

DOES INCREASED LITIGATION INCREASE JUSTICE IN A SECOND-BEST WORLD?

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The other chapters in this compilation contain a wealth of evidence—both empirical and anecdotal—that something is amiss with America’s legal system.¹ The exact diagnoses, as well as the prescribed remedies, are varied, as one might expect when economists and lawyers have been tasked with diagnosis and treatment, but there is significant agreement that, as it pertains to our legal system, American “exceptionalism” has dramatically increased costs with minimal corresponding benefits. In blazing new trails to legal liability, America certainly remains exceptional, but not in a way that will engender the envy of the rest of the world.

The view that something is amiss in the American legal system is not limited to proponents of tort reform. Trial lawyers seem to agree that reforms are needed, but are much more likely to argue that the American legal system is broken because access to the courts is too limited. This argument is often made in economic terms, that greater access to the courts would be largely beneficial as a means of forcing parties to internalize externalities and provide optimal levels of deterrence. This argument favors reforms such as loosening restrictions on third-party financing of lawsuits in order to alleviate the financial burden on victims and on lawyer advertising in order to inform victims of the available options for legal recourse. There are very

¹ See particularly, George Priest’s discussion of the expansion of liability at tort law.

good reasons to believe that, in an ideal world, allowing third-party financing of lawsuits and greater lawyer advertising might yield the benefits argued by pro-access reformers.² Taking the arguments contained in this volume as given, however, it is evident that we do not live in an ideal world when it comes to the modern American legal system.

Assuming that American litigation levels are excessive, we then ask whether procedural reforms that would increase litigation are benign. Our critique is targeted—we acknowledge the obvious benefits of litigation in many areas of the private law. But we also note that there are categories of cases where those benign conclusions do not hold—perhaps a minority of cases, to be sure, but an identifiable minority of cases that arguably exert an oversized influence over the evolution of the law and the perception of the American legal system’s efficiency and fairness. In such cases, procedural reforms that commend themselves in a first-best world are not suitable for the second-best world in which we live.

The Second-Best World of U.S. Tort Law

Although most pro-access reformers phrase their arguments in moral, non-measurable terms, such as “improving access to justice,” there are in theory more substantial benefits from allowing access to the courts. Tort law punishes those who impose harms through wrongful behavior, with costs to the individual victim and (where the victim is removed from productive

² See, e.g., Peter C. Coharis, A Comprehensive Market Solution for Tort Reform, 12 Yale J. Reg. 435 (1995); Robert Cooter, Towards a Market in Unmatured Tort Claims, 75 Va. L. Rev. 383 (1989); Mark J. Shukaitis, A Market in Personal Injury Tort Claims, 16 J. Legal Stud. 329 (1985).

activity) society at large. Without tort law requiring the tortfeasor to compensate the victims for the harm, the tortfeasor avoids bearing all the costs of his wrongful behavior and will engage in an inefficiently high level of tortious behavior. In an ideal world, the tort system promotes economic efficiency by enabling victims of tortious conduct to obtain redress, forcing tortfeasors to internalize their dangerous actions and thereby deterring future wrongful and wasteful behavior. Reducing barriers to access—cost, informational, or otherwise—can lead to improvements in individual and societal welfare and can improve efficiency in an ideal world. Because the consequences of any pro-access reforms can be far-reaching, it is necessary to ask how close our world is to the ideal.

Economists are often criticized for relying too heavily on the assumption of an ideal world where efficient outcomes are easily achieved. To many people, economists look like they are stacking the deck in favor of their conclusions.³ The theory of the second-best⁴ arose to address these concerns, and applying the theory allows us to consider how the optimal choice changes when we are dealing with a less-than-ideal, or “second-best,” world.

