

Who Killed the Mass Torts Bonanza?
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The power of the plaintiffs bar is on the wane in this country, and will be for a long time to come.

You won't hear many tort reformers admit it. They've done too good a job demonizing trial lawyers to let their bogeymen fade away. Twenty years ago, tort reform was an obscure movement with a funny name; today, politicians speak of "ending lawsuit abuse" or "eliminating frivolous lawsuits" -- tort reform by more felicitous names -- whenever they need a failsafe applause line. The movement's success has been a public relations masterpiece.

Beginning at a time when plaintiffs lawyers, flush from the fat years of asbestos revenues, seemed to have the money, brainpower and political alliances to cripple any defendant of their choosing, tort reformers engineered a billion-dollar anti-trial lawyer campaign: They produced and promulgated scholarly papers on the economic consequences of litigation; they sponsored grassroots groups to lobby state legislatures and campaign for business-backed state judicial candidates; they even hit upon such innovations as the publication of newspapers supported by the U.S. Chamber of Commerce to report on litigation in plaintiffs-friendly southern Illinois and West Virginia.

Plaintiffs lawyers, accustomed to thinking of themselves as champions of the people, fighting big business on behalf of the little guy, seethed at the vulturous image tort reformers created for them, but didn't grasp its implications. They were, by their own admission, so slow to respond to what Robert Jenner of Janet, Jenner & Suggs calls "the ridiculous propaganda" of their opponents that they permitted the chamber of commerce and the American Tort Reform Association to co-opt the very language of the debate.

"Reform" is one way to describe the business-backed changes in product liability litigation in the last decade. Trial lawyers would choose another, something along the lines of an unconscionable abrogation of plaintiffs' rights. See Mass Torts Roll Call.

Neither, however, would deny that the civil justice system looks drastically different than it did even two years ago. The true triumph (or tragedy, depending on your perspective) of the tort reform movement has been its ability to leverage the success of its public relations campaign into concrete and hard-to-reverse changes. State legislatures have passed laws that undercut the trial lawyers' successes in Washington, D.C. -- especially in the asbestos litigation, which has declined precipitously since the early 2000s.

Tort reformers have packed state judiciaries with judges amenable to their agenda. Federal and state courts overseeing multidistrict cases have become more vigilant about policing their dockets. And defendants, no longer as terrified of runaway punitive damages, "hellhole" jurisdictions and unmanageable trial schedules, are refusing to settle cases en masse. Such plaintiffs giants as Motley Rice; Waite, Schneider, Bayless & Chesley; and Lieff, Cabraser, Heimann & Bernstein

are reconsidering their caseloads and edging away from mass torts. "I do not believe the next 10 years will be a repeat of the last 10," says Joseph Rice, one of the shrewdest businessmen practicing law. "There will not be a repetition of the personal injury practice. Congress will not allow another tobacco. The courts will not allow multiple-jurisdiction litigation over products."

To be sure, plaintiffs lawyers and mass torts aren't going to disappear -- witness the furor over newly hatched global warming suits, which, despite legal theories that are speculative at best, have forced oil companies, coal manufacturers and utilities to begin planning a defense. Asbestos will continue to generate about 10,000 cancer cases a year, and plaintiffs firms are still pushing to lasso peripheral defendants into asbestos liability. Motley Rice's eight-year investment in lead paint litigation, which finally yielded a jury verdict on liability in Rhode Island in February, may yet pay off. Weitz & Luxenberg and Baron & Budd see promise in multidistrict litigation over the gasoline additive MTBE, in which oil company defendants face more than \$1 billion in claims of water contamination by municipalities and water districts. And Vioxx lawyers Christopher Seeger and W. Mark Lanier maintain that Merck & Co., Inc., will eventually begin settling cases, as almost all of the pharmaceutical defendants have.

