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A SURVEY OF CHANGES IN UNITED STATES LITIGATION

JACK B. WEINSTEIN[†]

The United States has a reputation abroad for supercharged mass litigation driven by powerful plaintiff attorneys. The assumption of big business is that this litigation, while of limited benefit to some consumers in deterring dangerous conduct and compensating for injury, is detrimental to commercial and financial institutions and the development of new technology.

It cannot be denied that United States litigators—both for plaintiffs and defendants—have done well financially. They have also kept our judges and the press both busy and entertained with complex and interesting litigation.

Some would argue that enrichment of the bar and amusement of the judiciary and public are not sufficient reasons for lawsuits. In any event, I submit that our legal system generally provides benefits commensurate with the costs.¹ The structural advantages of plaintiffs are overstated, and recent modifications have generally favored defendants.

Changes in our litigation system can be relevant to those outside our borders. While expansion of law firms and commerce on a worldwide scale may tend to eliminate some variations in the legal cultures of different nations,² choice of forum and choice

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¹ See THOMAS H. KOENIG & MICHAEL RUSTAD, IN DEFENSE OF TORT LAW § 2.2 (2001). See generally CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA (2001). But see John L. Warden, *Frivolous Publication*, THE AM. LAW., Jan. 2002, at 63 (criticizing Bogus' conclusions that lawsuits are beneficial).

² See Peter D. Zeughhauser, *The New World Order*, THE AM. LAW., Jan. 2002, at 49 ("A handful of firms are on the brink of global domination . . ."); cf. Anthony E. Davis, 'MJP' (*Multijurisdictional Practice*)—*Down to the Wire*, N.Y.L.J., Jan. 7, 2002, at 3 (discussing opposition to proposals to permit non-local attorneys to practice).

of law will remain critical to potential litigants.

Since so many internationally tinged transactions end up in our courts, it may be useful for non-American lawyers to have some understanding of trends within our system of law.

Let me draw your attention to a few major topographical features as we take a quick flight over the terrain of American litigation. Some recurring areas of change and tension in the United States are: (1) battles for substantive and procedural advantages between putative defendants and prospective plaintiffs (and among their attorneys); (2) contests between the states and the federal government for control of aspects of our legal system; (3) shifts between private and public law; (4) the continued magnetism of our courts for suits originating abroad; and (5) differences between more conservative and liberal judges, legislatures, and academics over litigation. I will also touch on the ad hoc administrative system devised to compensate those injured by the September 11th attack on the World Trade Center since it illustrates our reluctance to abandon the present tort system.

Our law is not static. The moving tectonic plates of political and social change alter the landscape. To those abroad, our system may seem fixed. For us, on the ground, it seems to be constantly shaking with volcanic eruptions and earthquakes.

I. DEFENDANTS V. PLAINTIFFS

Legislatures and courts are constantly altering substantive and procedural legal rules. These changes often affect the relative litigation strengths of plaintiffs compared to those of defendants. Recently these developments have tended to favor defendants.

Insurance companies and corporate interests have waged a sustained campaign through advertising, political efforts, and other activities to convince jurors, voters, and lawmakers that plaintiffs are abusing the system.³ This message is often exaggerated, but it has prompted legislators to somewhat tighten the substantive and procedural rules for tort recovery. Most of this "reform" has occurred in state legislatures.

³ See, e.g., Bob Van Voris, *Smokers' Suits Seen as Facing Juror Doubt*, NAT'L L.J., Mar. 18, 2002, at A1 (stating that prospective jurors' views of appropriateness of tobacco litigation is negative where advertising is by defendants, but positive where advertising is by plaintiffs' attorneys).

In states like New York, for example, it is harder than it once was to avoid the limits of workers compensation by suing a third party and having that party implead the employer.⁴ In some states, punitive damages have been abolished or limited and caps have been placed on what a plaintiff can recover.⁵

Congress has also participated. For instance, enforcement of federal securities law by private attorneys has been made more difficult.⁶

The 1938 Federal Rules of Civil Procedure, widely adopted by the states, opened the courts to plaintiffs, making recoveries much easier. In the last few years, both amendments to the Rules and their interpretations have somewhat closed the door to the courthouse. The tide does not flow all one way. The ENRON scandal may, for instance, lead to a shift towards easing private suits on behalf of shareholders.⁷

Some procedural developments have favored plaintiffs. Congress has encouraged certain types of cases by permitting recoveries of substantial legal fees by successful plaintiffs.⁸ Recovery of fees in civil rights⁹ and false advertising cases,¹⁰ *qui tam* claims by private litigants based upon frauds on the government,¹¹ and treble damage claims, as in federal fraud based statutes under our Racketeer Influenced and Corrupt Organization Act (RICO) actions,¹² have encouraged the plaintiff bar's private attorney general role.

⁴ See N.Y. WORKERS' COMP. LAW § 13 (McKinney 1992).

⁵ See, e.g., *Berry v. Loiseau*, 614 A.2d 414, 437-38 (Conn. 1992) (limiting punitive damages to plaintiff's litigation expenses less taxable costs); ALA. CODE § 6-11-21 (1975); CAL. CIV. CODE § 3358 (Deering 1994); FLA. STAT. ANN. § 400.0238 (West 2002).

