

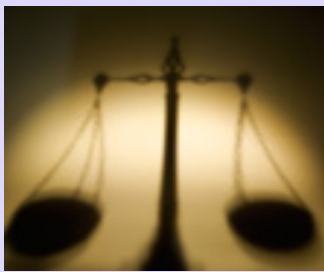
How Business Trowned The Trial Lawyers

By focusing on litigation reform at the state level, business has won key battles. Suddenly, it's a tough time to be a plaintiffs' attorney

In 1901 a well at Spindletop Hill sent petroleum shooting 200 feet in the air and made Beaumont, Tex., one of the first oil boomtowns. Decades later some locals tapped into a different kind of gusher: personal-injury litigation. Starting with highway and refinery accidents, and then moving to asbestos and tobacco, lawyers at the firm of Provost & Umphrey hauled in the kinds of fees that would make Wall Street lawyers drool.



But as is the case with oil in Texas, the easy money in injury lawsuits is gone. Thomas Walter Umphrey says the firm he co-founded in 1969 is downsizing. It's also prospecting in other fields of law to try to keep the business flowing. A couple of hundred miles to the north, in Daingerfield, plaintiffs' firm Nix Patterson & Roach is also pushing in new directions. "If today we were relying on personal-injury cases in Texas, we would be bankrupt," says partner Nelson J. Roach.



What has happened in Texas is not unique. In state after state, the tide has turned in one of the most protracted, hard-fought political struggles of the past two decades—the

battle over so-called tort reform. Few other business issues have generated more controversy, polemics, and campaign spending than the effort to scale back the types of lawsuits people can file and how much they can recover. In a speech on Nov. 20, for example, Treasury Secretary Henry M. Paulson Jr. charged that "the broken tort system is an Achilles' heel for our economy" and exhorted his audience to tackle "one challenge that will take a concerted effort over the long term to correct—the need for reform of our legal system."

But what Paulson and others have overlooked is that in large areas of the country, that "reform" has taken place, and business has emerged triumphant. *The American Lawyer*, an influential trade publication, recently declared an end to the era of mass-injury class actions, but the changes are far broader than that. Courthouse doors have slammed shut on a wide variety of claims. Michigan, for example, has virtually wiped out all lawsuits against drug-makers in the state. Six states have passed laws seriously restricting the kinds of asbestos suits that can be filed, and 23 now have statutes saying you can't sue the likes of McDonald's ([MCD](#)) for making you fat. Damage limits in many states have rendered medical malpractice litigation nearly comatose.

Both federal and state courts are reinforcing the trend. In December a U.S. appeals court in New York nixed a class action accusing investment firms of manipulating the price of initial public offerings. That was a big loss for securities fraud plaintiffs' lawyers, especially in a year when the total number of

shareholder suits filed was about half the level of prior years, according to statistics compiled by Stanford Law School. In 2005 the Illinois Supreme Court struck down a \$10.1 billion judgment against Philip Morris ([MO](#)), saying a state law protects the company from suits alleging that its marketing of "light" cigarettes was deceptive.

It all adds up to an extraordinary turnabout for the plaintiffs' bar, which has reveled in public-savior images of its top guns hauling Ford ([F](#)) and Firestone into court for disintegrating tires; standing side by side with state attorneys general to extract \$300 billion from cigarette makers; and trotting up courthouse steps with smoking-gun Enron documents. These days the law firm that once was the nation's most prolific filer of shareholder lawsuits is under indictment, thousands of asbestos and silicosis claims are being probed for fraud, and Vioxx litigation, once thought to be a gravy train express, is chugging in reverse. (Of 12 cases tried to verdict involving the painkiller, Merck & Co. ([MRK](#)) has won 8.)

