DOES INCREASED LITIGATION INCREASE JUSTICE IN A SECOND-BEST WORLD?

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**Abstract:**

Taking as given the claims of tort reform proponents, that increased tort liability in the past few decades has had deleterious effects on American productivity, consumer safety, etc., we consider whether proposed measures to increase access to the courts are likely to be beneficial, with a specific focus on third-party financing and lawyer advertising. We conclude that our current system is a second-best system and, applying the theory of the second-best, we conclude that increasing access would magnify the negative effects of increased tort liability and legal complexity.

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**Key Words:** Tort Reform, Civil Procedure, Liability, Attorney Advertising
**DOES INCREASED LITIGATION INCREASE JUSTICE IN A SECOND-BEST WORLD?**

By Jeremy Kidd and Todd Zywicki

**Introduction**

The other chapters in this compilation contain a wealth of evidence—both empirical and anecdotal—that something is amiss with America’s legal system. The exact diagnoses, as well as the prescribed remedies, are varied, as one might expect when economists and lawyers have been tasked with diagnosis and treatment, but there is significant agreement here that America has deviated from the formula that had previously led to American exceptionalism. We believe that America still possesses the potential for exceptionalism, but because America is a country built on the rule of law, America’s future depends on the evolution of its legal systems.

The view that something is amiss in the American legal system is not limited to proponents of tort reform. Trial lawyers seem to agree that reforms are needed, but they are much more likely to argue that the American legal system is broken because access to the courts is too limited. This argument is often made in economic terms, that greater access to the courts would be largely beneficial as a means of forcing parties to internalize externalities and provide optimal levels of deterrence. This argument favors reforms such as loosening restrictions on third-party financing of lawsuits in order to alleviate the financial burden on victims and on lawyer advertising in order to inform victims of the available options for legal recourse. There are very good reasons to believe that, in an ideal world, allowing third-party financing of lawsuits and greater lawyer advertising might yield the benefits argued by pro-access reformers. Taking the arguments contained in this volume as given, however, it is evident that we do not live in an ideal world when it comes to the modern American legal system.

As argued in the rest of this book, the evidence indicates a significant and inefficient expansion of liability in recent years. We take that basic conclusion as given for purposes of our analysis here. Our contribution is to argue that, given the presence of an evolutionary trend that has pushed society past the optimal level of liability, some procedural reforms that would increase litigation in some important areas of liability would serve only to magnify the already burdensome costs of the legal system to society. Our critique is targeted—we acknowledge the potential economic benefits of both in general. But we also note that there are categories of cases where those benign conclusions do not hold—perhaps a minority of cases, to be sure, but

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1 See particularly, George Priest’s discussion of the expansion of liability at tort law.

an identifiable minority of cases that arguably exert an oversized influence over the evolution of the law and the perception of the American legal system’s efficiency and fairness.

**Increased Access in an Ideal World**

Although most pro-access reformers phrase their arguments in moral, non-measurable terms, such as “improving access to justice,” there are, in theory, more substantial benefits from allowing access to the courts. Tort law punishes those who impose harms through wrongful behavior, with costs to the individual victim and, in circumstances where the victim is removed from productive activity, society at large. Without tort law requiring the tortfeasor to compensate the victims for the harm, the tortfeasor avoids bearing all the costs of his wrongful behavior and will engage in an inefficiently high level of tortious behavior. In an ideal world the tort system promotes economic efficiency by enabling victims of tortious conduct to obtain redress, forcing tortfeasors to internalize their dangerous actions and thereby deterring future wrongful and wasteful behavior. Barriers to access impede this important function and can take a number of forms, but two of the most common are barriers related to costs and information.3

When the legal system is costly, the poor and middle-class will be less able to pursue redress in the courts, either because they cannot afford the actual legal fees or because they cannot afford to meet their living expenses while pursuing redress. Cost barriers, therefore, can lead to both: (1) less than optimal deterrence of wrongful behavior, and (2) a distortion of wrongful behavior towards the poor and middle-class who are less able to vindicate their rights. Third-party financing is one way in which this barrier to access can be removed, and it makes little sense to argue against the proposition that, all other things held constant, third-party financing has the potential to make individuals and society better off.4 Moreover, as a general

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3 Just as we take as given the evidence contained in this volume regarding the inefficiency of the current level of liability and liability trends, we take as given the pro-access reformers’ arguments that the current level of access is too low. Whether or not that is the case is, ultimately, an empirical question, but it is irrelevant to our ultimate conclusion, which is that increasing access in our second-best world will be highly detrimental, regardless of whether the optimal level of access in a first-best world is higher.