⁶ See Miranda S. Schiller & Haron W. Murage, *Reforms Raise Hurdle in Securities Class Actions*, N.Y.L.J., Jan. 14, 2002, at 1; see also Edward Labaton, *Courts on Trial Symposium Closing Remarks*, 40 ARIZ. L. REV. 1111 (1998).

⁷ See Bob Herbert, *Enron and the Gramms*, N.Y. TIMES, Jan. 17, 2002, at A29 (warning against continued deregulation).

⁸ See David W. Garland & Vanessa M. Kelly, *Awards of Attorneys' Fees in Statutory Civil Rights Claims*, ALI-ABA Course of Study: United States and International Litigation and Dispute Resolution: Current Developments and their Impact on U.S. and European Companies, Insurers, and Lawyers (April 10-12, 2002).

⁹ See 42 U.S.C. § 1988(b) (1994).

¹⁰ See *Blue Cross and Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 190 F. Supp. 407, 414-25 (E.D.N.Y. 2002).

¹¹ See 31 U.S.C. § 3730 (1994).

¹² See 18 U.S.C. § 1964(c) (1994).

There is still a strong policy of keeping the courts open to those with private grievances. Despite restrictions, the number of civil filings has remained relatively constant.¹³ Payments of attorneys' fees by plaintiffs who lose to defendants, even when cases seem frivolous, have not yet become the rule.¹⁴ In this respect we remain reluctant to follow the English practice of broadly shifting legal fees to the loser, a change that would discourage litigation.¹⁵

The temperament of judges and juries varies by region. In some areas of the South, for instance, courts are known for returning generous verdicts favoring plaintiffs in product liability cases.¹⁶ The divergences in court approaches by region and between federal and state court systems increase difficulties of the courts and parties in coordinating sprawling litigations to achieve a uniform and reasonable national result.¹⁷

Procedures have been modified by the courts in ways that make litigation more difficult and less appealing to claimants, particularly in mass cases. Examples include two recent Supreme Court decisions in the vexing asbestos saga, *Amchem Products, Inc. v. Windsor*¹⁸ and *Ortiz v. Fibreboard Corp.*¹⁹ These cases could have been decided on narrow conflict of interest grounds based on overreaching of a few attorneys to

¹³ See National Center for State Courts, *Examining the Work of the State Courts, 1999-2000 Cases Filed in State Court*, at <http://www.ncsc.dni.us/divisions/research/csp/csp-stat01.html> (last visited July 2, 2002) (chart showing relatively stable number of state court civil filings over past decade); THE THIRD BRANCH (Newsletter of the Federal Courts), Mar. 2002, at 6, available at <http://www.uscourts.gov/ttb/mar02ttb/mar02.html> (discussing the slight decrease in federal personal injury cases as a result of discouragement of such cases in the federal courts); Mark P. Goodman & Robert D. Goodman, *Plaintiffs' Bar Now Opposes Unimpaired Asbestos Suits*, NAT'L L. J., Apr. 1, 2002, at B14-16 (discussing the shifting of asbestos claims from federal to state courts).

¹⁴ *But see* FED. R. CIV. P. 11(c)(2) (stating that court may order party to pay opponent's attorney's fees if the party has engaged in frivolous or harassing litigation).

¹⁵ See John Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, AM. U. L. REV. 1567, 1570-77 (1993).

¹⁶ See Robert Pear, *Class-Action Bill Favorable to Business Passes House*, N.Y. TIMES, Mar. 14, 2002, at A28 ("Jefferson County, Miss., one of the poorest counties in one of the nation's poorest states, . . . has become a popular venue for lawyers suing makers of prescription drugs, cigarettes, lead paint and asbestos products.").

¹⁷ See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 24-26 (1995).

¹⁸ 521 U.S. 591 (1997).

¹⁹ 527 U.S. 815 (1999).

increase their fees and the recoveries of their clients. Instead, the Court used language interpreted by many of the lower courts—in my opinion wrongly—to severely limit class action settlements of product liability cases.²⁰ In a recent case, *Stephenson v. Dow Chemical Co.*, the Second Circuit reopened the Agent Orange case to permit new claims more than a decade after the parties thought they had bought peace by a class action settlement.²¹

As a result of these anti-settlement decisions, a valuable tool for peaceably resolving massive disputes through class action settlements at relatively low transactional costs has been somewhat crippled. Why would the tobacco companies and others want to settle, terminating many individual and class actions, if large payments cannot guarantee an end to festering litigation? Some believe that these adverse class action decisions will discourage mass litigation because plaintiffs' attorneys will hesitate to sue when they cannot obtain low-cost settlements.

The Supreme Court has increased the trial court's powers to winnow out poor cases and to avoid jury trials. One device has been the expansion of summary judgments favoring defendants. Another has been the development of the gate-keeping function of the judge to exclude expert testimony relied upon by plaintiffs that does not measure up to appropriate standards of science and rationality.²² Moreover, appellate courts are more likely to

²⁰ See, e.g., Steve Lohr, *Federal Judge Deals Setback to Microsoft in Private Suits*, N.Y. TIMES, Jan. 12, 2002, at C1 (discussing a case in which proposed settlement of a class action suit against Microsoft was disallowed because of its anti-competitive effect). For the enormous costs of continuing asbestos cases which might have been limited by settlement or other devices, see, for example, STEPHEN CARROLL ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT (2002); GRIFFIN BELL, ASBESTOS LITIGATION AND JUDICIAL LEADERSHIP: THE COURT'S DUTY TO HELP SOLVE THE ASBESTOS LITIGATION CRISIS (2002); Mark A. Behrens, *Some Proposals For Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331 (2002).

