-economic-damages states had risen to twenty-three.¹⁴ Other kinds of tort reform were also enacted, including modifications to the joint and several liability rules, modifications of the collateral source rules, and limits on punitive damages.

Now this was all fine and good for the tort reform movement except that many state supreme courts were striking down state tort reform statutes as unconstitutional. And, plaintiffs' lawyers were filing lawsuits in courts perceived to be pro-plaintiff. This led to the "Judicial Hellhole" survey.¹⁵ Starting in 2002, the Chamber of Commerce's Institute for Legal Reform (ILR) initiated the Judicial Hellhole survey by going around and asking defense lawyers—typically lawyers who had actually lost a case in that jurisdiction—"Well, what do you think that the worst judicial hell holes are?" Madison County, Illinois? The Gulf States? West Virginia?" As a former New Yorker, I'm proud to say that New York is the number one judicial hellhole this year!

The "Hellhole" survey is obviously more fiction than fact. Professor Ted Eisenberg wrote a very important article in 2009 that not only exposed all of the flaws in the study but also talked about how ineffective tort reform was in terms of its stated goals.¹⁶ And if we don't believe how bad the Judicial Hellholes report was from Professor Eisenberg, all we need to do is hear what the spokesman for the ILR said about its own survey: "We have never claimed to be an empirical study. . . . It's not a batting average or a slugging

¹² John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021, 1031 (2005).

¹³ DAVID C. JOHNSON, COMMONWEAL INST., THE ATTACK ON TRIAL LAWYERS AND TORT LAW 17 (2003), <https://www.cttriallawyers.org/f/public/CommonwealReport2003.pdf> (citing AM. OSTEOPATHIC ASS'N, PROFESSIONAL LIABILITY REFORM 2002–2003 ENACTED LEGISLATION (2003)).

¹⁴ *Id.*

¹⁵ Am. Tort Reform Found., JUDICIAL HELLHOLES, <http://www.judicialhellholes.org/> (last visited Mar. 11, 2016).

¹⁶ See generally Theodore Eisenberg, *U.S. Chamber of Commerce Liability Survey: Inaccurate, Unfair, and Bad for Business*, 6 J. EMPIRICAL LEGAL STUD. 969 (2009).

percentage. It's no more or less subjective than what appears in *The New York Times*.”¹⁷

In addition to these state tort reform efforts, we see the emergence of a shift in the nature of tort reform, so to speak, to and through the procedural backdoor: stealth tort reform. In some respects, this type of tort reform is easier to enact than the substantive legislative or judicial reform that was adopted in the states. Citizens might notice if their rights are taken away directly through damages caps and the like, but perhaps the public will not notice as much when changes are made to procedural rules.

This stealth procedural tort reform arguably had its genesis in 1976 at the Pound Conference. To be clear, when I talk about the Pound Conference, I am not talking about the Pound Civil Justice Institute, which is cosponsoring today's program. The Pound Conference is a series of national conferences.¹⁸ The one in 1976, at which Chief Justice Warren Burger spoke, focused on the “causes of popular dissatisfaction with the administration of justice.”¹⁹ The argument he made was that there was a loss of confidence in our judicial system caused by lawyers—specifically plaintiffs' lawyers—who were using courts for their own ends rather than for obtaining justice.

Chief Justice Burger's remedy for this loss of confidence was to streamline procedure and enhance the use of ADR. At the time, some judges, lawyers, and professors suggested that the Federal Rules of Civil Procedure were partially the cause of some of the perceived problems. We had Justice Powell's mere “tinkering changes” quote, and even the Bernie Sanders of civil procedure professors, Arthur Miller, writing an article in which he says that “[t]he liberal and permissive Federal Rules of Civil Procedure . . . may be contributing” to various problems.²⁰

¹⁷ Adam Liptak, *The Worst Courts for Businesses? It's a Matter of Opinion*, N.Y. TIMES (Dec. 24, 2007), <http://www.nytimes.com/2007/12/24/us/24bar.html>.

¹⁸ *About the GPC Series*, GLOBAL POUND CONF., <http://globalpoundconference.org/about-the-series/about-gpc#.VuNUN4wrLq0> (last visited Mar. 11, 2016).

¹⁹ *1976 Pound Conference*, GLOBAL POUND CONF., <http://www.globalpoundconference.org/about-the-series/1976-pound-conference> (last visited Feb. 22, 2016).

