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*Michael I. Krauss**

INTRODUCTION

A Mississippi jury's \$500 million damage award in a clash between two funeral service companies has escalated into a NAFTA dispute that could significantly alter tort suits in the United States, international trade law, or perhaps even both.¹ The circumstances that led to this award serve as a warning to foreign investors about the importance of understanding the idiosyncrasies of doing business in the United States, where the legal culture is at times more foreign than the social or business culture.

When the Loewen Group, a rapidly growing Canadian funeral home conglomerate, entered the Mississippi market in 1990, it could not foresee that this move would bring about the eventual ruin of the company. Loewen soon found itself embroiled in a dispute with O'Keefe, a local Mississippi funeral home operator, over the terms of a funeral insurance contract. When Loewen declined an offer to settle what to all appearances was a routine contract dispute worth no more than a few million dollars, the local corporation sued Loewen in Mississippi state court.

At the 1995 trial, race and nationality suddenly became major issues. A flamboyant trial attorney represented O'Keefe. This attorney's populist arguments, unimpeded by an elected trial judge, portrayed Loewen as a greedy foreign invader out to deceive and cheat grieving consumers of funeral home services. The argument apparently succeeded as the jury returned a verdict of \$260 million. After a court-ordered reconsideration, which was requested by the stunned lawyers for Loewen, the jury increased this award to \$500 million, of which \$400 million was punitive damages. Loewen's ability to appeal was substantially impeded by Mississippi's requirement that defendants post a supersedeas bond equal to 125% of the total award. Faced with bankruptcy whether or not it appealed the award, Loewen settled the case with O'Keefe for \$175 million.

Effectively prevented from pursuing the action further in state or federal courts, Loewen has turned to the North American Free Trade Agreement (NAFTA) for relief. Loewen has filed suit against the United States, claiming that the Mississippi court proceeding violated two provisions of

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¹ See *O'Keefe v. The Loewen Group Inc.*, 91-67-423 (Cir. Ct., Hinds Co., Miss. 1995).

NAFTA's Chapter 11 governing the treatment of foreign investors. Only eight other claims have ever been made under these provisions of NAFTA by foreign investors; none has ever been made by a foreign corporation regarding another country's judiciary.

Loewen's NAFTA claim will be decided following secret meetings before an arbitration panel composed of three men, none of whom is a sitting judge in either the United States or Canada. Supporters of both tort reform and trial lawyers groups, as well as representatives of the United States and Canadian governments, are closely watching the case. If Loewen prevails, the United States will have to redress the losses that Loewen suffered in a Mississippi court. Even if Loewen does not win, the case demonstrates how foreign companies can use NAFTA to review American tort awards in an international forum. Unless that option is blocked—and both the United States and Canada have expressed an interest in amending NAFTA to this end—more companies can be expected to bring similar challenges. This, in turn, could provide pressure to bring American tort procedures and awards into alignment with the tort law of other Western nations.

Part I of this Article provides necessary background information relating to the funeral home and funeral insurance industries and introduces the parties. Part II relates the rich factual predicate of the *O'Keefe v. Loewen* lawsuit. Part III clarifies Loewen's NAFTA challenge. Finally, Part IV discusses similar cases filed against Canada and the United States, and explains what they may mean for the future of American tort law and for NAFTA.

I. BACKGROUND

A. *Market Inefficiencies in the Funeral Home Industry*

There are approximately 22,500 funeral homes in America.² Until very recently, virtually all were family-owned and community-based.³ However, the 1990s brought consolidation to the industry, with three or four conglomerates purchasing approximately 2,700 funeral homes.⁴ Because funeral homes are traditionally tied closely to the communities they serve, the conglomerates have not changed the names of the funeral homes they purchase, and generally retain their former owners as salaried managers.⁵

² See Nina Bernstein, *Brash Funeral Chain Meets its Match in the Old South*, N.Y. TIMES, Jan. 27, 1996, § 1, at 6.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

The conglomerates are able to reduce costs by centralizing operations such as body-preparation, phone banks, and motor pools for a geographic area into clusters.⁶ They are also able to increase profits by negotiating lower prices for high volumes of supplies such as caskets, embalming fluid, and hearses.⁷ Consolidation has, in short, produced higher profits and fed an ever-greater expansion of the industry.⁸ However, lower costs for funeral homes have apparently not translated into lower prices for consumers.

Contributing to the stable or even increased prices accompanying consolidation is what appears to be a rather strong inelasticity of demand for funeral services, which the old community-based firms did not fully exploit. Many people apparently do not comparison shop for funeral home services, being more concerned with location and reputation than price.⁹ The grief accompanying a loved one's demise and the survivors' desire not to be seen as parsimonious are major factors explaining this inelasticity.¹⁰ Social norms had apparently made local funeral home operators reluctant to fully exploit this phenomenon. Such norms have less influence on conglomerates that have tended to increase prices as soon as they establish a strong presence in a local market. The Loewen Group, for example, made a practice of increasing prices by as much as fifteen percent at newly acquired homes.¹¹ As funeral services cannot be postponed, the industry is practically recession-proof. Little wonder, then, that Wall Street analysts enthusiastically supported the consolidation of the 1990s.¹²

Along with funeral services and casket sales, many funeral homes also sell funeral insurance. Funeral insurance sounds like an oxymoron since insurance is meant to protect against large uncertain losses, and yet nothing is more certain than the fact that people die (and so need funeral services). The timing of the *funeral* (unlike the timing of the *death* of the person to be buried) usually poses no particular problems, and the cost of the funeral is often only a minor part of the total economic cost occasioned by the death. Life insurance, then, should cover the cost of funerals. In fact, poor families without life insurance often use funeral insurance as a high-cost "lay-away" method to pre-pay for funerals.¹³ Funeral insurance

⁶ Robin Fields, *Grim Time for Funeral Firms*, L.A. TIMES, Oct. 24, 1999, at C1.

⁷ Jonathon Harr, *The Burial*, THE NEW YORKER, Nov. 1, 1999, at 70, 80.

⁸ See Bernstein, *supra* note 2.

⁹ Fields, *supra* note 6, at C4.

¹⁰ Harr, *supra* note 7, at 80.

¹¹ *Id.*

¹² Robert Tomsho, *Funeral Parlors Become Big Business*, WALL ST. J., Sept. 18, 1996, at B1 (discussing "the flood of Wall Street money into the funeral business"). *Id.* at B4. *But see*, Bruce Ingersoll, *Senate Probe of Funeral Home Abuses May Spur Stricter Federal Regulation*, WALL ST. J., Oct. 22, 1999, at B11.

¹³ See Judith A. Frank, *Preneed Funeral Plans: The Case For Uniformity*, 4 ELDER L.J. 1, 9 (1996). See also Nicole Ostrow, *Paying to Death: Call it Industrial Life Insurance or Funeral Insur-*

is paid for by the consumer in either a lump sum payment or by installments.¹⁴ The named beneficiary of the policy is the funeral provider.¹⁵ Upon the death of the consumer, the benefit is then paid to the funeral provider to cover the costs of the funeral already arranged.¹⁶ The wish to force one's estate to pay tribute also plays an important role in the funeral insurance business. Many insureds want to guarantee that their loved ones will not have to pay for the lavish funeral desired. Although largely indistinguishable from term life insurance in function, funeral insurance is always more expensive; \$5,000 worth of funeral insurance costs *much* more than \$5,000 worth of term life.¹⁷

B. *The Defendant: The Loewen Group*

As of 1996, the Vancouver-based Loewen Group was the second largest consolidator of funeral services in North America, owning 856 funeral homes and 203 cemeteries (ninety percent of which were located in the United States).¹⁸ Its 73-year-old founder, Raymond Loewen, was the son of a Mennonite funeral home operator in rural Manitoba. During the 1940s, Raymond gradually took over the management of his father's business. A deeply religious man who typically began corporate meetings with a handholding prayer session, Raymond Loewen also proved a fierce businessman. He regularly told the story of his first management decision, which was to fire his ineffectual brothers from their positions in the family firm.¹⁹

Raymond Loewen was adept at expanding the family business, and by 1987 his company owned sixty-eight funeral homes in English Canada.²⁰ Big money, Loewen suspected, might be made by expanding into the

ance, the State Calls it a Rip-Off, FLA. TIMES UNION, Apr. 26, 1999, § First Business (Magazine), at 12.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See Ostrow, *supra* note 13. This article describes a woman who paid a \$2.09 weekly premium for 50 years on a funeral insurance policy. Although she had paid \$7,200 for her policy over this period of time, the company only paid out the \$1,000 face value of her policy when she died. Funeral insurance typically targets the poor, because they are often in need of immediate benefits to pay for a funeral, and because the payments are very low. However, the value of the policy is also very low. By contrast, renewable life insurance policies for a healthy people are not much more expensive, perhaps \$10 to \$20 a month, but the payout value of the policy typically starts at \$100,000. Life insurance may not always be an option for someone in need of funeral benefits, however, because it can sometimes take several months to pay out.

¹⁸ Lisa Bank Fasig, *Loewen Rebounds After Damaging Lawsuits*, CINCINNATI ENQUIRER, Apr. 15, 1996, at D1. The other major conglomerates are Service Corp. International, which is the largest, and Stewart Enterprises Inc. Fields. Fields, *supra* note 6.

¹⁹ Bernstein, *supra* note 2.