²¹ 273 F.3d 249 (2d Cir. 2001).

²² See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143–49 (1999) (concluding that trial judge must determine whether specialized evidence is reliable based on standards of the relevant discipline); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142–43 (1997) (discussing the appropriate standard of review in determining admissibility of expert testimony); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993) (stating that trial judge must ensure both the reliability and relevance of all scientific evidence); David Hechler, *Courts Toss Out Expert Testimony*, NAT'L L.J. Jan. 7, 2002, at A20. District courts have applied tougher standards to keep out expert testimony in business disputes, generally favoring defendants. See *id.* at

reverse jury verdicts favoring plaintiffs than those favoring defendants.²³

Lower courts as well as the Supreme Court have increasingly construed congressional statutes to preclude enforcement by individual suits of those injured, leaving enforcement to ill-financed regulatory agencies, which will often allow defendants violating the law to escape control.²⁴

II. NATIONAL V. STATE

Since the Civil War, control over the law has shifted away from the states and towards the federal government. That tendency accelerated during the depression and then again after World War II. Now there are signs of a swing back towards state control.

A major move towards national dominion was accomplished through congressional expansion of the Employee Retirement Income Security Act of 1974 (ERISA).²⁵ National statutes targeting discrimination based on sex,²⁶ race,²⁷ age,²⁸ and

A20. See generally Gerald J. Flattman, Jr. & Krista M. Rycroft, *Jury's Role Shrinks in Patent Litigation*, NAT'L L.J., Jan. 21, 2002, at C1.

²³ See Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 125, 138 (2001) (stating that appellate courts are more inclined to overturn plaintiff's verdicts because of the perceived pro-plaintiff bias of juries); Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128 (2000) (same).

²⁴ See *Olmsted v. Pruco Life Ins. Co.*, 283 F.3d 429, 434 (2d Cir. 2002) ("Past decisions reflecting judicial willingness to 'make effective [statutory] purpose' in the context of implied rights of action belong to an 'ancient regime.' (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001))).

²⁵ See 29 U.S.C. § 1001 (1994); see also Mark Hamblett, *Suit Seeking Interest on Benefits Revived: ERISA Does Not Bar Relief for Unjustified Delays*, N.Y.L.J., Jan 14, 2002, at 1 (discussing a Second Circuit case in which interest on late payments was not recoverable under ERISA).

²⁶ See 42 U.S.C. § 2000e-2 (1994); see also Dianna P. Scott, *Latest Developments in Sexual Harassment and Discrimination in the United States*, ALI-ABA Course of Study: United States and International Litigation and Dispute Resolution: Current Developments and their Impact on U.S. and European Companies, Insurers, and Lawyers (April 10-12, 2002).

²⁷ See 42 U.S.C. § 2000e-2 (1994); see also Joanna L. Grossman, *Making a Federal Case Out of It: Section 1981 and At-Will Employment*, 67 BROOK. L. REV. 329, 329 (2001) (stating that Title VII of the Civil Rights Act of 1974 "prohibit[s] employers from taking any racially motivated adverse employment action"); Scott, *supra* note 26.

²⁸ See 29 U.S.C. § 621 (1994); see also David W. Garland et al., *Age Discrimination and Employee Downsizing*, ALI-ABA Course of Study: United States

disability²⁹ have also served to nationalize a great deal of employer-employee relations; so too, have the National Labor Relations Act³⁰ and a national commission to provide safety protections for workers, OSHA.³¹

By contrast, recent strongly criticized (perhaps too strongly) limitations by the Supreme Court on broad powers of Congress to regulate under the Commerce Clause and Fourteenth Amendment of our Constitution have begun to affect litigation.³² The cases banning suits based on federal law on violence against women³³ or against states for various forms of discrimination³⁴ have limited the ability of plaintiffs to pursue certain actions in federal court, but most of these claims are cognizable in some form under state law.

Shifting centrifugal and centripetal forces mean that potential litigants may have to deal with fifty-one rules of law

and International Litigation and Dispute Resolution: Current Developments and their Impact on U.S. and European Companies, Insurers, and Lawyers (April 10–12, 2002).

²⁹ See 42 U.S.C. § 12112 (1994); see also Frank C. Morris, Jr. & Teresa L. Jakubowski, *The Americans with Disability Act*, ALI-ABA Course of Study: United States and International Litigation and Dispute Resolution: Current Developments and their Impact On U.S. and European Companies, Insurers, and Lawyers (April 10–12, 2002).

³⁰ See 29 U.S.C. § 151, 152 (1994).

³¹ See 29 U.S.C. § 657 (1994).