There will always be people injured by the products or actions of big corporations, and there's still money to be made representing them. But the bonanza -- the Wild West era in which mass torts was an unfettered frontier and plaintiffs lawyers seemed to have all the firepower -- is over. If you're a plaintiffs lawyer and you haven't already bought the plane and the yacht of your dreams, well, sorry, pal. You're too late.

IT'S THE STATES, STUPID

George Christian, a lawyer and lobbyist in Austin, remembers without fondness Texas' litigation situation in the early 1980s. Juries in places such as Beaumont and Corpus Christi were doling out million-dollar verdicts like lollipops on Halloween, drawing thousands of out-of-state plaintiffs to Texas courts and transforming a coterie of plaintiffs lawyers into multimillionaires with the power to influence state judicial elections. In 1986 the Texas Supreme Court handed down a ruling that ended contributory negligence in state courts, allowing plaintiffs to recover damages even when juries found them to be partially responsible for their own injuries.

"It was a major change in state policy and got people's attention," Christian says. In response, a coalition of businesses and doctors formed the Texas Civil Justice League, a lobbying group with the sole objective of making the state's civil justice system less friendly to plaintiffs. Christian became the group's general counsel.

The league had its first success right away, when the Texas legislature passed a cap on punitive damages in 1987. Christian's group then pressed for changes in venue rules and for product liability reform. The legislature obliged in 1993, and Democratic governor Ann Richards signed the tort reform bills into law. "Republican winds were blowing, and we took advantage of that," says Christian. "[But] Governor Richards was part of it. Because of the reputation of the state, she felt, 'I need to address this.'" The issues weren't politically sexy -

- joint and several liability doesn't exactly bring voters streaming to the polls -- but the coalition lobbying for change was influential and well financed.

Those early tort reform advances, which were taking place not only in Texas but also in other state legislatures, did not take the organized plaintiffs bar by surprise. Beginning in about 1990, ATLA began developing an expertise in state constitutional law, working under the umbrella theory that legislative meddling in the judicial process violated states' separation-of-powers doctrines, says Robert Peck of the Center for Constitutional Litigation, a spin-off of the Association of Trial Lawyers of America. In 1995 ATLA hired Peck to head its legal department, and he launched challenges to sweeping tort reform laws in, among other states, Ohio and Illinois. In both, Peck eventually prevailed: The Ohio and Illinois supreme courts threw out the legislation.

But Peck's wins proved temporary. Business interests learned that if state judges didn't vote their way, they could replace those judges with others who would. The Texas Civil Justice League offered an exemplar for tort reformers attempting to influence judicial elections. In 1988 a Texas supreme court justice appointed by Republican governor Bill Clements was opposed for election by a candidate running with the support of Texas' plaintiffs lawyers. "We spent a lot of time creating voters' guides," says Christian. "They went out by the millions." The league distributed its playing card-sized guides through its membership, asking doctors and local businesses to hand stacks of cards to patients and customers. "We were trying to build on people who already had an interest in the issue," Christian says. "We were able to win in 1988, then we got a couple more [justices] in 1990, 1992 and 1994. By 1994 the old court was pretty much replaced." The new Texas court showed its allegiance quickly, with pro-business rulings on punitive damages and expert witnesses in 1995.

Following the Texas Civil Justice League model, the Washington, D.C.-based American Tort Reform Association (ATRA) and Institute for Legal Reform began in the mid-1990s to nurture statewide groups that would simultaneously lobby in state legislatures and campaign against judges backed by trial lawyers. "Nobody had [previously] paid too much attention to the judiciary," says Edward Murnane of one such group, the Illinois Civil Justice League. "We realized we needed to expand our sphere of activity."

In Mississippi, Ohio, Alabama and Arkansas -- states once considered plaintiffs havens -- business interests succeeded in shifting the balance of power in state judiciaries. Five of the seven justices now serving on the Illinois Supreme Court received the support of the Illinois Civil Justice League, including the justice who holds the seat reserved for Illinois' notoriously plaintiffs-friendly southern counties. He prevailed against the trial lawyer-backed candidate in the most expensive state judicial contest in U.S. history in 2004; between them, the candidates raised an estimated \$9 million. Nationwide, according to *Governing* magazine, spending in state judicial elections has exploded in the last decade, jumping 61 percent from 1998 to 2000 alone; in 2004 the average cost of winning a judicial seat was \$650,000.