Even many victories are evanescent. According to a report issued by Beasley, Allen, Crow, Methvin, Portis & Miles, an Alabama personal-injury firm, the Alabama Supreme Court reversed 27 of 31 plaintiffs' verdicts during its 2004-05 session. Thomas J. Methvin of the firm asserts: "It's a tough time to be a plaintiffs' lawyer, and it's a tough time for consumers."

Of course, when plaintiffs' attorneys see a falloff in business, lawyers opposing them do, too, and in Texas both sides are feeling the pain.

Surprisingly, even businesses may occasionally feel the sting of lawsuit reform. Plaintiffs' lawyers, closed out of their traditional pursuits, are working harder to drum up claims companies can bring against one another. Additionally, the conservative legal climate may be making it harder for companies that believe they have legitimate claims to get what they feel they're entitled to when they file a lawsuit.

CREATIVE LITIGATION

In late November about 300 attorneys descended on the W ([HOT](#)) Dallas-Victory hotel for the annual conference of the Texas Trial Lawyers Assn. But rather than plotting the next industry-threatening megaligation, their goals were decidedly more modest. Attendees could sign up for a full-day "car wrecks seminar." One presentation explored whether an automobile manufacturer's failure to include electronic stability control on a crashed vehicle could be the basis for a negligence claim. Another offered tips on creating "trial exhibits on a budget."

Coming up with creative new lines of litigation—and doing it on the cheap—is imperative for plaintiffs' lawyers in Texas these days. No other state's trial bar has suffered a greater reversal of fortune. Until well into the 1990s, Lone Star State plaintiffs' lawyers walked tall. They pioneered asbestos litigation in the U.S., racked up eye-popping verdicts in cases involving everything from business fraud to diet drugs, and perfected the art of "forum shopping." Companies dreaded getting sued in places like Eagle Pass, in the Rio Grande Valley, which has bucked the trend in Texas and remains a "hellhole" for business defendants, according to the American Tort Reform Assn.

Continued on page 32

Business Trounced (continued from page 31)

Money poured in. Five firms, Umphrey's among them, shared \$3.3 billion for representing Texas in its suit against the tobacco companies. Even putting aside the cigarette windfall, top plaintiffs' lawyers boasted eight-digit incomes. That was several times higher than blue-chip corporate attorneys in New York, Washington, and Houston, whose annual take topped out in the low seven digits. For Umphrey's 70th birthday bash this summer, organizers had to move three planes and a helicopter out of his firm's private hangar so 400-odd guests could rock out to live performances by Jerry Lee Lewis and Chuck Berry. Houston attorney John M. O'Quinn, who has cashed in on tobacco, breast implants, and diet drugs, has amassed a classic car collection worth \$100 million.

Initially in the liability-reform wars, the plaintiffs' bar and their opponents pursued very different strategies. While trial lawyers poured considerable resources into electing plaintiff-friendly state judges and legislators, business groups aimed to win federal liability limitations in Washington, but repeatedly saw their efforts founder. One player who realized that a different approach was needed: Karl Rove. Not only did the current White House deputy chief of staff help elect George W. Bush as governor of Texas in the 1990s, but he also was instrumental in judicial-election campaigns that, by 1998, had converted the makeup of the Texas Supreme Court from 100% Democratic to 100% Republican. He played a similar role in flipping Alabama's high court. Particularly during the Bush presidency, tort reform has become a major talking point for Republican candidates at both the

state and federal levels.

For years, says Stephen B. Hantler, an assistant general counsel at DaimlerChrysler Corp. ([DCX](#)) and chairman of the American Justice Partnership, a recently formed litigation reform organization, "the business community stood on the sidelines and watched," reluctant to get involved in state politics. But by the mid-'90s, national groups like the U.S. Chamber of Commerce and the American Tort Reform Assn. realized, as Hantler puts it, "that the greatest return on investment is at the state level."

The trial lawyers and the business community entered a campaign-spending arms race, but even for the well-heeled trial bar, it was no contest. In 2004, for example, business groups spent \$21.5 million on state supreme court elections, eclipsing the amount spent by plaintiffs' attorneys and their allies (\$13.3 million) for the first time, according to Justice at Stake Campaign, a Washington group that monitors judicial independence.