³² See, e.g., JOHN T. NOONAN, *NARROWING THE NATION'S POWER* (2002) (criticizing the Court's restrictions on congressional powers); GARRETT EPPS, *TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL* 226–41 (2001) (discussing passage of the Religious Freedom Restoration Act to reverse Supreme Court views); Larry D. Kramer, *The Supreme Court, 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 169 (2002) (pronouncing that “[t]he Supreme Court has made its grab for power”); Robert C. Post, Remarks at the 2001 Induction Ceremony of the American Academy of Arts and Sciences (Oct. 13, 2001), in BULL. AM. ACAD. ARTS & SCI., WINTER 2002, at 32 (stating that “that limits of congressional power are now uncertain”); see also ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *Report of Committee on Civil Rights: Salvaging Civil Rights Undermined by the Supreme Court: Extending the Protection by Federal Civil Rights Laws in Light of Restrictive Supreme Court Decisions*, 56 THE REC. 510 (2001); Linda Greenhouse, *Judicial Restraint: The Imperial Presidency vs. the Imperial Judiciary*, N.Y. TIMES, Sept. 8, 2002, at WK3; Sen. Charles Schumer and Chief Judge J. Harvey Wilkinson III, *Congress and the Court*, AM. ACAD. ARTS & SCIENCES, Summer 2002, at 37 (panel discussion with Jesse Choper, Linda Greenhouse, Abner J. Mikva, Nelson W. Polsby, and Robert C. Post on choice of judges and effect on state-federal and congressional powers).

³³ See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that a federal civil remedy for assault cannot be sustained under the Commerce Clause nor under section 5 of the Fourteenth Amendment).

³⁴ See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 78–79 (2000) (addressing specifically age discrimination).

and administration rather than just one. The conflicts of law problems grow apace, making national litigation more difficult.

As I have already suggested, there is a sharp debate developing about whether attorneys admitted in one state or country should be able to practice more freely elsewhere in national and international litigation.³⁵ A relative openness for lawyers seeking admission to federal courts on a *pro hoc vice* basis addresses the problem in a limited way. It is my hope that these rules will be extended to foreign attorneys so we can eventually recognize an international bar for private litigation.

III. PUBLIC V. PRIVATE AND JUDICIAL V. NON-JUDICIAL

Public suits by both government officials and private attorneys to prevent private abuse are increasingly encouraged. The Supreme Court has even recently allowed our Equal Employment Opportunity commission to ignore an employer-employee arbitration agreement and to sue the employer in the public interest for discrimination against its employees.³⁶

There has been a discernable shift towards public criminal and administrative law and away from private tort law as tools of deterrence and compensation.³⁷ Criminal law statutes now provide for compulsory restitution,³⁸ leaving little for tort recovery in some major fraud cases. Agencies such as the Federal Trade Commission, the Securities and Exchange Commission, and the Federal Drug Administration are

³⁵ See *State Move to Ease Multijurisdictional Rules to Let Lawyers Work Temporarily Interstate*, U.S. LAW WEEK, Jan. 22, 2002, at 2428; see also Martha Neil, *Easing Up: Proposed Changes in the ABA Model Rules Would Recognize the Reality of Multijurisdictional Practice*, 88 A.B.A. J. 47 (2002) (stating that "clients' needs are becoming increasingly national and international in scope").

³⁶ See *E.E.O.C. v. Waffle House*, 534 U.S. 279 (2002); Robert S. Greenberger, *Supreme Court Gives Workers Legal Options: EEOC May Pursue Relief Even When Employee Signs Arbitration Pact*, WALL ST. J., Jan. 16, 2002, at B14; Linda Greenhouse, *Justices Limit Reach of Arbitration Law*, N.Y. TIMES, Jan. 16, 2002, at A17 (announcing that "[t]he court says an agency can represent workers who waive the right to sue").

³⁷ See, e.g., Jack B. Weinstein, *Compensation for Mass Private Derelicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947 (2001); *Today's News*, N.Y.L.J., Apr. 24, 2002, at 1 (announcing the formation of a multi-state task force to investigate possible securities violations by investment banks); cf. Richard L. Marcus, *Reform Through Rulemaking?* (Mar. 16, 2002) (unpublished manuscript on file with author).

³⁸ See, e.g., 18 U.S.C. § 3663A (2002), MICH. CONST. art. I, § 24 (Lexis 2001); S.D. CODIFIED LAWS § 23A-28-1 (Michie 1998).

increasingly utilizing disgorgement orders to compensate victims, obviating some of the need for private class actions.³⁹

Administrative requirements that manufacturers report problems in automobiles, toys, and a myriad of other consumer products and services, as well as other administrative regulations, reduce the risk of injury.⁴⁰ In auto safety design and many other areas, this is a far better way than private law suits to protect consumers in our complex society. Court review of such administrative decisions is limited,⁴¹ though increasing.⁴²

One of the risks of reliance on public controls is that budgets may be cut, and with the new Administration's commitment to the ideology of deregulation, protections may be reduced. This danger is partly mitigated by the ability of the states to regulate independently of the federal government, where the latter has not preempted the field.⁴³ In a backlash against Washington's trend towards more business friendly policies, some states have brought new suits and enacted new protective laws.⁴⁴

The state attorneys general do not automatically fall in line with national administrative law or policy. Some of them, for example, refused to settle (as the feds did) antitrust claims against Microsoft, a major computer producer.⁴⁵ By contrast,

³⁹ See Weinstein, *supra* note 37, at 952.

⁴⁰ See UNITED STATES CONSUMER PRODUCT SAFETY COMM'N, 107th Cong., 2000 Annual Report to Congress (stating that reporting requirements and other regulations have contributed to a thirty percent decline in rates of deaths and injuries related to consumer products since the Consumer Product Safety Commission was founded).

⁴¹ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (establishing the process by which courts review administrative agencies' construction of statutes).