The impact of the dual judicial-and-legislative attack has been profound. In Mississippi the newly constituted supreme court played tag-team tort reform with state lawmakers, each branch rushing to ratify the other's advances; the state has gone from being "the poster child of litigation abuse," wrote Shook, Hardy & Bacon partner (and ATRA counsel) Mark Behrens in a 2005 law review article, to "a shining example of how a state can join the legal mainstream and foster economic growth through legal reform."

Both the silica and asbestos dockets in Mississippi have been slashed, according to defense lawyer Brian Hannula of Jackson's Forman Perry Watkins Krutz & Tardy: silica from more than 21,000 to fewer than 4,000 cases; asbestos from more than 60,000 to fewer than 10,000. In Illinois, where Democrats in state government have stalled tort reform laws, the new supreme court issued a series of pro-business rulings, overturning a \$10 billion verdict against Philip Morris USA Inc. and acting to restrict class actions and out-of-state filings.

"I don't want to take credit," says Murnane of the Illinois Civil Justice League. "But I definitely think our activities and the involvement we've had, helping good people get on the court, [meant] we were able to break the stranglehold. We helped the court become more independent."

Texas remains the most dramatic state transformation. In the last 10 years, the legislature passed law after law, knowing that the court would approve them: punitive damages and liability reform in 1995; caps on medical malpractice damages in 2003; and restrictions on asbestos litigation in 2005. Personal injury filings statewide dropped about 30 percent after the 2003 reforms. "We hemmed [them] in pretty good," says Christian of the Texas Civil Justice League. "We've become a pretty unfriendly place for mass torts."

ATLA kept abreast of what was happening in the states, says communications vice president Chris Mather, but the national group's orientation has always been Washington, D.C, where, since 2000, it has been plenty busy warding off federal laws intended to restrict litigation. (ATLA's only significant defeat in Washington was the Class Action Fairness Act of 2005, which assured that most big class actions would be litigated in federal, not state, court.) State trial lawyer associations fought state-based tort reform groups in the legislatures and in judicial elections, but even with ATLA's assistance, they were outmatched and outspent. The judicial situation is now so unpromising that Robert Peck, the onetime ATLA lawyer who was so effective in the 1990s at persuading state justices to overturn tort reform laws, says he has decided against challenging new laws in some states with hostile supreme courts.

"The moment we won in Ohio, they began campaigning against the author of the opinion," says Peck, who spun off the Center for Constitutional Litigation from ATLA in 2001. "There was nothing I could do as a law firm." (The justice, Alice Resnick, was reelected but recently announced that she will not run again.) Peck does have a challenge pending in Ohio, where the legislature passed a new, but hardly changed, tort reform bill after the old law was struck down. His briefs cite some of the same constitutional deficiencies that led the Ohio Supreme Court to overturn the original law, but he doesn't know how

effective they'll be this time: Only two of the justices who ruled in his favor in 1997 are still on the court.

VOLUME KILLS

In the early days of the asbestos litigation, which is to say, the early days of mass tort litigation, what so unnerved judges and defendants was volume: There seemed to be too many cases to litigate within the routine procedures of the civil justice system. Corporations said they couldn't defend themselves simultaneously in dozens of trials all over the country, particularly when plaintiffs lawyers could file those cases in jurisdictions inclined to award crippling punitive damages. Judges said they couldn't manage dockets with hundreds -- then thousands -- of cases, and pressed for block settlements and group trials. Volume shifted the focus of litigation away from the facts of any one particular case, which meant that plaintiffs lawyers were able to generate fees from cases without compelling facts. In one oft-employed asbestos strategy, now banned in Texas, plaintiffs lawyers would bundle a strong case, one involving the asbestos-linked lung cancer called mesothelioma, with many cases of lesser injury or shakier causation, and demand settlement of all of them at the same time.