²⁰ Harr, *supra* note 7, at 79.

much larger, but also more competitive, American market.²¹ Shortly after one modest acquisition in Flint, Michigan, Loewen was offered an eight-home chain in California at a bargain price.²² These two profitable opportunities were wholly unsolicited: Raymond Loewen saw this as a sign that God was answering affirmatively his question about whether to enter the United States market.²³ The company thus began an extremely aggressive series of American acquisitions, and by the early 1990's the Loewen Group was drawing ninety-percent of its revenue from the United States, and stating its income in U.S. dollars.²⁴

The Loewen Group entered the Mississippi market in 1990 when it purchased the Riemann Brothers' Funeral Homes holdings in Gulfport and Biloxi. These holdings included several funeral homes and one funeral insurance subsidiary.²⁵ Loewen next purchased Wright & Ferguson, the largest funeral home in Jackson. Rather than provide its own funeral insurance, Wright & Ferguson had contracted with Gulf National Life Insurance Company to provide funeral insurance. Jeremiah O'Keefe, a Biloxi funeral home and insurance businessman, owned Gulf National.²⁶ After its purchase by Loewen, however, Wright & Ferguson discontinued selling Gulf National funeral insurance policies and instead sold Riemann Brothers' insurance.²⁷

The Loewen Group's decision to sell Riemann funeral insurance in Jackson significantly depleted the cash flow of the Gulf National funeral insurance company, already in dire straits as a result of an infelicitous investment in a savings-and-loan. As a result, the Mississippi Insurance Department placed the Gulf National Insurance Company under "administrative supervision."²⁸ It is possible that Loewen intended this result in the hope of driving O'Keefe out of business. Ironically, this action caused O'Keefe to file the lawsuit that eventually drove Loewen out of business.

C. *The Plaintiff: Jeremiah O'Keefe*

Jeremiah O'Keefe's first American ancestor was an Irish immigrant and livery stable owner, who happened upon a very lucrative side business

²¹ Loewen Corp.'s CFO, Robert Lundfren, recently recalled Raymond Loewen's fear of getting "eaten alive" in the much more competitive (i.e., efficient) United States market. *See* Harr, *supra* note 7, at 79.

²² *See id.*

²³ *See id.* at 80.

²⁴ *Id.*

²⁵ Bernstein, *supra* note 2. Gulfport and Biloxi are both situated along the southernmost edge of Mississippi—the Gulf coast—separated by about eight miles on United States Route 90. Jackson is located roughly in the center of the state.

²⁶ *See id.*

²⁷ *Id.*

²⁸ Harr, *supra* note 7, at 83.

when he used his stable for the undertaking of dead soldiers during the Civil War.²⁹ By the turn of the century, the O'Keefe family owned a *beaux-arts* mansion in Biloxi and an ornate horse-drawn hearse.³⁰ The family lost these possessions along with most of the family fortune in the Great Depression but bounced back under the excellent stewardship of the current successor to the family business, Jeremiah O'Keefe.³¹

Like Raymond Loewen, O'Keefe succeeded in turning a "mom-and-pop" funeral home into a moneymaking operation. O'Keefe was a decorated World War II veteran and the father of thirteen children. His business success allowed him to fulfill a childhood dream of repurchasing the family mansion, which he promptly converted into a casket showroom.³² By the 1990s, O'Keefe had served one term as Mayor of Biloxi and owned eight other southern Mississippi funeral homes as well as the Gulf National Funeral Insurance Company.³³

When the Loewen Group purchased Wright & Ferguson and stopped selling Gulf National insurance, O'Keefe responded by filing suit in Mississippi state court claiming breach of contract.³⁴ The claim was filed against both Wright & Ferguson and Loewen, claiming that they had willfully and intentionally induced or committed breaches of the contract between Gulf National and Wright & Ferguson, which provided that Wright and Ferguson would exclusively market Gulf National insurance.³⁵ Loewen counterclaimed that Gulf National had breached the contract first, as the agreement was conditioned upon the continued financial well being of Gulf National, and that company was having obvious financial difficulties. Furthermore, Loewen claimed that the contract between Gulf National and Wright & Ferguson was unenforceable, as several material terms had been omitted. These rather mundane contractual issues were at the core of O'Keefe's lawsuit.³⁶

²⁹ Bernstein, *supra* note 2.

³⁰ *Id.*

³¹ *Id.*

³² *See id.*

³³ Harr, *supra* note 7, at 83.

³⁴ Bernstein, *supra* note 2.

³⁵ Including Wright & Ferguson as a defendant assured that the case could not be removed to federal court.

³⁶ Although this is not the main focus of this paper, a brief look at basic Mississippi contract and corporation law indicates that Loewen was likely in the wrong on these contract issues. First, although Loewen was not a party to the original Riemann/O'Keefe contract, when one corporation entirely takes over another corporation, the acquiring corporation assumes the liabilities of the acquired corporation. *Miss. Cottonseed Prods. Co. v. Planters Mfg. Co.*, 132 So. 96, 99 (Miss. 1931). Second, a finding of anticipatory breach, as alleged by Loewen, would have require a complete repudiation by the alleged breaching party, Gulf National. The financial difficulties of Gulf National almost certainly did not constitute repudiation. *See Mobley v. N.Y. Life Ins. Co.*, 74 F.2d 588, 589 (5th Cir. 1935). Finally, the claim that the Gulf National/Wright & Ferguson contract left open material terms is likely without merit, as continuous dealing contracts are often somewhat open ended.

Shortly after he filed suit, Jeremiah O'Keefe was invited to visit Loewen headquarters in Vancouver to discuss a settlement. After a dinner cruise on Raymond Loewen's yacht, the parties agreed in principle to settle.³⁷ The settlement provided that Loewen would take ownership of two O'Keefe funeral homes, while O'Keefe would take over the Riemann funeral insurance business.³⁸ O'Keefe would receive premiums for all existing insurance policies, as well as \$3.5 million for the funeral homes being sold.³⁹ This agreement seemed to serve both O'Keefe's and Loewen's interests; O'Keefe wanted the insurance business and badly needed an infusion of cash following his savings-and-loan calamity, while Raymond Loewen was still hungry for Mississippi funeral homes.

However, the settlement agreement was never finalized.⁴⁰ The Loewen Group claimed that that documents produced during the due diligence period contradicted O'Keefe's valuation of his three funeral homes, which therefore did not justify the \$3.5 million purchase price.⁴¹ At this point O'Keefe amended his lawsuit to include tort causes of action based on fraud, tortious interference (with Gulf National's funeral insurance contract), breach of good faith, and unfair trade practices (the latter stylized as "willful and malicious monopoly").⁴² O'Keefe now asked for several million dollars in damages, over ten times his original claim.

The jury trial of this lawsuit would take place in Hinds County, Mississippi, a county with a majority black population.⁴³ In preparation for trial, each party added experienced black trial lawyers to their legal teams.⁴⁴ Loewen's additional legal troops included one former state senator and another former chairman of the state house's black congressional caucus.⁴⁵ On learning of this, O'Keefe's attorney is said to have advised his client, "We've been out-blacked."⁴⁶ In response, O'Keefe's legal team journeyed to Florida to seek the participation of a very special lawyer to lead the plaintiff's contracts case.⁴⁷

³⁷ Harr, *supra* note 7, at 83.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Bernstein, *supra* note 2.

⁴¹ Walter Olson, *A Small Canadian Firm Meets the American Tort Monster*, WALL ST. J., Feb. 14, 1996, at A15.

⁴² Harr, *supra* note 7, at 84.

⁴³ The case was ultimately heard in the Hinds County Circuit Court before James E. Graves, an elected black judge. The jury was composed of eight blacks and four whites. The relevance of this will be made clear.

⁴⁴ See Harr, *supra* note 7, at 86.

⁴⁵ *Id.* at 85.

⁴⁶ See *id.*

⁴⁷ Bernstein, *supra* note 2.

D. *Attorney Willie Gary*

Willie Gary, more than Jeremiah O'Keefe or Raymond Loewen, had risen from humble beginnings to become spectacularly wealthy in his chosen profession. Gary's father had worked as a farmhand, and Willie Gary grew up in a house with no electricity or plumbing.⁴⁸ After working his way through college at Shaw University and obtaining a J.D. from North Carolina Central University Law School, Gary opened a solo law practice in Stuart, Florida. Gary quickly found success in personal injury actions, winning twenty-five suits of \$1 million or more during his career.⁴⁹ His most highly publicized win occurred in 2000 when he and co-counsel Johnie Cochran Jr. achieved a \$240 million verdict against the Walt Disney Corporation.⁵⁰ A personal attorney for Reverend Jesse Jackson, Gary is in the forefront of the movement to obtain "reparations for slavery for every black American."⁵¹

Gary has a well-developed set of trial skills to which he candidly attributes his successes. His key talent, apparently, is the ability to "simplify" complex doctrines for juries uninterested in legal niceties.⁵² Picking jurors willing to "rise above" the judge's legal instructions is especially important to him, as "one person could spoil your whole case."⁵³ Gary states he does not, "need the jury to be nitpicky [sic], so I don't want engineers. I want people with common sense."⁵⁴ Gary reportedly begins every trial by saying, "I'm just a country boy, if I just talk in plain ordinary talk about what happened, you won't hold it against me, will you?"⁵⁵ Inviting jurors to ignore legal niceties has served Gary well enough to pay for a Gulfstream jet and a forty-room Mediterranean-style villa complete with gymnasium and movie theater.⁵⁶ However, Gary's "successful" tactics in the legal arena have recently warranted judicial restraint in a federal case involving a race-discrimination class action suit.⁵⁷

⁴⁸ Harr, *supra* note 7, at 72.

⁴⁹ Willie E. Gary, *Front-Load Effort and Win Your Case*, NAT'L L.J., MAY 13, 1996, at D5.

