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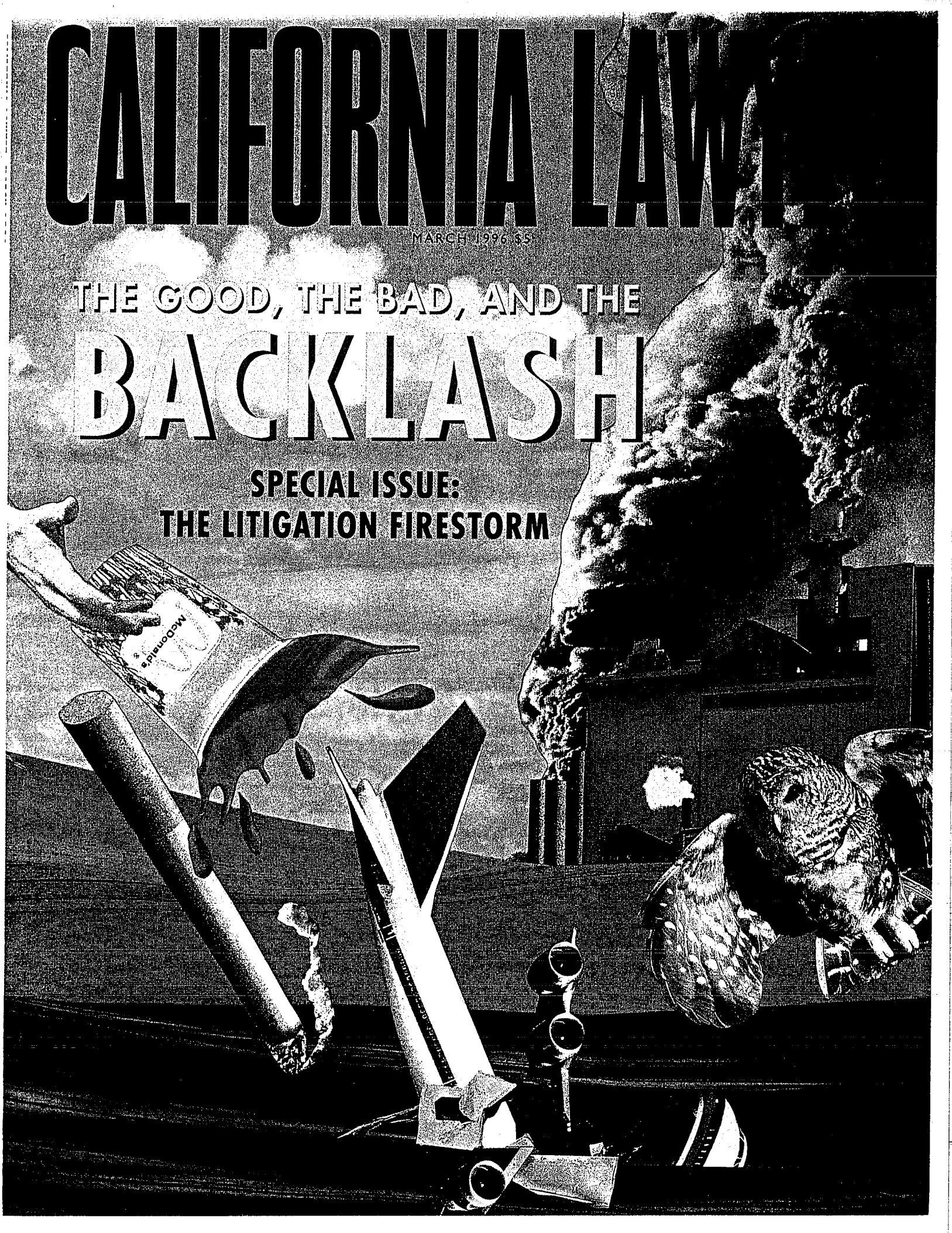
THE GOOD, THE BAD, AND THE BACKLASH

SPECIAL ISSUE: THE LITIGATION FIRESTORM



CLASS ACTION CONFLICT

Facing drastic changes in rules governing litigation and attorneys fees, a panel of specialists representing plaintiffs and the defense searches for common ground

CONVENING TO DISCUSS TORT REFORM AT THE REQUEST OF *CALIFORNIA LAWYER* LATE IN 1995, eight of the West's top litigators were sipping coffee and wondering whether the ninth invitee was about to arrive.