As mass tort litigation spread beyond asbestos to other environmental, product liability and pharmaceutical cases, the plaintiffs bar developed a system that institutionalized the advantage of volume. Lawyer advertising and labor unions produced potential clients, whose initial lawyer contact might well have been with a firm that functioned only as a referral clearinghouse. Client files would be passed to one of a couple dozen large, well-financed plaintiffs shops operating in jurisdictions where juries could be counted upon to reward plaintiffs claims. Those firms, through their referral networks, would wind up with tens of thousands of cases -- and they understood how to leverage those numbers into settlements. (The big firms, in turn, directed a percentage of their contingency fees to the referring firms.) Volume permitted plaintiffs lawyers to make money from little more than nothing. "They have a long history of making easy profit by jamming the system," says Theodore Mayer of New York's Hughes Hubbard & Reed, spokesman for Merck in the Vioxx litigation. "Courts threw up their hands and forced settlements in the interest of clearing dockets."

Volume frightened defendants into overvaluing finality. The personal injury class action vogue of the 1990s, in which mass tort defendants attempted to settle huge numbers of individual cases through global class actions, developed because defendants were more anxious to define the limits of the litigation they faced than to test plaintiffs cases one at a time. Paying weak claims seemed preferable to litigating endlessly. The corrupting power of volume was displayed most egregiously in the 1999 settlement of the diet drug litigation against American Home Products Corp. (now Wyeth). Wyeth believed that it could resolve the litigation through a global settlement (carefully crafted to comply with the restrictions on personal injury class actions established by the U.S. Supreme Court's rulings in the Amchem and Georgine cases of the 1990s). But Wyeth knew that the \$3.75 billion class action fund it was proposing could not receive the necessary judicial approval if enough plaintiffs objected to it. So to minimize objections to the global deal, Wyeth lawyers paid billions to settle thousands of untested cases. That free spending, as well as the

settlement's concession of causation, turned the diet drug litigation into a \$20 billion debacle of dubious claims.

In recent years, however, the federal judiciary has quietly mitigated the power of volume in mass torts, most frequently through the use of the MDL, or multidistrict litigation, vehicle. The MDL process has existed since 1971. A panel of six federal judges, who are selected by the chief justice of the U.S. Supreme Court, decides whether cases involving similar claims but filed in multiple federal courts should be transferred to a single federal judge for consolidated pretrial discovery and motions practice. At first, according to a report prepared by the MDL panel's statistical analyst at the request of The American Lawyer, the MDL judges appeared skeptical about using the vehicle to manage product liability mass torts.

In the panel's first 15 years of existence, the judges heard arguments to transfer 32 mass torts matters. They denied the transfer of 19 of them -- including several proposed asbestos MDLs and at least a half-dozen pharmaceutical cases -- leaving the cases to be litigated in multiple courtrooms. Then trends changed. As mass tort litigation burgeoned, the MDL panel judges not only heard more requests, they also transferred a higher percentage of them. From 1986 through 2000, the panel denied only nine of the 68 MDL motions it heard. And in the last six years, only six of the 62 cases the panel considered were denied MDL status. "The MDL panel is so quick to jump in today," says Rice of Motley Rice. "Too quick. If there's a [product] recall, before suits are even filed it's an MDL."

Mass tort lawyers on both the defense and plaintiffs sides used to debate whether the MDL process helped or hurt defendants. Transferring all federal cases to a single judge reduced the chaos of mass tort litigation and lifted the defense burden of fighting the same discovery and motions battles in multiple courtrooms. But MDLs also permitted plaintiffs lawyers to pool resources, spreading the expense of working up the litigation to several firms -- and spreading damning documents turned up in discovery across the country. Moreover, when a case was deemed an MDL, the litigation gained credibility in the plaintiffs bar. The MDL panel's imprimatur was a signal that a case was officially a mass tort, so MDLs attracted additional filings, thus magnifying the risk to defendants of adverse rulings by the MDL judge.