⁵⁰ Jerry Jackson, *Florida Lawyer Anchors Win In Disney Case*, THE ORLANDO SENTINEL, Aug. 13, 2000, available at 2000 WL 25442842.

⁵¹ *Making the Case for Racial Reparations*, HARPER'S MAGAZINE, Nov. 1, 2000, at 37.

⁵² Thus, when he decided to accept O'Keefe's attorneys' advice to take the case, Gary disclaimed any interest in the intricacies of contract law. Rather, he allegedly jumped up and shouted, "this case . . . is about lying, cheating, and stealing!" Harr, *supra* note 7, at 84.

⁵³ Gary, *supra* note 49, at D5.

⁵⁴ *Id.*

⁵⁵ Harr, *supra* note 7, at 78.

⁵⁶ *See id.* Gary named the jet "Wings of Justice." *Id.* at 89.

⁵⁷ Betsy McKay, *Judge in Coke Case Says Lawyer Can't Solicit New Clients*, WALL ST. J., July 12, 2000, at A10 ("U.S. District Judge Richard W. Story barred attorney Willie E. Gary, his law firm and plaintiffs he represents in the class action from initiating contact with, soliciting, or entering into fee agreements with any African-American employees at Coke who are potential beneficiaries of a pending settlement of the class action.").

Willie Gary's influence was made clear to the Loewen legal team when it received a new settlement demand three months before trial. Six months earlier O'Keefe's attorneys had been rebuffed when they demanded \$4 million. Now Willie Gary sent Loewen a settlement demand of \$125 million. This new settlement demand was for an amount much greater than the entire value of O'Keefe's funeral homes and insurance company combined, and astronomically greater than the original contract claims.

II. O'KEEFE V. LOEWEN: WHAT'S LAW GOT TO DO WITH IT?

A. *The Trial Debacle*

Gary's presentation at trial was essentially devoid of legal arguments regarding contract law. Instead, he structured the trial as a populist confrontation pitting a Mississippi business owner and family man against a tricky, racist, and greedy foreign firm that was taking money out of the state.⁵⁸ Gary presented Jeremiah O'Keefe as a patriotic war hero "willing to stand up for America."⁵⁹ On the other hand, he portrayed Raymond Loewen as a man who "wouldn't keep his word, deceived people, and would not deal with honor."⁶⁰ One full-page color ad placed by Gary in local newspapers during the trial juxtaposed the Mississippi and American flags on one side of the page, and the Japanese and Canadian flags on the other.⁶¹ Under the two foreign flags was written "NO" and "Loewen/Riemann;" under the domestic flags, "YES" and "O'Keefe".

The trial judge did little to rein in Gary's trial theatrics. Loewen's attorneys objected the allusions to Loewen's nationality on *more than fifty occasions*, claiming that these references were irrelevant and inflammatory. Each time their objections were overruled.⁶² Loewen's lawyers remained confident that despite Gary's showmanship they would win the case because Gary had presented no specific evidence on the contract issue—the only issue they felt mattered to the case's outcome.⁶³

Loewen's attorneys appear not to have realized the extent of the damage that Gary was inflicting on them. Witnesses testified that Loewen would raise prices at each new funeral home he bought. The relevance of

⁵⁸ Olson, *supra* note 41, at A15.

⁵⁹ *Id.*

⁶⁰ Harr, *supra* note 7, at 86.

⁶¹ There is no Japanese connection to this case. But, Gary questioned O'Keefe at length before the jury regarding O'Keefe's decision to volunteer for service following the Japanese attack on Pearl Harbor. Brief for Claimants/Investors at 11 (on file with author), O'Keefe v. The Loewen Group, Inc., 91-67-423 (Cir. Ct., Hinds Co., Miss. 1995) [hereinafter Brief for Loewen Group].

⁶² Harr, *supra* note 7, at 87.

⁶³ *Id.*

this to O'Keefe's claim was never made clear, especially since O'Keefe had sought to sell his own funeral homes to Loewen. Particularly effective, apparently, was testimony that Loewen marketed one line of caskets at three times wholesale cost.⁶⁴ All this evidence was quite properly objected to; all objections were overruled.

Over similar objections, Gary also continued to focus on race by introducing a string of black witnesses who testified that O'Keefe, a wealthy Biloxi white, was not a racist.⁶⁵ For example, Mike Espy (the former U.S. Secretary of Agriculture) testified that O'Keefe "is a man without bias or prejudice."⁶⁶ Espy also raised the issue of Loewen's foreign status, testifying about his own efforts, as Secretary of Agriculture, to protect the American market from Canadian "dumping" of wheat.⁶⁷ Gary also introduced testimony that while O'Keefe was mayor of Biloxi, he had on one occasion (unconstitutionally) prevented the Ku Klux Klan from demonstrating. Loewen objected to all of this evidence on relevance grounds, and each time was overruled. Raymond Loewen, who attended the proceedings, was understandably incredulous.

In response to the rhetoric of Willie Gary, Loewen attorneys attempted to demonstrate Raymond Loewen's benign attitude toward blacks by introducing evidence of the Loewen Group's well-intentioned, if disastrous, dealings with the National Baptist Convention.⁶⁸ In 1995, Raymond Loewen had come to the realization that he was unable to penetrate the market for black funeral services, in large part because blacks, like whites, tended to seek out funeral homes run by members of their own communities.⁶⁹ Later that year, Loewen met the Rev. Henry J. Lyons, President of the National Baptist Convention (NBC). Rev. Lyons, claiming his organization represented eight million black Baptists, had made a practice of signing sponsorship contracts with large corporations.⁷⁰ Loewen and Lyons concluded that they could jointly market Loewen's services to the NBC membership.⁷¹ The deal presented clear advantages for both sides: Loewen would be able to break into the lucrative black funeral market, and the NBC would benefit from marketing "commissions."⁷²

As the Loewen Group was fiercely expanding its business in the United States, and just before the O'Keefe-Loewen dispute metastasized,

⁶⁴ *Id.*

⁶⁵ See Brief for Loewen Group at 23.

⁶⁶ *Id.* at 24.

⁶⁷ *Id.*

⁶⁸ See David Barstow & Monica Davey, *Anatomy of a Swindle: The Rev. Henry J. Lyons and the Loewen Group*, ST. PETERSBURG TIMES, Aug. 30, 1998, at 1A.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

Ray Loewen finalized his deal with the NBC.⁷³ The contract created an affiliate company of sales representatives who would sell Loewen plots to NBC members. The NBC would get a whopping thirty-three percent sales commission.⁷⁴ However, the implementation of the contract proved very onerous for Loewen. In response to phone requests by Rev. Lyons, Loewen wrote substantial checks for items not provided for in his contract with the NBC. One "request" was for money to cover training of the NBC's sales force. Another was for donations to the NBC's newly established "education fund." A third covered a proposed NBC drug rehabilitation program. Unfortunately for Loewen, Rev. Lyons was in fact redirecting all these moneys into secret accounts to pay for luxury items for himself and his mistress. This embezzlement was not public knowledge at the time of the *O'Keefe v Loewen* trial. Eventually, though, Lyons and his mistress were discovered, prosecuted, and sentenced to prison for their fraud.⁷⁵

Although the arrangement with the NBC had not been fully implemented at the time of trial, Loewen's attorneys called one of Rev. Lyons' assistants to testify, hoping the program would illustrate Loewen's attachment to the black community. This strategy failed spectacularly. Gary responded by bringing in an economist who testified that Loewen would make \$3 billion "off the back of the eight million National Baptist Convention members."⁷⁶ If the price of Loewen funerals was high enough to pay NBC commissions, it was high enough to "gouge" black consumers, argued Gary. The very generous profit sharing that, to Raymond Loewen, demonstrated his good will toward blacks, seemed to condemn his behavior in the jury's eyes.

The Loewen Group's legal team also stumbled when Gary introduced evidence about Raymond Loewen's yacht. Gary had made several remarks about the yacht during the course of the trial.⁷⁷ In response to this, Loewen's attorneys spent hours trying to demonstrate that the yacht was used for business purposes.⁷⁸ When Loewen testified, he characterized the vessel as his "boat," a designation that Gary used on cross-examination to portray Loewen as deceptive. In closing arguments, Gary told the jury, "These people just lied, lied, lied, lied. They lied to Jerry and they lied to you. They even lie for no reason. They lie. What about the boat? Nothing wrong with a man having a yacht, but if you've got a yacht say it!"⁷⁹ One can imagine the discomfiture of Ray Loewen, whose Calvinistic under-

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Barstow & Davey, *supra* note 68, at 1A.

⁷⁶ *Id.* It was uncovered at Lyons' trial that the eight million figure was grossly inflated.

⁷⁷ Harr, *supra* note 7, at 80.

⁷⁸ *Id.*

⁷⁹ *Id.* at 90.

description of the vessel was suddenly attributed, not to strait-laced modesty, but to dishonesty.

Gary's closing arguments ignored all details of contract or tort law, and instead played to the populist sentiments of the Mississippi judge and jury. As far as the contract claim went, Gary summarized, "[t]he bottom line is they broke their word. They broke their word and it was intentional and it was malicious."⁸⁰ Loewen had dominated markets, created monopolies, and gouged grieving black families.⁸¹ Gary asked the jury for \$105 million in damages, adding, "You may think that is not enough."⁸² Loewen's motion for a directed verdict, based on O'Keefe's total lack of evidence to support his legal claim, was denied.