⁴² See Jack B. Weinstein & Catherine Wimberley, *Secrecy in Law and Science*, 23 CARDOZO L. REV. 1, 1-2 (2001) (noting that the Freedom of Information Act (FOIA) and other laws require agencies to divulge information).

⁴³ See, e.g., Richard L. Revesz, *Federalism and Environmental Regulation: A Public-Choice Analysis*, 115 HARV. L. REV. 553, 630-31 (2001) (noting the "willingness of some states to extend environmental regulation at a time of federal inaction..."); James Traub, *The Attorney General Goes to War*, N.Y. TIMES MAGAZINE, June 16, 2002, at 38.

⁴⁴ See, e.g., Stephen Labaton, *States Seek to Counter U.S. Deregulation*, N.Y. TIMES, Jan 13, 2002, at 23 (acknowledging state expansion of law enforcement capabilities in response to lax enforcement at the federal level).

⁴⁵ See Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistage Litigation*, 101 COLUM. L. REV. 1998, 2030 (2001) (establishing that in the Microsoft antitrust case, states acted pursuant to federal law); Leonard Orland, *The Microsoft End Game*, 34 CONN. L. REV. 221, 230 n.53 (2001) (noting that nine Attorneys General refused to sign a consent decree);

state attorneys general settled state claims against tobacco companies for hundreds of billions of dollars when Congress was unable to reach agreement.⁴⁶

The rules of preemption may severely limit state regulation and private suits after a protective federal rule, regulation, or statute takes effect. The Tobacco cases are an example.⁴⁷ Although settlements of state attorneys general with major producers did regulate the conduct of cigarette advertising to a significant degree, federal statutory administrative requirements of warnings on cigarettes have largely protected the manufacturers from civil actions claiming fraud in failing to warn, and prevented the states from enacting more rigorous control. Additionally, the development of protected commercial speech concepts by the Supreme Court has further reduced the ability of states to regulate how dangerous products are advertised.⁴⁸

As previously noted, there is some resistance to a conflicts of law approach that permits application of one rule of law throughout the nation in private lawsuits.⁴⁹ Yet, in bankruptcy settlements—a form of public administration—such as those precipitated by asbestos injury cases, a fairly uniform national

Labaton, *supra* note 44, at 23 (declaring that state legislation and state-initiated lawsuits represent a “public break with Washington”).

⁴⁶ See generally Lynch, *supra* note 45. Private litigants are also increasingly using state courts to resolve problems of national dimension. See Elizabeth J. Cabraser, *Class Action Update 2001: Mass Tort Trends, Choice of Law, Rule 23(f) Appeals, and Proposed Amendments to Rule 23*, ALI-ABA Course of Study: United States and International Litigation and Dispute Resolution: Current Developments and their Impact on U.S. and European Companies, Insurers, and Lawyers (April 10–12, 2002) (“The 1990s saw a trend toward increased filing of large class actions, often nationwide in scope, in the state courts.”).

⁴⁷ See, e.g., *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 178 F. Supp. 2d 198, 262–65 (E.D.N.Y. 2001) (finding that federal law preempts state regulation of the advertising and promotion of tobacco products, but does not preempt all claims based on deceitful practices); cf. *Burke v. Dow Chemical Co.*, 797 F. Supp. 1128, 1139–41 (E.D.N.Y. 1992) (noting that federal regulation of pesticides preempts claims that pesticides were mislabeled to the extent manufacturers complied with federal labeling requirements, but does not preempt claims based on failure to warn).

⁴⁸ See *Lorillard Tobacco, Inc. v. Reilly*, 533 U.S. 525, 551 (2001) (holding that state regulations banning outdoor advertisement of certain tobacco products violated the First Amendment).

⁴⁹ See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (rejecting the possibility that negligence laws of the fifty states and the District of Columbia could be collapsed into a single rule).

consensus tort law matrix is being utilized to divide some sixty billion dollars of potential recoveries.⁵⁰ Some twenty billion dollars of plaintiff attorney fees will be allowed by generous state laws—an amount that seems somewhat excessive. A foreign entity buying an American firm may find itself drawn into the quicksand of asbestos, putting at risk its main business.⁵¹

As more and more potential defendants are forced into bankruptcy as a result of asbestos litigation, it is apparent that there will not be enough money to compensate all of the prospective claimants who are expected to fall ill (or who think they will become ill from asbestos) from now to the middle of this century.⁵² Struggles have intensified among members of the trial bar to divide the limited funds. The division between the most seriously injured and those with almost no health problems is being resolved by negotiation among plaintiffs' counsel with little input by courts or defendants. As a result of this private triaging by plaintiffs' attorneys, serious lung cancer claimants will probably receive higher awards in proportion to those with only benign pleural symptoms.⁵³

Probably favorable towards defendants is the enormous move towards arbitration. Employee-employer disputes, litigation by customers against their brokers, intercompany claims by producers and insurance companies, and the like are now less likely to be found in our courts.

Many of our former judges and law professors have become influential in their new roles as mediators and arbitrators in national and international matters. Awards of hundreds of millions of dollars suggest, however, that arbitration is not an entirely safe refuge for prospective defendants.⁵⁴ Yet, by shifting

⁵⁰ See *In re Joint E. & S. Dist. Asbestos Litig.*, 878 F. Supp. 473, 495–97 (E.D.N.Y. & S.D.N.Y. 1995) (describing how the matrix operates); Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise: Courts Recent Jury Awards Underscore Commercial Disaster's Continuing Toll*, L.A. TIMES, Dec. 17, 2001, at A1 (“U.S. insurers are expected to cover \$60 billion [in asbestos-related payouts], for which the industry may face a shortfall of as much as \$33 billion.”).

