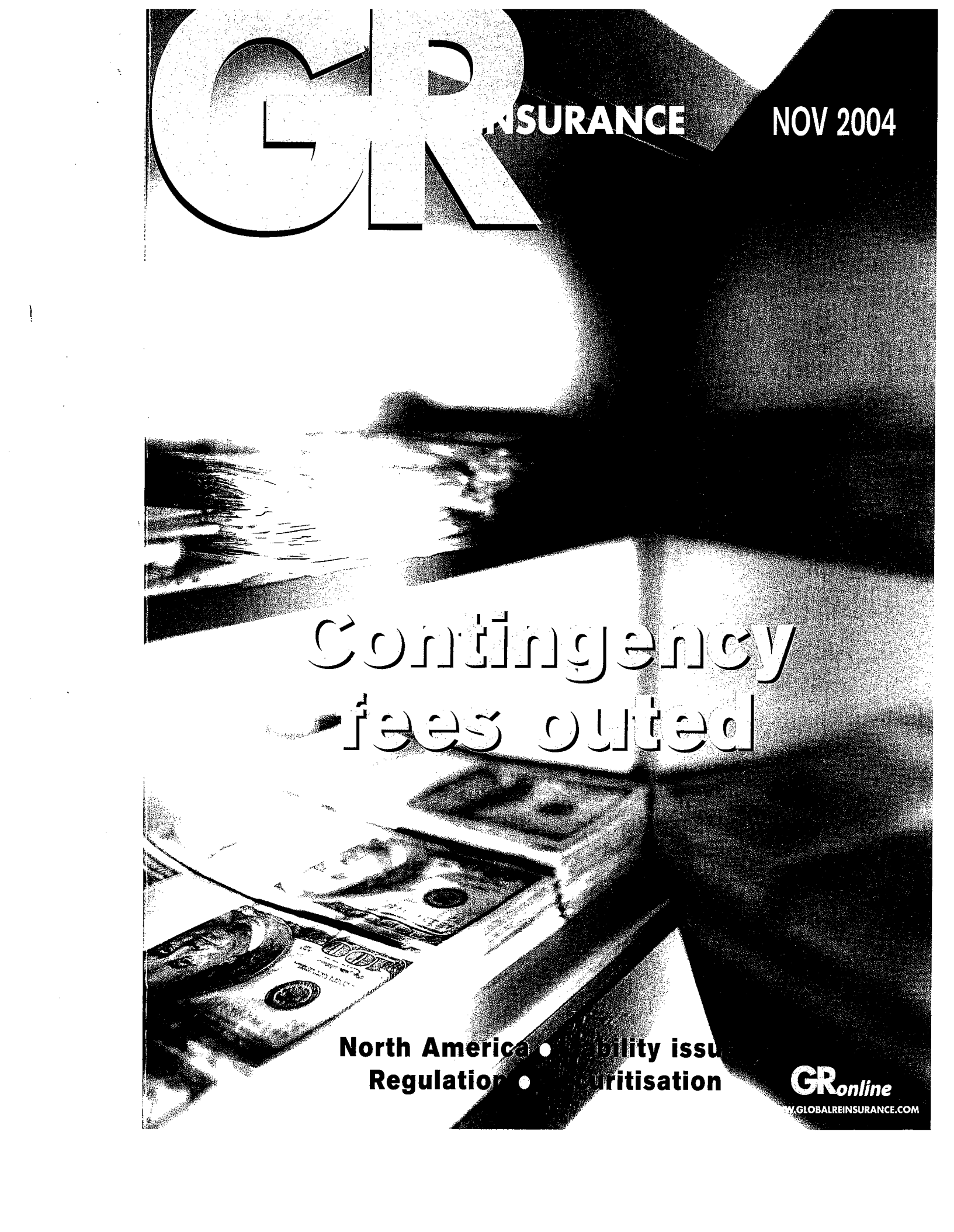
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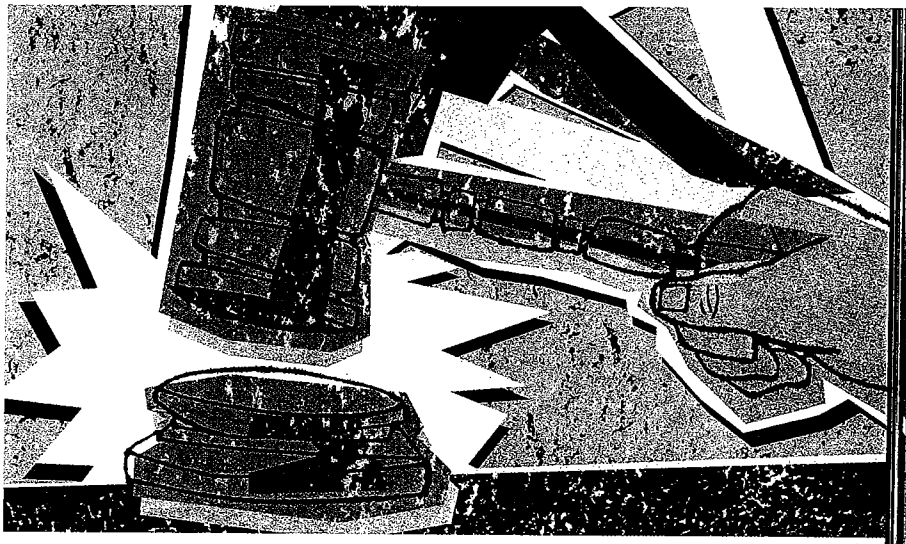