B. *The Original Verdict*

The jury returned a stunning verdict of \$260 million for O'Keefe on November 1, 1995.⁸³ This amount reflected compensatory damages of \$100 million and punitive damages of \$160 million.⁸⁴

The verdict suffered from an obvious and fatal legal flaw totally distinct from its astonishing *quantum*. Under Mississippi law, the issue of punitive damages can only be considered after a separate hearing, which must follow the verdict on compensatory damages.⁸⁵ The jury had shown that it misunderstood the judge's instructions when it combined punitives with compensatory damages in its verdict. Loewen's attorneys moved for a mistrial on this basis. Judge Graves immediately denied this motion.⁸⁶ He advised both parties that he was willing to let the verdict stand if both parties agreed not to file any appeal based on the jury's misbehavior.⁸⁷ O'Keefe's lawyers, not surprisingly, agreed with this offer, but Loewen's lawyers refused to accept the court's condition. They opted instead to argue punitives before the jury.⁸⁸ Judge Graves warned Loewen's attorneys, "I don't think you want to go back in there. You already know they've given a hundred and sixty million without knowing [the Loewen Group's] net worth."⁸⁹ When Loewen's attorneys persisted in their refusal to accept the punitive award without having had a chance to argue it, the judge reformed the verdict to reflect the \$100 million compensatory amount and scheduled a hearing the next day for the same jury to consider punitive

80 *Id.* at 91.

81 *Id.*

82 *Id.*

83 *See* Brief for Loewen Group at 38.

84 *Id.* at 39.

85 *Id.*

86 Harr, *supra* note 7, at 92.

87 *Id.*

88 *Id.*

89 *Id.*

damages.⁹⁰

C. *The Punitive Damages Award*

In most countries punitive civil damages are virtually non-existent. Likewise, the use of juries in civil trials abroad is extremely rare. Loewen's lack of knowledge of punitive damage jurisprudence in the United States likely explains the company's reluctance to accept the judge's offer.

The use of juries in civil trials in the United States coincides with the birth of the country. The fear and mistrust by early Americans of the aristocratic English judiciary led to separate federal and state judicial systems.⁹¹ The Bill of Rights guarantees each American the right to a federal jury trial, even in civil actions.⁹² Forty-nine states have similar clauses in their constitutions.⁹³ The right to a trial by jury in civil, as well as criminal cases, is entrenched in American culture. Additionally, most states allow punitive damages to be awarded by a jury.⁹⁴

The use of punitive damages in the United States has steadily increased over the years. The judiciary has been largely unable or unwilling to stop the practice, and damage awards have escalated exponentially. Juries in the United States seem unfazed in granting facially excessive punitive damage awards, even when compensatory damages are minimal.⁹⁵ Unlike Canada, where cases are ordinarily heard in front of a judge alone and where punitive damages virtually never exceed \$30,000,⁹⁶ juries in the United States often calculate punitive damages as a percentage of the wealth of the defendant.⁹⁷

⁹⁰ See Brief for Loewen Group at 39.

⁹¹ Paul D. Carrington, *Moths to the Light: The Dubious Attractions of American Law*, 46 U. KAN. L. REV. 673 (1998).

⁹² U.S. CONST. amend. VI.

⁹³ In Colorado, trial by jury in a civil action is not a matter of right and is currently regulated by Rule 38 of the Colorado Rules of Civil Procedure. See also *Parker v. Plympton*, 273 P. 1030 (Colo. 1928).

⁹⁴ Civil punitive damages are prohibited in Michigan, Nebraska, New Hampshire, and Washington. RICHARD L. BLATT, ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE, § 8.2 (1991 & Supp. 2001).

⁹⁵ See, e.g., *BMW of N. Am. v. Gore*, 646 So. 2d 619 (Ala. 1994). A brand new BMW automobile was delivered to the dealership with a scratch in the paint. The dealer repaired the scratch without notifying the buyer. A jury awarded the buyer \$4 thousand in compensatory damages, and \$4 million in punitive damages. The United States Supreme Court reversed the verdict: the first time ever that the Court found a state jury's punitive damages award excessive. 517 U.S. 559 (1996).

⁹⁶ See, e.g., *Whiten v. Pilot Ins. Co.* [1999] 170 D.L.R. (4th) 280, at § 39 (citing a typical maximum of \$CDN 50,000, equivalent to \$US 33,000). See also Bruce Feldthusen, *Punitive Damages in Canada: Can the Coffee Ever Be Too Hot?*, 17 LOY. L.A. INT'L & COMP. L.J. 793 (1995).

⁹⁷ In *Whiten v. Pilot Ins. Co.* [1999], for the first time in Canadian history a substantial punitive damage award was upheld on appeal. 170 D.L.R. (4th) 280. The quantum (\$US 65,000) was, however, minimal compared to the *Loewen* award. In addition, the defendant's behavior (denying any recovery

Additionally, attorneys in the United States are free to ask for shocking sums, regardless of the merits of the case. This is largely due to the fact that there is no “loser pays” rule in the United States, which would require a losing plaintiff to pay at least part of the winner’s legal expenses according to a schedule, based on the amount demanded.⁹⁸ American rules provide little disincentive to alleging exorbitant and unproveable damages in the complaint.

When American juries award punitive damages to *in-state* plaintiffs against *out-of-state* corporations, as was the case in the *Loewen* trial, the potential for abuse is multiplied.⁹⁹ Loewen’s status as a foreign corporation made it a prime target for just such abuse. The practical effect of such awards is that foreign companies wishing to do business in the United States must consider the potential for being discriminated against by local juries. Often, corporations will go to extraordinary lengths to avoid litigation in state courts.¹⁰⁰ For example, in 1995, Crown Life Insurance Co., a Canadian corporation, besieged by litigation in the United States, arranged to sell five percent of its stock to the government of Saskatchewan. It then declared itself a foreign state, which would allow it to get into federal court and avoid future state jury trials. Loewen, however, was unable to remove to federal court because of the inclusion of Wright & Ferguson as a defendant. Wright and Ferguson’s in state corporation status effectively precluded diversity jurisdiction.

Mississippi’s historical hostility to out-of-state interests is demonstrated by its selective application of punitive damage awards. The state constitution declares that the populace of Mississippi needs to be protected from large monopolistic companies.¹⁰¹ Two quintessential out-of-state industries, railroads and telegraph companies, were early targets of Mississippi punitive damage awards. By comparison, the cotton industry, which is near and dear to the hearts of many Mississippians, has historically been

under a homeowner’s insurance policy to a destitute couple whose only possession, their home, was clearly burned down as a result of an accidental fire) was without doubt admittedly execrable and unconscionable. In *Loewen*, there was no clear villain to this contract dispute.

⁹⁸ Many Canadian provinces’ civil rules include costs “tariffs” which incorporate this kind of sliding scale. Others do not. In these provinces the size of the claim is one factor in assessing costs, but time spent is more important: the basic approach is to multiply time reasonably spent by an hourly rate that the court assessment officer considers reasonable. In practice, that rate is only a fraction of market value. Under either Canadian “loser pays” system, costs recoveries in cases involving big city counsel tend to be about forty percent or less of actual lawyers’ fees. This is forty percent more than under the American default rule.

⁹⁹ See RICHARD NEELY, *THE PRODUCT LIABILITY MESS, HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS* (1988). In this book, Neely, then Chief Justice of the West Virginia Supreme Court, wrote, “As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so.” *Id.* at 4.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (citing MISS. CONST. art. VII, § 186).

subject to very little tort litigation.¹⁰² A more recent target of Mississippi's tort system has been another out-of-state scapegoat—the insurance industry. Insurers have fallen victim to several judgments awarding punitive damages in amounts many times greater than the corresponding compensatory awards.¹⁰³

The punitive damages phase of the *Loewen* trial was held on November 2, 1995, before the same jury that had determined the compensatory damage award one day earlier. During this phase, Gary produced two economists who testified that the Loewen Group's net worth exceeded \$3 billion. Loewen's two expert witnesses were inconsistent as to the net worth of the corporation, variously estimating its value at \$4 and \$7 hundred million. Gary presented this equivocation as yet another demonstration of the allegedly deceitful behavior of Loewen, although a dishonest defendant would certainly have coached his two experts to arrive at exactly the same (low) figure.¹⁰⁴ Most of Loewen's efforts were devoted to showing that the company was not guilty of the type of behavior that merited *any* punitive damages, and that in any event, the blameworthiness of its behavior, not the corporation's net worth, was the best measure of punitives.

At the close of his presentation, Gary asked the jury for one billion dollars in punitive damages.¹⁰⁵ And he apparently came within one juror's vote of getting his billion dollars.¹⁰⁶ The jury increased the punitive damages award to \$400 million, bringing the total damage award to \$500 million.¹⁰⁷ This amount represented up to seventy eight percent of the net worth of the Loewen Group, and well over 100 times the value of the aborted contract between O'Keefe and Loewen.¹⁰⁸ The judgment was also by far the largest in Mississippi's history, where \$38 million was the previous record for a single punitive damages award.¹⁰⁹ The jury members who spoke with the press afterwards stated that justice had been done. The

¹⁰² John G. Corlew, *The Pursuit of Deep Pockets: A Historical Overview of Punitive Damages in Mississippi*, 63 MISS. L.J. 583 (1994).

¹⁰³ *Employers Mut. Cas. Co. v. Tompkins*, 490 So. 2d 897 (Miss. 1986) (The Mississippi Supreme Court reduced \$50,000 compensatory award to \$500, but let stand the \$400,000 punitive damages award for a ratio of 800 to 1).