⁵¹ See Elizabeth Olson, *ABB Expects to Report a Loss Over Asbestos Cases*, N.Y. TIMES, Jan. 31, 2002, at W1.

⁵² See *id.*

⁵³ See, e.g., *In re Joint E. & S. Dist. Asbestos Litig.*, No. 90 Civ. 3973, 2001 WL 1464362, at *1 (E.D.N.Y. Nov. 7, 2001) (noting a continuing rise in claims and decline in funds available to pay claims).

⁵⁴ See, e.g., *NYSE Panel Orders \$429M Award; Largest Ever Against a Stockbroker*, NEWSDAY, Dec. 27, 2001, at A37.

some arbitration costs to plaintiffs, thus reducing the freedom claimants have had to sue at almost no risk or costs to themselves, and by avoiding juries (and in some cases punitive damages), arbitration has become ever more attractive to potential defendants.

Courts themselves have utilized court annexed arbitration and mediation through panels of volunteers. Partly as a result of these techniques, the ratio of jury trials to judgments has continued to decrease to just a few percentage points. Civil jury trials, and criminal jury trials as well, are no longer a significant aspect of federal court proceedings in the United States.⁵⁵

The increasing prevalence of mandatory international arbitration clauses and various international forums for certain types of disputes have also reduced the number of defendants that can be sued in United States courts.⁵⁶

IV. AMERICAN COURTS AS A MAGNET FOR HUMAN RIGHTS AND OTHER SUITS

The threat of prosecution in United States courts for civil rights violations and other torts throughout the world is substantial. It may show some slight signs of abatement as Congress recognizes that Americans may also be sued in courts abroad⁵⁷ (which partly explains the United States' rejection of an international criminal court).⁵⁸ Nevertheless, as recent class

⁵⁵ Compare *What Has Contributed to a Decade of Increasing Civil Case Filings*, 33 THIRD BRANCH (Newsletter of the Federal Courts), Dec. 2001, at 7 (increased civil case filings in federal court) with Jack B. Weinstein, *The Restatement of Torts and the Courts*, 54 VAND. L. REV. 1439, 1446 (2001) (demonstrating a decrease in jury trials).

⁵⁶ But see *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 113 F. Supp. 2d 345, 367-68 (E.D.N.Y. 2000) (denying summary judgment motion brought by British holding company because there was a genuine issue of fact as to its responsibility for its American subsidiary's acts); Juan Zuniga, *When is a Corporation liable for acts of subs abroad?*, NAT'L L.J., Feb. 11, 2002, at B13 (explaining the courts' increased exercise of power over parent corporations for foreign subsidiaries acts).

⁵⁷ See, e.g., *Commercial Arbitration and Mediation Center For the Americas (CAMCA): Mediation and Arbitration Rules*, 35 I.L.M. 1541, 1544 (1996) (noting that any investment dispute between a North American Free Trade Agreement (NAFTA) state and a citizen of a NAFTA signatory is subject to arbitration between the investor and the state); Edmund L. Andrews, *Trade Panel Says Europe Can Impose Penalties on U.S.*, N.Y. TIMES, Aug. 31, 2002, at A1, A6 (noting that the "ruling's biggest effect is likely to be on a handful of major American manufacturers").

⁵⁸ See Barbara Crossette, *World Court For War Crimes Inches Closer To*

actions against German and Swiss entities settling huge claims for slave labor and other Nazi atrocities indicate, our courts continue to be a magnet for human rights suits.⁵⁹

Forum non conveniens and deference doctrines that could dilute our private law suits have not been popular with the American judiciary. In general, our courts will defer only if there is substantial assurance that the foreign system will supply an effective remedy.⁶⁰ Our experience in sending the Bhopal disaster to India's courts for quasi-administrative control where, reportedly, compensation to those injured has been too long deferred, has not produced confidence in foreign justice in some countries among our judges.⁶¹

We continue to provide restrictive limits on personal jurisdiction that grant some protection for foreigners against being dragged into our courts.⁶² Since the foreign approach

Reality, N.Y. TIMES, Mar. 26, 2002, at A8.

The Bush administration, breaking with European and NATO allies, strongly opposes the court and has vowed never to send the treaty to the Senate for ratification. The treaty, adopted by a conference of nations in Rome in 1998, was signed by the United States in the waning days of the Clinton administration over the objections of the Pentagon and conservatives in Congress who feared that Americans would be easy targets as they carried out missions abroad.

Id. *But cf.* Convention for the Suppression of Unlawful Seizure of Aircraft, art. 2 (Dec. 16, 1970) (obligating signatories to severely punish hijackers), available at http://www.undcp.org/terrorism_convention_aircraft_seizure.html.

⁵⁹ See, e.g., Ukrainian Nat'l Assn. of Jewish Former Prisoners of Concentration Camps & Ghettos v. United States, 182 F. Supp. 2d 305, 311 (E.D.N.Y. 2001) (allowing Holocaust survivors' lawsuit against United States to proceed); Francine Parnes, *Fighting On: Legal Actions by Nazi Victims Seeking Compensation Meet With Mixed Results*, A.B.A. J., Mar. 2002, at 20; Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, in Institute for Law and Economic Policy Conference on Litigation in a Free Society (2002).