The debate should now be over: The MDL process has proved to be more of a boon to defendants than plaintiffs, thanks to several rulings by MDL judges aggressively policing the mass torts transferred to their courtrooms. The most famous MDL ruling was the 2005 opinion of Corpus Christi federal district court judge Janis Graham Jack in the silicosis litigation, which at one time was considered to have asbestos-sized potential. After Judge Jack held hearings on the qualifications of the plaintiffs' expert witnesses under the Supreme Court's Daubert "junk science" decision, she found enough evidence of malfeasance by doctors and plaintiffs lawyers that Texas prosecutors convened a grand jury. Jack's ruling effectively halted the silica litigation, and, at least in the view of defense lawyers, sent a strong message to plaintiffs lawyers about the scrutiny they could expect in other mass torts as well.

No other federal judge has written a decision as devastating as Judge Jack's, but in both the Rezulin and Meridia MDLs, for instance, pretrial proceedings resulted in rulings that made the cases manageable for defendants. Judge Lewis Kaplan's 2005 Daubert hearings in the 23,000-case Rezulin litigation, which involved a Warner-Lambert Co. drug to treat diabetes, persuaded about 80 percent of the plaintiffs to settle or voluntarily dismiss their claims. Kaplan severely restricted the litigation, holding that only plaintiffs who could prove their livers were affected while they were taking Rezulin -- not those whose livers were damaged before or after they took the drug -- had scientifically valid claims. Warner-Lambert's successor, Pfizer Inc., was subsequently able to dispose of the cases that survived Kaplan's ruling.

The Meridia diet drug ruling was more drastic: Judge James Gwin dismissed the entire federal litigation on a summary judgment motion by the defendant, Abbott Laboratories, which argued that the drug's warning label protected it from liability. Gwin's ruling helped convince Stanley Chesley, who headed the Meridia plaintiffs steering committee, that mass torts were no longer a reliable source of business. "Looking at our past experience in mass torts," says Chesley, a pioneer in the litigation, "I'm [now] very picky before I get into them. ... We've moved into securities and antitrust [instead]." (Chesley is not guaranteed success in those areas, either: The number of securities class action filings is down in the last two years, and, according to plaintiffs lawyer Steven Toll of Cohen, Milstein & Hausfeld, the dismissal rate is on the rise.)

In addition to scrutinizing the claims of masses of plaintiffs, more state and federal MDL judges are demanding evidence of injury from individual claimants early in the litigation, says O'Melveny & Myers partner John Beisner, a mass tort defense specialist. "It used to be that all the time up front, the discovery, everything was on the plaintiffs side," Beisner says. "Now judges are saying, 'We're going to work on both sides of this. ... What is the evidence that you, Mr. or Ms. Smith, were injured?'"

In the litigation over Baycol, a cholesterol-reduction drug produced by Bayer AG, the state court judge overseeing all of the Baycol cases in Pennsylvania required each plaintiff to submit an expert report on his or her injury; as a result, says Baycol defense counsel Philip Beck of Bartlit Beck Herman Palenchar & Scott, plaintiffs lawyers dropped weak claims that plumped the purported size of the litigation. "Judges have seen what happens when the mass tort process gets abused, when it gets out of control," says Beck, who, like Beisner, is on Merck's Vioxx defense team. "They're doing something about it."

The MDL vehicle is now common in state courts. Pennsylvania, New Jersey and Texas, for instance, have established state-court mechanisms that parallel federal MDLs: Cases are consolidated before a single state judge for pretrial hearings (many states have adopted stringent Daubert-like standards for expert witnesses) and docket management. State MDLs have also served mass tort defendants well, says O'Melveny's Beisner. "One of the plaintiffs tactics was to get an early trial, to get the best case set for trial in a place like Texas. Now, with [state] MDL proceedings, their capacity to walk to the courthouse and get a trial date is limited. There aren't many states anymore where you

can get cases on a fast track to trial." Texas' asbestos litigation, says Christian, of the Texas Civil Justice League, was tamed only after the cases, at the behest of tort reformers, were transferred to a Houston state MDL.

