

Comment

*Theodore B. Olson**

John Baker said that the tort reform debate is too partisan, and that each side is guilty of skewed rhetoric.¹ My job, as I perceive it, is to make sure that I present some of that skewed rhetoric to you, and to make sure that you have at least one utterly unbalanced, one-sided presentation. Others can take care of the opposing side and the neutral solutions. For today, at least, I am not into neutral solutions. Instead, I thought I would give you a new model that we could use to think about tort reform. Although I thought Professor Baker's proposal was very good, I thought it ought to be considered in the context of this new model, which I now present to you.

First of all (and I do not mean any offense to any of the fabulous trial lawyers that exist in this country), I want you to think of a tiny segment of the plaintiffs' tort bar as modern day bank-robbing Willy Suttons or Jesse Jameses. The large jury awards we often read about typically involve verdicts for an amount that compensates the lawyers as much as the plaintiffs, and in many class action cases, attorney compensation amounts to more than plaintiff compensation.

Think of the defendant in this model as the stagecoach hijacked by Jesse James in western movies, or the Wells Fargo Bank that Willy Sutton robbed in the twentieth century. Bill Lerach, one of the premiere plaintiffs' lawyers in this country, acknowledged in a Federalist Society debate I had with him several years ago, that this was sort of the model he had in mind as well but that he felt that he was providing an immense benefit to society as well as to himself by driving the tobacco companies out of business, and so forth. He asserted that enormous attorneys' fees provide a capitalistic incentive for lawyers to do things that will change society in good ways. So I do not feel too guilty by using my example, which is a slightly modified model of what he described.

* Solicitor General of the United States. Mr. Olson's remarks were delivered prior to his nomination to the post of Solicitor General, and the views expressed here are his alone.

¹ John S. Baker, Jr., *Respecting a State's Tort Law, While Confining its Reach to that State*, 31 SETON HALL L. REV. 698, 700-03 (2001).

With that general picture in mind, think about the following point with respect to the so-called “tort reform debate.” Punitive damages, class actions, private attorney general suits, and (in many instances) mass tort cases introduce a regulatory element into the tort system. From that perspective, the tort lawsuit is intended not just to seek compensation for an injury, which is the traditional function of the tort system, but to alter behavior by sending a message to an arguably errant defendant. Thus, the typical tort lawsuit is instituted to redress societal harm and to deter future practices that juries have been persuaded to find offensive. Many plaintiffs’ lawyers consider the individual plaintiff or class representative as incidental to the ostensible purpose of a product liability lawsuit—as Bob Dylan would put it, plaintiffs are “only a pawn in their game.”²

This concept provides a rationalization for large punitive damage awards or large assessments of damages for the infliction of societal harm. Those who support large damage awards do so because they hope to change the marketplace conduct of the supposed wrongdoer, and therefore, the damage awards need to be large. Otherwise, their theory goes, defendants will not be affected and will not change their conduct. As long as judges and juries stick to the compensatory function of the civil justice system, the problems in the tort system are not very bad. Large verdicts are essentially episodic, aberrational, and generally can be taken care of through the appellate process. It is only when class actions or punitive damage suits are used not only to compensate individual victims for a wrongdoing, but to change the rules or function of society, that we get extremely large awards and extremely large class actions. This presents the problem that we are debating today.

Since the typical defendant operates in interstate commerce it generally cannot, contrary to Professor Baker’s paper, and consistent with what Richard Willard was explaining from his own experience, confine the changes that it makes in its conduct as a result of one of these awards, or as a result of witnessing one of these awards levied upon one of its colleagues in the manufacturing sector to the state in which the verdict or award is imposed. It cannot stop doing business in that state because products migrate from state to state and because highly liberal venue and jurisdiction provisions allow suits to be brought in a high verdict state whether or not the enterprise consciously does business there. Changing conduct in a single state does not mean that a defendant will not be sued there. For instance, General Motors or Coca-Cola cannot stop doing business in Georgia. Even if they did, they would be sued in Georgia.

² Bob Dylan, *Only a Pawn in Their Game*, on *THE TIMES THEY ARE A-CHANGIN’* (Sony/Columbia 1964).

Moreover, these awards result in higher direct costs, or costs due to increased insurance expenses that are added to all products wherever they are sold. Thus, the impact of a jury award in one state will be felt in other states and will be felt by consumers nationally. Prices will go up. Conduct will be changed nationally. For instance, a New Mexico jury determined what temperature a cup of coffee should be in Nebraska.³ Some products will be withdrawn from the market, and a propensity to award generous verdicts will attract more lawsuits. Responding to this trend, some states, like Colorado, may decide that such verdicts are counterproductive.⁴ These efforts are somewhat fruitless, because plaintiffs will just bring suits elsewhere, and the inhabitants of Colorado will nonetheless have to pay the price in terms of higher costs, access to fewer products, or alterations of products due to the regulatory impact from states which allow large awards. Thus, Colorado's legislative solution will not insulate Colorado citizens from the problems.

