

Tort Reform

Stuart Ollanik

Some plaintiffs lawyers like to refer to the recognition of individual rights by the courts in the mid-20th century as the real “tort reform.” This includes the rise of causes of action for civil rights abuses, employment discrimination, toxic torts, and liability for dangerous products. More commonly, the term “tort reform” has been used to describe efforts to limit those rights through legislation. Particularly, the phrase has been attached to the wave of state statutes limiting rights of recovery and capping damages that were widely adopted in the 1980s in response to a perceived “insurance crisis.”

In three features in this issue of *TortSource*, proponents of a new wave of lawsuit-limiting “tort reform” state their case. They suggest the need for a new round of leg-

islation to respond to current perceived threats to corporate defendants. Are these threats real? The author of our fourth lead article discusses studies she says show that the “insurance crisis” that gave rise to the last round of “tort reform” never really existed. Are the new proposed reforms warranted? Would they provide needed fairness to business or greater dangers to consumers? Do they seek to restore or undermine the proper constitutional balance between legislative, administrative, and judicial decision-making? These issues will be debated in the years to come.

Also in this issue, Alan Lazarus reports on the Supreme Court's recent pronouncement on punitive damages and identifies its implications and, perhaps most importantly, the issues it leaves unanswered. ♦

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Illustration by Andrew O. Alcalá

The Insurance Cycle [The Reform Cycle]

Joanne Doroshow

The tort “reform” movement of the last two decades has turned the civil justice system into a battleground. Founded in 1986, the American Tort Reform Association (ATRA), with the backing of 300 corporate, professional, and insurance trade organization members, boasts that most states have enacted some form of tort reform—laws that restrict the rights of injured consumers to sue and be fully compensated for their injuries.

In the mid-1980s, manufacturers, municipalities, doctors, nurse-midwives, daycare centers, nonprofit groups, and many other commercial customers of liability insurance were faced with skyrocketing insurance rates, coverage reductions, and arbitrary policy cancellations. Many could not find coverage at any price.

Insurance companies said costs were being driven up by an “explosion” in litigation and claimed “frivolous lawsuits” and “out of control” juries were forcing them to make insurance unaffordable or even unavailable. They told state legislatures around the country that the only way to ease this crisis was to limit tort laws, to make it more dif-

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The Changing Landscape

Mark A. Behrens and Cary Silverman

For more than a decade, civil justice reform efforts have focused on punitive damages, products liability, and medical malpractice liability, among other issues. Although these traditional efforts are important and should continue, the frontier of tort reform reveals new challenges to be addressed: judicial nullification of state tort reform legislation, regulation and taxation through litigation, and an explosion of state court class actions.

Judicial Nullification

Plaintiffs' bar scholars consider judicial nullification of state tort reform legislation one of the most significant occurrences in tort law from the plaintiffs' perspective in the past 50 years. Judicial nullification occurs when state courts use state constitutional provisions to overturn legislative tort policy decisions. This practice relies on the

growing willingness of some state courts to substitute their own views of proper tort law for that of state legislators.

Many of the decisions overturning tort reform statutes are based on the assumption that state courts have a fundamental and exclusive right to make state tort law, which ignores both sound policy considerations and legal history. The decisions overlook the fact that legislatures are uniquely situated to reach informed decisions on the need for broad and complex public policy changes. Also ignored is the fact that when state legislatures delegated to state courts the authority to develop the common law in accordance with the “public policy” of the state, the legislatures also provided that such authority could be retrieved.

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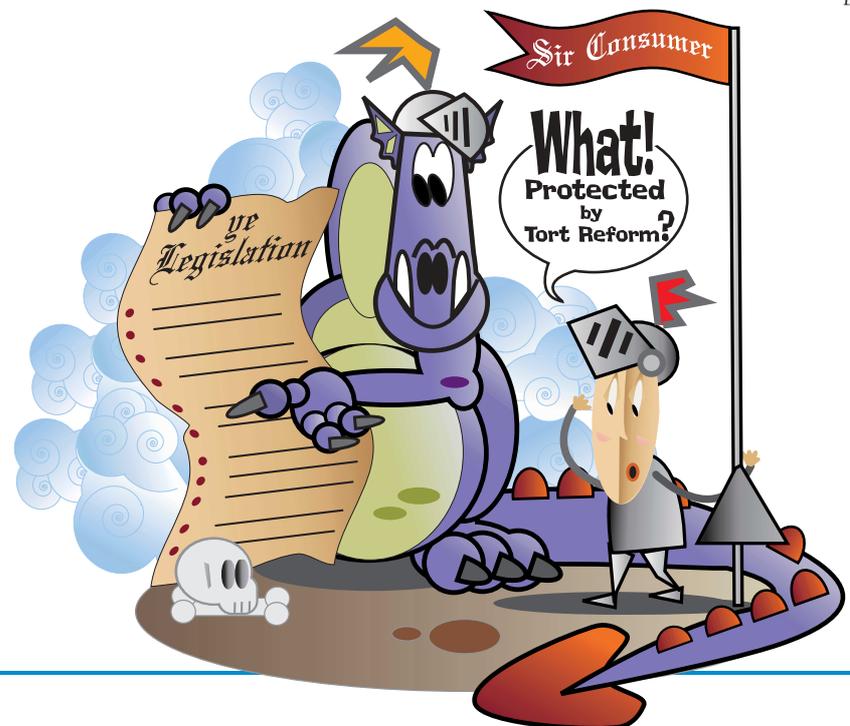


Illustration by Andrew O. Alcalá

The ABA Responds

In September 20, 2001, the American Bar Association named a task force of experts in diverse areas of the law to offer counsel to the country's political leaders as they consider measures in the wake of the September 11 terrorist attacks. The

Task Force on Terrorism and the Law, chaired by Robert Clifford of Chicago, began its work at once. ABA President and former Chair of the Tort and Insurance Practice Section Robert E. Hirshon declared that "we need to make sure the mechanisms exist that will permit prompt and effective investigation and prosecution of those responsible for these heinous acts, while at the same time ensuring we preserve the fundamental principles of our system of constitutional law." Richard P. Campbell, Chair of the ABA's Tort and Insurance Practice Section, was named to the task force. ❖

Kirsten L. Christophe In Memoriam

TIPS member Kirsten L. Christophe died in the September 11 terrorist attack on the World Trade Center in New York. She was a Council member, an active TIPS member, and most of all, our friend. The following remarks were made by Dick Campbell and Francine Semaya during services held for Kirsten.