Much of the money, from both sides, was channeled through state-level organizations that played a critical role in reshaping the legal landscape. The most powerful force for change in Texas has been the home-grown Texans for Lawsuit Reform. Since 1996, tlr's political action committee has spent more than \$13 million promoting liability limits, according to Texans for Public Justice, a not-for-profit organization that tracks campaign spending and opposes

litigation curbs. Big donors to tlr's pac in 2006 included Bob Perry, a Houston homebuilder and funder of the Swift Boat group that attacked John Kerry (\$601,000); financier and oilman T. Boone Pickens (\$500,000); and real estate magnates Harlan and Trammell Crow (\$220,000 together).

Sipping wine in his Houston home one afternoon in November, Hugh Rice Kelly, former general counsel of Reliant Energy Inc. ([RRI](#)) and a leader of tlr, ticks off the changes his group has helped

usher in. "We have covered most of the things we wanted to have corrected," he says, looking more than satisfied.

The changes came not all at once but in waves, starting in 1995 and crescendoing in 2003 with a far-ranging set of liability limitations. Collectively, they have eliminated just about all of the litigation concerns in Texas that keep company executives awake at night. Punitive damages now have ceilings that, for example, will reduce an August, 2005, award of \$253 million against Merck & Co. ([MRK](#)) in a Vioxx case to \$26 million—if the verdict survives an appeal. Plenty of other states have cracked down in this area, as well. Georgia, for instance, limits punitive damages to \$250,000, unless "the defendant acted with a specific intent to harm," and New Hampshire bars them altogether. As for class actions in Texas, a series of judicial rulings has set the bar so high for a judge to approve them

that it's effectively impossible to meet, practitioners say.

The far-ranging changes passed by Texas lawmakers in 2003 included one that bars injury suits against a seller more than 15 years after a product is sold. One result: After a doctor was decapitated by a Houston hospital elevator in August, 2003, no suit could be filed against the manufacturer, since the elevator was too old. Dallas attorney Todd Tracy notes that many other products, including automobiles, farm and construction equipment, and factory machinery are used for extended periods and now enjoy the same protection. The rule is "one of the worst things about tort reform," says Tracy, who has his own firm, Tracy Car Boy ("cause that's what I do. I'm a boy, and I sue car manufacturers").

DEATH KNELL

Doctors also gained substantial shielding under the 2003 statute, with a \$250,000 maximum on "noneconomic damages"—essentially pain and suffering. Both defense and plaintiff firms say this has been a death knell for many medical malpractice suits. The reason is that a huge number of potential claimants, such as kids and the elderly, suffer no lost income in the view of courts. That means the top recovery is \$250,000, and it can easily cost \$100,000 or more in expert fees to prepare a case for trial—making litigation a money-losing proposition for attorneys, who now turn these cases away in droves. "They've just taken away so many of the rights of victims here," says Carolyn St. Clair, a nurse and medical malpractice attorney in Houston.

Consumer advocates worry that Texas lawmakers will move next to limit pain-and-suffering awards in product liability cases, too. On a national level, Hantler of the American Justice Partnership says he's not nearly done.

Continued on page 33



Business Trounced (continued from page 32)

He worries that lawsuits are migrating to states like West Virginia and New Mexico, after crackdowns elsewhere. And while he acknowledges that the results of the November elections will have business playing defense for the next couple of years, he's already girding for battle in judicial elections in Wisconsin and Ohio in 2008.

The decade-long spending assault by tlr, the U.S. Chamber, and others has done more than just win judicial elections and change laws. Lawyers in Texas say that after years of exposure to tv commercials, billboards, and campaign speeches, public opinion in the state has been profoundly affected. "They have demonized trial lawyers as money-hungry thugs," complains Houston litigator David Berg. "They have brainwashed jurors."