¹⁰⁴ See Harr, *supra* note 7, at 92.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Panel Expected to be Constituted Soon in Canadian Firm's \$725 Million NAFTA Claim*, INT'L TRADE REP. (BNA) No.3 at 81 (Jan. 20, 1999). Interestingly enough, the jury foreman was exactly the sort of jury member that Gary likes to avoid. Glen Millen was a white man, 63 years old, and an electrical engineer by trade. And while he had lived in the United States for about half of his life, he was in fact born in Canada. He had once before sat on a jury in a civil case, and that jury found for the defendant. In all, Mr. Millen seemed like the perfect juror for Loewen. Harr, *supra* note 7, at 91.

¹⁰⁹ Janet Novack, *Move Over, Alabama*, FORBES, June 17, 1996, at 81.

jury foreman proudly stated that Loewen “was a rich, dumb Canadian politician [sic] who thought he could come down and pull the wool over the eyes of a good ole Mississippi boy. It didn’t work.”¹¹⁰

D. *The Appeal Fiasco*

Mississippi law requires enforcement of judgments within ten days pending appeal.¹¹¹ An appellant can delay the enforcement requirement only by posting a bond for 125% of the judgment.¹¹² The purpose of Mississippi’s bond requirement is to assure the winning plaintiff that the defendant does not attempt to dissipate assets pending the appeal. In this case, the required bond totaled \$625 million, an amount that approached and possibly exceeded Loewen’s net worth.¹¹³

Federal courts have held that the Mississippi appellate bond requirement would be an unconstitutional deprivation of due process of law if the cost of posting the bond would effectively bankrupt the appellant.¹¹⁴ In response to this ruling, the Mississippi Supreme Court instituted Appellate Procedure Rule 8(b), which states that the bond may be reduced or eliminated by the trial Court upon a showing of “good cause.”¹¹⁵

Pursuant to Rule 8(b), Loewen moved for a reduction in the appeal bond to \$125 million, which Loewen felt complied with the spirit of the state’s bond requirement.¹¹⁶ It represented 125% of the compensatory damages.¹¹⁷ Loewen’s Rule 8(b) motion relied on federal case law, which held that defendants should not be required to post a bond for the punitive component of an award when doing so could potentially bankrupt them.¹¹⁸ To the extent that the bond protects compensatory sums, it fulfills its purpose since the compensatory portion of any damage award is, by definition, sufficient to make the plaintiff whole.¹¹⁹ Loewen argued that the plaintiff should not be entitled to protection of punitive as well as compensatory damages because any punitive amount is in essence a windfall to the plaintiff.¹²⁰

¹¹⁰ Bernstein, *supra* note 2, at 6.

¹¹¹ Harr, *supra* note 7, at 93-94.

¹¹² Scott Morrison, *Canadian Group in First Use of NAFTA Clause*, FINANCIAL TIMES, Nov. 19, 1998 at 7.

¹¹³ *Id.*

¹¹⁴ Henry v. First Nat’l Bank of Clarksdale, 424 F. Supp. 633, 638-39 (N.D. Miss. 1976), *aff’d*, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

¹¹⁵ MISS. R. APP. P. 8(b).

¹¹⁶ See Brief for Loewen Group at 44.

¹¹⁷ *Id.*

¹¹⁸ Olympia Equip. Leasing Co. v. W. Union Tel. Co., 786 F.2d 794, 796-97 (7th Cir. 1986).

¹¹⁹ *Id.* at 797.

¹²⁰ *Id.* See also Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O’Connor, J., concurring) (noting that punitive damage awards are meant to punish, and the effects of such windfalls are “unpredictable and potentially substantial”).

Pursuant to the discretion granted to him under Rule 8(b), Judge Graves rejected Loewen's motion to reduce the appeal bond. He found that a reduced bond would not adequately protect O'Keefe's interests.¹²¹ However, it is difficult to support Judge Graves contention that O'Keefe's interests were being jeopardized, as the compensatory award, amounting to more than twelve times the value of the entire O'Keefe business group, would have been fully protected by the bond.

To avoid liquidating all of its assets to make its appeal possible, Loewen had to find a bond agency to post bond. Given the now-perilous state of Loewen's balance sheet, the surety bond companies Loewen contacted required 100% collateral in the form of a \$625 million letter of credit. Loewen claimed that financing \$625 million of new debt would be impossible, as it already had \$736 million of outstanding debt.¹²² Taking on the new debt would have drastically increased Loewen's debt-equity ratio, violating covenants with existing creditors and triggering defaults on Loewen's senior debt and bank credit lines.¹²³ In any event, Loewen estimated that posting the bond would cost \$200 million in non-recoverable fees, even if Loewen were to prevail on appeal.¹²⁴ That amount alone constituted, by Loewen's calculations, more than twenty-five percent of the net worth of the company.

Loewen was faced with an impossible situation. The judgment was clearly outrageous, and complying with it would bankrupt the company. Given the trial record, Loewen was confident of prevailing on appeal, but it was impossible to post the bond required to pursue the appeal process. And even if Loewen managed to post the bond, the financing charges would be enormous.¹²⁵

During the ten-day period before the judgment came due, Loewen's attorneys filed motions for a new trial, for defendant's judgment notwithstanding the verdict, and for *remittiturs*.¹²⁶ Judge Graves heard oral argument on all these motions, and then dismissed them. Judge Graves also refused to reduce the bond requirement. Loewen petitioned for immediate review of this denial from the Mississippi Supreme Court, requesting relief from the bond requirement and again agreeing to post a \$125 million bond.¹²⁷ The petition was denied in late January 1996.¹²⁸ Loewen was back

¹²¹ See Brief for Loewen Group at 44.

¹²² *Id.*

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ An additional consideration for appellants in Mississippi is § 11-3-23, which imposes a penalty of fifteen percent of the judgment amount when a party loses on appeal and the judgment is not modified. In this case, if Loewen appealed and lost, they would have lost the \$200 million financing fees, the \$500 million punitives award, and an additional penalty of \$75 million (fifteen percent of \$500 million). See MISS. CODE ANN. § 11-3-23 (West 1999).

¹²⁶ Harr, *supra* note 7, at 93.

¹²⁷ Harr, *supra* note 7, at 94-95.

to square one: it now had one week to post the required bond if it wanted to appeal the \$500 million judgment.¹²⁹

Even at this point there was bargaining room between the parties, for the plaintiffs wanted to avoid both a likely reversal if Loewen somehow did appeal, and the prospect of competing with other creditors if Loewen was forced into bankruptcy.¹³⁰ The two sides, therefore, met in an Atlanta hotel for what became a marathon bargaining session.¹³¹ O'Keefe himself attended the meeting, and in the end, it was his initiative that was the catalyst for a \$175 million settlement.¹³² The negotiated settlement was structured as \$50 million in cash, 1.5 million shares of Loewen Group stock, and payments of \$4 million per year for twenty years.¹³³ Gary was entitled to twenty-five percent of the entire settlement amount.¹³⁴ The fact that the settlement amount was less than the \$200 million Loewen would have had to pay to finance its appellate bond is powerful circumstantial evidence that O'Keefe's attorneys recognized the likelihood of defeat if Loewen pursued the appeal.

Following the settlement, Loewen hired a new law firm, Jones, Day, Reavis & Pogue, to petition a very different forum.¹³⁵ Meanwhile, Loewen's stock recovered from a post-verdict free-fall, and in two equity offerings the following year, the company raised \$382 million.¹³⁶ The Loewen Group continued to expand and successfully fought off a hostile takeover effort by archrival funeral consolidator Service Corporation International.¹³⁷ However, the rapid expansion and the O'Keefe award saddled Loewen with considerable debt, which proved increasingly difficult to bear in an era of decreasing mortality and increasing cremation rates.¹³⁸ As a result, Raymond Loewen was forced to resign from the family company that he had personally built, and in June 1999, the Loewen Group filed for bankruptcy protection.¹³⁹

Jeremiah O'Keefe's fortune was markedly better. In September 1999, O'Keefe and a group of investors offered to buy from the bankrupt Loewen all of its holdings in Mississippi, Alabama, and Louisiana.¹⁴⁰ This ironically ended the Loewen Group's foray into the South.

128 *Id.* at 95.

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 Brief for Loewen Group at 45.

134 Harr, *supra* note 7, at 95.

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

III. THE LOEWEN GROUP INC. V. UNITED STATES

A. Background

Having accepted a settlement, Loewen was precluded from appealing in either state or federal courts. The company therefore charted a new course. Claiming violations of Chapter 11 of NAFTA, Loewen brought suit *in extremis* against the United States.¹⁴¹ This was the first time that a private corporation had sued the United States under NAFTA, and the first time that anyone had claimed that a *judicial proceeding* in any signatory country constituted a NAFTA violation.¹⁴²

NAFTA's Chapter 11 allows private corporations to sue a signatory directly instead of appealing to their home governments to make a more traditional nation-to-nation complaint under Chapter 20 of the treaty.¹⁴³ Chapter 11 of NAFTA is largely based on the investment provisions of the United States-Canada Free Trade Agreement ("CFTA").¹⁴⁴ During the negotiations over Chapter 11, United States' participants actively sought to "secure access to international arbitration for investor disputes under the agreement" because of Mexico's longstanding opposition to arbitration panels.¹⁴⁵ The original intent of Chapter 11 was to protect foreign investors from the risk of government seizures, a particular concern for American firms doing business in Mexico.¹⁴⁶

Under Chapter 11, a corporation based in one signatory state can sue another signatory before an arbitration panel if it alleges that one or more of Articles 1102-1111 has been breached.¹⁴⁷ Loewen's claims were brought pursuant to Articles 1102, 1105, and 1110 of NAFTA.¹⁴⁸

1. First Cause of Action: Article 1102 Equal Protection

Article 1102 requires that signatories accord treatment to foreign in-

¹⁴¹ Claims brought under Chapter 11 are subject to a three-year statute of limitations. NORTH AMERICAN FREE TRADE AGREEMENTS, pt. 5, ch. 11, § B, arts. 111b-17 (James R. Holbein & Donald J. Musch eds., Release 95-5, Nov. 1995) (hereinafter NAFTA). Loewen brought this claim in with little time to spare.

