

**Special Report**

# Tort Reform Movement Dead In The Water

*Plaintiffs' bar jubilant at  
Election of Obama*

March 2009

Those who have been paying attention to more pressing issues such as the dismal state of the economy, the early ups and downs of the Obama presidency, or the wars in Iraq and Afghanistan, may have missed the fact that the tort reform movement in America is dead in the water. It ended officially on November 4th with the election of Barack Obama and large Democratic majorities in both houses of Congress. The demise of the tort reform movement was completed by the revelation in mid-December that the Securities and Exchange Commission, which is supposed to police such matters, had allowed a smooth-talking financier named Bernard Madoff to run the greatest Ponzi scheme in the history of business for nearly twenty years, despite the fact that there had been sufficient warnings about its illegality for at least a decade.

And in early March, the U.S. Supreme Court cleared up some confusion of its own making by ruling 6-3 that drug makers were not immune from being sued in state courts. The companies had argued, with the strong support of the Bush administration, that because the FDA had approved a particular drug in the first place, this pre-empted any state court decision that said the drug was either unsafe or its FDA approved warning label inadequate.

### **Vengeful Plaintiffs Will Be Flocking to Court**

It would take a very brave conservative ideologue to argue at this time of national financial crisis brought on by the greed of people like Bernie Madoff and those who ran the housing market into the ground that the American public should have limited or no access to the courts in order to retrieve some of their lost money or at least financially punish those who beggared us all.

Revenge is the order of the day, and the courts are where to find it. And no Democrat worthy of the name will raise a finger to hinder the plaintiffs' bar as it sharpens its knives for eviscerating those it deems created our current debacle. Why should Democrats object? After all, they rode to

victory on a carpet of money provided by the trial lawyers. According to the Center for Legal Policy at The Manhattan Institute, since 1990 trial lawyers have donated over a half-billion dollars to federal campaigns alone—a figure far higher than any other industry group. The vast majority of that money has gone to Democratic candidates.

### **First Bill Signing Potentially Opens Legal Floodgates**

That investment is already paying off. On January 29th, just nine days into his presidency, President Obama signed into law the Lilly Ledbetter Fair Pay Act. Lilly Ledbetter had worked as a supervisor at a tire company in Alabama for nearly 20 years. After she retired, she found out that from the start she had been paid less than male supervisors with equal experience and responsibilities. She sued for wage discrimination and won a big settlement. The U.S. Supreme Court agreed to review the case and, in 2007, overturned the jury verdict, ruling 5-4 that she should have filed her suit within 180 days of when the discrimination first occurred, not when she first found out about it. In other words, she should have sued 20 years ago, not after she retired.

The Act named in Ledbetter's honor eliminates time limits on such discrimination claims, a decision even some Republicans supported. But the Act also changes the definition of discrimination to include not just intentional discrimination but also unintentional acts that result in pay disparities, which led The Wall Street Journal editorial page to dub it the "Trial Lawyer Bonanza."

### **Tort Reform Groups Fighting Losing Battle**

While reform groups such as the American Tort Reform Association, the Washington Legal Foundation, The Manhattan Institute and others will continue to argue for "loser pays" rules, limits on punitive damages and "pain and suffering" awards, and other changes, the time for enacting such reforms has past, at least at the federal level

and probably in most states as well. Despite holding control of one or both Houses of Congress, and/or the White House for the past 14 years, the Republicans have failed miserably at enacting significant tort reform legislation in the face of trial-lawyer backed Democratic opposition.

The one important exception—the Class Action Fairness Act—was passed in the heady days following President Bush’s re-election and signed into law in February 2005. It establishes guidelines for removing class action lawsuits from plaintiff-friendly state courts into federal court, where, presumably, the rule of law would be more fairly followed. For all that it may tell us about his attitude toward tort reform, Senator Barack Obama voted for it, along with 74 other Senators, citing it during the presidential campaign as his major bipartisan vote. In any case, that success was pretty much it. A strong bipartisan effort was made to craft an asbestos settlement that would end that protracted litigation, but it fell apart in the face of opposition from organized labor, which demanded more money be put in the pot plus the elimination of a requirement that workers would actually have to prove they had an asbestos-related disease before they got any money.