²⁰ *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521, 523 (1980) (“I reiterate that I do not dissent because the modest amendments recommended by the Judicial Conference are undesirable. I simply believe that Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms. The process of change, as experience teaches, is tortuous and contentious. Favorable congressional action on these amendments will create complacency and encourage inertia. Meanwhile, the discovery Rules will continue to deny justice to those least able to bear the burdens of delay,

This all led to pressure on the Federal Civil Rules Advisory Committee (my apologies to Dean Klonoff, my panel-mate, who serves so ably on the present Committee). This pressure, in turn, played a part in the adoption of a series of amendments from the 1970s to the present. We should start by talking a little bit about the discovery rules. The first significant set of amendments to the discovery rules took place in 1977.²¹ But the amendments led Justice Powell to lament that these were mere tinkering changes; that more had to be done.²² Since 1977, we have had numerous amendments to the discovery rules, all of which were designed to limit the scope and amount of discovery.

All of this may have been well-intentioned, but if you think about what Professor Resnik said this morning, discovery is the FBI for poor people. The problem is that discovery reform may have the inadvertent effect of being more anti-plaintiff and pro-defendant, which poses a serious problem in the administration of justice. And the 2015 discovery amendments, which went into effect on December 1, have the plaintiff's bar fearing a similar effect because the courts are now required to really think about proportionality factors—including the importance of the issues at stake in the action and the amount in controversy—as aspects of whether discovery ought to be allowed or not.

Probably the most famous aspects of tort reform deriving from the Federal Rules of Civil Procedure were the 1983 Amendments to Rule 11 and Rule 16. Addressing Rule 16 first, the amendments for the first time really pushed the idea of federal judges as managers of the cases before them rather than umpires, and that led to, for example, a push to settlement.²³ Underlying the amendment to Rule 16 is the idea that having a trial is an error—in fact, trials are not a good idea because they are too costly. Rather, there should be settlement, settlement, settlement.

Rule 11 is the other significant rule. At the time, the Advisory Committee sought to use Rule 16 to get judges to shape up and Rule 11 to get lawyers to shape up. Now, again, the intention was good. Rule 11 requires lawyers to do a reasonable investigation into the law and the facts before they file a lawsuit and not file for any improper purpose. Good idea. The problem is that 78.8%

escalating legal fees, and rising court costs.”); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 8 (1984).

²¹ See generally *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487 (1970).

²² *Amendments to the Federal Rules of Civil Procedure*, *supra* note 20, at 523.

²³ Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 190 (1988).

of Rule 11 motions were made by defendants against plaintiffs.²⁴ That was my finding from a review of the reported cases, and confirmed by other empirical studies. This suggested that Rule 11 had become a tool for defendants to bludgeon plaintiffs. This, in turn, gave rise to a chilling-effect problem. There may have been meritorious cases not filed. In fact, some studies showed that meritorious cases were not being brought because of the fear of sanctions under Rule 11.²⁵

As a result, in 1993 the Civil Rules Advisory Committee did the right thing: they rolled back the amendments to Rule 11, making sanctions non-mandatory and providing plaintiffs—or the targets of the Rule 11 motions—with the safe harbor. But the problem with that is it led to a pushback in Congress where various lobbying efforts led to the enactment of the Private Securities Litigation Reform Act (PSLRA), in which, among other things, Rule 11, for the purposes of securities cases, was rolled back to its 1983 glory. These actions continued despite the results of the Federal Judicial Center’s 1995 study, which outlined judges’ experiences under the 1993 amendments—the more liberal amendments—and their general opinion that frivolous litigation is not really a problem.²⁶ To the extent that we have a problem, the 1993 version of Rule 11 is sufficient to take care of any problems that may arise.

I would argue that Rule 11 was not successful at all: it led to a decline in civility. In fact, in one case, as a sanction where there were cross-motions for sanctions, the judge required the lawyers to go out and eat lunch together so they could start figuring out how to get along. Moreover, the Rule 11 experience led to a further erosion of public support for plaintiffs because of the perception that so many cases are frivolous.

Let’s move to the Supreme Court. The Supreme Court picked up the tort reform ball quite capably, and I think there are a number of reasons for that. Of course, during this period of time we saw the Supreme Court moving from being quite liberal to being more and more conservative, which, as I will describe later, led to more constricted readings of the Federal Rules of Civil Procedure. Additionally, the Federal Judicial Center was basically instructing judges to get rid of cases by settling them—don’t worry about adjudicating

²⁴ *Id.* at 200; see also Stephen B. Burbank, *The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11: An Update*, 19 SETON HALL L. REV 511, 521 (1989).

²⁵ Vairo, *supra* note 23, at 200.

²⁶ See generally FED. JUDICIAL CTR., 1995 ANNUAL REPORT (1995).

them; don't worry about trials. Judges were taught to use Rule 16 to the maximum.