¹⁴² Morrison, *supra* note 112, at 7.

¹⁴³ NAFTA, *supra* note 141, ch. 11, arts. 1116, 1117.

¹⁴⁴ For an overview of chapter eleven provisions, see generally, Richard C. Levin & Susan Erickson Marin, *NAFTA Chapter 11: Investment and Investment Disputes, 2-Sum NAFTA: L. & Bus. Rev. Am.* 82, 83 (1996); the United States Canada Free Trade Agreement, Jan. 2 1988, U.S. Can., Pub.L. No. 100-449, 27 I.L.M. 281 (entered into force on January 1, 1989).

¹⁴⁵ *Id.* at 89.

¹⁴⁶ Mathew Nolan & Darin Lippoldt, *Obscure NAFTA Clause Empowers Private Parties*, NAT'L L.J., Apr. 6, 1998, at B8.

¹⁴⁷ *Id.*

¹⁴⁸ See Brief for Loewen Group at 3.

vestors no less favorable than the treatment they accord to their own investors. It states in pertinent part “Each party shall accord to investors of another party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”¹⁴⁹

Loewen claims that prejudicial statements made at trial about its Canadian nationality, and which were allowed over objection, amounted to “less favorable” treatment, and as such violated Article 1102.¹⁵⁰ To support this contention, Loewen asked Sir Robert Jennings, Professor Emeritus of International Law at Cambridge University, to examine the trial record. Jennings concluded that the verdict was obtained by “the quite ruthless and blatant working up of both racial and nationalistic prejudice.”¹⁵¹ As additional support, Loewen provided affidavits from former West Virginia Chief Justice Richard Neely and from former Mississippi Governor Kirk Fordice.¹⁵² Chief Justice Neely’s affidavit concludes that Loewen’s rights were violated when O’Keefe’s lawyers “reiterated three themes that had the effect of inflaming the passions of the jury, namely race, wealth, and many of the defendants’ Canadian citizenship.”¹⁵³ In the affidavit, Chief Justice Neely goes on to state that he believes with a “reasonable degree of jurisprudential certainty” that the Loewen Group was “intentionally subjected to a complete denial of justice by the Mississippi Supreme Court” because of its Canadian citizenship.¹⁵⁴ Governor Fordice echoes this view, stating, “Loewen’s status as a Canadian based company may have deprived it of fundamental rights that would otherwise be guaranteed to the citizens of our state.”¹⁵⁵

2. Second Cause of Action: Article 1105 Due Process

Article 1105 states that “[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”¹⁵⁶ Under this Article, Loewen alleges that the O’Keefe litigation failed to meet the “fair and equitable treatment” requirement. Relying on principles of international law, Loewen claims that the \$500 million judgment, the

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 50.

¹⁵¹ *Id.* at 49.

¹⁵² *Id.* According to his book, Neely would apparently sympathize with Judge Graves, as he was acting in his own best interests in being re-elected. NEELY, *supra* note 99.

¹⁵³ Brief for Loewen Group, Exhibit B, Affidavit of Chief Justice Richard Neely at 6.

¹⁵⁴ *Id.* at 3.

¹⁵⁵ Brief for Loewen Group, Exhibit C, Letter to the Tribunal from Mississippi Governor Kirk Fordice at 2.

¹⁵⁶ NAFTA, *supra* note 141, ch. 11, § A, art. 1105 (1).

prejudicial and inflammatory rhetoric heard by the jury, and the requirement that a \$625 million appeal bond be posted in order to proceed with an appeal amounted to substantive and procedural denials of justice.¹⁵⁷

3. Third Cause of Action: Article 1110 Anti-Expropriation

Loewen's final claim is stated under Article 1110, which states:

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
 - (a) for a public purpose;
 - (b) on a non-discriminatory basis;
 - (c) in accordance with due process of law and Article 1105(1); and
 - (d) on payment of compensation in accordance with paragraphs 2 through 6.
2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place. . . . Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.¹⁵⁸

Relying on international law principles, Loewen asserts that the excessive verdict, the denial of its right of appeal, and the coerced settlement were tantamount to an uncompensated expropriation under Article 1110.¹⁵⁹ Expropriation occurs when government action interferes with a foreign investor's use or enjoyment of property.¹⁶⁰ The state does not have to be the beneficiary of the action, but merely the instrument of the action.¹⁶¹ Furthermore, the complaint states that there is no "public purpose" for providing O'Keefe with this disguised expropriation.¹⁶² The anti-Canadian sentiment rampant during trial is evidence that the confiscatory verdict and judgment were not arrived at "on a non-discriminatory basis."¹⁶³ Finally, the complaint claims that the "due process" reference of Article 1110 (1)(c) was violated, and that Loewen was not compensated for the expropriation.¹⁶⁴

B. *Holding the United States Liable*

Loewen's claim attaches liability to the United States on two grounds. First, it correctly argues that, under principles of international law, Article 105 of NAFTA makes the United States responsible for actions of its con-

¹⁵⁷ See Brief for Loewen Group at 52.

¹⁵⁸ NAFTA, *supra* note 141, § A, art. 1110.

¹⁵⁹ See Brief for Loewen Group at 59.

¹⁶⁰ *Id.* at 59.

¹⁶¹ *Id.* at 60.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

stituent units, including the Mississippi state judiciary.¹⁶⁵ Article 105 states that “[p]arties shall ensure that all necessary measures are taken in order to give effect to the provisions of this agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.”¹⁶⁶ Congress contemplated whether the United States could be liable for the actions of individual states when NAFTA was originally presented.¹⁶⁷ Its apparent conclusion was that the federal government was indeed liable for non-compliant state action.¹⁶⁸ It is unclear whether the actions of state *judiciaries* were considered in this debate, as the more obvious meaning of state action is legislative or executive action, and not judgments rendered following jury verdicts. On the other hand, United States Supreme Court case law has held that state courts’ judgments do indeed constitute state government action.¹⁶⁹

Loewen’s second ground for attaching liability to the United States is the “full protection and security” clause of Article 1105.¹⁷⁰ Loewen claims that this clause was intended to codify international common law principles according to which a state is responsible for failing to exercise due diligence to protect aliens from third parties.¹⁷¹ As authority, they cite an incident in which several Italian citizens were lynched in New Orleans, following which the United States responded by agreeing to pay compensation to the victims.¹⁷² Loewen claims that it was similarly “lynched” by the “gross injustice that it suffered in Mississippi, an injustice against which the United States offered it no protection.”¹⁷³

Loewen is not seeking to overturn the Mississippi court’s judgment; it clearly has no right to such relief under NAFTA. Rather, Loewen seeks compensation for damages caused by Mississippi’s alleged breaches of NAFTA’s Chapter 11.¹⁷⁴ Loewen estimates these damages at \$725 million.¹⁷⁵ This figure includes the \$175 million settlement, “reduced prospects for corporate investment and growth,” “harm to its business

¹⁶⁵ *Id.* at 61.

¹⁶⁶ *Id.*

¹⁶⁷ H.R. Doc. 103-159, 103d Cong., 1st Sess., v. 2. at 5 (1993).

¹⁶⁸ See Letter from Michael Kantor, to Hon. Henry A. Waxman, Chairman, Subcomm. On Health and the Environment (Sept. 7, 1993), reprinted in 1993 U.S.C.C.A.N. 2858, 2862.

¹⁶⁹ *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Supreme Court held in *Shelley* that judicial enforcement of contracts was “state action” under the Constitution, and that if such contracts were racially discriminatory their enforcement would constitute a violation of the Equal Protection clause of the Fourteenth Amendment. *Id.*

¹⁷⁰ See Brief for Loewen Group at 62.

¹⁷¹ *Id.* (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 183(b)(ii) (1965), RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 711(b), cmt. e (1987)).

¹⁷² See Brief for Loewen Group at 63.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 65.

¹⁷⁵ *Id.* at 67.

reputation,” “reduced credit ratings,” “increased financing costs,” and “other harms,”¹⁷⁶ as well as personal damages to Loewen.

Claims brought under Chapter 11 are subject to a three-month “cooling off period,” established to encourage settlement.¹⁷⁷ When the United States failed to accede to Loewen’s complaint during this period, Loewen chose to register the suit for arbitration before the International Center for Settlement Disputes (ICSID).¹⁷⁸ NAFTA provides for three ICSID arbitrators, one representing each country involved in the dispute and a third agreed upon by the parties.¹⁷⁹ Arbitrators were appointed,¹⁸⁰ and on May 18, 1999, the first arbitration session was held in Washington, D.C. As a procedural matter, ICSID arbitration proceedings are secret, although the rules provide that after the arbitration panel’s decision, the parties can announce the result.¹⁸¹

IV. WHAT IS AT STAKE: NAFTA REFORM AND TORT REFORM

A. *Impact on American Tort Law*

The dilemma sketched by Chief Justice Neely, in which state courts redistribute wealth from out-of-state defendants to in-state plaintiffs, can be usefully conceptualized as a classic Prisoners’ Dilemma.¹⁸² The Prisoners’ Dilemma springs from the reality that many state tort suits involve local plaintiffs and out-of-state defendants (who are unable to remove the suit to federal court, often because of incomplete diversity rules). In brief, each state’s judicial system can treat out-of-state defendants equally to in-

¹⁷⁶ *Id.* at 66.