In the theory of the second-best, the “optimal” solution may not longer be efficient and the second-best solution might be preferable. As but one example of this phenomenon, societies

³ As the criticism is usually stated, arguments about efficiency and the “optimal” outcome rely on unreasonable assumptions, rendering any predictions based on those assumptions inherently unreliable. In fairness, it should be noted that, in many cases, whether or not the optimality conditions are perfectly realistic is not central to the research being conducted and, as such, it is unnecessary to engage in a lengthy defense of the optimality conditions.

⁴ Richard G. Lipsey and Kelvin Lancaster, *The General Theory of Second Best*, 24 *Rev. Econ. Stud.* 11 (1956).

regularly face a choice between establishing bright-line rules or less precise standards to govern the conduct of individuals. In dealing with the problem of highway accidents, for example, the state might enact a rule that prohibits driving over 65 mph. Alternatively, it might adopt a standard that penalizes “dangerous driving.” In an ideal world where information is costless and resultant errors rare, a dangerous driving standard would identify every such case. In the real-world, however, information is costly and errors occur. A dangerous driving standard might then permit some unsafe drivers to escape detection, and it will then be optimal to adopt a bright-line 65 mph rule. Such a rule is a second-best solution, since it will often be overinclusive (and catch drivers who can drive safely at higher speeds) and underinclusive (and excuse drivers who can drive safely only at speeds less than 65 mph).⁵ Thus, while standards might be optimal in an ideal world, in the world of the second-best we often turn to rules as the least-costly alternative—even though we know that those rules inevitably will result in errors at times.

The theory of the second-best urges caution in deciding questions of increased access to the courts. Procedural rules that increase litigation levels, even if efficient in a hypothetical first-best world, might not be desirable for two reasons. First, procedural rules that increase litigation will magnify the effects of the substantive legal rules, and if these are inefficient, and inefficiently penalize valuable behavior, then the magnification effect will result in greater inefficiency. When in a hole, one should stop digging. And if the evidence presented by other contributors to this volume is correct, we are in a hole.

Second, procedural and substantive rules are plausibly endogenous, in the sense that a more pro-plaintiff set of procedural rules will result in a more pro-plaintiff set of substantive

⁵ Isaac Elrich and Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 *J. Legal Stud.* 257 (1974).

rules. The underlying substantive law is shaped by procedural law, and that substantive law in turn impacts the evolution of procedural rules. For example, procedural rules in many jurisdictions facilitate inefficient forum-shopping that can be used to initiate or accelerate trends in substantive liability by making it easier to bring and win dubious cases. An efficient set of substantive legal rules might thus exist in equipoise with a less than efficient set of procedural rules, with the result that a more generous set of procedural rules will tip the substantive rules in an inefficiently pro-plaintiff direction.

The endogeneity of procedural and substantive rules is in part a consequence of litigation designed to manipulate the path of legal precedent toward more expansive liability and damages, a strategy which has been described as “path manipulation.”⁶ As new avenues open for litigation, the self-interest of lawyers and financiers will trigger a new wave of frivolous lawsuits, pushing the boundaries of liability even further. This danger is more than merely theoretical; plaintiffs’ lawyers have financial incentives to bring claims they know to be non-meritorious, knowing that all they need is a single favorable case to create a precedent that instantly opens the door to new avenues for recovery.⁷ Thus the lawyer can suffer several losses

⁶ Maxwell L. Stearns, *Standing Back From the Forest: Justiciability and Social Choice*, 83 Cal. L. Rev. 1309 (1995).

⁷ Martin J. Bailey and Paul H. Rubin, *A Positive Theory of Legal Change*, 14 Int'l Rev. L. & Econ. 467 (1994); Paul H. Rubin and Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. Legal Stud. 807 (1994). Zywicki details how this form of path manipulation was impossible before the evolution of the doctrine of stare decisis in the nineteenth century. Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: a Supply-Side Analysis*, 97 Nw. U. L. Rev. 1551 (2003).