During this period of time there were also a number of private seminars sponsored by tort reform groups, at least *sub silentio*, where judges were brought in and taught what the *real* law was. For example, there were all kinds of seminars to teach federal judges about law and economics,²⁷ and I wonder whether it was a coincidence that one federal judge's opinions on antitrust law shifted 180 degrees over this period of time. There is that pendulum again, swinging from the plaintiffs' side to the defenses' side.

Probably the first area in which the Supreme Court started to make an impact from a stealth tort reform perspective was Rule 56: the summary judgment rule. "No Spitting, No Summary Judgment" admonished a plaque outside the courthouse of a district court judge in New Orleans.²⁸ This judge was so tired of being reversed for granting summary judgment that he refused to grant them anymore. Thus, the bar for granting summary judgment was very, very high. The perception, for all kinds of reasons, was that summary judgment was going to be tough to get, and various Supreme Court and earlier opinions backed up this perception.²⁹

Then we get to the 1986 "Summary Judgment Trilogy." The *Celotex Corp. v. Catrett* case, written by Chief Justice Rehnquist, was a virtual ode to summary judgment.³⁰ I actually agree with the bottom line of *Celotex*. If the Federal Rules of Civil Procedure are about liberal notice pleading and liberal discovery, but the plaintiff cannot come up with evidence to prove an essential element of the case, well, then it is time to put up or shut up: summary judgment should be granted. The problem was that in the other Trilogy cases—*Anderson v. Liberty Lobby, Inc.*,³¹ for example—there was a lot of loose language. The Court in *Anderson* repeated the well-known phrase that all students remember: "On a motion for summary judgment, the court is not to

²⁷ *Id.* at 8–11; Chris Young, Reity O'Brien & Andrea Fuller, *Corporations, Pro-Business Nonprofits Foot Bill for Judicial Seminar*, CTR. FOR PUB. INTEGRITY (May 27, 2014, 5:02 PM), <http://www.publicintegrity.org/2013/03/28/12368/corporations-pro-business-nonprofits-foot-bill-judicial-seminars>.

²⁸ Steven Alan Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 6 REV. LITIG. 263, 264 (1987).

²⁹ *Id.* at 264–65.

³⁰ 477 U.S. 317, 322–23, 327 (1986).

³¹ 477 U.S. 242 (1986).

resolve any issues of fact.”³² However, what the Court also said is that, “when determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of the proof necessary to support liability,”³³ which sounds a little bit like inviting judges to weigh the evidence.

The *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* case was also important because of the way it discussed the plaintiffs’ expert in that antitrust case.³⁴ It laid the groundwork for the *Daubert* trilogy. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court admonished district court judges to be gatekeepers when evaluating expert testimony.³⁵ Everybody knew that the Supreme Court was talking about trying to keep out junk science.

Did these decisions make a difference? Empirically, it is difficult to say. But certainly in terms of the signaling function, they made a big difference. The Second Circuit in *Knight v. U.S. Fire Insurance Co.*, right after the Trilogy came down, essentially said, “We were only kidding all those times when we reversed grants of summary judgment. Really, please make summary judgment motions.”³⁶ The Fifth Circuit pre- and post-trilogy cases also made clear that summary judgment should be granted more liberally; so now the courts are saying that maybe you cannot spit anymore, but you can get summary judgment. The Federal Rules of Civil Procedure also were turned on their head by the Rule 8 pleading cases—*Bell Atlantic Corp. v. Twombly*³⁷ and *Ashcroft v. Iqbal*³⁸—where the emphasis went away from the “short plain statement” language of the rule to plaintiffs having to “show” that they are entitled to relief.

³² *Id.* at 248–49 (“[T]he issue of material fact required by Rule 56(c) to be present entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence . . .” (citing *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968))).

³³ *Id.* at 254.

³⁴ 475 U.S. 574 (1986) (generally dismissing the plaintiff’s expert).

³⁵ 509 U.S. 579, 597 (1993).

³⁶ 804 F.2d 9, 12 (2d Cir. 1986) (“It appears that in this circuit some litigants are reluctant to make full use of the summary judgment process because of their perception that this court is unsympathetic to such motions and frequently reverses grants of summary judgment. Whatever may have been the accuracy of this view in years gone by, it is decidedly inaccurate at the present time, We hope that the Committee’s study dispels the misperception so that litigants will not be deterred from making justifiable motions for summary judgment.”).

³⁷ 550 U.S. 544, 554–56 (2007).

³⁸ 556 U.S. 662 (2009).