4 It is worth pointing out that our legal system currently addresses, at least in part, these concerns over cost barriers. Contingency fee arrangements, for example, alleviate the concerns that legal fees will keep the poor and middle class from accessing the courts. Similarly, the common law doctrine known as the collateral source rule allows victims to receive help with living expenses, medical expenses, etc., without impacting the amount they are entitled to recover from the tortfeasor. Michael Krauss and Jeremy Kidd, "Collateral Source and Tort's Soul." The University of Louisville Law Review 48 (2010): 1. While the emergence of the collateral source rule likely served to meet other purposes of the common law of torts, it also serves to lower the financial barriers to bringing a suit. *Id.*

Combined, these doctrines increase the ability of plaintiffs to access the courts, but they are only partial solutions, requiring a successful pairing between a tort victim and a collateral source and/or contingency fee lawyer. High transaction costs could still prevent a successful pairing and keep otherwise meritorious lawsuits from being filed.
rule, economic principles support allowing new markets to arise, as those markets will be efficiency enhancing for participants in the new market.\(^5\)

Likewise, attorney advertising can help remove informational barriers to access. Economists have long-recognized that advertising can, and usually does, play a valuable role in improving economic welfare and consumer welfare. Advertising, in the legal context, can be economically efficient and useful for consumers and society in three ways. First, advertising can alert tort victims of possible legal remedies and the benefits of choosing a particular law firm that may have experience in pursuing redress for the type of harm suffered by the tort victim.\(^6\) Without this information, a tort victim may be unaware that legal remedies exist, and simply not bring a claim, or else the search costs will cause the tort victim to make a suboptimal choice of attorney, unnecessarily reducing the likelihood of obtaining redress. Second, advertising can provide a type of bond that can ensure product quality,\(^7\) which is especially useful in the legal context, as information asymmetries make it very difficult for tort victims to directly measure quality. The bond will increase the confidence of tort victims in their attorneys, and in the legal industry, generally,\(^8\) leading to a greater chance of obtaining redress. Related to cost barriers, advertising can also promote price competition and efficient scale economies, which can lead, in turn, to lower prices for legal services without negative impacts on quality.\(^9\)

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Historically, attorney advertising was strictly regulated by state bar associations as professional self-regulation standards, and those restrictions were later codified by the American Bar Associations Code of Professional Responsibility. In 1977, however, the United States Supreme Court struck down many of these restrictions in *Bates v. State Bar of Arizona*. Bates held that to the extent that such restrictions prohibited with the provision of truthful advertising to consumers it ran afoul of the First Amendment and advanced no economic or professionalism purpose. Subsequent cases have extended the holding of *Bates* to protect a wide variety of lawyer (and other professional) advertising in a variety of media, often with the resistance of organized bar associations. By removing arbitrary limits on attorney advertising, it is likely that the *Bates* Court allowed a closer approximation of the optimal level of lawyer advertising.11

**The Second-Best World of U.S. Tort Law**

Reducing barriers to access—cost, informational, or otherwise—can lead to improvements in individual and societal welfare and can improve efficiency in an ideal world. Because the consequences of any pro-access reforms can be far-reaching, it is necessary to ask how close our world is to the ideal.

Economists are often criticized for relying too heavily on the assumption of an ideal world where efficient outcomes are easily achieved. To many people, economists look like they are stacking the deck in favor of their conclusions.12 The theory of the second-best13 arose to address these concerns, and application of the theory allows us to consider how the optimal choice changes when we are dealing with a less-than-ideal, or “second-best,” world.
In the theory of the second-best, the absence of multiple optimality conditions may result in a world where the “optimal” solution may no longer be efficient, and an alternative policy choice that accounts for the absence of optimality conditions—the second-best solution—is preferable. As but one example of this phenomenon, societies regularly face a choice between establishing rules or standards to govern the conduct of individuals. In an ideal world where information was costless and resultant errors rare, legal systems could provide detailed standards that would allow fact-finders to accurately weigh and consider all relevant facts and provide highly-tailored guidance to private parties. In the real-world, however, information is costly and errors occur—as a result, it will often be optimal to adopt bright-line rules that regulate categories of cases, even though those rules will often be over or underinclusive in terms of their fit with the facts of a given situation. Thus, while standards might be optimal in an ideal world, in the world of the second-best we often turn to rules as the least-costly alternative—even though we know that those rules inevitably will result in errors at times.