"I was looking forward to seeing Bill Lerach," said Michele Corash, the Morrison & Foerster partner who has represented so many Prop. 65 defendants in recent years. Corash recalled Lerach, her sometime nemesis, with a wry smile. "I had a few questions of my own I wanted to ask him."

"Probably not today," chimed in Joe Cotchett, the plaintiffs attorney from Burlingame. "I'm pretty sure he's at the White House."

As it turned out, that's exactly where Lerach was. The San Diego class action specialist was in the nation's capital seeking a presidential veto of legislation limiting the rights of stockholders to sue for fraud. Congress had just passed the measure; President Clinton did indeed strike it down within days; and the House and Senate came back to override the veto for the first time in this administration.

The litigious powerhouses knew then that the securities suit restrictions augured lengthier struggle. A Republican Congress and shifting zeitgeist have altered the landscape for lawsuits in America. In discussing that seismic shift, the assembled advocates—split evenly between the plaintiffs and defense bar, and with representatives from four distinct practice areas—were forthright in their disagreements. Yet, on the eve of Californians' casting their ballots for no fewer than three tort reform initiatives, what was perhaps most astonishing about the roundtable that follows were the bridges of agreement and compromise built by the time the colloquy was over.

photos by Eric Slomanson

PARTICIPANTS

Michele Corash, a partner at Morrison & Foerster of San Francisco. Formerly general counsel of the Environmental Protection Agency, Corash represents the defense in environmental litigation.

Joe Cotchett, a partner at Cotchett & Pitre of Burlingame. For the past 30 years, Cotchett has represented plaintiffs and defendants in a variety of civil cases ranging from environmental protection to antitrust and financial frauds.

Bill Griffin, a partner at Brobeck, Phleger & Harrison of San Francisco. Griffin specializes in mass-tort product liability defense, representing manufacturers of asbestos, silicone breast implants, and medical devices.

Bill Hirsch, a partner at Lieff, Cabraser, Heimann & Bernstein of San Francisco. Hirsch began his career practicing securities law, then became involved with toxic torts, including the *Exxon Valdez* litigation, and several national product liability class actions.

Garry Mathiason, a partner at Littler, Mendelson, Fastiff & Tichy of San Francisco. Mathiason represents employers in the field of employment and labor law and speaks frequently about the advantages of alternative dispute resolution.

Cliff Palefsky, a partner at McGuinn, Hillsman & Palefsky of San Francisco. Palefsky represents plaintiffs in employment, privacy, and civil rights claims.

Vic Sher, president of the Sierra Club Legal Defense Fund in San Francisco. Sher began his career doing securities litigation, moved through a plaintiffs wrongful discharge phase, pursued civil rights claims, and has spent the past seven years representing the spotted owl.

Bruce Vanyo, a partner at Wilson, Sonsini, Goodrich & Rosati of Palo Alto. Vanyo heads the firm's securities litigation department, primarily defending Silicon Valley companies in shareholder class action cases.

Richard Zitrin, *moderator,* professor of ethics at Hastings College of the Law and the University of San Francisco School of Law. Zitrin advises law firms on ethical issues, represents lawyers in malpractice cases, and testifies as an expert witness in matters regarding legal ethics.

WHY NOW?

ZITRIN: This year promises to be a watershed for litigators in California and across the country. We have a new federal securities tort law, three initiatives on the March primary ballot, and two more in the November election. We have new words in our public lexicon—tort reform, loser pays, contingency fee limits, and securities litigation safe harbors. We don't know where all this is going, but we know that the battle lines have been set. Why has all this occurred now, and how has it affected what you do?