### **Supreme Court Sends Mixed Signals On Litigation Issues**

The U.S. Supreme Court has been sending out decidedly mixed signals on litigation. Of special interest to industry have been the Court’s rulings on the question of “pre-emption.” According to the U.S. Constitution’s Supremacy Clause, federal laws are “supreme” when they conflict with state laws. The Clause also allows the federal government to “pre-empt” an area over which it has exercised control. Industry, with the support of the Bush administration, argued this should extend to litigation as well.

In February the Court seemed to agree when it ruled 8-1 that a man whose heart catheter burst during an angioplasty could not sue the manufac-

turer because the FDA’s approval of the medical device pre-empted any lawsuits alleging it was defective. However, in mid-December, the Court appeared to reverse itself when it ruled that Maine smokers could sue Philip Morris for using the terms “light” and “low tar” on its cigarettes despite the fact that the Federal Cigarette Labeling and Advertising Act appears to pre-empt such suits when it states that “no requirement or prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion of cigarettes.” The 5-4 majority ruled that “light” and “low tar” were not health claims and therefore the suit was not preempted under the labeling act. The ruling has prompted applause from the left and cries that the sky is falling from the right.

### **Wyeth Case Appears to Settle Pre-Emption Issue**

The overall pre-emption issue remained up in the air until the Court ruled March 4 on a case involving a woman who sued drug manufacturer Wyeth for failing to warn her about the risks of one of its drugs. She lost most of her right arm as a consequence, and was awarded \$6 million by a Vermont jury. The manufacturer and the Bush administration asked the Court to set aside that verdict under the pre-emption clause since the FDA had ruled the drug safe and any warnings of possible side effects adequate.

The Court came down strongly against the drug maker, ruling that the FDA’s position on pre-emption was “entitled to no weight” and that the Bush administration’s support of that position was “undeserving of deference.” The Court said the medical device case was quite different in that the federal law on medical devices clearly states that only the FDA has the right to regulate such devices, while there is no such provision in the federal law governing drugs. In other words, pre-emption cannot be assumed unless it is based on express language in a Congressional statute or agency regulation. Bolstered by this decision, Democrats in Congress announced that they

would introduce legislation that would change the wording of the law governing medical devices to specifically permit state lawsuits to move forward.

### **States Continue To Move Forward On Tort Reform—For Now**

At the state level, there has been more progress. Texas and Mississippi in particular, which were once plaintiffs' legal havens, moved to reform their tort systems extensively and have become far less trial-lawyer friendly. Florida and some other states are attempting to pass legislation that would limit the amount of money in contingency fees trial lawyers could make handling lawsuits on behalf of the state. This movement grew out of the outrage over the billions of dollars handed over to a relatively small number of law firms for their work on behalf of various states in the huge tobacco settlement. In some instances it added up to lawyers being paid the equivalent of \$100,000 or more per hour.

The American Tort Reform Association's (ATRA) annual listing of "judicial hellholes," where corporate defendants rarely get a fair shake in state court, include all of West Virginia; South Florida; Cook County, Illinois; Clark County, Nevada; Atlantic County, New Jersey; Los Angeles County, California; and Macon and Montgomery counties in Alabama. ATRA warns, however, that trial lawyers are investing heavily in campaigns to overturn existing tort reform statutes and so the list of "judicial hellholes" could grow exponentially in the next few years.

### **Lead Paint Litigation: A Lesson for Other Industries**

Of particular interest to litigation watchers in the past year has been the all out assault by the trial bar on the former lead paint industry and the success of those companies in defending their interests. Because, over the years, the industry had never lost a product liability case involving

the dangers of lead paint, in 1999 the plaintiffs' law firm now known as Morley Rice devised the legal theory that the mere presence of lead paint in homes constituted a "public nuisance" and convinced the state of Rhode Island to sue on that basis. The first trial ended in a hung jury, but the second found the defendants guilty, and they were ordered to pay for the clean-up of the existing lead paint in every building in the state, at a cost estimated in the billions. The industry naturally appealed the verdict to the state Supreme Court which, on July 1 of last year, ruled unanimously that the companies were not liable for the abatement of lead paint hazards in the state and, more importantly, that the lawsuit was a totally inappropriate use of "public nuisance" law and should have been dismissed at the outset of the case.