risking only the lawyers' fees and costs at stake in each case. For mass tort defendants, by contrast, every case is a "bet the company" case holding the potential for bankruptcy from an adverse judgment. Tobacco and asbestos claims, for example, were repeatedly rejected by the courts prior to their eventual acceptance, but the size of the payout more than compensated those attorneys who pursued the long-term strategy.⁸ In other words, the plaintiffs' bar has strong monetary incentives to *create* liability through repeated litigation of non-meritorious claims.⁹

The same incentives that encourage plaintiffs' lawyers to push the boundaries of liability also encourage expansion of the monetary value of claims for which liability is already established. Plaintiffs' lawyers are likely to compete for clients in both price and quantity. Price competition occurs in the size of the contingency fee demanded by the lawyer. Quantity competition occurs, at least in part, in the size of damages award promised. It is essentially costless to claim higher damages, especially in the difficult-to-measure areas of non-pecuniary and punitive damages; pleading requirements typically do not require particularity in the amount of damages, and expert testimony on damages can be modified at essentially zero cost.

External Costs of Excessive Litigation

⁸ Walter K. Olson, *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law* (2003).

⁹ It can be very difficult and expensive for defendants to examine each plaintiff in order to determine the veracity of the plaintiff's claim. Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 S.M.U. L. Rev. 1221 (2008).

Increased access to the courts might usefully force tortfeasors to internalize the costs of their harm and thereby deter wrongdoing. However, litigants and their lawyers also externalize some of the costs of their lawsuits.¹⁰ First, because the court system is subsidized by the public, lawyers and litigants do not bear the full cost of congestion that they impose upon the court or the full cost associated with distinguishing valid from invalid claims, and thus impose the cost of “weeding out meritless claims” on defendants and judges.¹¹

Second, the increased litigiousness imposes additional costs on defendants. They must worry not only about their out-of-pocket costs for defending the case and liability for baseless claims, but also about the costs of harm to their reputation (even from false claims if such claims are imperfectly verifiable) and the opportunity costs from time taken by senior executives and others to participate in litigation.¹²

Third, as Judge Jack observed in the silica litigation,¹³ plaintiffs might themselves be harmed. Plaintiffs with meritorious claims are prejudiced when the court is congested with thousands of meritless claims that divert scarce judicial resources and attention from their claims and reduce the amount of defendants’ resources available to them. These costs seem especially

¹⁰ Michael P. Stone, *Optimal Attorney Advertising*. Working paper, University of Connecticut Department of Economics, July 2010, available at <http://www.econ.uconn.edu/working/2010-14.pdf>.

¹¹ *In re Silica Products Liability Litigation*, 398 F. Supp. 2d 563, 636 (S.D. Tex. 2005).

¹² Todd J. Zywicki, *Spontaneous Order and the Common Law: Gordon Tullock's Critique*, 135 *Pub. Choice* 35 (2008).

¹³ *In re Silica*, 398 F. Supp. 2d at 636.

large in the context of high-profile nationwide class action cases that may drag on for years and involve countless hours of highly intrusive discovery proceedings.

Finally, litigation also imposes costs on society at large. The plaintiffs' bar equates increased litigation with increased access to justice, but neglects to mention the cost of that justice. It is estimated that the direct costs of the tort system make up almost 2% of GDP,¹⁴ and half of those costs are merely the administrative costs to run the system.¹⁵ The indirect costs are even greater. As discussed in other chapters in this book, although litigation might improve products safety (although even that is unclear), the litigation system is exceedingly inefficient in doing so. Moreover, increased safety also increases the price of the goods and to the extent that the legal system imposes excessive costs, consumers are made worse off by the higher prices that result. Producers might also design products in an unduly risk-averse fashion in order to avoid the risk, cost, adverse publicity, and uncertainty of litigation, even if they expect to prevail in the end. Other beneficial products are even kept off the markets due to the uncertainty regarding potential products liability claims, depriving consumers of these products entirely.¹⁶ New, innovative products are particularly susceptible to this form of strategic litigation and consumers are hurt as they are denied the benefits of technological and other innovation. U.S. businesses

¹⁴Tillinghast-Towers Perrin, 2008 Updates on U.S. Tort Cost Trends (2008), available at http://www.towersperrin.com/tp/getwebcachedoc?webc=USA/2008/200811/2008_tort_costs_trends.pdf.