GRIFFIN: Three or four things have changed dramatically, shifting the balance in products litigation. The most important is the accumulation of enormous resources on the plaintiffs' side and the willingness to use them.

Probably as important is the rise of the American Trial Lawyers Association as a cohesive integrating force for plaintiffs. Defendants can no longer divide and conquer as a strategy in mass-tort cases. It really unnerves manufacturers to learn that you can go to a seminar and there's a booth about their company with the complaint that was used in a case—along with all the documents—that is handed out to plaintiffs lawyers all over the country.

In addition, the enormous publicity that the breast implant litigation generated has caused defendants to decide that there are some risks that are unacceptable. When companies, especially the biomaterials companies, say, "We're no longer going to make products here, we're going overseas," that's when more and more people became interested in tort reform.

Finally, I think that what we're seeing results from the recognition that the system doesn't work very well. A book published by the Brookings Institution [*The Liability Maze* by Peter Huber, 1991] claimed that the total cost of litigation to the system is close to $100 billion a year. Even if a company wanted to resolve its complaints and pay a certain amount of money, the legal system is very difficult to get in and out of. It's not an efficient way of resolving disputes. And it's very uncertain; the law is changing with every breath.

PALEFSKY: I think what's happened is a political change. The legal system and lawyers are taking a big and undeserved hit because of changes in the political environment. There haven't been any major legal developments. The Republicans have taken over, and now it's possible to buy legislation.

The system is working well, to the extent that CEOs are now afraid to get up and make fraudulent statements with the purpose of inflating the stock price of their companies. It's good that companies are afraid of manufacturing products that contain asbestos or that may be harmful. There is a cost of manufacturing dangerous products for profit, and I think that's what the tort system's fundamental purpose is.

SHER: In the environmental arena, the laws have largely been effective at deterring and changing bad conduct. What we're seeing now is a political response, which is noteworthy because it's largely a stealth response focusing on Congress.

HIRSCH: I would try to put [tort reform] into a broader context: Much of this begins with the breakdown of America's international economic position and the decline of living standards at home.

At the same time, you have the rise of groups that developed out of the civil rights movement that are demanding more access to the political and legal system. The class action device allowed these new groups to assert their rights on behalf of large numbers of individuals. The balance of power in the legal system shifted, and corporate interests were no longer able to totally dominate.

We're having a political reaction to that now. We're seeing an attempt to strip plaintiffs of much of the power they had obtained.

GRIFFIN: Let me give an example I think refutes that contention. Dow Corning Corporation has been taken down by the plaintiffs bar because of silicone gel breast implants. There is not a single medical organization in the United States that will say silicone gel causes disease in women. In fact, many [researchers] overseas say that it does not. Yet Dow Corning is down. So how did that happen? We now have lay juries trying to answer a question [that has confounded] at least two expert advisory panels in the United States.

COTCHETT: That's the best example of what has gone wrong with the system. Whether or not Dow is innocent, the fact is that a massive corporation has been taken down. And therein lies the genesis of the economic struggle we find ourselves in. Because the courtroom is really a battlefield where the war is fought between those with less and those with more.

Big business is worried that there may be more Dows, where massive claims wipe out a corporation. Which, in turn, wipes out jobs and affects a major portion of the economy. And I think their concerns are legitimate. The system has gotten a little bit out of whack.

VANYO: Let me comment on federal securities legislation, which I've been involved with. The high-tech industry was the driving force behind that legislation. And I can tell you that there was an emotional factor to [the campaign] as well as economic considerations. It is really an affront to be accused of securities fraud. You can say [in a complaint] that it's reckless, but it's still fraud. And it really irritated, to use a mild term, a lot of the CEOs in Silicon Valley. People don't like to be called liars.