The initial suit in Rhode Island produced any number of copycat "public nuisance" lawsuits in municipalities throughout the United States. By the time the Rhode Island State Supreme Court threw out the case in July, courts in a number of other states had already dismissed similar cases as being inappropriate under "public nuisance" law, and a number of other suits were voluntarily withdrawn, leaving only suits in California and Ohio still on the docket at year end. The Ohio suit was withdrawn in February.

These victories by the former lead paint industry were due primarily to its determination to fight it out with the plaintiffs' bar to the bitter end and not settle, a path seldom trod by other companies and industries in the past faced with the same choice. Perhaps, inspired by their success, others will follow the lead paint companies' example in the coming years.

### **Madoff Case a Search for Deep Pockets**

The Madoff debacle, besides the enormity of the losses suffered by investors, will be fascinating to follow in 2009 since an army of plaintiffs and their lawyers will be looking for someone with deep pockets to sue. Madoff himself is an

unlikely target since his financial resources are reportedly down to a paltry \$300 million or so, a drop in the bucket compared to the losses. A second target would be the hedge funds that invested with Madoff, almost exclusively on the basis of his reputation. According to media reports, in a number of cases hedge fund managers collected huge fees from their investors for doing nothing more than passing on the investments to Madoff to manage. Their due diligence is obviously in question, but many of them lost everything as well.

A third target could be the accounting firms for the hedge funds and other investor groups. The New York Times reported in late December that the trial lawyers would be testing new legal ground to go after the accounting firms of investment managers one rung removed from the auditing firm at the center of the scandal, but these are challenging times for the plaintiffs' bar. Already, the New York Law School has sued not only the manager of the so-called "feeder fund" that invested \$3 million of its money with Madoff but also the auditing firm for that fund, saying that it "utterly failed" its accounting responsibilities.

### **Democratic Party Rebirth Could Lead To Fewer Lawsuits**

Except for the apparent demise of "public nuisance" as a trial lawyer gambit, there is little on the horizon to suggest good times ahead on the tort reform front. The Democrats are in charge in many venues, and efforts are underway at the state level to roll back recent tort reform measures. Curiously, however, the rebirth of the Democratic Party at the federal level could possibly contribute to less, not more, litigation. For the past eight years the Bush administration has wielded its anti-regulation stick with a heavy hand, discouraging efforts by regulatory agencies to actually regulate the industries under their authority. There is not an agency at the federal level that was not ordered to become more "business friendly" during that period. The result was an

increasing number of lawsuits by outside groups seeking to enforce regulations that the administration chose to ignore.

That situation will undoubtedly change with the Democrats in power, as agencies whose regulatory thrust was blunted by the prior administration begin to reassert their mandate. Ironically, some argue, this may lead to fewer public interest lawsuits aimed at forcing agencies to enforce regulations already on the books.

### *Implications for business*

The next few years are likely to be difficult indeed for business on the litigation front. Even the modest gains in tort reform of the past eight years may not last as trial lawyers press to roll them back. Certainly the plaintiffs' bar will do all in its power to convince its friends and supporters in Congress to limit, if not reverse, any legislative obstacles that stand between plaintiffs and the deep pockets of corporate America. Only time will tell if American business has the resolve to meet this challenge.

To help prepare for this potential onslaught of litigation, every American company should:

- Conduct a vulnerability audit to identify possible company products or practices that could be the target of litigation;
- Establish a crisis management team within the company to deal with any litigation issue. Such a team should include both outside legal and communications counsel;
- Develop a crisis management and communications plan and test it on a regular basis;
- Participate in efforts by national and local trade and business groups to support tort reform and fight efforts to roll it back;
- Be mentally prepared for a long and hard fight, since the plaintiffs' bar doesn't give up easily.