¹⁵ Id.

¹⁶ Theodore H. Frank, Riverboat Poker & Paradoxes: The Vioxx Mass Tort Settlement, Legal Backgrounder 23, no. 12 (2008).

suffer billions of dollars in lost sales each year,¹⁷ not to mention the jobs those lost sales represent. Litigation diverts numerous non-legal personnel from productive work, costing businesses thousands of man-hours in foregone productive work,¹⁸ and the riches transferred through the litigation system draws talented youth into law schools to become lawyers, thereby drawing them away from alternative employment.¹⁹ The fear of lawsuits also results in wasteful defensive actions, such as “defensive medicine,” making medical judgments on the basis of avoiding malpractice suits, rather than in the best medical interests of the patient.²⁰

¹⁷ Lawrence J. McQuillan, Hovannes Abramyan, and Anthony P. Archie, *Jackpot Justice: The True Cost of America's Tort System* (2007).

¹⁸ Laurence H. Silberman, *Will Lawyering Strangle Democratic Capitalism?*, 15 *Regulation*, March/April 1978.

¹⁹ Theodore H. Frank, *Protecting Main Street from Lawsuit Abuse*. Testimony before the Senate Republican Conference, March 16, 2009, available at <http://www.aei.org/docLib/Frank%20testimony.pdf>.

²⁰ The U.S. Department of Health and Human Services reported that 79% of all physicians report ordering more tests than they believed were medically necessary because of litigation fears. The same survey indicated that 74% report referring patients to specialists, 51% report recommending invasive procedures, and 41% report prescribing more medications, than they believed medically necessary. U.S. Department of Health and Human Services, *Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing Our Medical Liability System*, 24 July 2002. Doctors expended \$124 billion dollars in unnecessary health care costs in response to the threat of medical malpractice lawsuits. McQuillan, *Jackpot Justice*, supra note 17.

When all direct or indirect costs are totaled, it is estimated that the U.S. tort system costs between \$600 billion and \$900 billion per year, or between 4.3% and 6.5% of GDP.²¹ These costs will only increase as pro-access reforms generate even more claims.

Third-Party Financing

Where third-party financing is permitted, the financier pays the plaintiff's portion of the costs of the litigation, in return for a portion of the payout awarded by the court. The loan is non-recourse, which means that the plaintiff does not have to repay the loan if the action is unsuccessful. In this respect, third-party financing is simply an extension of contingency fee arrangements, with the difference that the plaintiff's lawyers pass on the risk to the financiers and not his lawyers.²²

In the economic downturn of the last few years, the prospect of what amounts to inventory financing has proven highly attractive to the plaintiff's bar.

Third party financing can be expected to increase the level of litigation for two reasons. First, the practice reduces the risk exposure of the plaintiff's lawyers and permits them to pursue

²¹ Frank, *supra* note 19.

²² Similarly, the common law doctrine known as the collateral source rule allows victims to receive help with living and medical expenses, without reducing the amount they are entitled to recover from the tortfeasor. See Michael Krauss and Jeremy Kidd, *Collateral Source and Tort's Soul*, 48 U. Louisville L. Rev. 1 (2010).

more claims. Second, the financier will likely be permitted to take a greater stake in the outcome than a law firm might, and become in effect a purchaser of the claim.²³

In a first-best world, third-party financing might usefully increase access to justice by impecunious plaintiffs who cannot afford to bear the costs of pursuing a claim, or who (being risk-averse) will find it efficient to sell the claim to a risk-neutral financier qua insurer.²⁴

However, third-party financing would also magnify the inefficiencies of the American tort system. If litigation is excessive today, it will become more excessive still when barriers to litigation are relaxed; and all of the problems outlined above will come back in spades.