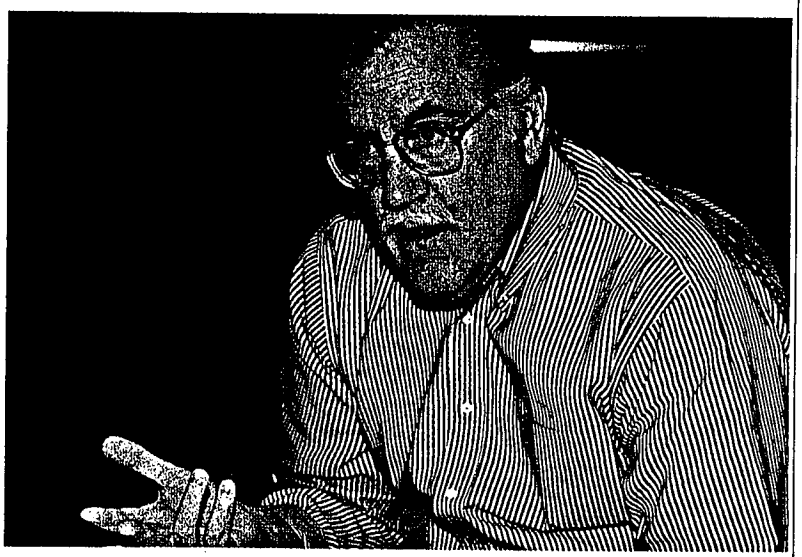
CORASH: The change in my field, environmental law, is quite different in one important respect: There is an assault on some fundamental aspects of the prior system. Let me contrast it to what's happening in securities law.

In both fields, the traditional enforcers were government agencies—the SEC, the EPA, and others. [Because of deregulation] the new cops are now private citizens, private practitioners. Congress now is changing the rules of battle in the securities area. It's going after the new cops. But the cops have been left alone in the environmental area. There has been a massive assault on the substantive body of law—proposed changes to the Clean Water Act, the Clean Air Act, and the other statutes. But there hasn't been any effort to limit private-citizen suits used to enforce the law.

I suspect the reason for the difference is that when people think of environmental cops, they think of the Sierra Club Legal Defense Fund, the Environmental Defense Fund, and the Natural Resources Defense Council. Congress doesn't like to take them on because they still occupy a very different place in the public mind than most of us at this table do.

"Whether or not Dow is innocent, the fact is that a massive corporation has been taken down. And therein lies the genesis of the economic struggle we find ourselves in."

—Joe Cotchett



CONTINGENCY FEES

ZITRIN: Is there an inherent conflict between the way plaintiffs attorneys or class action attorneys get their fees and their clients' best interests?

HIRSCH: I don't think so. Our interests are aligned if we take a percentage of the recovery as the basis for any fee that we obtain. On the other hand, there clearly are cases in which attorneys seem to make substantial amounts of money and none of the class members do.

But you have to remember that the whole purpose of class actions is to provide a means for individuals with relatively small damages to join their claims and to pursue those who injured them. The incentive for the lawyers is to get some percentage of the recovery they ultimately obtain.

GRIFFIN: Obviously, class action lawyers market a device plaintiffs want. I think the defense bar is conspicuously silent on the question of these fee awards. [Plaintiffs attorneys] provide a good service and sometimes the return is high. But if you look at those who spent millions of dollars in the breast implant global settlement, sometimes the risks are pretty high, too. I actually think it works pretty well.

ZITRIN: What about "loser pays" measures? Would that mean that plaintiffs will only file righteous, justifiable suits? Or does it mean they will be denied access to the courts?

PALEFSKY: The purpose of loser pays is to intimidate plaintiffs from bringing cases. Its purpose is fundamentally unconstitutional and should be stopped immediately by the courts.

"I think the real villians here are not the attorneys who are doing what Congress intended them to do, but the mainstream media, which has mischaracterized the class action."

—Cliff Palefsky

Left to right: Bruce Vanyo, Vic Sher, Cliff Palefsky, Bill Hirsch

COTCHETT: How is it unconstitutional? I don't agree with it, and I feel as you do, but I'm trying to find constitutional law that applies.