¹⁷⁷ Article 1119 of NAFTA, the Notice of Intent to Submit a Claim to Arbitration, requires in part, “[t]he disputing investor shall deliver to the disputing party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted . . .” NAFTA, *supra* note 141, ch. 11, art. 1119.

¹⁷⁸ The ICSID is a division of the World Bank. Submission for arbitration to the ICSID is explicitly provided for under Chapter 11’s arbitration articles. *See* NAFTA, *supra* note 141, arts. 1118-38.

¹⁷⁹ Article 1123 of NAFTA, titled the “Number of Arbitrators and Method of Appointment,” provides in part, that “unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the parties.” NAFTA, *supra* note 141, ch. 11, art. 1123. Provisions are made in Article 1124 for situations in which the parties fail to appoint, or cannot agree, on an arbitrator. *Id.*

¹⁸⁰ The Canadian arbitrator, Yves Fortier, is a prominent Montreal corporate attorney. The American Arbitrator, Abner Mikva, the D.C. Circuit Court of Appeals. The third arbitrator, Anthony Mason, recently retired from President of the board and is an Australian attorney.

¹⁸¹ Annex 1137.4: Publication of Award, provides that where either the United States or Canada is a disputing party, either party to the arbitration may make the award public. NAFTA, *supra* note 141, ch. 11, annex. 1137.4.

¹⁸² Eric Helland & Alexander Tabarrok, *Exporting Tort Rewards*, REGULATION, Jan. 1, 2000, at 21-26.

state defendants, in which case national welfare is maximized (investments are less costly, commerce is less risky, etc.). However, an individual state might be tempted to extract large profits for local residents by oppressing out-of-state defendants. This temptation could yield sub-optimal outcomes as illustrated in the following simple table:

		State B (Second Payoff)	
		Legal Neutrality to Defendants from A	Exploitation of Defendants from A
State A (First Payoff)	Legal Neutrality to Defendants from B	10,10	-40,15
	Exploitation of Defendants from B	15,-40	-25,-25

The above matrix (the numbers are arbitrary—many different numbers could illustrate the dilemma) shows that State A would optimize its payoff, regardless of State B's behavior, by exploiting out-of-state defendants. State B has similar incentives. The expected outcome is the lower right-hand corner, which is Pareto-inferior to the upper left-hand corner outcome.

The Prisoner's Dilemma could of course be resolved (i.e., the payouts altered) if out-of-state defendants could price-discriminate, and charge higher prices for goods and services in states where they are more likely to be subject to tort liability. For various reasons, this is not usually a realistic alternative.¹⁸³ Thus, costs are diffused among the national population, reducing any one person's or group's incentives to argue for change. As benefits are highly concentrated (in, for instance, plaintiff's lawyers), political pressures to *exacerbate* the problem may prevail over reform-minded lobbying.¹⁸⁴

¹⁸³ In brief, customers in tort-crazy states can currently purchase their goods and services out-of-state at low cost, and (under current law) invoke in-state law when disputes arise.

¹⁸⁴ The most visible opponent of tort reform is the Association of Trial Lawyers of America (ATLA). ATLA has actively worked with state trial lawyers' associations, writing *amicus* briefs and providing legal staff to fight tort reform statutes. Richard D. Hailey, *ATLA's Constitutional Litigators Fight 'Tort Reform,'* TRIAL, Feb. 1998, at 9. ATLA's constitutional litigation department has been instrumental in strategic planning and providing support to state trial lawyers' associations. Harvey Berkman, *Ironies Abound in Tort Reform Battle: Court Voiding of Tort Reform Laws Triggers State-*

The dilemma could also be resolved if States A and B themselves could be made to bear more of the costs of their oppressive choices. This would occur if the oppressed defendant could sue the oppressive state; however, sovereign immunity precludes this outcome. What if, alternatively, the oppressed defendant could sue a third party that *is* in a position to exert influence on the oppressive state?

The outcome of the *Loewen* case could in this sense have far-reaching consequences for the American tort reform movement as well as for NAFTA. If the case is decided in Loewen's favor, foreign companies will feel authorized to bring adverse United States judicial decisions before a NAFTA tribunal that will consider other countries' tort law when evaluating the American judgment.¹⁸⁵ The possibility that an American state court's decision would be effectively neutralized by an unelected, non-American, and secret NAFTA panel should galvanize opposition to NAFTA by states' rights advocates and federalists alike.

From a public choice perspective, Chapter 11 is fascinating. The structure of NAFTA's arbitration panel makes it difficult for interest groups to fully capture the panel, since each party has full control over one member.¹⁸⁶ The arbitration panel established by Chapter 11 is designed to insulate the panelists from political pressures. Rent-seekers who may subject local state actors to professional or political pressures are, therefore, much less able to exert pressure on the panel.

Admittedly, a successful NAFTA claim by Loewen would externalize the costs of NAFTA-violating behavior onto the national population, rather than only onto the state or locality where the misbehavior occurred. This result produces little direct incentive for elected state judges to modify

Federal Struggle, NAT'L L.J., Aug. 30, 1999. ATLA's strategy relies on lawsuits to overturn legislatively enacted tort reform by exploiting traditional constitutional principles, such as the right to due process and the right to trial by jury, as well as individual state constitutional provisions, such as "right to remedy" clauses. The state branches of ATLA, supported by the national organization have been successful in several states, particularly ones with elected judiciaries, at getting tort reform measures overturned. *See, e.g.*, *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997) (overturning state tort reform statute based on constitutional arguments advanced by the Illinois Trial Lawyers Association and ATLA); *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999) (overturning tort reform statute largely based on state constitutional arguments submitted in an amicus brief by the Indiana Trial Lawyers Association with the assistance of ATLA); *Lakin v. Senco Prods.*, 987 P.2d 463 (Or. 1999) (holding that the legislature does not have the plenary power to change the common law, which had been advanced by ATLA in its amicus brief). *See also* *State Ex. Rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999) (finding every element of Ohio's tort reform statute unconstitutional despite blistering dissenting opinions).

¹⁸⁵ America's "free-form liability standards, broad-ranging discovery practice, civil jury system, and punitive damage awards," are "all uniquely American creations" and are the subject of a great deal of concern for foreign businesses interested in doing business in America. *See* Alfred W. Cortese, Jr. & Kathleen L. Blaner, *Civil Justice Reform in America: A Question of Parity with our International Rivals*, 13 U. PA. J. INT'L BUS. L. 1 (1992). *See also* Carrington, *supra* note 91.

¹⁸⁶ Michael I. Krauss, *The Record of the United States-Canada Binational Dispute Resolution Panels*, 6 N.Y. INT'L L. REV. 85, 91 (1993).

either their own or the jury's behavior to prevent NAFTA-violating outcomes. Elected local judges are subject to local, not national, political pressures with respect to their reelection.¹⁸⁷ Even appointed members of the judiciary are often subject to political pressures that would make them reluctant to oppose large jury verdicts.¹⁸⁸ But a successful claim by Loewen would encourage the federal government to restrain NAFTA-violating behavior by local courts. Both through its treaty implementation power and under the 14th amendment, the federal government can exercise such control if it wishes. Thus Chapter 11 might solve the Prisoner's Dilemma.

Arrayed against Loewen's NAFTA suit are pro-plaintiff lobbies, which perceive a problem with NAFTA, not with the American tort system. *Public Citizen*, founded by "consumer advocate" Ralph Nader, and opposed to NAFTA on mercantilist grounds, has been particularly vocal in its denunciation of Chapter 11. *Public Citizen* has portrayed Loewen's claims as an attack on the American judicial system in general, and on the institutions of juries and of punitive damages in particular.¹⁸⁹ *Public Citizen* contends that the fact "that a NAFTA tribunal of unelected trade bureaucrats can sit in judgment over the legal system of sovereign nations poses a threat to the legal tradition of the United States as well as to consumers' rights under the law."¹⁹⁰ *Public Citizen* also opposes the secretive nature of the entire NAFTA dispute resolution mechanism. To illustrate how incompatible the mechanism is with the United States law, *Public Citizen* notes that the United States government might have settled the case during the cooling-off period, and had that happened, taxpayers would never even have known of the settlement.¹⁹¹

B. Chapter Eleven Actions Brought Against NAFTA Signatories

Signatory countries have been as disturbed as watchdog groups by Chapter 11 suits. Canada, Loewen's nominal protector, has offered no support for Loewen's claim.¹⁹² One Canadian official commented that "the rights of investors cannot inhibit the sovereign responsibility of governments to legislate and regulate in the public interest."¹⁹³ Indeed, Chapter 11 has spawned far more suits against Canada and the United States than

¹⁸⁷ See Carrington, *supra* note 91, at 685 (stating that in states where judges are elected, the beneficiaries of large judgments have incentive to spend large amounts influencing elections).

¹⁸⁸ Krauss, *supra* note 186, at 91.

¹⁸⁹ *Canadian Corporation Uses NAFTA to Challenge State Civil Verdict; Claims U.S. Legal System Violated its Rights*, PUBLIC CITIZEN PRESS RELEASE, Apr. 21, 1999.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Under Chapter 20 of NAFTA, a business can go to its own country for support. The signatory country would then file a complaint on behalf of the business.

¹⁹³ BNA INT'L TRADE DAILY, Jan. 15, 1999.

against its intended target, Mexico.