Third party financing was formerly banned as “champerty,” and remains prohibited in most states. One reason given for the ban is that, while lawyer misbehavior is constrained by codes of professional responsibility, financiers are not subject to any such duties. Thus, it is thought, financiers will call the shots and finance unmeritorious claims which lawyers would hesitate to bring on their own.²⁵ However, a casual look at the cases brought without third party financing suggests that codes of ethics have little effect on unmeritorious claims. In addition, the financier might plausibly reduce certain kinds of lawyer misbehavior, since the financier will have a greater stake in the outcome and will be well-positioned to police erring lawyers. This will be particularly true of a prominent kind of misbehavior, where lawyers on both sides work

²³ In class action litigation, however, the reality is that the entire payout might effectively end up in the pockets of the plaintiffs’ lawyers.

²⁴ Contingency fees will have alleviated both such concerns, of course.

²⁵ See John Beisner, Jessica Miller and Gary Rubin, *Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States* (Washington, D.C.: U.S. Chamber Institute for Legal Reform, 2009).

out a settlement in which the plaintiff's lawyer receives virtually all of the payout. That's not something third-party financiers are likely to permit.

Attorney Advertising

Historically, attorney advertising was strictly regulated by state bar associations and these restrictions were later codified by the American Bar Associations Code of Professional Responsibility. In 1977, however, the United States Supreme Court struck down many of these restrictions in *Bates v. State Bar of Arizona*.²⁶ *Bates* held that to the extent that such restrictions prohibited the provision of truthful advertising to consumers, they advanced no economic or professionalism purpose and ran afoul of the First Amendment. Subsequent cases have extended the holding of *Bates* to protect a wide variety of lawyer (and other professional) advertising in a variety of media, often with the resistance of organized bar associations.

Economists have long-recognized that advertising can, and usually does, play a valuable role in improving economic welfare and consumer welfare, and this in general might be true of lawyer advertising. First, advertising can alert tort victims of possible legal remedies and the benefits of choosing a particular law firm that may have experience in the type of harm suffered by the tort victim.²⁷ Without this information, a tort victim may be unaware that legal remedies

²⁶ *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

²⁷ For more detailed discussions of how advertising can alert consumers to important product attributes in other areas, see Pauline M. Ippolito and Alan D. Mathios, *Information, Advertising, and Health Choices: A Study of the Cereal Market*, 21 *RAND J. Econ.* 459 (1990); Pat Kelly, *Perspective: DTC Advertising's Benefits Far Outweigh Its Imperfections*, *Health Affairs*, April

exist, and simply not bring a claim; or else the search costs will cause the tort victim to make a suboptimal choice of attorney, unnecessarily reducing the likelihood of obtaining redress.

Second, advertising can identify a legal firm in the minds of consumers and the heightened reputational concerns will give it stronger incentives to provide good services.²⁸ This is especially valuable for law firms, as tort victims would otherwise find it very difficult to measure lawyer quality. Third, advertising can promote price competition and efficient scale economies, which can lead, in turn, to lower prices. Empirical studies of the impact of advertising of professional services, including lawyers, generally have found that advertising produces lower prices without any discernible decline in quality.²⁹

28, 2004, W4; Dominick Frosch, David Grande, Derjung M. Tam and Richard L. Kravitz, A Decade of Controversy: Balancing Policy With Evidence in the Regulation of Prescription Drug Advertising, 100 Am. J. Pub. Health 24 (2010).

²⁸ Benjamin Klein and Keith B. Leffler, The Role of Market Forces in Assuring Contractual Performance, 89 J. Pol. Econ. 615 (1981). See also Richard J. Cebula, Does Lawyer Advertising Adversely Influence the Image of Lawyers in the United States? An Alternative Perspective and New Empirical Evidence, 27 J. Legal Stud. 503 (1998); Robert E. Hite and Joseph A. Bellizzi, Consumers Attitudes Toward Accountants, Lawyers, and Physicians with Respect to Advertising Professional Services, 26 J. Advert. Res. 45 (1986).