PALEFSKY: There's a First Amendment right to access the courts. I think every American citizen has the right to have statutes or laws—passed for their protection—enforced. And I think putting in place something that has the purpose of chilling the exercise of a right is unconstitutional. I don't think you can chill First Amendment rights. I don't think you can punish someone for attempting to vindicate his rights in court.

SHER: We have a host of statutes in which attorneys fees have been included as a deliberate policy matter to provide incentives for people to bring lawsuits. Those include civil rights and environmental statutes, and cases involving fraud against the government and the public.

If we start providing disincentives to bring the cases as a way of getting at lawyer conduct, we're undercutting these policies. It's the environment and the public that are going to suffer in the long run.

MATHIASON: The big problem [with class actions] is not the underlying goals. It's the efficiency of the process in getting there, and the meritless cases that are settled because of the high cost of defending them.

We've long had statutes in the civil rights employment area with attorneys fees provided. And those statutes are balanced, theoretically. In other words, the individual bringing the action that loses can have an attorneys fee award generated against them if the suit was frivolous.

The reason it works is because the court tends to evaluate the effect on the individual litigant. It will often temper the award based on the underlying ability of the individual to pay it.

PALEFSKY: I have no problem with awarding fees against someone who brings a frivolous suit. That's not what I'm talking about. When you're awarding civil rights cases, it's not uncommon to lose at the trial court, and you have to go to the appellate court and the U.S. Supreme Court.

No one in his right mind would take a case and try to expand the law if you are exposed to $100,000 in attorneys fees. I think the real villains here are not the attorneys who are doing what Congress intended them to do, but the mainstream media, which has mischaracterized the class action.

In order to prosecute a class action, you need to put in a couple of million dollars' worth of time. If it was so lucrative and so easy, every big firm in this state would be doing it. So you have to reward people who put something up. But more important, if you produce a fund of $50 million, a $5 million attorneys fee that is based on the hours put in is perfectly appropriate.

MATHIASON: I think that really underscores the analysis we need to apply: Is the dispute-resolution process we're using worth what it costs? Is there an alternative method that is better suited for the consumer, that will get a better result? Or is the current system, with some repairs, able to accomplish that?

COTCHETT: The issue, then, turns on: "Does the public perceive our process as too expensive?" That's really what it comes down to.

ZITRIN: Does "loser pays" reform the contingency fee system, in the sense that lawyers will basically decline contingency fee cases if they feel they've got to advance costs and time only to lose at the end?

COTCHETT: I think most good lawyers will not take on a contingency fee case if it's not viable. Unfortunately, there are a lot of lawyers who will file a frivolous case. But we have judges who deal with it adequately using either rule 11 of the Federal Rules of Civil Procedure or California CCP section 128.7, the new state court equivalency. I truly believe that fee shifting, or loser pays, is intended simply to bar the courthouse door.

ZITRIN: Just so that we're clear, we're talking about loser pays where there is a decision on the merits adverse to one side, not a situation where there's a frivolous lawsuit such that it would be subject to rule 11 sanctions.

VANYO: That's an important difference. There are different levels of loser pays, and I think they all tend to be lumped together. What we have now hasn't done anything. Neither judges nor lawyers have much stomach for rule 11, and as a result it isn't used. The new securities bill is one level up from that. It essentially makes it mandatory for a judge to look at whether a lawsuit was without a substantial basis.

PUNITIVE DAMAGES

VANYO: Not long ago, I was invited to a citizens group meeting organized by CALA—Citizens Against Legal Abuse.

These grassroots organizations are being formed throughout the United States. A huge issue for them is punitive damages. They think the awards are totally out of proportion to anything that's close to being just.

PALEFSKY: Clearly, punitive damages are a windfall to the victim. That's not the point. They are intended to deter wrongful conduct. Without them, companies could budget into the cost of a product how much it's going to cost to kill or maim somebody. Punitive damages are intentionally bad for business.

GRIFFIN: I have all of my guns loaded on this one. From the standpoint of the manufacturer of consumer products, I think punitive damages is the single most important issue for reform. I would trade almost anything for some sort of cap on the number of times my companies [can be sued].