Excerpts from the remarks by Dick Campbell:

We at TIPS have taken the enemy's arrow deeply to our hearts. Our colleague, Council member, and friend Kirsten Thompson Christophe was murdered only one week after her return to work. Thinking of her we must keep in mind the last verse of the hymn "On Eagles Wings": "For to His angels He's given a command to guard you in all your ways, [and]

upon their hands they will bear you up. . . .

Kirsten Christophe, our fallen colleague, was a true believer in our profession, our creed of freedom, justice and equality, and the rule of law. She was the epitome of dedication, integrity, professionalism, and hard work.

That was Kirsten's mission: Secure a meaningful place at the table for women and minorities; reach out to lawyers from small towns to large cities and from huge national law firms to sole-practice storefront operations; assist non-profits; improve lawyer competence; and, most of all, promote professionalism.

We hear much about the challenges facing young women today. They are pulled in all directions by the demands of their husbands, their children, and their careers.



Kirsten Christophe faced those demands on all fronts and won hands down. She was what all women aspire to be. No, let me restate that. She was what all of us, women and men, aspire to be. She was the successful businesswoman, the consummate professional, the loving and devoted spouse, and a truly radiant parent.

Excerpts from the remarks by Francine Semaya:

If I really was Kirsten's role model, then I am truly honored, because as I watched Kirsten grow and mature, not only as a lawyer but also as a person, she became the consummate role model for so many other

young women. Over the last two weeks, I have spoken to so many of our mutual friends and colleagues, and they all have the same things to say. "Kirsten was a natural, she juggled her lifestyle so easily—as a devoted daughter, beloved wife, nurturing mother—as easy as could be. She gives her all to everything she does, and she does it all." One of our colleagues, Sandy, said it best when she said, "Kirsten was just good, she was so normal."

When I stop and think of the tragic events of September 11, I become angry and then I become sad. To have lost someone as special as Kirsten to such blind hatred is unconscionable to me. But, when I step back and think, I know that Kirsten was doing what she does best—helping those less fortunate than herself—and I don't believe we have lost. Yes, we have lost hearing her voice, receiving her hugs, laughing at her jokes, and, most of all, watching her with Charles and Gretchen, but I truly believe that with everything we do from now on, we will have Kirsten guiding us, as always, to do the right thing. ❖

Regulating Against Regulation (by Litigation)

Richard L. Cupp Jr.

Everyone knows that lawmakers are adept at generating hot air. The nation sorely needs them to direct some of it back into the sails of tort reform restricting government-sponsored mass tort lawsuits.

The tort reform movement is primarily associated with restricting lawsuits, but in many situations, tort reform could just as fairly address expanding meritorious lawsuits. The plaintiffs' bar often attempts to generate favorable legislation but is rarely successful on a large scale—when a pro-plaintiff statute is enacted, it rarely is thought of as "tort reform." That term, along whatever legislative momentum still exists, seems to belong to those favoring more restrictions.

Several factors influence this. The electorate on the whole is likely less pro-plaintiff than is the judiciary, despite the latter's staid image. Further, efforts at restrictive legislation are relatively well funded and well coordinated. Another factor—possi-

bly more variable yet more interesting—is that public sentiment regarding the appropriate scope of tort liability reflects social conditions.

In the 1960s unprecedented national prosperity and emphasis on individual liberties (themselves likely related) fueled explosive growth of the tort system. Courts perceived themselves as responding to the public's wishes in expanding liability, and, if pro-plaintiff jury decisions are any measure, the courts' perceptions were correct. Even legislatures seemed to favor expansion in those days (although, tellingly, they often moved less quickly than the supposedly stodgy courts).

Only when the economy soured in the mid-1970s and the conservative Reagan revolution rose in its wake did tort reform don its present restrictive mantel. Insurance crises in the mid-1970s and mid-1980s and effective advertising and lobbying campaigns by insurance compa-

nies that attributed the crises to the tort system set the stage for an unprecedented flurry of restrictive legislative reforms.

However, by the 1990s the pace of restrictive reform slowed. The economy was doing well. Insurance crises had become an increasingly distant memory. Indeed, product liability and other insurance became significantly cheaper. By the early 1990s, the average product seller had no trouble obtaining insurance, which cost on average only 16 cents for every \$100 of product sales. Although these developments received nowhere near the media attention that accompanied the insurance crises of the earlier decades, they obviously provided less fodder for sensationalistic stories about how courts were going overboard. This weakening of the citizenry's perception of crisis, along with a perception by many courts that much of the legislation was overreaching, took much of the wind out of restrictive tort reform's sails.

Perhaps ironically, during this period of diminishing interest, arguably the most legitimate and socially important basis for restrictive tort reform has begun to take shape. Government-sponsored mass tort claims, starting spectacularly with tobacco and now spreading to handguns and lead paint, threaten significant harm to the tort system and to representative democracy.

They offer the most compelling argument to date for restrictive reform.

Government-sponsored mass tort claims are the most extreme form of what some identify as "regulation by litigation," in that the very entity charged with regulating by legislation (government) is generating the claims. Government-sponsored lawsuits allow government to impose massive new taxes through the courts when doing so through the legislatures would be messy or impossible. They encourage government to "roll the dice" with claims lacking merit, because the private law firms working the claims typically offer contingency fee arrangements. They encourage graft and influence peddling because private law firms are often chosen behind closed doors—sometimes after providing generous financial support to the politicians who do the hiring. They diminish the legal profession's credibility and respect by creating instant-billionaire lawyers from obscure fees.

Most importantly, government-sponsored claims present enormous potential for generating unfair results. Numerous government entities can make claims for millions of citizens, but there are concerns that government's perceived moral authority could unduly sway jurors. This ultimately

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Class Actions: The Problem

Joyce Kraeger

Class actions have been a part of American jurisprudence since its inception, but the recent explosion of such suits and the abuses that accompany them have generated a high level of concern on the part of insurers and the larger business community alike.

Many explanations exist for the dramatic rise in class actions—from changes in procedural rules to the need for more aggressive marketing efforts by attorneys. However, the result is the same across all segments of the business community. Class actions are forcing corporations to focus on lawsuits rather than on manufacturing better products, providing better services, or lowering their prices.