²⁹ See James H. Love and Frank H. Stephen, Advertising, Price and Quality in Self-Regulating Professions: A Survey, 3 Int'l J. Econ. Bus. 227 (1996); Timothy J. Muris, California Dental Association v. Federal Trade Commission: The Revenge of Footnote 1.7, 8 Sup. Ct. Econ. Rev. 265 (2000); Timothy J. Muris and Fred S. McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 4 Am. B. Found. Res. J. 179 (1979).

Today lawyer advertising is ubiquitous and sophisticated and sweeps in all types of media: television, newspapers, Yellow Pages, television, radio, direct mail, and the Internet, often providing “800” telephone numbers for potential clients to contact lawyers. Stone reports that from 2000 to 2009, television advertising by attorneys (in constant dollars) rose from \$236 million in 2000 to \$394 million in 2009.³⁰ Advertising in print media rose from \$47 million to \$81 million and radio and Internet advertising doubled from \$5 million in 2001 to \$10 million in 2009. Overall in 2009 attorneys spent over \$485 million on advertising outlays. Attorneys have also become proficient at garnering free news coverage about harms caused by a product, an effort often facilitated by consumer advocacy groups “closely aligned with mass tort lawyers.”³¹

Although attorney advertising can be economically beneficial in many cases, these benefits are less clear in mass tort cases, where there are also substantial costs that may not be present in other contexts. As in the traditional case, advertising might be useful to help an injured person learn about his potential claim and locate a lawyer who will bring it. But there is good reason to believe that the benefits of attorney advertising are smaller in mass liability cases.

This is because of the way mass tort claims are structured and pursued. In a traditional tort case, an individual who is harmed seeks out an attorney who then assist in seeking redress for the harm. In mass tort actions, however, this dynamic is turned on its head. Attorney advertising dramatically expands the potential for litigation because it permits lawyers to take the

³⁰ Stone, *supra* note 10.

³¹ Brickman, *supra* note 9, at 226. For example, the silicone breast implant litigation was given a major boost by a widely-viewed but completely unsupported television news broadcast by reporter Connie Chung.

initiative in recruiting legal claimants, especially for class actions. Advertising therefore enables plaintiffs' lawyers to act entrepreneurially in creating lawsuits. Rather than awaiting injured plaintiffs to come to them with actual claims, advertising allows lawyers to identify *potential claims* first, and then recruit clients to bring these claims. When combined with the power of class action lawsuits, this allows lawyers to initiate suit with little in the way of real clients and then to recruit clients after devising novel claims to pursue.³² The advertisements are often nakedly mercenary rather than medical—one direct marketing company recruited potential claimants with the sales pitch “Find out if you have Million Dollar Lungs.”³³

Many of the possible benefits of attorney advertising, found in general litigation, are attenuated or absent in mass tort cases. First, there is no indication that advertising leads to lower prices for legal services for contingency fee cases in general or mass torts specifically. In theory, amassing tens of thousands of claimants into one class action could create economies of scale in production that could be passed on to class members in the forms of lower prices. However, there is little evidence that lawyers compete on price in contingency fee cases or that their

³² See Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 *L. & Soc. Inquiry* 1 (1994); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 *Nw. U. L. Rev.* 469 (1994).