Victor E Schwartz *and* Cary Silverman *look at civil justice reform in the 108th Congress and an important state reform.*

PRESSURE FOR REFORM

US Congress is currently considering legislation to address three serious problems in the civil justice system: frivolous lawsuits that plague small businesses, the rise of 'litigation tourism' in which plaintiffs' lawyers travel with their cases to friendly jurisdictions, and the troubling potential for regulation through litigation of food products and services. Proposals to address these problems are encompassed in the *Lawsuit Abuse Reduction Act* and the *Personal Responsibility in Food Consumption Act*, both of which passed the House of Representatives by wide margins and await Senate action.

Another troubling issue, the driving up of pain and suffering awards to evade statutory caps and constitutional limitation on punitive damages, can be countered by adoption of new model legislation developed by the American Legislative Exchange Council, the *Full and Fair Noneconomic Damages Act*, in the states.

The Lawsuit Abuse Reduction Act

Frivolous lawsuits pose a great threat against small businesses including 'mom and pop' stores, restaurants, schools, dry cleaners and hotels. It costs little more than a $100 filing fee and often takes no more time than generating a form complaint to begin a lawsuit. Additional defendants, who may have nothing to do with the case, can be named at no charge. It costs much more for a small business to defend against it. The system is rigged to allow, in effect, legal extortion.

Plaintiffs' lawyers realise that the cost of defending a case for a small business or its insurer, even when it has no factual or legal basis, will typically be more than $10,000. Thus, a plaintiff's lawyer may propose a settlement amount that is lower than the expected defence costs to make the case 'go away'. The defendant's insurer is then placed in a dilemma. If it fights the case and a judge allows the case to go to a jury, and the jury renders a verdict above policy limits, the insurer could be subject to a claim by its insured for wrongful failure to settle. On the other hand, if the insurer settles such a case, over time such action will cause the defendant's insurance costs to increase exponentially. Under the current system, small businesses have no effective recourse when hit with a frivolous lawsuit.

The weaponry against frivolous lawsuits was considerably weakened when Federal Rule of Civil Procedure 11 was modified in 1993. Subsequently, state rules that are tied to modifications in federal rules were also weakened. The 1993 changes to Rule 11 allowed the lower end of the personal injury bar to commit legal extortion. Plaintiffs' lawyers could bring frivolous claims, knowing that they would not be penalised, because a new 'safe harbor' provision allowed them to simply withdraw their claim within 21 days and escape any sanction. Even if sanctioned, the offending party was no longer required under Rule 11 to pay the litigation costs of the party burdened by a frivolous lawsuit, motion, or other pleading.

The weakening of Rule 11 has led to an almost total failure of attorney accountability. As officers of the court, personal injury lawyers should be accountable to basic, fair standards: they should be sanctioned if they abuse the legal system with frivolous claims.