Most of the empirical findings so far about the impact of *Twombly* and *Iqbal* are that they are having an effect. There are more grants of motions to dismiss under Rule 12(b)(6); however most of them are granted with leave to re-plead.³⁹ Thus, the jury is still out with respect to the impact of those cases. However, as with the Rule 11 experience, most people suspect that fewer cases that may have merit are being filed.

Next we have class action reform. Class actions are critical to vindicating small claims cases. A combination of *Wal-Mart Stores, Inc. v. Dukes*⁴⁰ and *Comcast Corp. v. Behrend*⁴¹ will make class actions basically disappear, along with the ability to enforce the law where claimants have small value claims or negative value claims. *AT&T Mobility LLC v. Concepcion*⁴² and the *American Express Co. v. Italian Colors Restaurant*⁴³ cases, which were discussed this morning, are also very important. Most consumers are being forced to sign arbitration agreements that waive class arbitration. If class actions and arbitration are dead, we have a real problem. As Judge Posner has said, only an idiot would sue for \$30.⁴⁴

Congress has also stepped into the fray. I mentioned the PSLRA earlier. There also is the Class Action Fairness Act of 2005,⁴⁵ which provides defendants with a very important forum-shopping tool. Defendants had been complaining that they were being sued in nationwide class actions in state (judicial hellhole) courts, which very freely granted class certification. The enactment of the Class Action Fairness Act made it easier for defendants to get a free pass out of state courts and into federal courts.

There also are various other statutes where the federal government has restricted the remedies available to plaintiffs, and the states are still in the act.

³⁹ JOE S. CECIL ET AL., FED. JUDICIAL CTR., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND 4 & nn.8–9, 5 (2011) (As of 2011—the Federal Judicial Center found that there was increased rate of grant in financial instruments cases, but not in others, after *Iqbal* motion grant with leave to re-plead. However, “the opportunity to present an amended complaint reduced the overall rate at which movants prevail (from 65.9% to 56.4% in 2006, and from 75% to 62.9% in 2010), and reduced the size of the movant’s advantage in 2010 (from 9.1% in the March 2011 study to 6.3% in this study). While this overall difference of 6.3% meets conventional levels of statistical significance, this difference is the result of the sizeable effect of the financial instruments cases.”).

⁴⁰ 131 S. Ct. 2541 (2011).

⁴¹ 133 S. Ct. 1426 (2013).

⁴² 131 S. Ct. 1740 (2011).

⁴³ 133 S. Ct. 2304 (2013).

⁴⁴ *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

⁴⁵ 28 U.S.C. § 1711 (2012).

My adopted state, California, was actually the first to enact a cap in medical malpractice cases.⁴⁶ Last year, there was an initiative to overturn the cap. TV ads in support of the initiative were aimed at plaintiffs' lawyers. Ultimately, the initiative to overturn the caps failed.⁴⁷ In West Virginia, the state enacted four tort reform statutes just last year, in one legislative session.⁴⁸ The West Virginia Chamber of Commerce president essentially said, "We have only just begun." In 2015, thirteen states were still considering tort reform.⁴⁹

So, did tort reform work? There is no question that claiming is down nationally. In Texas, for example, a 2015 study showed that civil lawsuits are down 17% over the last ten years.⁵⁰ A RAND Corporation study looked at malpractice claiming and the original hypothesis, prior to the study, was that there was over-claiming. The RAND study, however, showed that there was under-claiming. Overall, the statistics showed that only 10% of injured people actually seek compensation by writing to their insurance companies, and only 2% actually file a lawsuit.⁵¹

In fact, there is a doubling down effect of the tort reform effort. Even in states that have not enacted tort reform, the public relations campaigns have led to a diminution in claiming.⁵² Tort reform efforts have had a tremendous influence on jurors. Even though plaintiffs prevail in 48% of the cases in which there is a jury trial, most of the big verdicts are in business-to-business cases.⁵³

In addition, the median jury award is less than judge-awarded compensatory awards. The median award by a jury is \$27,000; the median

⁴⁶ See *Provisions of MICRA*, CAPP: CALIFORNIANS ALLIED FOR PATIENT PROT., <http://micra.org/specifics-of-micra/provisions-of-micra/> (last visited Mar. 29, 2016).

⁴⁷ See Melanie Mason, *Proposition 46, on Medical Malpractice Awards, Fails*, L.A. TIMES (Nov. 4, 2014, 9:24 PM), <http://www.latimes.com/local/political/la-me-pc-prop-46-results-20141104-story.html>.

⁴⁸ See Martin & Seibert, L.C., *West Virginia Passes Significant Tort Reform Measures*, UPDATE ON L., Apr. 2015, at 1, 1.