State and federal MDL judges are increasingly likely to work together to manage mass tort litigation. Federal judges can decide when and whether to remand cases to state courts; some mass torts lawyers say there's growing federal court resistance to the plaintiffs tactic of naming a local doctor or pharmacy as a defendant in order to keep a case in state court. State judges often wait for federal rulings on Daubert and other motions to conduct their own hearings. Judges on both levels coordinate trial dates. In the manganese welding rod mass tort, for instance, federal court judge Kathleen McDonald O'Malley and various state judges have scheduled only 12 trials in almost four years of litigation, says lead defense counsel Beisner: one in the federal MDL and 11 in state courts. The defendants have had time to prepare for each trial, and have won all but one of them. A litigation that, according to Beisner, started off with about 7,000 cases is "diminishing rapidly," he says. "The numbers are down 40-45 percent. The winnowing has been successful."

PLAYING DEFENSE

When Phil Beck began advising Bayer in the Baycol litigation in the early 2000s, he says, Wyeth's diet drug experience loomed large. "That was the prototype for disaster," he says. "We looked very closely at fen-phen and other mass tort situations and saw how things had gone awry. ... We made a very conscious decision to take a different approach."

That new defense attitude, pioneered by Bayer in the Baycol litigation and spreading fast ever since, may be the most significant obstacle that plaintiffs lawyers will face in future mass torts. Of course, Beck says, Bayer could not have engaged plaintiffs lawyers so aggressively had it not been for state tort reform and activist MDL judges. But the Baycol litigation emboldened defendants -- and chastened plaintiffs lawyers -- because it showed both sides that defendants could seize control of a mass tort litigation from the plaintiffs in a way that had rarely happened before.

After Bayer voluntarily withdrew Baycol from the market in 2001 because of a side effect called rhabdomyolysis, a potentially fatal muscle deterioration, the company faced the onslaught of suits that seems to follow every drug recall. Some of the cases involved claims of rhabdo, as the condition is known; other plaintiffs claimed different Baycol-related injuries. The company believed, based on epidemiological evidence, that it knew the universe of Baycol users who had developed rhabdo -- and that it could afford to settle their cases. The uncertainty lay in the thousands of cases in which the plaintiffs' evidence of rhabdo was weak, or in which plaintiffs claimed non-rhabdo injuries. And it was in these cases, says Beck, that Bayer took a radical position.

Early in the litigation, the federal MDL judge, Michael Davis of Minneapolis, called a meeting of Bayer defense lawyers, plaintiffs lawyers and state judges with large Baycol dockets. "At that big

meeting," says Beck, "I stood up and said, 'I have an announcement. We recognize that some people who took Baycol experienced the side effect [of rhabdomyolysis]. We think we have a good defense on the merits, [but] if you can show your client was taking Baycol contemporaneously with contracting rhabdo, we're willing to settle every case. We're going to be fair and reasonable.'" Beck recounts. "'But on the flip side, if you demand a premium [because] you have a trial in a plaintiffs-friendly jurisdiction, we're going to fight you to the death. And most of your cases are not rhabdo. We're not going to pay a penny on those.'"

Plaintiffs lawyers put Bayer to the test in both of the situations Beck cited. In 2003 Bayer went to trial on a rhabdo case in Corpus Christi, Texas, against noted plaintiffs lawyer Mikal Watts. "He had over 1,000 Baycol cases and was trying to put pressure on us to settle globally," Beck says. "[Watts] told us he wouldn't settle the rhabdo cases without the others. And he was out there telling the financial press that Baycol was going to cost Bayer \$50 billion." (Watts did not respond to phone and e-mail messages requesting comment.)