Today, the class action device is employed in a wide variety of litigations, including consumer, securities, antitrust, employment, civil rights, and, increasingly, in mass-accident, product liability, and toxic tort litigations. The class action concept is quite appealing in theory, permitting ordinary citizens with relatively minor claims and damages to collectively invoke the power of the law against wealthy and organized corporations. Nevertheless, abuses have raised product costs and frequently resulted in diminished recoveries for litigants but disproportionately large attorneys' fees.

Class actions can seem coercive when filed as a threat or pressure tactic and are sometimes frivolously filed to harass and intimidate. Nevertheless, many defendants can be forced into unwanted settlements when faced with the extraordinary costs of defending a class action.

Further abusing the procedure, plaintiffs often take a shotgun approach to class actions by including defendants without investigating whether they are proper parties to the lawsuit. This approach abuses the class action by permitting discovery and fishing expeditions merely to support filing subsequent class actions after dismissal.

Even when plaintiffs win a class action, high attorneys' fees allow little dollar return for class members. From their perspective, only the attorneys seem to profit from such windfalls. Such cases have heightened the public's awareness of the abuses inherent in the current system, as a report issued by the Insurance Research Council in June 2000 illustrates. The *Public Attitude Monitor 2000* report examined public opinions concerning class action lawsuits and included findings based on a survey conducted in February 2000 by Roper Starch Worldwide, Inc. Not surprisingly, a whopping 70 percent of those surveyed said they either somewhat agreed or strongly agreed that reform is needed.

In a study conducted in 1997, the RAND Institute for Civil Justice noted that the landscape of class action activity had shifted dramatically in the past several years. Litigation increased at a rapid rate, especially in state courts, and most of it was focused in the consumer area, with burgeoning claims alleging fraud, deceptive advertising, and improper calculation of fees and other charges.

The Federal Judicial Conference's advisory committee on civil rules estimates that corporations today face a 300 to 1,000 percent increase in the number of class action lawsuits.

What Can Be Done?

One reform that would significantly improve the landscape of class action litigation is federal legislation to make it easier to remove class actions from state court to federal court and to grant federal district courts original jurisdiction over class actions with minimal diversity.

Federal courts are better equipped than state courts to deal with complex cases that class actions typically produce. It is important to note that current federal proposals addressing this issue change neither class action rules nor plaintiffs' rights to recovery. They impact merely which court should hear the case. The RAND study confirms that the majority of class actions are filed in state court. The bulk of these filings could be redirected to the federal court system, which has generally been more protective of consumers' and defendants' rights in class actions and which is better equipped to deal with the complexities.

State legislation also should be enacted. Reforms here would: (1) give greater weight in judicial proceedings to an insurer's compliance with applicable laws, regulations, and agency pronouncements; (2) require a court to refer certain cases to the state insurance department for resolution; (3) stay discovery in class actions while a motion to dismiss is pending; and (4) limit the size of appellate bonds or authorize courts to waive such bonds.

• Presumption of Validity

Often insurers named as defendants in a class action received approval for the practice or activity from the state insurance department at an earlier time, or even were in compliance with all applicable statutory and regulatory requirements relating to the practice or activity at all relevant times. These cases greatly frustrate insurers, who believe they are in a "no win" situation because the company at the time in question acted in good faith. At a later date, however, once the activity or practice was challenged, the company cannot use the department's prior approval or the company's compliance as a defense in the litigation.

Allstate and Texas Farmers Insurance were sued early in 1996 in Texas over a practice known as "double-rounding." Pursuant to state insurance regulations, insurers were allowed to round automobile and homeowners insurance premiums to the nearest dollar to simplify their calculations. However, a class action suit was filed over the companies' practice of rounding twice—once after calculating premiums and again after dividing premiums into two semi-annual payments.

In court proceedings, Allstate produced written documentation from a Texas insurance regulator instructing Allstate to engage in the double-rounding procedure. Nevertheless, this approval did not carry the day in court, and Allstate ultimately settled the case for approximately \$35 million, with \$25 million going to policyholders in the form of refunds and \$10 million to the plaintiffs' attorneys. Each policyholder was expected to receive approximately \$5.50.

This is just one of many class actions involving insurers who in good faith followed the law and the instructions received from a regulator with respect to a particular practice or activity only later to find themselves in court, second-guessed by a plaintiffs' attorney engaging in "class action regulation." In order to promote fairness and provide greater certainty and predictability in the business of insurance, the states should enact legislation that would create a rebuttable presumption of validity in civil actions against regulated entities for practices and activities that were approved by the applicable regulatory body.

• Exhaustion of Administrative Remedies

Another important reform measure is state legislation to require a court to dismiss or abate a proceeding where state agency jurisdiction is involved. Further, legislation should provide that relief awarded to a claimant may be adequate even if the relief does not include exemplary damages, multiple damages, attorneys' fees, or costs of court.

Had such a procedure been in place in Texas at the time of the premium-rounding case, the matter would have been transferred from state court to the Texas Department of Insurance for resolution. Consumers unhappy with their bills thus could have filed complaints with the department, which could have ordered appropriate relief, saving all parties both time and money.

Consumers would undoubtedly be better served under this approach, because state insurance regulators are experts in the field and are not motivated, as class action plaintiffs' attorneys might be, by their own financial gain. Additionally, judicial resources would be conserved under such an approach, and referral to an administrative agency might discourage the filing of frivolous class action suits and give companies more time to take corrective action.

• Staying Discovery

By staying discovery while a motion to dismiss is pending, attorneys' fees would be greatly reduced, and defendants who never should have been named in the first place could be dismissed promptly from the litigation, saving time and money.

• Appellate Bonds

Finally, legislation or rules of court should limit the size of appellate bonds required for all civil awards for damages in class actions or authorize the waiver of such bonds, especially in appeals of punitive damage awards. Currently, many state courts have discretion to require that a bond be posted in the amount or an amount in excess of an award before an appeal can proceed. Many corporate defendants find that the bond requirement is an obstacle to appealing large jury verdicts for class action suits and those involving punitive damages. A limit would facilitate the appeal of class action verdicts.

Conclusion

The need for class action reform has never been greater. The reforms discussed above are largely procedural in nature and do not operate to "close the courthouse doors" on injured plaintiffs. Rather, they would return class actions to their original purpose and restore a sense of fairness and balance to such litigation. ♦

Joyce Kraeger is an attorney with the Alliance of American Insurers in Downer's Grove, IL.