Furthermore, excessively generous awards invariably favor in-state plaintiffs at the expense of out-of-state defendants. So, there is a natural process of discrimination. Jesse James did not rob his hometown bank. Juries can be more readily induced to take large amounts out of the treasuries of distant corporations for the benefit of their neighbors, and judges might be more likely to sustain exorbitant awards if a foreign corporation is involved.

Thus, regulation by Congress of excessive awards and massive lawsuits is not, in my judgment, federalization of the tort system. It is a national response to the national impacts of extra-state regulation and a system of indirect tariffs imposed by the Jesse Jameses and the Willy Suttons that are operating in the particular states. One of the purposes behind the Commerce Clause⁵ was to prevent interstate commerce from being fettered, interrupted, and narrowed by diverse and conflicting state regulations. That is what Alexander Hamilton said in *The Federalist*.⁶ And by the way, Professor Eid,

³ *Liebeck v. McDonald's Restaurants*, CV-93-02419, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994) (awarding plaintiff \$160,000 compensatory damages and \$2,700,000 punitive damages for product defect, breach of the implied warranty of merchantability, and breach of warranty of fitness for a particular purpose).

⁴ Allison H. Eid, *The Tort Reform Debate: A View from Colorado*, 31 SETON HALL L. REV. 740 (2001).

⁵ U.S. CONST. art. I, § 8, cl. 3.

⁶ THE FEDERALIST NO. 11, at 68 (Alexander Hamilton) (Modern Library College ed., 1937). Hamilton argued that a unified commercial system would benefit the states and establish it as a powerful source in international trade, stating:

[T]he aggregate balance of the commerce of the United States would bid fair to be much more favorable than that of the thirteen States without union or with partial unions. It may perhaps be replied to this that whether the States are united or disunited, there would still be an intimate intercourse between them which would answer the same ends; but this intercourse would be

this genie is already out of the bottle, so we do not need to worry about that.⁷

Professor Baker says that these are state problems that call for state solutions, but I submit that those states which engage in these excesses do not want to change. The states like their systems. Why would they want to change? So it is not a state problem or a problem that a state itself has any incentive to solve. It is a national problem because, as Professor Baker does say, the state system affects the cost, nature, and availability of goods elsewhere.

Neither is it a problem of bias. Trial lawyers are not biased against corporations. Neither was Willy Sutton biased against banks. Corporations are to trial lawyers what banks were to Willy Sutton: they are simply where the money is. Willy Sutton did not dislike banks, he loved banks. Trial lawyers love corporations for the same reason that Willy Sutton loved banks. Additionally, do not think that anti-corporate rhetoric is antipathy, actual hatred, or anger towards corporations. It is simply a weapon that lawyers use to extract money from corporations. Anger towards corporations is to trial lawyers what a gun was to Willy Sutton: a tool to get money. Juries award big money verdicts when they are mad at corporations, just like bank tellers gave money to Willy Sutton when they saw his gun.

Trial lawyers have not become federalists, by the way. They would like friendly judicial environments in at least some of the states—and this can be accomplished through controlling the legislatures or the court systems of several key jurisdictions. They do not have to control the legislature or the courts in *all* of the states; just a few states—Alabama, Florida, New Jersey, California, Mississippi, and Montana—will do. They can leave the rest of the states alone, because they need only a few states to bring these cases.

Like trial lawyers, corporations are neither federalists nor anti-federalists. All corporations care about is relative uniformity, predictability, and rationality.⁸ They do not like paying an excessive judgment to plaintiffs

fettered, interrupted, and narrowed by a multiplicity of causes A unity of commercial, as well as political, interests, can only result from a unity of government.

Id.

⁷ Eid, *supra* note 4, at 742.

⁸ See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) for a discussion of this subject. Although the Court declined to establish a bright-line test for determining the validity of punitive damages, it did consider “the degree of reprehensibility” of BMW’s conduct; “the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award;” and “the difference between this remedy and the civil penalties authorized or imposed in comparable cases.” *Id.* at 575. Furthermore, the Court expounded on the notion of federalism in a commercial context, stating:

[BMW’s] status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce. While each State has ample power to

in Alabama that will require them to raise prices in Idaho. Unfortunately, they cannot get the kind of uniformity, predictability, and rationality they seek from every state, because they cannot successfully influence all fifty state legislatures and all fifty state supreme courts. In fact, as hard as it is for corporations to win over Congress and the President, it is much easier to attempt to persuade the federal government than it is to persuade the legislatures and the supreme courts of fifty states.

I now come to my conclusion. I propose that a solution to this dilemma may be found in the Commerce Clause. This is so, because these cases involve interstate commerce and inhibitions on interstate commerce. Just as Congress passed a law to deal with Jesse James and other train robbers, and just as Congress passed a law to deal with Willy Sutton and other bank robbers, Congress should address lawsuits and damage awards that interfere with interstate commerce.

In closing, I suggest that no one really wants neutral solutions. As one of my partners once told a judge, "all I want is a fair advantage." That is all the corporations want, and that is all the trial lawyers want.

protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.

Id. at 584.