It baffles me that in our system, if you rob a bank, you go to jail for ten years and you're finished. But if you make a product that has a design flaw and there are legitimate claims against you, a punitive damage complaint can be filed on every product you manufactured. You could lose $100 million in one case, and even if that is the complete deterrent value, you're still at risk for $100 million in every other case.

In reaction, cities now are passing laws that move some of the punitive damages to the state treasury. I don't think that's the way to go. But we need a rule that says you pay a certain amount, and that is credited against future suits. The thing that drives more cases in the consumer products world is the threat of punitive damages, because they are uncertain.

PALEFSKY: That's the point. I am really happy that the manufacturers of products are concerned about the liability risks if they knowingly put dangerous products on the market. I think that's great.

You can't get hit for punitive damages simply for making a defective product; you have to have malice, oppression, fraud, or despicable conduct. The award has to get past a jury, trial judge, all the appellate courts. [As a result] the instance of punitive damages in product liability cases is extraordinarily low.

That said, I think you're right that there should be limits on how many times you can be hit with punitive damages for the same conduct.

MATHIASON: The problem with the present system is that the potential for punitive damages drives settlements. They are absolutely, positively, without any question, based on that. And I have rarely, if ever, seen an employment-discrimination case where there wasn't a possibility of a finding that would allow [punitive damages] to go to the jury. So it is a factor.

HIRSCH: But if there is a possibility [for punitive damages], it should be a factor. If there is conduct that leaves that possibility open, then it's appropriate that a defendant is considering that.

MATHIASON: We have some common ground. The purpose behind punitive damages is to dissuade somebody from a particular type of activity. And I, quite frankly, applaud that. The problem is its tremendous uncertainty and uneven application.

I just did some jury research where we had two juries out—behind closed glass, identical videotaped presentations. One jury came in with zero punitive damages and a very modest award, and the other jury came in with $100 million in punitive damages. The corporate people looked at this and were in shock as they wondered how to put a value on the process. We need something that better gives us real standards and expectations on what that will be.

HIRSCH: The reality is that there are very few punitive damage awards, and the median award in all types of tort cases, according to [a 1995 report by] the National Center for State Courts, is $50,000.

GRIFFIN: You obviously don't need them, then. Why don't you just give them up?

PALEFSKY: They work. They work because people are afraid of them. When the directors of that company watch a mock jury make a $100 million punitive award—even though no judge would ever let that stand—they say, "We better find ways to make sure we don't get sued." And that's when they bring in the trainers [to prevent] sexual harassment and provide in-house programs to avoid a lawsuit.

Let me flip this around. After your clients have spent three years developing a product, say they find there is a defect in it that may cause cancer. With all of the pressures to enhance the value of the stock, what are the checks against those involved to cover it up, to make false statements? What check exists, other than punitive damages?

GRIFFIN: You really don't believe in the fundamental decency of corporations. Granted, this is a whole new world, where people are trying to make a lot of money quickly. But everybody is not puffing up the price of their stock. There are a lot of companies that have been around for a long time, have a reputation with the public, have reasonable people sitting in

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"From the standpoint of the manufacturer of consumer products, I think punitive damages is the single most important issue for reform."

—Bill Griffin

Class Action

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their legal departments, and are trying to make good products.

COTCHETT: I agree the word *predictability* has to come into play—and I've personally gotten somewhere around $2 billion in punitive damage awards. There's got to be some way for a company or individual to have an idea where we're going in terms of valuating conduct.

HIRSCH: The answer is mandatory punitive damages classes. It's what we used in the *Exxon* case. Every one of the 10,000 to 30,000 members of the class had their punitive damage claims tried at one time. But you have to recognize that it's not just the compensatory damages of the one plaintiff that has to be put before the jury, but all of the harm that was caused by the defendants' conduct. Because only then can you have some kind of proportionate relationship between the harm caused and the punitive damages, which is what the Supreme Court has required in punitive damage cases.