The Changing Landscape

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The American Legislative Exchange Council (ALEC), the nation's largest bipartisan membership association of state legislators, has proposed a model Separation of Powers Act to address this issue. The act would remind courts and the public that legislatures that repeal or modify common law causes of action are following a practice engaged in by state legislatures from the earliest days of the country's history. Federal legislation provides another method of curtailing judicial nullification of civil justice reform. Although Congress is not likely to "federalize" the entire civil justice system, legislation at this level could provide redress for states that would not otherwise have the means to address unfair tort liability.

Regulation and Taxation Through Litigation

In recent years, a new trend has developed that violates the bedrock principle of separation of powers and threatens the landscape of tort law in America: regulation and taxation through litigation. This trend began with the state attorneys general tobacco lawsuits and is built upon a powerful new alliance between state executives and private, contingency fee lawyers.

Government-sponsored lawsuits are likely to proliferate. These cases give state executives a new revenue source without raising taxes and provide a chance to achieve a regulatory objective without legislative support. They also provide contingency fee lawyers with opportunities for astronomical fees.

In the wake of the state attorneys general tobacco litigation, government-sponsored lawsuits already have been brought against firearms manufacturers and companies that formerly made lead paint. Reports suggest that future targets of multigovernment litigation could include health insurers; manufacturers of automobiles, chemicals, alcoholic beverages, and pharmaceuticals; Internet providers; "Hollywood" media; videogame makers; and even the dairy and fast-food industries. ALEC has developed a number of positive approaches to curb the growth of such lawsuits.

Most government entities contract for goods and services in an open and competitive manner. In the state tobacco lawsuits, however, many attorneys general disregarded such practices and instead negotiated contingency fee contracts with handpicked personal injury lawyers. When partnerships between public officials and private personal injury lawyers are consummated behind closed doors, the attorney selection process can be abused for personal gain and political patronage.

ALEC has adopted model legislation to require open and competitive bidding and greater public oversight in government retention of private legal services. ALEC's model bill, the Private Attorney Retention Sunshine Act, would cap attorneys' fees at the equivalent of \$1,000 an hour and require private contingency fee lawyers to keep complete time and expense records. It also would ensure that states negotiate contracts for legal services in an open and competitive manner and would provide for at least one hearing if the contract likely would result in more than \$1 million in fees and expenses. Kansas, North Dakota, and Texas have enacted legislation based on ALEC's model bill.

Supersedeas (appeal) bonds provide security that a civil defendant who suffers an adverse judgment at trial will be able to pay it if appeals are unsuccessful. Most bonding

statutes were adopted when judgments were much smaller in scale; the laws are outdated and need reform.

Many defendants (even large corporations) may be financially unable to post the bond necessary to pursue an appeal. This is especially true if they face an exorbitant judgment in a government-sponsored lawsuit or large class action plus a concomitant bond to stay a judgment pending appeal. A defendant that goes to trial in such a case risks bankruptcy, and the only way to avoid this fate might seem to be to settle, even if the plaintiff's case seems flimsy or without merit. This loophole in bonding statutes can be abused and deserves attention.

Civil defendants should have full access to a state's appellate court system to challenge an adverse judgment. Recognizing this issue of fundamental fairness, Florida, Georgia, Kentucky, North Carolina, and Virginia adopted legislation modeled after an ALEC proposal on the right to appellate review. The Ohio Senate passed similar legislation in October 2001. The Mississippi Supreme Court adopted an appeal bond reform rule this year. Other states have passed narrower bond reform laws that apply only to cases against tobacco product manufacturers that have signed on to the state attorneys general litigation Master Settlement Agreement.

Class Actions

Class actions are supposed to be an efficient way to resolve with one lawsuit similar legal claims held by numerous people. Instead, class action litigation has become a money-making bonanza for plaintiffs' lawyers, often providing settlements resulting in million-dollar fees for the lawyers but little or no benefit for the actual class members. Instead, class members are often "compensated" with coupons or negligible damages awards—or nothing of value at all.

The explosion of class actions over the past decade has highlighted these abuses and allowed new ones to flourish. From 1988 to 1998, class action filings against Fortune 500 companies increased by more than 1,000 percent in state courts and by 338 percent in the federal courts.

ALEC has proposed a model Class Action Reform Act to improve state class action law. The bill would, among other things: (1) authorize appellate review of trial court orders certifying or denying certification of proposed classes; (2) establish a rule limiting the scope of plaintiff class actions to residents of the forum state; (3) adopt an explicit "class-wide-proof" prerequisite for class certification; (4) add a "maturity" factor to state class certification prerequisites; and (5) add an "administrative process" factor to class certification state prerequisites.

At the federal level, class action reform efforts are likely to concentrate on eliminating the federal jurisdiction loopholes exploited by plaintiffs' counsel to keep their cases before state court judges.

The solutions discussed in this article will not cure all the abuses of our legal system, but they provide a welcome starting place for current civil justice reform goals and should be strongly supported. ♦

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Regulating Against Regulation

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could persuade many targeted industries to capitulate and pay enormous settlements, even for claims that might not prevail if taken to trial. The lawsuits permit, and even encourage, government to transform itself from protector to marauder of the citizenry.

Limiting Government

To counteract these possibilities, legislators should enact at least three types of statutes to rein in government-sponsored mass tort claims:

1. Enact "sunshine laws" requiring open bidding when private law firms are employed and mandating that all material aspects of their representation agreements be public.

2. Require losers to pay attorneys' fees in government-sponsored cases. Loser-pays rules are unfair when one party has

limited financial resources and the other does not, because they pressure poorer litigants to surrender quickly even if they would likely prevail at trial—the risk of losing is unaffordable. However, this dynamic does not apply when governments sue industries, where both sides can typically afford significant attorneys' fees and a loser-pays rule would encourage the side with weaker arguments—rather than the side with the weaker pocketbook—to avoid litigation.

3. Bar the use of contingency fee arrangements in government-sponsored lawsuits. Contingency fees were designed to provide access to justice for the poor, and government tort lawsuits do not fit this intended purpose. If governments have a cause they believe in, they are capable of generating the resources to pay attorneys a reasonable hourly fee. Eliminating contingency fees in such lawsuits would eliminate government's "roll the dice" attitude toward

lawsuits by imposing a financial cost. This in turn would eliminate obscene legal fees and dampen the high risk/high reward dynamic that may cause lawyers to encourage governments to file suit even when potential claims are weak.