As an initial matter, the theory of the second-best urges caution in deciding questions of increased access to the courts. Because our legal system evolves in step with the type of cases brought, procedural rules that increase litigation will have the tendency to magnify the underlying nature of the legal system. If the law promotes economic efficiency then this magnification effect will tend to encourage this benevolent tendency. If the law deviates from efficiency, however, this magnification effect will further push the legal system toward inefficiency. Increased litigation means an increased volume of cases, and more of the same type of cases increases the pressure on the judiciary to affect changes encouraged by those cases. Even assuming no substantive changes, then, an existing trend towards increased liability will be exacerbated by procedural changes that allow for increased numbers of cases which push the current boundaries of liability. If the evidence presented by other contributors to this volume is correct, the magnification effect would be undeniably negative.

Moreover, procedural rules will have a feedback effect causing further distortion in the underlying substantive law, especially if it encourages or enables strategic litigation. Underlying substantive law is in the real-world shaped by procedural law, and that substantive law in turn impacts the evolution of procedural rules. Current procedural rules in many jurisdictions, for example, facilitate inefficient forum-shopping that can be used to initiate or accelerate trends in substantive liability by making it easier to bring and win dubious cases. In turn, concerns about runaway liability can create a feedback loop, as judges attempt to use procedural rules in order to erect checks on frivolous lawsuits and extortionate settlements, thereby distorting procedural rules. Focusing on bad substantive rules in isolation, therefore, understates their negative effects on society and the economy. Instead, it is necessary to also look at procedural rules and whether they exacerbate or mitigate those rules.

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Path Manipulation

Increasing access to the courts by removing cost or informational barriers creates an opportunity for strategic litigation designed to manipulate the path of legal precedent toward more expansive liability and damages, what can be referred to as “path manipulation.” As new avenues open for litigation, the self interest of lawyers and financiers will trigger a new wave of frivolous lawsuits, pushing the boundaries of liability even further. This danger is not just theoretical; plaintiffs’ lawyers have financial incentives to bring claims they know to be non-meritorious, knowing that all they need is a single favorable case to create precedent that instantly opens the door to new avenues for recovery. A plaintiff’s lawyer needs to win only one case in a high-liability jurisdiction to win a favorable precedent that generates the promise of a stream of massive future damages and contingency fee payouts. Thus, the lawyer can suffer several losses risking only the lawyers’ fees and costs at stake in each case. For mass tort defendants, by contrast, every case is a “bet the company” case holding the potential for bankruptcy from an adverse judgment. Tobacco and asbestos claims, for example, were repeatedly rejected by the courts prior to their eventual acceptance, but the size of the payout more than compensated those attorneys who pursued the long-term strategy. In other words, the plaintiffs’ bar has strong monetary incentives (to say nothing of any personal, ideological incentives in favor of expanded liability) to create liability through repeated litigation of presently non-meritorious claims.

Third-party financing magnifies this asymmetry by making it easier for lawyers to finance a stream of cases in hopes of gaining a favorable judgment. Financiers and lawyers are not in precisely the same position with regard to capturing the future stream of revenues generated by favorable precedent, but we believe that any difference is insignificant. Lawyers will continue to have incentives to push the boundaries of liability and financiers, by increasing the amount of funding available for litigation, will increase the total available payout, thus magnifying those incentives. Because financiers are investors, they will want to maximize their

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long-term payout, and will ally themselves with the goals of plaintiffs’ lawyers in order to maximize their returns.\(^\text{18}\)

Where increased access makes it easier for lawyers to amass huge classes of plaintiffs, such as in mass tort cases, this too can thwart justice and produce inefficiencies. Increasing access could also exacerbate the current difficulty faced by defendants in mass tort suits. By manufacturing bogus claims and amassing tens of thousands of claimants, often claims with more minor injuries (at most), lawyers can use the sheer volume of the claims as a vehicle to steamroll defendants into settling, thereby preventing a full hearing of the issues in question. Although many of the claims generated by litigation screening are specious, defendants lack the financial wherewithal to challenge this mass of fraudulent claims. It can be very difficult and expensive for defendants to examine each plaintiff in order to determine the veracity of the plaintiff’s claim. The difficulty is enhanced by the challenge of conducting a medical examination of an uncooperative plaintiff-witness, which can raise the cost of challenging the plaintiff’s diagnosis as well as making a negative evaluation more difficult. While it is conceivably possible for a defendant to examine tens of thousands of plaintiffs individually, this rarely will be feasible.\(^\text{19}\)

The same incentives that encourage plaintiffs’ lawyers to push the boundaries of liability also encourage expansion of the monetary value of claims for which liability is already established. Plaintiffs’ lawyers are likely to compete for clients in both price and quantity. Price competition occurs in the size of the contingency fee demanded by the lawyer. Quantity competition occurs, at least in part, in the size of damages award promised. It is essentially costless to claim higher damages, especially in the difficult-to-measure areas of non-pecuniary and punitive damages; pleading requirements typically do not require particularity in the amount of damages, and expert testimony on damages can be modified at essentially zero cost.