⁴⁹ See AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2015–2016, at 5–42 (2015), <http://www.judicialhellholes.org/wp-content/uploads/2015/12/JudicialHellholes-2015.pdf>.

⁵⁰ Angela Morris, *Why Are Filings Falling? Civil Lawsuits Down 17 Percent in 10 Years*, LAW.COM (Mar. 9, 2015), <http://www.law.com/sites/articles/2015/03/09/civil-case-filings-down-17-percent-in-10-years/>.

⁵¹ DEBORAH R. HENSLER ET AL., RAND: INST. FOR CIVIL JUSTICE, COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 120–22 (1991).

⁵² Scott DeVito & Andrew W. Jurs, "Doubling-Down" for Defendants: *The Pernicious Effects of Tort Reform*, 118 PENN ST. L. REV. 543, 565–66 (2014).

⁵³ Bruce A. Finzen, Daniel A. O'Fallon & Brooke B. Tassoni, *Tort Reform: Perception Versus Reality*, ROBINS KAPLAN LLP (Feb. 11, 2003), <http://www.robinskaplan.com/resources/articles/tort-reform-perception-versus-reality>.

award by a judge is \$75,000.⁵⁴ The public relations campaigns have been successful in shaping juror ideas. For instance, “83% of jurors think that there are ‘far too many frivolous lawsuits,’ [while] 57% believe that ‘lawsuits interfere with the development of [safe] and useful products,’ and 51% believe that ‘big business . . . is adequately concerned with safety [issues].”⁵⁵

The argument that there has been a litigation explosion has been shown to be a fiction by Professor Galanter and other scholars.⁵⁶ More importantly, tort reform has not achieved many of its stated purposes. For example, one purpose of tort reform was to drive down the cost of insurance. It probably has not done that. The studies are mixed and the Congressional Budget Office cannot figure it out.⁵⁷ But, to the extent that there has been any impact, it has been marginal. It also hasn’t changed the practices of professionals. A study that was conducted last year that focused on emergency care showed that the intensity of practice—what doctors were doing in the emergency room—did not change whether they were in a tort reform state or a non-tort reform state.⁵⁸

Where are we today? This slide shows another picture. This playground has people in it. This is certainly where we want to be. We want to be in a society where we have playgrounds open, and where we have safer products. And so the question is this: What are we going to do about it? I emailed Katherine Flynn Peterson—a past president of the American Association of Justice—as I was preparing for today, and I asked, “What should we be doing and how are we going to combat the billions of dollars that the Chamber of Commerce and its friends are putting into their public relations war?” This is a hard question. Many of the plaintiff-oriented groups are dependent on individual membership fees, which will not in a million years stack up to the billions that the Chamber receives every year. Additionally, lobbying is difficult: in one year, the American Association of Justice had three lobbyists compared to eighty just for the Chamber of Commerce.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See Nockleby, *supra* note 1, at 544.

⁵⁷ See generally CONG. BUDGET OFFICE, THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES (2004), <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5549/report.pdf>.

⁵⁸ Daniel A. Waxman et al., *The Effect of Malpractice Reform on Emergency Department Care*, 371 NEW ENG. J. MED. 1518 (2014).

So what other counterattacks can we engage in? Well, we have Ralph Nader, whose American Museum of Tort Law was recently opened;⁵⁹ maybe that will help spread the word. There is something else that works: lawyers taking it into their own hands. The Los Angeles County plaintiffs' lawyers, for example, always ask potential jurors about whether they have heard about the hot coffee case. Of course they all have. Paraphrasing Arthur Miller, that case is the cosmic anecdote which purportedly shows rampant frivolous litigation and runaway juries. The plaintiffs' lawyers then talk to the jury about the case. In voir dire, they try to tease out whether the potential jurors know how serious the injuries to that plaintiff were and that the amount of damages that she was awarded were cut down significantly on appeal.

Obviously, the plaintiffs' bar has to step it up and become more generous in terms of funding their organizations to get the alternative message out. I don't know whether social media is going to be useful in this effort or not. But if we do not, we're going to be back to products being "unsafe at any speed." So, I hope that Professor Freer is correct that people will notice that the courtroom door is closing,⁶⁰ so that we can ensure products that are safe at any speed. Thank you.

⁵⁹ Jenny B. Davis, *A Dream Come True: Ralph Nader Open His American Museum of Tort Law*, ABA J. (Oct. 1, 2015, 8:40 AM), http://www.abajournal.com/magazine/article/a_dream_come_true.

⁶⁰ Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1491 (2016).