To address this situation, the House of Representatives passed the *Lawsuit Abuse Reduction Act* (LARA), HR 4571, by a vote of 229–174 on 14 September 2004. LARA eliminates the 'safe harbor' for frivolous lawsuits. It would restore mandatory federal sanctions on attorneys, law firms, or parties who file frivolous lawsuits, the lawyers having to pay the costs of defending such claims. LARA also allows a court to impose sanctions for frivolous or harassing conduct during discovery. The sanctions available under Rule 11 would apply in federal courts as well as in state cases that affect interstate commerce.

The House judiciary committee also added a 'three-strikes' provision to the bill. This would require a federal court to suspend an attorney from practising before that court for one year if he or she brought three frivolous claims before that federal district court.

Apart from dealing with frivolous claims, LARA addresses a major problem in the current US national judicial system: forum shopping. Forum shopping occurs when 'litigation tourists' are guided by their attorneys into bringing claims in what the American Tort Reform Association (ATRA) has called "judicial hellholes". These are certain jurisdictions in the US that consistently show "a systematic bias against defendants, particularly those located out of the state".

These courts have become a powerful magnet for out-of-state plaintiffs that have absolutely nothing to do with a local jurisdiction. Often, the plaintiff was not injured in the jurisdiction, never lived in the jurisdiction, and does not work in the jurisdiction. Such lawsuits clog local courts, delay justice to those who live there, and place a burden on local taxpayers. LARA would stop the unfair forum shopping by limiting plaintiffs to

Personal injury lawyers during trial and in closing arguments push juries to punish defendants through extraordinarily high and sometimes unreasonable pain and suffering awards

filing lawsuits where they live, where they were hurt, where they worked, or the defendant's principal place of business.

In recent years, broad or complex legal reforms, such as legislation to move multi-state class action lawsuits to federal court, a proposal to create a federal administrative system to compensate claimants with asbestos-related injuries, and medical malpractice reform have each faced substantial obstacles because the wealthy personal injury bar and their allies make it very difficult to overcome threats of a Senate filibuster. They are deserving proposals that should, but have not yet, become law. Some believe, and experience has shown, that short, focused bills such as LARA and the *Personal Responsibility in Food Consumption Act* may be more successful.

LARA awaits a vote in the US Senate. It has the support of a broad range of organisations, including the National Federation of Independent Business and the National Restaurant Association, and should receive strong bipartisan support. In fact, both Senator Kerry and Senator Edwards have gone on record as supporting mandatory sanctions and a three strikes provision in the medical malpractice context. According to newspaper reports, however, Senators Kerry and Edwards have expressed opposition to LARA and suggested that monetary sanctions should be confined to medical malpractice. It is not clear, however, why small businesses do not merit the same protection as doctors, or why any litigant should be subject to frivolous claims.

The Personal Responsibility in Food Consumption Act

One type of questionable lawsuit argues for a new approach to food liability. These lawsuits charge that regular consumption of a restaurant's food was a significant or substantial factor in the development of obesity, diabetes, coronary heart disease, high blood pressure, elevated cholesterol, or other adverse diseases or health effects. It is not that any particular food product contains a defect; it has always been common knowledge that obesity can occur when people consistently overeat and fail to burn off excess calories. While the common law of torts does not support such claims, entrepreneurial attorneys have nevertheless filed lawsuits on behalf of obese children and their parents or guardians against such businesses as McDonald's. The lawsuits attempt to 'regulate through litigation' what products restaurants can serve and how – public policy decisions typically reserved for legislators and the appropriate regulatory authorities. While the first of these lawsuits were not successful, those bringing such claims have predicted, "we'll find a judge. And we'll find a jury" that will find food sellers liable for their customers' weight gain.

The public overwhelmingly supports legislation banning obesity suits. A July 2003, Gallup poll showed that 89% of respondents oppose the idea of suing fast food restaurants for obesity problems. A similar survey conducted by Research International and Lightspeed Research showed that 79% of respondents agreed that "it is our own responsibility to fight obesity". Only 11% were willing to blame manufacturers and sellers of food.

On 10 March 2004, the House of Representatives passed the *Personal Responsibility in Food Consumption Act*, HR 339, by a healthy bipartisan majority. The final vote was 276 – 139 and included 55 Democrats supporting the bill. A companion bill in the Senate, known as the *Commonsense Consumption Act*, S 1428, has garnered strong support and awaits legislative action.