Beck won the trial in Texas. "That was the big turning point," he says. "Plaintiffs lawyers said, 'Why do I want to invest the time and the money litigating when they're willing to settle the rhabdo cases?'" Then, after Bayer won four non-rhabdo trials, including three in Mississippi, plaintiffs lawyers began dropping those cases. With the litigation now winding down, Beck says, Bayer has settled 3,050 Baycol cases for \$1.15 billion -- a tiny fraction of what fen-phen, with its failed attempt at a global settlement of all claims, cost Wyeth.

In a series of mass torts since Baycol, defendants have taken a similar approach, settling the strongest cases but refusing to pay for weaker claims, even if that means going to trial. "The paradigm definitely shifted," says plaintiffs lawyer Jenner, a lead counsel in the litigation over Prempro, Wyeth's hormone replacement therapy drug. "Plaintiffs lawyers are not taking cases with nominal injuries. People are not taking a broad inventory of cases." In his litigation, for instance, there are about 5,000 cases -- far fewer than Wyeth faced in the fen-phen litigation -- but almost all of them involve such serious side effects as breast cancer or stroke.

The most prominent example of defense intransigence right now is Merck's proclamation in the Vioxx litigation that it will try every case (24,000 have been filed). "Ten years ago," says plaintiffs lawyer Seeger of New York's Seeger Weiss, "this case would already be over. It wouldn't be dragging on like this. It would be over." Lanier agrees: "If Vioxx predated [fen-phen], you would see Merck more willing to settle instead of trying every case. Instead, they're following the tobacco model: Try every case, take no prisoners." Merck, according to Securities and Exchange Commission filings, has set aside about \$1 billion to defend Vioxx cases. It spent \$325 million in the first three quarters of 2006, but none of that money went to Vioxx claimants or their lawyers.

Merck counsel Mayer of Hughes Hubbard is circumspect to the point of impenetrability, but he does allow that state tort reforms have factored in Merck's strategy. "They help the courts do justice in individual cases," he says. So far, the judges overseeing Vioxx cases

in state and federal courts -- there is not only a federal MDL, but also state court-coordinated proceedings in jurisdictions with busy Vioxx dockets -- have permitted what Mayer calls "a very rational program of trials" involving plaintiffs claiming serious injuries. The company may yet request judicial orders demanding proof of injury from plaintiffs, which could serve to weed out weaker claims. Until then, Merck plans to proceed with trials scheduled in New Jersey, California and Texas. "We believe in our defense," says Mayer. "We believe it's important to put plaintiffs to the test. We're going to continue to take cases as they arise." (It's worth noting that in the long run, tort reform hurts the defense bar as well as the plaintiffs bar, except when mass tort defendants resolve to try lots of cases. "It's in our interest to have a broken system," says Beck. "I have one view of what's good for the country, and another of what's good for me. A system that is slightly out of control is good for me.")

BACK TO THE FUTURE

Perry Weitz of New York's Weitz & Luxenberg, an accomplished mass tort strategist, maintains that all of tort reform's gains can still be undone. "If we get a new president, a new Congress, everything is up for grabs again," he says. In fact, even in the crucible of the Bush administration, the trial lawyers have been remarkably effective at blocking federal legislation intended to curtail litigation. With ATLA's lobbying expertise and their own contributions to Democratic politicians, they defeated attempts to shut down litigation over MTBE, guns and certain vaccines -- and, in the biggest and hardest-fought battle, asbestos. Weitz and a dozen or so other asbestos lawyers fiercely opposed a plan to remove all asbestos cases from the courts and place them instead in an extrajudicial federal trust. The asbestos bar placed its trust in Democratic politicians, to whom it made lavish campaign contributions. In the midterm elections of 2002, with the asbestos issue gaining attention in Congress, nine of the 20 biggest law firm campaign contributors were asbestos firms, according to data compiled by opensecrets.org, the Web site of The Center for Responsive Politics. In 2004, when the asbestos bill was before the Senate, ATLA was once again the largest contributor in the legal industry, with 92 percent of the group's \$2.6 million in campaign contributions going to Democrats. Since 2003, according to opensecrets.org, ATLA has spent \$13.9 million on federal lobbying, to apparently good end: The Senate killed the asbestos bill earlier this year.