Perhaps tort "reform" should not always be associated with restrictive legislation. As the courts and legislatures continue to evolve, perhaps that term eventually will be used to describe plaintiff-friendly as well as defendant-friendly laws. But at present, our commitment to representative democracy and to a healthy tort system requires legislatures to renew their focus on restrictions, at least in this area. ♦

Richard L. Cupp, Jr., is a professor of law at Pepperdine University School of Law in Malibu, California.



Bad Faith and Punitive Damages, Second Edition, is now available on CD-ROM. This valuable resource contains annotations to first-party insurance cases, statutes, and regulations. It is available for \$179.00 (regular) and \$149.00 (TIPS members), PC 5190335, at 800.285.2221 or www.ababooks.org.



“When I Was a Young Lawyer”

**Honorable Cara Lee Neville
Judge of the Fourth Judicial District,
Minneapolis, MN**

What was your background like and what inspired you to become a lawyer?

My father was a businessman. He was competent and almost totally self-sufficient. The only time he wasn't was when he had legal matters to tend to, at which time he called his lawyer. I always assumed I would end up in business also, and thought I could benefit by having a law degree. I wrote my first essay on wanting to be a lawyer in ninth grade.

Where did you go to law school and what did you do right after that?

I attended William Mitchell College of Law in St. Paul, Minnesota. While in law school I clerked for the state prosecutor's office part time and upon graduation became an attorney in the criminal felony division. I loved the courtroom, but in 1975 women were hard pressed to get into the courtroom very often if they went to a civil firm, so I started trying felony cases as a prosecutor. As women lawyers were still a rarity in the courtroom, I had the advantage of always having the jury's attention.

Do you have any young lawyer experiences that particularly stand out in your memory? If so, what have you learned from them and how have they helped you to become so successful?

As a young lawyer I was so hungry for trial experience that I would go up and down the halls of the office asking to take any “extra cases” that anyone had. That meant I got a lot of lousy cases that no one else wanted to try, but I loved every minute of it. I worked very hard and very long hours, but to me it was fun. I remember concluding final argument, sending a jury out to deliberate, and immediately meeting someone on the elevator who handed me another file—after which I got off the elevator and started jury selection on my next felony case. It seemed like I was perpetually in trial. I still enjoy the courtroom and love a well-tryed case. It's a beautiful art form. Attention to detail, hard work, and long hours have served me well to this day.

Whom do you most admire?

All of the women lawyers and judges who came before me and paved the way so my journey would be easier than theirs. I hope I have done the same for those who have followed me.

What is your greatest source of professional pride?

My greatest accomplishment I believe has been raising two sons as a single parent for the last 16 years while serving on the bench and being an active member of the ABA and president of other legal organizations such as the National Association of Women Judges and the Amdahl Inn of Court. My oldest son has just started law school.



Cara Lee Neville
then and now



What got you started with ABA involvement?

I chaired a section of the Minnesota State Bar Association and for the first time our section actually made money because of some changes we made. The section voted to send me to an ABA meeting to be the state bar liaison. I loved seeing people deal with the most important issues of the day in the various sections, and of course I loved the lawyers and judges who had the energy and interest to make a difference. I believe those who are really involved in the ABA do so because they do believe they can make a difference.

What was the worst professional advice you ever received?

Luckily I didn't listen so I can't remember.

What was the best professional advice you ever received?

Take your work seriously but not yourself, and remember to laugh.

What personality traits have served you best over the years?

Perseverance, hard work, and a sense of humor.

What challenges you the most?

To stay ahead of the curve and to welcome new technologies and ideas while remaining steeped in history and stare decisis.

What is the one thing you cannot stand (regarding the law/lawyers)?

Incivility, followed closely by not being prepared. We all get busy and at times can't do our best, but for a few it seems to be a habit.

What is your favorite type of legal work?

Trials, trials, trials.

What are your future ambitions?

To remain free of apathy; to continue to care about issues, ideas, and the profession; to treat everyone I meet with respect, and to try to do better at all that I do and that which I hope to learn to do.

What can the ABA do to be a good home to young lawyers?

The ABA can give young lawyers the information they need substantively to be knowledgeable in their chosen field of the law, which in turn gives them confidence. The combination of knowledge and confidence, as well as the opportunities provided by sections and committees, will give them the ability and experience to become leaders in the law and in their communities. ❖

Cara Lee Neville's Advice for Young Lawyers:

- Above all, be scrupulously honest.
- Do your best even when being poked in the eye; be civil to everyone.
- Organize, prioritize, and be willing to work hard.
- Be a zealous advocate, but remember, the lawyer you are opposing today may be your new law partner next year, so treat her courteously.
- Watch trends in the law.
- Be sure to look at the surrounding forest from the trees' perspective. ❖



In Motion

Leo V. Boyle, TIPS member and president of the Association of Trial Lawyers of America, received the **ABA/TIPS Pursuit of Justice Award** at the TIPS meeting in Boston.

Vincent R. Fontana, of counsel to L'Abbate, Balkan, Colavita & Contini, L.L.P., recently addressed the 13th Annual Symposium of the Academy

of Trial Lawyers of Allegheny County, Pennsylvania.

Sandra McCandless of San Francisco, California, was recently elected a fellow of the **American College of Labor and Employment Lawyers**.

Richard Turbin, of Honolulu, Hawaii, was recently honored by his alma mater, Harvard Law School, by being selected as a **Traphagen Distinguished Alumni Speaker**.

Michael W. Drumke, of Chicago's Freeborn & Peters, was selected by

Chicago Lawyer and the *Chicago Daily Law Bulletin* as one of “**40 Illinois Attorneys Under 40 to Watch**.”

Pamela J. White, president of the Maryland State Bar Association and a principal of the Baltimore, Maryland, firm Ober/Kaler, has been selected to receive the first annual **Maryland Leadership in Law Award**.

Dennis J. Wall, of Orlando, Florida, is the author of *Litigation and Prevention of Insurer Bad Faith*. West Group is publishing the 2001 Supplement. ❖



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The Insurance Cycle

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difficult for sick and injured consumers to sue and be compensated by wrongdoers in court.