COTCHETT: Why isn't that $5 billion dollars [in punitive damages] going back to the State of Alaska to repair the environment around Prince William Sound? To think that that's got to be divided up by 30,000 people is crazy.

My biggest problem with punitive damages is who they belong to. I believe they belong to the public as a punishment, if you will. They do not belong to that one person. That's a very hard concept to swallow when you were the person who was run over by a drunk and you're maimed for life. But I truly believe they should repay society as a whole.

HIRSCH: I agree with you. I'm not sure 100 percent [of the damages], but I think some percentage of it should go to the public.

VANYO: The key to it, though, Joe, is to get the jury [to exercise] some restraint. Jurors vent on the defendant all their pent-up frustration at, say, spending a lifetime on the assembly line. And that has to be curbed or controlled.

HIRSCH: I think there's a common theme here: The public does have a misconception about both contingency fee awards and punitive damages. They hear about cases like [the $2.7 million coffee-burn verdict against] *McDonald's,* which the press carried without giving the facts and the reasons for the jury's action. They inflamed the American public against punitive damages.

CORASH: I'm sitting here smiling, because here are the two of you, among the best advocates in the country, complaining that your view has not been communicated. You could learn something from Vic's organization and others like it, which do a masterful job of communicating their views to the press. There's an audience out there that you think has the wrong picture. They're not going to get the right picture from anybody but you.

REFORM IDEAS

ZITRIN: What would be your initiative, if you were to write the "Mathiason Legal Reform Act of '97"?

MATHIASON: I would try to get Palefsky to help draft—to the point that his conscience would allow him—alternative dispute resolution [ADR] processes. When we get to the point of arbitration, we might part company as to whether that mechanism should be mandatory or voluntary.

PALEFSKY: I think ADR is a great thing. Mediation is one of the most civilized and mutually beneficial ways of resolving cases. I have done everything in my power to encourage the use of it to help people get back on their feet and keep them out of litigation. I think the public supports ADR as long as it's not being imposed by one side to get a more favorable result.

CORASH: Most environmental litigation is an exception to that. There is ADR in clean-up cases, where private parties are battling among themselves about who pays. But the defense perceives that environmental advocates prefer to go to a jury. [They] believe a jury is going to feel emotionally aligned with them, and they realize that the defense often comes down to technical, scientific questions that are difficult for a jury [to understand].

SHER: I agree. Aside from the cases Michele cites, environmental disputes are not susceptible to alternative dispute resolution. The reason, in addition to the ones she mentioned, is the disparity of power between the parties.

On questions of standing, I believe that what we need is more access to the judicial system to enforce environmental standards and codes of conduct.

ZITRIN: We've got one initiative that might eliminate standing and one that might broaden access. So that's heading us in two very different directions.

What's the "Joe Cotchett Initiative of '97"?

COTCHETT: None. In terms of judicial reform, I think that initiatives are about the worst thing we can do. With all due respect, the public should not be deciding on systems of law. They are found in our Constitution.

GRIFFIN: I'm glad to hear Joe say that. I think all these initiatives are the most ridiculous thing happening in California.

HIRSCH: I'll certainly agree with Joe that the initiative process is not a reasonable or acceptable way to legislate. I think it's an indication of mob rule, the breakdown of civil order, and it leads to thoughtless and dangerous legislation.

In the national mass-tort field, I think there needs to be more coordination between state and federal courts, so that you don't end up with cases filed in every jurisdiction. At the federal level, you have the multidistrict litigation process, but the state cases oftentimes are not coordinated with the federal case.

ZITRIN: Cliff Palefsky, what's your initiative?

PALEFSKY: I don't think we need initiatives. The key to improving our system is a better case management system, a level of either magistrates or commissioners involved with discovery, to make sure that a case moves and that everyone is acting appropriately.

Any changes to the system should be done by academics based on facts and on the public interest—not on whether it hurts to be accused of discrimination or racketeering, or on statistics that litigation is costing the country jobs. The economics are important, but that's a secondary consideration. Once we shift the focus from justice to economics, we undermine the whole legal system. ❖