³³ Judyth Pendell, *Regulating Attorney-Funded Mass Medical Screenings: A Public Health Imperative?* Working paper, AEI-Brookings Joint Center for Regulatory Studies, September 2005, available at <http://regulation2point0.org/wp-content/uploads/downloads/2010/04/phpZI3.pdf>.

advertisements even disclose the contingency fee percentage at all.³⁴ In mass tort claims, the retainer contingency fee is almost always between 33 to 40 percent of the recovery.³⁵ According to RAND's analysis of asbestos litigation, claimants' total legal expenses, including lawyers' fees and other expenses averaged 39% of gross compensation in 1984 and in 2002. As RAND notes, "[A]lthough plaintiff lawyers may have recognized savings from routinization of the litigation (e.g. the widespread use of administrative payment schedules)... none of those we interviewed suggested that any of the savings have been passed on to claimants."³⁶

Second, advertising in the mass tort context also may be of less value in providing a reputational bond for lawyers to consumers and less valuable in enabling entry of new lawyers into the market. Instead, the market for these cases today appears to be concentrated among a relatively small and discrete group of lawyers who effectively work together and divide the relevant product markets. As noted, price competition seems to be largely absent from these arrangements, eliminating the ability of new firms to enter by undercutting price. Similarly, the massive up-front funding cost of these cases, as well as the start-up costs of advertising to recruit

³⁴ Jeffrey O'Connell, Carlos M. Brown, and Michael D. Smith, *Yellow Page Ads as Evidence of Widespread Overcharging by the Plaintiff's Personal Injury Bar – and a Proposed Solution*, 6 *Conn. Ins. L.J.* 423 (2000).

³⁵ Judyth Pendell, *Regulating Attorney-Funded Mass Medical Screenings: A Public Health Imperative?*, AEI-Brookings Joint Center for Regulatory Studies 05-22 (Sept. 2005).

³⁶ Stephen J. Carroll, Deborah Hensler, Jennifer Gross, Elizabeth M. Sloss, Matthias Schonlau, Allan Abrahamse and J. Scott Ashwood, *Asbestos Litigation 103* (RAND Institute for Civil Justice, May 2005).

plaintiffs, suggests that the need to advertise might act more as a barrier to, rather than vehicle for, entry by law firms.

Third, attorney advertising might tend to promote bogus claims. Once potential plaintiffs begin to respond to the advertising, they must be “screened,” a process that has been found to be rife with fraud.³⁷ Often the harms claimed by plaintiffs are difficult to verify objectively, such as shortness of breath, headaches, or insomnia. Moreover, plaintiff recruitment advertising will often inform plaintiffs of the symptoms that they must manifest upon examination in order to be included in the class. In addition, the costs of litigation are especially large in the context of high-profile nationwide class action cases that may drag on for years and involve countless hours of highly intrusive discovery proceedings, and this gives plaintiffs a powerful threat advantage.

³⁷ Brickman estimates, for example, that in the average litigation screening for occupational exposure to asbestos, 50-60 percent will be diagnosed with asbestosis, compared to only 3-4 percent who would be diagnosed in a clinical setting. Brickman, *Litigation Screenings*. Pendell reports that between 1986 and 2004 there were “at least four impartial panels of scientists who ... evaluated the accuracy of litigation-related asbestos diagnoses, and they have found the rate of false positives from the screening companies to range from 66% to 97%. Pendell, *Medical Screenings*, supra note 35. See also Joseph N. Gitlin, Leroy L. Cook, Otha W. Linton, and Elizabeth Garrett-Mayer, *Comparison of 'B' Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 *Acad. Radiology* 843 (2004). In the class action cases involving 10,000 silicosis claims generated by litigation screenings, United States District Court Judge Janis Jack concluded that the doctors who rendered the diagnoses on which the claims were brought and the lawyers who ordered the screenings were willing participants in a scheme to manufacture diagnoses for money. *In re Silica*, 398 F. Supp. 2d 563.