But what ultimately proved to be the true cause of the “liability insurance crisis” of the mid-1980s was not the legal system at all. Study after study that examined the property/casualty insurance industry found the same result: The “insurance crisis” was actually a self-inflicted phenomenon caused by the mismanaged underwriting practices of the industry itself.

The past few years, when the economy for the most part was booming, have found state court tort filings stable or declining. Only 10 percent of injured people file claims for compensation, and just 2 percent file lawsuits. Nearly eight times as many patients suffer an injury from negligent medical treatment than ever file a claim. Punitive damages are rarely awarded, and liability insurance costs for businesses are minuscule and dropping. The premium-gouging cash-flow underwriting practices of the insurance industry have been widely exposed. With these facts in mind, it may be hard to understand why tort reform remains on the national agenda.

Without question, one of the major reasons is the number of conservative, industry-sponsored think tanks, polling companies, and lobbying firms that are setting legislative agendas, devising strategies, and purchasing expensive media to convince the public that the tort system is out of control and needs to be scaled back. Because of the intensity of their efforts, it is sometimes easy to forget that it was the insurance industry that created the “crises” that led to the drive for tort reform in the first place. Given recent indications, the insurance cycle is about to change again.

The insurance industry’s profits and underwriting practices are cyclical, often characterized by sharp ups and downs. In fact, these underwriting practices and the insurance cycle caused a similar, less severe “insurance crisis” in the mid-1970s. During years of high interest rates and/or excellent insurer profits, insurance companies engage in fierce competition for premium dollars, lowering prices and insuring very poor risks just to get the premium dollars. In the mid-1980s, the cycle’s effects were exacerbated by a particularly exaggerated underwriting response to the high interest rates of the early 1980s—characterized by such risky underwriting as insuring the MGM Grand Hotel months after it burned down in a fire.

By 1985 interest rates had dropped, and investment income had decreased accordingly. The industry responded by sharply increasing premiums and reducing availability of coverage, creating a “liability insurance crisis.” As *Business Week* explained in a January 1987 editorial,

Even while the industry was blaming its troubles on the tort system, many experts pointed out that its problems were largely self-made. In previous years the industry had slashed prices competitively to the point that it incurred enormous losses. That, rather than excessive jury awards, explained most of the industry’s financial difficulties.

The National Association of Attorneys General and state commissions in New Mexico, Michigan, and Pennsylvania reached similar conclusions. Even the insurance industry admitted this internally. In 1986 Maurice R. Greenberg, president and CEO of American International Group, Inc., told an insurance audience in Boston that the industry’s problems were due to price cuts taken “to the point of absurdity” in the early 1980s. Had it not been for these cuts, he said, “there would not be ‘all this hullabaloo’ about the tort system.”

But to the public and to lawmakers, insurers told a different story. In fact, coming out of their bottom year of 1984, insurance companies marketed the idea that the civil justice system is flawed. The goal, in the words of industry leader John J. Byrne, GEICO’s chairman, was “to withdraw [from the market] and let the pressure for reform build in the courts and in the state legislatures.”

To support this effort, the Insurance Information Institute purchased \$6.5 million worth of print and television ads in 1986. Their headlines read “The Lawsuit Crisis Is Bad for Babies,” “The Lawsuit Crisis Is Penalizing School Sports,” and “Even Clergy Can’t Escape the Lawsuit Crisis”; the ads ran in *Readers’ Digest*, *Time*, *Newsweek*, and Sunday newspaper supplements. Insurance companies and other insurance trade associations complemented the campaign with their own ads.

State legislatures, regulators, and voters in ballot initiative states were told by business and insurance lobbyists (and their PR firms) that the way to bring down insurance rates was to make it more difficult for injured consumers to sue in court. A November 7, 1988, *National Underwriter* editorial entitled “Prepare for the backlash” bluntly conceded, “Let’s face it. The only reason tort reform was granted in many states is because people accepted our argument that it was needed to control soaring insurance rates.” At the same time, another business trade publication acknowledged “a virtual absence of empirical evidence that tort reform [would] indeed lower liability insurance rates or expand the insurance’s availability.”

When lobbyists were pushed hard by legislators to provide guarantees that rates would drop, they could not. In state after state, subsequent rate filings with insurance departments confirmed this. For example, in 1986 Washington State enacted what was considered at the time one of the most comprehensive tort reform bills ever. Before it passed, Ted E. Linham, president of the Washington State Physicians Insurance Association, testified that the new law would reduce premiums charged by the association, a mutual company, by 25 to 30 percent within 18 months after the legislation took effect. However, after the law passed, the company asked for a rate hike, and state regulators began looking for an explanation.

By the late 1980s, the insurance cycle had flattened out; rates stabilized, and availability improved everywhere. This had nothing to do with tort law restrictions enacted in particular states but was the result of modulations in the insurance cycle everywhere. As Washington’s insurance commissioner Dick Marquardt concluded in a 1991 report, it was “impossible to attribute stable insurance rates to tort-law changes or the damages cap” because rates also improved in states that did not pass tort reform.

This fact was confirmed much later in a 1999 Center for Justice & Democracy study, *Premium Deceit—the Failure of “Tort Reform” to Cut Insurance Prices*. After examining liability insurance rates in every state in the country between 1985 and 1997, the study concluded that enactment of tort reform had not succeeded in reducing insurance prices for insurance consumers. Some states that resisted enacting tort reform since 1985 experienced low increases in insurance rates relative to the national trends, and others that enacted major tort reform packages saw high rate increases.

After publication of the report, ATRA spokespeople admitted in published statements that lawmakers who enacted tort reform should not expect insurance rates to drop. ATRA President Sherman Joyce told *Liability Week* on July 19, 1999, “We wouldn’t tell you or anyone that the reason to pass tort reform would be to reduce insurance rates.” Victor Schwartz, ATRA’s general counsel and one of D.C.’s principal tort reform lobbyists on behalf of business interests, told *Business Insurance* he thought severe tort reform measures could reduce insurance rates; when pressed, however, he admitted, “more importantly . . . many tort reform advocates do not contend that restricting litigation will lower insurance rates, and I’ve never said that in 30 years.”

Tort reform has had terrible consequences for many innocent people yet done nothing to improve the affordability or availability of liability insurance for businesses or professions. Insurance companies that claim otherwise are severely misleading the country’s lawmakers. ❖

Joanne Doroshov is executive director of the Center for Justice & Democracy in New York City.