The legislation under consideration in Congress assures that restaurants and other sellers of food will not be subject to the huge costs of discovery to defend against baseless lawsuits that are not supported by existing law. These bills help assure that consumers are not denied access to food choices because litigation threats have forced businesses to stop selling products that are perfectly healthy when they are consumed in moderation. The bills are narrowly tailored to apply only to obesity-related lawsuits. It would not limit liability if a seller makes false claims about a product or intentionally violates a federal or state statute or regulation in a way that causes obesity, and does not restrict the authority of the Federal Trade Commission and Food and Drug Administration to protect consumers.

While this issue requires a national solution, given the impact that a single judge can have on a nationally distributed product or restaurant chain, state action is also helpful. As federal legislation has moved forward, 12 state legislatures have acted to ban obesity suits, including Arizona, Colorado, Florida, Idaho, Georgia, Illinois, Louisiana, Michigan, Missouri, South Dakota, Tennessee, Utah and Washington.

The Full and Fair Noneconomic Damages Act

Damages for pain and suffering are intended to compensate the plaintiff for physical suffering and anguish. These damages are inherently subjective, and it has been stated that "juries are left with nothing but their consciences to guide them". Personal injury lawyers have exploited this gap and, during trial and in closing arguments, push juries to punish defendants through extraordinarily high and sometimes unreasonable pain and suffering awards.

The most blatant example of this occurred in a product liability case involving the heartburn drug Propulsid. There, the jury awarded $10m in compensatory damages to each of 10 plaintiffs, upon a lengthy improper closing argument in which they were urged to "send a message" even though the trial court found insufficient evidence of bad conduct to even allow a jury to consider awarding punitive damages. Fortunately, in this case, the Mississippi Supreme Court intervened in May 2004 and overturned the award precisely due to such abuse.

However, it happened again this year when a Beaumont, Texas, jury awarded $1bn, including $100m in pain and suffering on top of a much more modest $1.6m in economic or special damages, against Wyeth Pharmaceuticals for claims associated with the diet drug Pondimin. The inflated pain and suffering award allowed the trial court to uphold the jury's subsequent $900m punitive damage award. That case is on appeal.

Given the lack of standards, it is imperative that judges properly instruct the jury on the purpose of pain and suffering awards. Juries must understand that these awards must serve a compensatory purpose and may not be used to punish a defendant or deter future bad conduct. When juries reach an extraordinary compensatory damage award, both trial and appellate level judges must closely review the decision to ensure it was not inflated due to the consideration of inappropriate evidence. Without proper oversight by the court, the jury can be directed away from the plaintiff and toward the wrongdoing of the defendant by a carefully constructed maze of 'guilt evidence'.

Inflated pain and suffering awards are not subject to the extensive constitutional and statutory controls that help assure that real punitive awards are based on the evidence, serve their proper function, and are not excessive. The inflated "compensatory" award can then be used to justify and uphold a higher punitive damage award than would otherwise be constitutionally permissible. A prominent judge on the US Court of Appeals for the Fourth Circuit, Paul Niemeyer, has recognised this problem and called for legislative reform.

In order to address this problem, the nation's largest bipartisan membership organisation of state legislators, the American Legislative Exchange Council (ALEC) recently developed a new model *Full and Fair Noneconomic Damages Act.* ALEC's model legislation, which was developed for the consideration of state legislatures, would preclude the improper use of 'guilt' evidence in the calculation of pain and suffering damages. It would also enhance the opportunities for meaningful judicial review of such awards.

Real solutions

LARA and the *Personal Responsibility in Food Consumption Act* provide real solutions for addressing frivolous lawsuits, forum shopping, and the latest style of lawsuit that denies personal responsibility while limiting consumer choice. The Senate should follow their House colleagues and approve both bills.

As states prepare to begin their 2005 sessions, legislators have a new tool at their disposal. States should add the *Full and Fair Noneconomic Damages Act* to their legislative menus to stem the use of pain and suffering awards to evade statutory and constitutional safeguards on excessive damages. **GR**

By Victor E Schwartz and Cary Silverman

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