The result, say Berg and others, is that they are often hesitant to bring cases before a jury. And when they do, the obstacles become quickly apparent. St. Clair says that during jury selection for a negligence trial she handled, dozens of prospective jurors had to be dismissed because they stated that they would not be able to award punitive damages or damages of more than \$1 million. "Everybody was raising their hands" to say they couldn't, St. Clair says.

While big jury verdicts are increasingly rare in Texas, they still occur. Thus the giant Vioxx award in 2005 and a \$36 million verdict in a highway crash case handed down in November. But such awards are vulnerable on appeal. According to Texas Watch, an Austin consumer advocacy group, of the 69 consumer cases accepted for appeal by the Texas Supreme Court during its

2005-06 term, it decided against the consumer in 57, or 83%, a trend Texas Watch says has been consistent for the past six years. "When you have a large verdict that you receive from a jury, you can't settle the case anymore because the defendants will walk in and say: We know we're going to win in the Supreme Court," says Frederick M. Baron, a Dallas attorney who has handled cases involving exposure to asbestos and industrial toxins.

In fact, lawyers on both sides have had to adjust. When the first round of liability limits passed in Texas, Carol Butner, then a partner handling mainly medical malpractice and product liability defense cases at Fulbright & Jaworski in Houston, recalls some younger lawyers at her firm cheering. "Well guys, if nobody's going to be filing lawsuits, what do you think you're going to be doing?" replied Butner, who now does intellectual property litigation at McKool Smith.

Roy Camberg, a solo practitioner in Clear Lake, Tex., who built a practice representing plaintiffs in nursing-home abuse cases (also now subject to strict damage limits), says he is simply making less money. In November, he said, he settled a case for \$75,000 that three years ago would have settled for \$375,000. In Beaumont, Provost & Umphrey still bills itself as a personal injury firm. But Umphrey says 25% of his firm's work now involves representing companies in patent suits and other commercial disputes. Lawsuit reform, he says, "changed our direction."

Gwinn & Roby, a Dallas medical malpractice and product-liability defense firm, closed

its Fort Worth office in March. Houston's Beirne Maynard & Parsons, which has also worked in those areas, is re-tooling some of its 90 attorneys. But it has had modest attrition, and partner Martin D. Beirne says: "We're probably going to see some more." Another pressure that firms like his face, Beirne says, is the influx of plaintiffs' attorneys into business practice, which may push hourly rates down as more lawyers compete for the same work.

Sitting in a conference room high over Houston's Galleria neighborhood, James L. Reed Jr. and two other attorneys from Looper, Reed & McGraw contemplate the new legal landscape. Looper Reed's 60 attorneys represent small and midsize businesses, so one would presume that their clients have only benefited from the new environment. But Reed notes that there has been a "ripple effect" from the changes that is affecting commercial cases, too. His colleagues J. Cary Gray and Jack Rains, both self-described conservative Republicans, agree.

"It's a hell of a lot harder for one of our clients when a contract gets breached to collect all of their damages," complains Gray, noting that conservative judges take a very narrow view of what kind of damages they will even allow a jury to consider. In general, Gray says, he thinks many Texas judges are "afraid of big verdicts coming out of their courtrooms," even in a dispute between businesses. Citing a group of rice producers he and Gray represent and the limits they may face on their claims, Reed notes: "They're starting to get educated about how much tort reform is too much tort

reform."

That's certainly an idea that would get a sympathetic reception among those who attended the Texas Trial Lawyers Assn. conference. But Amarillo attorney Joe L. Lovell says that thanks to the Democrats' strong showing in the November elections, "this was the first kind of upbeat meeting that we've had in a long time." Does he think conservatives will now see some of the liability limits reversed? "It brought a lot of people hope," Lovell says, "that perhaps at a minimum, they'll stop trying to do any more."