Mark Your Calendar

Life Insurance Law, Health and Disability Insurance Law, Public Regulation of Insurance Law, Employee Benefits, and Financial Services Integration Committees
28th Annual CLE Midwinter Meeting,
January 16-19 in Lake Buena Vista, FL
(312.988.5672 or 877.309.1565; e-mail:
aba@trexperts.com)

Fidelity and Surety Law Committee 2002
Annual CLE Midwinter Meeting, **January 25 in New York, NY** (312.988.5672)

TIPS Industry Conference: The Marriage
of Insurers and Outside Counsel: Renewal
of Vows or Trial Separation, **January 28-29 in Chicago, IL** (312.988.5672)

ABA Midyear Meeting, **February 6-12 in Philadelphia, PA** (312.988.5672)

Section of Dispute Resolution and Tort
and Insurance Practice Section Fourth
Annual Spring Dispute Resolution
Conference—“New Vistas in Dispute
Resolution,” **April 4-6 in Seattle, WA**
(312.988.5672)

Bioethics, Minorities and the Law, **April 5-6 in Tuskegee, AL** (312.988.5672)

TIPS 2002 Spring Meeting, **April 11-14, 2002 in Destin, FL** (312.988.5672)

2002 National Trial Academy, **April 20-24 in Reno, NV** (312.988.5656)❖



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Legislative Update

Leo J. Jordan

Air Transportation Safety and System Stabilization Act

(September 11 Victim Compensation Fund of 2001)

Rarely has legislation been introduced and passed with the speed of H.R. 2926. This bill was introduced in the House of Representatives on September 21, 2001, by Rep. Don Young (R-AK), immediately referred to four committees of the House, and passed (356-54) by 8:48 p.m. that night. The House bill was concurrently received in the Senate, read twice, considered, read the third time, and passed that same evening by a 96-to-1 margin. Late on September 21, the bill was cleared for White House consideration and presented to President Bush. The bill became Public Law No. 107-42 on September 22, 2001.

In summary this act:

(1) Directs the president to take action to compensate air carriers for losses incurred as a result of the terrorist attacks on the United States on September 11, 2001. Included are requirements to (a) issue \$10 billion in federal loan guarantees to air carriers; and (b) provide \$5 billion for direct losses incurred as a result of the government's decision to ground all aircraft after the attacks.

(2) Establishes an Air Transportation Stabilization Board to issue federal credit instruments. This board will have broad discretion to decide how much money an airline can receive. The board is comprised of the transportation and treasury secretaries, the Federal Reserve Board chair, and the comptroller general.

(3) Urges the secretary of transportation to take action to ensure continuation of scheduled air service to all communities, including essential air service to small communities.

(4) Authorizes the secretary of transportation to provide insurance and reinsurance against losses arising out of the operation of an American aircraft or foreign-flag aircraft while in the United States. It also limits air carrier liability for losses incurred as a result of acts of terrorism.

(5) Establishes a compensation program for any individual who was injured or killed as a result of terrorist-related aircraft crashes of September 11, 2001.

There is no question the September 11 attacks in New York City, Washington, D.C., and Shanksville, Pennsylvania, dealt a significant blow to the airline industry. Not only did American and United lose experienced pilots and flight attendants, but the subsequent total shutdown of American aviation had a severe financial impact on carriers and led to the layoffs of more than 100,000 employees.

With this summary in mind, I will concentrate the remainder of this article on sections of the bill that have considerable importance to TIPS members.

Federal Payment of Insurance Premiums

The *New York Times* reported on September 22, 2001, that airlines around the world would stop flying as early as September 24 after insurers said they would sell them only \$50 million in war and terrorism coverage. Before the attacks, this was included in the airline liability coverage of \$1.5 billion carried by each aircraft. Airline liability policies reportedly allowed insurers to cut back the coverage on seven days' notice.

The act allows the federal government to pay increases on airline insurance premiums over the insurance premium that was in effect ending September 10, 2001. It is likely the airlines will be required to buy the \$50 million in war and terrorism liability coverage offered by insurers; however, the premium for larger amounts would be paid by the government.

The federal insurance premium section of the act sets out an apparent limitation of coverage amounts. For acts of terrorism committed on an air carrier during the 180-day period from date of enactment, the secretary of transportation may limit the responsibility of air carriers to \$100 million, aggregate, for all claims arising out of such activities. Moreover, the act

provides that the federal government shall be responsible for any liability above that amount. Punitive damages against an air carrier or the government are proscribed.

H.R. 2926 also extends federal "war risk insurance" to cover domestic operations of airlines, expanding its former international-only scope, and covers vendors, subcontractors, and agents of airlines as well. An individual air carrier's liability for the events of September 11, 2001, is limited to the amount of liability insurance carried. Because four aircraft were involved in the attacks, the extent of insurer liability should be \$6 billion.

Aid to Insurers

In addition to this act's premium subsidies, the Bush administration has under consideration a proposal to pay a large part of future losses incurred by the insurance industry as a result of terrorist attacks. The proposal is intended to respond to the reported intent of reinsurers to exclude coverage for future terrorist attacks. The current proposal would require the government to pay, in 2002, 80 percent of the first \$20 billion of claims and 90 percent of the next \$80 billion. If claims exceed \$100 billion, it will be up to Congress to determine how they will be paid. There is no consensus as to the actual proposal at this time, but there is general agreement that a program involving substantial federal dollars for insurers will be enacted.

Victim Compensation Fund

In establishing a victim compensation fund, the new act sets no limit on the amount of money a victim can receive in economic and non-economic damages. Insurance experts say the claims could easily reach \$18 billion. The fund's intent is broadly stated—compensation to any individual (or relatives of a deceased individual) physically injured or killed as a result of the September 11 attack. This includes compensation to passengers and crews of the ill-fated aircraft; the thousands of victims of the Twin Towers destruction; civilian and military personnel at the Pentagon; and hundreds of dedicated firefighters, police officers, and related rescue personnel.

A special master will be appointed by the attorney general to review the claims and determine the amount of compensation to which each claimant is entitled. Although the special master may not consider negligence or any other theory of liability, the computation of recovery nonetheless strongly resembles a tort-based damages system. A claimant choosing this compensation system must be aware that an award determination will be final and not subject to judicial review. The law properly provides for the rights of claimants to be represented by an attorney and to present evidence, as well as other due process rights. The special master may not award punitive damages. Moreover, the amount of compensation awarded will be reduced by the amount of collateral-sources recovery received or to be received.