⁶⁰ See *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 WL 319887, at *8-13 (S.D.N.Y. Feb. 28, 2002). An earlier dismissal on *forum non conveniens* grounds was reversed by the Second Circuit. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 108 (2d. Cir. 2000). See generally Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. INT'L L. & POL. 1001 (2001); MARTIN FLUMENBAUM & BRAD S. KARP, *Forum Non Conveniens*, N.Y.L.J., Jan. 10, 2002, at 3.

⁶¹ See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 177-78 n.3 (1995).

⁶² See *In re DES Cases*, 789 F. Supp. 552, 571 (1992) ("Local businesses, or foreign businesses whose products normally have no contact with the United States, may arguably rely on the fact that they never expected to have any dealings that affect New Yorkers."); Jack B. Weinstein, *Mass Tort Jurisdiction and Choice of Law in a Multinational World Communicating by Extraterrestrial Satellites*, 37 WILLAMETTE L. REV. 145, 148 (2001) ("Some [state jurisdictional] statutes providing

seems to be more top-down administrative rather than our more bottom-up court-centered litigation, this limit on personal jurisdiction disfavors proceedings favoring the injured.⁶³ There is a slight tendency to rely upon international human rights law to check our own courts. In capital punishment, immigration rights, and now in the Afghanistan prisoner rights issues, we begin to see problems of our courts with foreign and international substantive and procedural law lurking on the horizon.⁶⁴

V. CONSERVATIVE V. LIBERAL COURTS

United States courts, particularly appellate courts, have become more conservative—i.e., defense oriented—as a result of the Reagan-Bush appointments. Clinton tended to be a centrist who left the balance much as it was. The close balance in the Supreme Court, where so many critical cases are 5-4, epitomizes the split and explains some of the sharp confirmation struggles in the Senate.⁶⁵

As older, more liberal judges depart, the conservative cast of the federal bench grows. Culturally, the United States has shifted toward Republicanism in the south and elsewhere, moving away from populism—even in areas which are strongly democrat—as reflected by the widespread public acceptance of welfare “reform.”⁶⁶ The move from secular rationalism toward religious faith presages less reliance on litigation and government controls because of the belief that God, rather than

for nationwide service may not reach foreign national defendants residing abroad.”).

⁶³ See Jack B. Weinstein, *Compensating Large Numbers of People for Inflicted Harms*, 11 DUKE J. COMP. & INT'L L. 165, 177 (2001).

⁶⁴ See *Beharry v. Reno*, 183 F. Supp. 2d 584, 604 (E.D.N.Y. 2002) (holding that United States immigration law should be interpreted to comport with international common law favoring family preservation); *Wiwa*, 2002 WL 319887.

⁶⁵ See, e.g., Neil A. Lewis, *First Punch in the Revived Bench-Tipping Brawl*, N.Y. TIMES, Mar. 17, 2002, at 35 (There has been an “escalation in the long running partisan and ideological fight between presidents and senators over the shape of the federal courts. . . . In the 12 years of Republican rule under Mr. Reagan and the First President Bush, the courts were tilted distinctly rightward. . . . President Bill Clinton . . . generally named moderates who would be palatable to Republicans.”).

⁶⁶ See, e.g., Kathleen A. Kost & Frank W. Munger, *Fooling All of the People Some of the Time: 1990's Welfare Reform and the Exploitation of American Value*, 4 VA. J. SOC. POL'Y & L. 3, 27 (noting that welfare reform advocates have shifted the “emphasis of public discourse away from poverty, to the deviant behavior of recipients”).

government administrators, will guide us.⁶⁷

Even if our society immediately were to become markedly less conservative, the make-up and decisional bent of the bench would not change rapidly.⁶⁸ There is a “cyclical lag” that delays the impact of cultural and political alterations on the make-up of the judiciary. This is but one aspect of the conservatism of the law and its resistance to new views.

VI. THE SEPTEMBER 11TH VICTIMS’ COMPENSATION FUND

Let me touch upon the Victims’ Compensation Fund and procedure created by Congress following the September 11, 2001 attack on the World Trade Center and the Pentagon.⁶⁹ In a sudden outpouring of compassion for the victims and their families and fear that major elements of the airline industry would be driven into bankruptcy by private tort litigation, Congress created an ad hoc non-reviewable administrative system of compensation for what will be some 3,000 wrongful death cases and a few hundred personal injury cases. It is available to those who agree not to sue under the private tort system.⁷⁰ The 9-11 Act, as it is called, seems fair to me; the regulations and administration of the talented Special Master, Kenneth Feinberg, are sound and consonant with the statute. Although it will probably cost the public about five billion dollars if almost all claimants opt for it, there are many—particularly the more well-to-do—who complain that their compensation will not be enough. Attorneys will obtain negligible fees under the Act.

⁶⁷ See, e.g., Teresa Watanabe, *Church-State Line is Still Blurred After Rulings; Religion: Decisions on the Pledge of Allegiance and School Vouchers Continue a Tradition of Debate As Old As the Nation Itself*, L.A. TIMES, July 3, 2002, at A20 (“Some experts also suggest that the long national trend toward ‘secular individualism’ has run its course, creating a sense of fragmentation that has led many Americans to long for more community.”).