1. *Ethyl Corporation v. Canada*

Ethyl Corporation is a Virginia-based firm that manufactures MMT, a fuel additive.¹⁹⁴ Canadian environmental groups claimed that MMT damages automobiles' emissions sensors, resulting in a failure to detect high levels of emissions.¹⁹⁵ However, these claims against MMT were insufficiently corroborated by scientific evidence, prohibiting Canada from proscribing the chemical under its environmental protection statute.¹⁹⁶ Instead of banning MMT outright, Canada forbade the importation of MMT.¹⁹⁷

Ethyl owned a subsidiary in Canada for the sole purpose of importing and distributing MMT. Claiming that Canada had enacted the import ban based on the same inadequate science that failed to justify a total prohibition, Ethyl brought action for \$251 million against Canada under Chapter 11 of NAFTA.¹⁹⁸ Ethyl based its claim upon Article 1110, alleging that the ban on importing MMT amounted to an indirect confiscation of Ethyl's Canadian assets.¹⁹⁹

The Canadian government apparently felt that if the case was allowed to go before the arbitration panel, Canada stood a good chance of losing. Therefore, Canada settled during the cooling-off period.²⁰⁰ It repealed the import ban and paid Ethyl \$13 million in damages, including \$4.5 million in attorneys' fees.²⁰¹ In a letter to Ethyl, the Canadian Minister of the Environment admitted that insufficient evidence existed regarding the health risks of MMT.²⁰²

The importance of the *Ethyl* settlement should not be underestimated. Canadian authorities evaluated evidence concerning the health risks of a substance, and took action that harmed a foreign corporation. That Canada arguably took action on the bases of "junk science" would normally not have affected the legality of its decision. However, in this case the harmed corporation was a foreign national. Under NAFTA's Chapter 11, Ethyl was able to impose its interests on a sovereign state. In effect, NAFTA gave the foreign corporation greater rights than those enjoyed by domestic corporations, as Ethyl's ability to sue under NAFTA was completely de-

¹⁹⁴ Amy Schroeder, *Ethyl Corporation v. Canada*, THE AMERICAN LAWYER, June, 1997.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ J. Martin Wagner, *International Investment Expropriation and Environmental Protection*, 29 GOLDEN GATE U. L. REV., 465, 491-95 (1999).

¹⁹⁹ *Id.* at 491-92.

²⁰⁰ *Id.* at 495.

²⁰¹ *Id.*

²⁰² *Id.*

rived from Ethyl's status as a foreign corporation.

2. *Sun Belt Water v. Canada*

The *Ethyl* victory paved the way for other suits. A California business, Sun Belt Water Inc., sued Canada under Chapter 11 for \$468 million after the province of British Columbia banned the exportation of water.²⁰³ Sun Belt had won a contract to supply water to a small California town, and then contracted with Snowcap Waters, a Canadian firm, to supply the water.²⁰⁴ Canada's fresh water supply is abundant: twenty percent of the world's fresh water flows through the country, most of it flowing unused into salty seas.²⁰⁵ American businesses have been and continue to be interested in purchasing Canadian water.²⁰⁶ However, nationalists in Canada have long been opposed to water exports to their southern neighbors, in part as a matter of national pride.²⁰⁷

The government of British Columbia banned the export of water from its territory. This ban effectively cancelled the contract that Sun Belt had previously signed to bring water by tanker into California. Both Snowcap and Sun Belt sued the government of British Columbia.²⁰⁸ Snowcap's suit was settled, but Sun Belt's was not.²⁰⁹ This prompted Sun Belt to file suit under NAFTA's Chapter 11, claiming British Columbia's government had discriminated against it.²¹⁰

3. *Methanex v. United States*

In addition to *Loewen*, the United States has been subject to another claim under NAFTA's Chapter 11. Methanex, a Canadian corporation that produces the gasoline additive MTBE, has filed suit under NAFTA claiming that a California law phasing out MTBE is tantamount to expropriation.²¹¹ MTBE is an effective oxygenate, cleaning the air as required by federal legislation. However, MTBE has been identified as a possible carcinogen, and on occasion finds its way into the water supply from defective underground storage tanks. The governor of California labeled MTBE a "significant risk to California's environment," and the director of

²⁰³ *United States Water Policy: There's Plenty Up North*, THE ECONOMIST, Jan. 23, 1999.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ It is unclear why sale of Canadian timber and petroleum to the United States does not similarly rile nationalists. The rhetoric of being "sucked dry" by the American behemoth seems to have a particularly hypnotic effect when water is being discussed.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Natalia Williams, *Health Canada Studies MTBE Warning*, TORONTO STAR, July 28, 1999.

the Environmental Protection Agency recently initiated proceedings designed to ban it nationwide.²¹² The claim is the largest Chapter 11 suit yet, with Methanex alleging damages of \$970 million.²¹³

Plaintiff companies claiming direct harm have brought all three of these cases by state action. The *Ethyl* case protests against Canadian federal legislation, *Sun Belt* involves the action of the government of British Columbia, and *Methanex* attacks California state action. The *Loewen* case is unique in that it alleges harm caused by *judicial* action.

4. *MetalClad v. Mexico*

In a stunning decision in September 2000, a Chapter 11 panel found that a Mexican state prevented an American company from operating a toxic waste storage site because of its nationality.²¹⁴ MetalClad had obtained Mexican federal environmental approval for the facility, which was sorely needed in a country producing 10 million tons of hazardous waste each year with only one current storage site. But the state of San Luis Potosi and the municipality of Guadalcazar, spurred on by Greenpeace activists, exercised their federal rights and denied local approval. MetalClad claimed the state and local setbacks were in fact based on its American citizenship. An international panel agreed, and condemned Mexico to reimburse MetalClad for \$16 million in reliance costs.²¹⁵

As a result of this claim and the other three previously mentioned in this Part,²¹⁶ Canada has undertaken a review of Chapter 11.²¹⁷ The United States has also initiated an analysis of Chapter 11 following the *Loewen* suit.²¹⁸ Representatives from both countries who participated in negotiating NAFTA have expressed surprise at the way Chapter 11 has been used by plaintiffs to gain leverage.²¹⁹ Given the outcome of the *MetalClad* case, it

²¹² *Id.* American ethanol producers would likely be the main beneficiaries of such a ban. Ethanol is a more expensive oxygenate than MTBE.

²¹³ See Robert Collier & Glen Martin, *U.S. Laws Diluted by Trade Pacts*, SAN FRANCISCO CHRONICLE, July 24, 1999, at A1.

²¹⁴ *NAFTA Panel Directs Mexican Government to Pay Compensation to U.S. Corporation MetalClad*, SOURCEMEX ECONOMIC NEWS & ANALYSIS ON MEXICO, Sept. 13, 2000, available at 2000 WL 19420862.

²¹⁵ *Id.* MetalClad had demanded expectation damages of \$90 million in lost profits, but was limited to reliance damages by the panel. *Id.*

²¹⁶ For a listing of other similar claims brought under NAFTA, see Wagner, *supra* note 198, at 495 n.90.

²¹⁷ *Panel Expected to be Constituted Soon in Canadian Firm's \$725 Million NAFTA Claim*, *supra* note 108, at 114.

²¹⁸ U.S. Trade Representative Charlene Barshefsky, set up a "special working group" in January 1999 to examine whether Chapter 11 should be modified to restrict private company suits against signatories.

²¹⁹ See *Panel Expected to be Constituted Soon in Canadian Firm's \$725 Million NAFTA Claim*, *supra* note 108, at 114.

appears increasingly likely that these two signatories will obtain Mexico's assent to prevent collateral attacks on legislation, executive action, and judicial behavior.

CONCLUSION

The Loewen Group was victimized by a judicial system it did not anticipate, and by a plaintiff's lawyer who mastered it all too well. The farcical judgment against it arguably had little to do with either tort or contract law, and much to do with factors unwritten in any Mississippi Code. In NAFTA, the Loewen Group has found a possible remedy for devastating verdicts that is innovative, but destructive of our federal structure.

It is not clear that Loewen should be forced to resort to a NAFTA remedy for what might qualify as illegitimate state action on other grounds. As has already been judicially noted, a strong case can be made that state juries are systematically biased against out-of-state corporations, and frequently saddle them with high punitive damages awards.²²⁰ If this state jury bias can be analogized to a state tax on out-of-state firms, then its prevalence could arguably run afoul of the Commerce Clause of the United States Constitution.²²¹ The Supreme Court has already held that a state may not use punitive damages in lieu of criminal fines to favor its citizens at the expense of out-of-state interests.²²² Even in the unlikely event²²³ that the bias against out-of-state corporate defendants is no greater than that toward in-state corporations, arbitrary jury awards could constitute violations of federal Due Process guarantees.²²⁴

The effects of this case and others like it are still evolving. If Chapter 11 suits proliferate, it is safe to say that changes will be made, either to NAFTA or to the United States tort system. It appears increasingly likely that Chapter 11 will be modified to remove the ability of foreign firms like the Loewen Group to "stand in" for out-of-state tort defendants. Until this happens, and until other methods of resolving the Prisoner's Dilemma are implemented,²²⁵ the *Loewen* case may be our best hope.

²²⁰ See *Games v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991) (Neely, J.).

²²¹ *Id.* at 906.

²²² *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996).

²²³ Anecdotal evidence suggests that Virginia juries are not as critical of Philip Morris, Inc. as are California juries. See NEELY, *supra* note 99.

²²⁴ *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 473 (1993) (O'Connor, J., dissenting).

²²⁵ See Michael I. Krauss, *Tort Reform*, in CATO HANDBOOK FOR THE 107TH CONGRESS (2001).