Claimants retain the option to seek recovery under this compensation program or to file a traditional civil or wrongful death lawsuit. However, the submission of a claim for compensation precludes the right to file a civil action in any federal or state court. Claimants who elect to forgo compensation in favor of a civil action will find that liability for all claims against any air carrier will not be in an amount greater than the limits of liability insurance maintained by the air carrier.

A special federal cause of action was created by Congress for damages arising out of the hijacking and subsequent crashes of the American and United aircraft. This cause of action is the exclusive remedy for all damages arising from these events. The applicable substantive law is the law of the state in which the crash occurred, unless such law is inconsistent with federal law.

The U.S. District Court for the Southern District of New York has been granted original and exclusive jurisdiction over "all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001." A debate already has surfaced about whether this jurisdictional language means "everything" including disputes over all types of life, health, and property casualty claims.

The attorney general no later than 90 days after enactment is required to issue procedural and substantive rules for the implementation of the act. The rule-making process is considered crucial to the success of the program. TIPS will follow the published rules and is expected to offer formal comments. ♦

Leo J. Jordan is Chair of the TIPS Governmental Affairs Committee.

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Something New

Alan J. Lazarus

Reentering the fray of constitutional litigation over the size of punitive damages awards, the U.S. Supreme Court recently decided, in *Cooper Industries v. Leatherman Tool Group*, 121 S. Ct. 1678 (2001), that courts of appeal must exercise independent, non-deferential review when evaluating challenges to a district court's treatment of the size of an award. The Tort and Insurance Practice Section and the Intellectual Property Section responded by convening a three-“judge” panel to independently review the merits and ramifications of the *Cooper* decision during a Distance Learning Seminar held on July 25, 2001.

Cooper follows a 10-year odyssey of Supreme Court case law struggling to clarify how the substantive component of the due process clause serves to protect civil defendants from excessive punitive damages awards. In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991) and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), the Court recognized that the Due Process Clause imposes substantive constitutional limits on the amount of punitive damages a court may impose. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Court struck an award applying several constitutional “guideposts”.

Left unaddressed by *Gore* was how trial court determinations under its “gross excessiveness” standard should be reviewed on appeal: deferentially under an abuse of discretion standard or independently under a de novo review standard. *Cooper* answers that question, holding that de novo review is constitutionally required—but that question raised several others of interest.

The Court reasoned essentially that similar constitutional proportionality-of-punishment analyses under the Eighth Amendment and Due Process Clause (including *Gore*) commanded de novo review; that such independent review for “gross excessiveness” was supported by (1) the fluid, imprecise, and fact-sensitive nature of the analyses; (2) the institutional need to develop a body of precedent defining the constitutional limits; and (3) the related interest in predictability and stabilizing constitutional law.

The Seventh Amendment Reexamination Clause did not require appellate deference to the award because the punitive damages calculation, although a “fact-sensitive undertaking,” was not a finding of fact. The traditional common law role of the jury in assigning

punitive damages did not trigger the Reexamination Clause because the original role of punitive damages—including a substantial compensatory function—had fundamentally changed with the acceptance of non-economic damages recovery. And the trial court was in no better position than the appellate court to conduct the excessiveness analysis. The Court did note that factual determinations actually made by the fact-finder would be entitled to deference.

The panelists identified and discussed the following legal and practical issues:

• Does *Cooper* require state courts to apply de novo review to punitive damages awards? Because the Reexamination Clause would have required deferential review if it applied, states could be free to determine whether de novo review is necessary in cases where jury trial guarantees are extended to punitive damages findings. Another view is that the *Gore* and *Cooper* analyses trump any such state constitutional provisions under the Supremacy Clause.

• The panel believed that *Cooper's* distinction between historical and predictive fact and fact-sensitive expressions of moral outrage, and the concession that underlying factual findings continue to be entitled to deference, invite creativity in the preparation of special verdict forms by plaintiffs' attorneys who want to preserve deferential review. By obtaining express findings on the factual issues encompassed by the *Gore* guideposts, the ultimate facts can be transformed into the type of historical and predictive fact findings that would trigger the Reexamination Clause and deferential review.

• It was suggested that legislative limits on punitive damages awards could obviate the need to analogize to penalties for comparable misconduct and thereby rein in judicial discretion to further limit awards. But limits imposed by legislatures are also subject to substantive due process limits, and under one view, state legislatures' authority to impose punitive damages caps or ratio limitations is questionable.

• The elimination of Seventh Amendment constraints on review of punitive damages awards may apply in both directions—permitting additur by the court when the punitive damages award is deemed too low. But such authority is not likely to see much use.

• These issues will be interesting to follow, particularly the debate over *Cooper's* application to state courts. That issue could quickly become paramount, given the size of some punitive damages verdicts rendered recently in state courts. ♦

Alan J. Lazarus is a member of Preuss Shanagher Zvoleff & Zimmer in San Francisco.




Pursuing Liberty
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A Publication of the Tort and Insurance Practice Section

TortSource

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Winter has arrived, and Apollo is packing his bags for his annual vacation in the southern latitudes. In just a few months, however, the sun will begin its return journey, crossing the Gulf of Mexico to make landfall on the shores of the Florida Panhandle. There, the white that you see is warm, sugary sand bordered by aqua-marine surf, which frames a crimson sunset against an azure canvas at the end of each day.

In 2002, TIPS will welcome Apollo's return in Destin, Florida. Celebration headquarters will be the Hilton Sandestin Beach and Golf Resort, surrounded by spectacular beaches, four championship golf courses, clay and grass tennis courts, and a vast array of shopping opportunities. We'll open the festivities with a bonfire and beach party among the dunes. After a night on your own to enjoy the local dining delights, we will explore the award-winning town of Seaside, with its galleries, shops, and pastel homes that provided the setting for the movie *The Truman Show*. After you have exhausted your credit card limits, join us for dinner and dancing at the Watercolor Beach Club.

Mark your calendars for April 11-14, 2002, and make plans to join us for fun and sun at the TIPS Spring Meeting in Destin, Florida. ♦

Jim Proctor is vice president and general counsel at McWane, Inc. in Birmingham, AL.

TIPS Spring Meeting Site April 11-14, 2002

Jim Proctor

“My Destin”