⁶⁸ In any event, individual decisions often defy political leanings. See, e.g., Michael Dorf, *It’s Not About Politics*, COL. L. SCHOOL REP., Fall 2001, at 30.

⁶⁹ Victims of Terrorism Relief Act, P.L. 107-34, 115 Stat. 2427 (2002); September 11 Victim Compensation Fund of 2001, 28 C.F.R. § 104 (2002).

⁷⁰ But see William Glaberson, *4 Suits Filed Despite Call for Restraint by Lawyers*, N.Y. TIMES, Jan. 15, 2002, at A13. Compare Williams Glaberson, *Lawyers Said to Back Compensation Plan to Polish Image*, N.Y. TIMES, JAN. 14, 2002, at A9 (noting that many members of plaintiffs’ bar support Compensation Fund) with Lee S. Kreindler, *WTC Victims’ Compensation: A Sad Disappointment*, N.Y.L.J., Jan. 4, 2002, at 3 (criticizing the fund).

The Act is supposed to somewhat mimic the tort system. This creates problems of variations among the laws of the states where the dead and injured resided regarding liability, set-offs for collateral source recoveries, and conflicting claims of various family members. States differ, for example, on whether a decedent's unmarried partner—homosexual or heterosexual—can recover on a claim of wrongful death.⁷¹ These variations make it somewhat difficult to create a national compensation system.

One academic has posited that if we are trying to compensate all those injured by the September 11th attack, why should we not duplicate this system for all those injured in product liability, auto accidents, medical malpractice, and other areas?⁷²

The answer: Politicians will never duplicate this September 11th system to replace our tort law. The tort system will remain our primary method of compensating the injured (apart from workers compensation for job related injuries) for various reasons: (1) It is less expensive since many of the injured never sue or do not recover. (2) It provides the model of a jury system (even in non-jury cases) which can make distinctions based upon wide disparities in incomes and capacity to sue, without requiring the legislature to explicitly recognize gross differences between the economic opportunities of the haves and the have-nots in our society. (3) It is flexible enough to meet new situations without new statutes, thus allowing subtle shifts in the definition of duties in our constantly changing complex real world.⁷³ (4) There is an enormous politically powerful litigation industry that would be largely superfluous. Lastly, (5) The bottom-up system of private litigation with a lawyer standing by

⁷¹ Compare *Raum v. Rest. Assoc., Inc.*, 675 N.Y.S. 2d 343, 344 (1st Dep't 1998) (holding that state may exclude unmarried partners of a decedent from bringing a wrongful death action) with *Thompson v. Dewey's South Royalton, Inc.*, 733 A.2d 65, 69 (Vt. 1999) (holding that father, child, live-in partner, and partner's child all had a right to recover loss of means of support from bars, their owners and employees after decedent drank excessively and died as a result of injuries sustained in a car crash).

⁷² See Peter H. Schuck, *Equity for All Victims*, N.Y. TIMES, Dec. 19, 2001, at A35.

⁷³ See John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 723 (2001) (explaining that the tort system fills the "default norm that the civil justice system will provided a remedy for every wrong.").

his or her client is something that appeals to our sense of justice even if the paradigm is somewhat tarnished.⁷⁴

Feints in the direction of transcending the tort system through mechanisms like workers compensation,⁷⁵ limited auto accident payments,⁷⁶ coal miner black lung disease compensation,⁷⁷ and tide-over relief for crime victims⁷⁸ have been very limited. Both national and state legislatures are skeptical of any government expansion of payment for the injured except in a national no-fault social security system.⁷⁹

VII. CONCLUSION

Moderate rather than radical changes in our litigation system are what you should expect. The mountains will only slightly erode into the valleys. Our present litigation model is not as plaintiff-friendly or as litigation-heavy as some believe it to be. As to the near future, indications are that incentives and opportunities for plaintiffs to litigate will continue to decrease slightly, favoring defendants. There is just a hint of a shift in American litigation towards the more conservative models of England, Europe, and Japan.

⁷⁴ See generally THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 67 (2001) (noting that the "inherent flexibility of tort law allows it to mediate social inequities as they arise"); Jack B. Weinstein, *Compensating Large Numbers of People for Inflicted Harms*, 11 DUKE J. OF COMP. & INT'L LAW 165, 177 (2001).

⁷⁵ See, e.g., N.Y. WORKERS' COMP. LAW §§ 1-355 (McKinney 1992-1994).

⁷⁶ See, e.g., N.Y. INS. LAW § 5201 (McKinney 2000) (establishing a state-created not-for-profit corporation that pays no-fault claims to pedestrians when they cannot recover from the vehicular operators who harmed them).

⁷⁷ See, e.g., Federal Mine Safety and Health Amendments Act of 1977, as amended, 30 U.S.C. §§ 901-45 (2000).

⁷⁸ See, e.g., N.Y. EXEC. LAW §§ 620-35 (McKinney 1996).

⁷⁹ See Federal Disability Insurance Trust Fund, 42 U.S.C. § 401 (2002); see also, Louis Uchitelle, Laid Off Workers Swelling the Cost of Disability Pay: Most From Low End Jobs, N.Y. TIMES, Sept. 2, 2002, at A1.