Amassing tens of thousands of claims, often for little more than minor injuries, lawyers can use the sheer volume of the claims as a vehicle to steamroll defendants into settlement. Attorney advertising in the mass tort context can also facilitate improper forum-shopping by plaintiffs.³⁸ Mass media advertising, such as television or Internet advertising, makes it possible to recruit class members from across the country. Thus, rather than being constrained to file a case in the plaintiff's place of residence, attorneys can select the court with the most favorable likely result and then recruit class members from around the country to join the class. Brickman observes that improper forum shopping was made easier by the very liberal joinder rules in Mississippi and West Virginia, two states with unusually pro-plaintiff courts.³⁹ Lawyers often found at least one properly-venued plaintiff who had an especially compelling case, and joined that case to hundreds or thousands of more dubious cases recruited by litigation screenings. This ability to put forth an attractive local plaintiff at the front of the mass led defendants to fear that a local jury would award compensatory and punitive damages that could bankrupt the company. In light of this risk, and the inability to weed out the weak claims from the strong, defendants have been driven to settle frivolous claims.

Fourth, attorney advertising in mass tort cases does not appear to provide the informational benefits that other types of advertising do. For example, drug company

³⁸ It should be emphasized that not all forum shopping is necessarily bad. Ex ante forum-shopping, such as by contractual choice of law, likely conduces to economic efficiency. One-sided ex post forum shopping in the tort class action context, however, is likely to create suboptimal outcomes. Todd J. Zywicki, *Is Forum Shopping Corrupting America's Bankruptcy Courts?*, 83 *Geo. L. J.* 1309 (1995).

³⁹ Brickman, *supra* note 9, at 1230.

advertising can inform consumers about untreated health problems and potential treatments. By contrast, lawyer advertising about health claims simply directs website visitors to law firms.⁴⁰ And they move quickly. A study in *CMAJ*, the journal of the Canadian Medical Association, examined the growth in Internet websites following the publication of a study in the *New England Journal of Medicine* found that within a week of the online pre-release of an article on the dangers of a particular antibiotic (gatifloxacin) there were almost 100 Internet websites providing information on personal injury lawsuits.⁴¹

Under Google Adwords, advertisers can bid to have their advertisements appear first on the list of advertisers that arise when a consumer inserts a specific search term. Google charges the advertiser a price based on the number of times the sponsoring website is clicked. In 2009, the price for the search term “mesothelioma” reached \$99.44 per click.⁴² A 2006 review of Google Adwords found that the list of highest-priced keywords was dominated by lawyer advertisements for keywords related to mass torts.⁴³ For example, the top four health-related keywords were variations on searches for “mesothelioma”: “peritoneal mesothelioma” (\$48.38 per click), “mesothelioma” (\$33.83), “mesothelioma symptoms” (\$31.41), and “mesothelioma

⁴⁰ Brickman, *supra* note 9, at 1226.

⁴¹ David N. Juurlink, Laura Y. Park-Wyllie, Moira K. Kapral, The effect of publication on Internet-based solicitation of personal-injury litigants, 177 *Canadian Medical Ass'n J.* 1369 (2007).

⁴² Laurie Sullivan, Top Keyword Price Nears \$100 Per Click, *Online Media Daily*, Oct. 14, 2009, http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=115431.

⁴³ Top Paying Keywords, *Impact Lab*, January 22, 2006, <http://www.impactlab.net/2006/01/22/top-paying-keywords/>.

info” (\$25.79). The remainder of the top ten highest-priced keywords were dominated by “mesothelioma” and “asbestos”-related search terms. As these extremely high prices for Internet keyword search terms indicates, the ability of lawyers to reach consumers directly by highly-targeted Internet advertising is extremely lucrative. The web domains “mesothelioma.com” and “asbestos.com” are both owned by law firms, and are designed to recruit litigation plaintiffs, rather than to provide health information.

What To Do?

If the evidence presented by other contributors to this volume is correct, we have moved well beyond the efficient level of litigation, and society suffers because of it. We live in a second-best world, and this must affect how one regards procedural reforms that might commend themselves in a first-best world. We are not opposed to third-party financing and lawyer advertising, in principle. However, in the brave new world created for us by plaintiffs’ lawyers and their allies, the alluring promises of increased efficiency through increased access to the court must be resisted as illusory.