But the success was Pyrrhic -- and it shows why, even though the Democrats have regained much of their political power, they probably won't be the saviors of the trial bar. Weitz and his brethren beat back the asbestos legislation only at the expense of repeated vilification. Congressional asbestos hearings spotlighted the most egregious mass tort litigation excesses, such as the roving X-ray vans that generated tens of thousands of cases on behalf of plaintiffs whose lungs showed evidence of asbestos exposure, but who suffered no impairment. Defendants and insurers blamed plaintiffs lawyers for driving dozens of companies, some of which were far removed from asbestos manufacturing, into bankruptcy, where those same plaintiffs lawyers, running creditors committees, established trusts that even now provide them with a continuing stream of contingency fees. The asbestos debate fed tort reform's campaign against the trial bar, helping make plaintiffs lawyers a big, fat, juicy target.

So as states passed legislation to restrict suits by unimpaired asbestos claimants and jurisdictions with heavy asbestos caseloads shifted unimpaired plaintiffs onto inactive dockets -- essentially accomplishing, piecemeal, what the federal legislation intended -- no one stood up to defend trial lawyers. And even if Democrats backed by the plaintiffs bar win additional state and federal offices, it's impossible to imagine them rushing to reverse tort reform. It requires great political resolve to repeal legislation that has survived judicial review, as much state tort reform has. Mustering that resolve at the behest of trial lawyers is unthinkable. "It used to be that when you walked around, people on the street thought you were their lawyer," says Chris Seeger. "The Republicans have convinced people on the street that we're the bad guys, that they're paying more because of us."

Until trial lawyers win back those people on the street, the people who have deflated mass torts -- lobbyists, legislators, and judges on both the state and federal level -- have no reason to permit mass torts to balloon once again. ATLA is at least, and at last, trying. Last summer the group announced that it was changing its name. Its board had imported a new chief executive officer, Washington, D.C., public relations executive and presidential campaign veteran Jon Haber, and he "got people together to talk about the fight we're in," says Chris Mather, ATLA's vice president of communications and another of the group's new, politically tested advisers. The result of ATLA's soul-searching was not only a new name -- the American Association for Justice -- but also a public relations campaign called "The Fight for Justice."

"We are in a battle for justice," says the relentlessly on-message Mather. "We fight for justice. The other side doesn't." ATLA intends its "Fight for Justice" effort to remind Americans of the rights they've lost through tort reform. "I think people are starting to catch on to the motives of our opponents," says Mather. "The commitment from trial lawyers to fight back has never been greater."

Tort reformers are hardly sitting back and enjoying their gains, though. They're targeting West Virginia, which has proved resistant, so far, to business-backed attempts to change the laws and the judiciary; California, where asbestos cases have migrated and claims under disability statutes are on the rise; and Delaware, where there's talk of an influx of class actions now that the old class action haven, Madison County, Illinois, has been shut down. The relatively sleepy Wisconsin Coalition for Civil Justice Reform was just energized by a series of pro-plaintiff state supreme court rulings, and plans to campaign in nonpartisan judicial elections in April.

The best hope of the plaintiffs bar may lie in, of all places, Texas -- the very state that first made tort reform politically popular. George Christian, the general counsel of the Texas Civil Justice League, says that Texans are beginning to have second thoughts about some of the legislation his group lobbied for (though not enough to suggest rolling back the laws). "To be honest, in the medical area there have been some instances that have made people stop and look," he says. "In the 1980s and 1990s we were able to show that the pendulum had swung too far to the trial lawyers. Has it swung too far in the other direction?"

Plaintiffs lawyers launched the mass tort era by exposing the grave wrongs that defendants inflicted on ordinary people. To revive it, they'll have to show those people that it's still the defendants -- and not they -- who are at fault.

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