\(^{18}\) For example, financiers might enter into long-term contractual arrangements with plaintiffs’ lawyers, much like the legal equivalent of an HMO or PPO, wherein financiers would steer cases to preferred lawyers in return for a share of the strategic payout. Because the financier would then share the lawyer’s incentives, there would also be increased incentives to ignore plaintiffs with legitimate but low-dollar-value claims in favor of frivolous claims with high long-term value. Contingency fee lawyers are already likely to ignore these plaintiffs, so third-party financing fails to improve upon the status quo in this regard.

\(^{19}\) Brickman describes the defendants’ reality:

A diligent defense can expose the fact that the medical reports generated by screenings at least lack reliability. But litigation screenings enable plaintiffs’ lawyer to overwhelm defendants by filing hundreds and thousands of suits, thus making it a practical impossibility for the defendants to take any significant percentage of the cases to trial and coercing defendants into entering large-scale settlements of, at best, dubious claims.

Expansion of damages amounts serves the self-interest of plaintiffs’ lawyers, providing a short-term payout to the plaintiff and increasing the demand for litigation and, as a result, for lawyers’ services. If reforms include third-party financing, financiers will share those incentives and would provide even more financing to motivate the litigation which would, in turn, lead to even greater damages awards.

Lawyers also have an incentive to increase the complexity of the law, subject to the law not becoming so complex that no lawsuits will be brought at all.\textsuperscript{20} Increased legal complexity raises uncertainty regarding individual obligations, resulting in an increased demand for \textit{ex ante} lawyer’s services, in order to better determine actual obligations. Uncertainty regarding obligations will also lead to an increase in occasions where actual obligations diverge from expected obligations, leading to an increase in demand for \textit{ex post} lawyer services, in order to sort out liability and damages. It is not clear that third-party financiers share all of the same incentives to increase complexity; financiers share the desire to see demand for \textit{ex post} lawyer services increase, but would be indifferent to the increase in demand for \textit{ex ante} lawyer services. In the end, however, indifference is not the same as opposition, and whether contingency fee lawyers or financiers are footing the bill, increased access to the courts will result in an increase in the law’s complexity.

\textit{External Costs of Excessive Litigation}

Increased access can help increase deterrence by forcing tortfeasors to internalize the costs of their harm. However, litigants and their lawyers also externalize some of the costs of their lawsuits.\textsuperscript{21} For example, because the court system is subsidized by the public, lawyers and litigants do not bear the full cost of congestion that they impose upon the court or the full cost associated with distinguishing valid from invalid claims, thereby imposing the cost of “weeding out meritless claims” on defendants and judges.\textsuperscript{22} Moreover, this increased litigiousness imposes costs on defendants as well, not just in terms of out-of-pocket costs for defending the case and liability for baseless claims, but also the costs of harm to the defendant’s reputation (even from false claims if such claims are imperfectly verifiable) and the opportunity cost to the defendants


\textsuperscript{21} Stone, Optimal Attorney Advertising.

\textsuperscript{22} In re Silica Products Liability Litigation, 398 F. Supp. 2d 563, 636 (S.D. Tex. 2005).
business from time taken by senior executives and others to participate in litigation.\(^{23}\) As Judge Jack observed in the silica litigation, even those plaintiffs with meritorious claims are harmed when the court is congested with thousands of meritless claims that divert scarce judicial resources and attention from their claims and reduce the amount of defendants’ resources available to them. These costs seem especially large in the context of high-profile nationwide class action cases that may drag on for years and involve countless hours of highly intrusive discovery proceedings.

Litigation also imposes costs on society, at large. The plaintiffs’ bar equates increased litigation with increased access to justice, but they neglect to mention the cost of that justice. It is estimated that the direct costs of the tort system make up almost 2% of GDP,\(^ {24}\) and half of those costs are just the administrative costs to run the system.\(^ {25}\) The indirect costs are even greater. As discussed in other chapters in this book, although litigation might improve products safety (although even that is unclear) the litigation system is exceedingly inefficient in doing so. Moreover, increased safety also increases the price of the goods and to the extent that the legal system imposes excessive costs, consumers are made worse off by the higher prices that result. Producers might also design products in an unduly risk-averse fashion in order to avoid the risk, cost, adverse publicity, and uncertainty of litigation, even if they expect to prevail in the end. Other beneficial products are even kept off the markets due to the uncertainty regarding potential products liability claims, depriving consumers of these products entirely.\(^ {26}\) New, innovative products are particularly susceptible to this form of strategic litigation and consumers are hurt as they are denied the benefits of technological and other innovation. U.S. businesses suffer billions of dollars in lost sales each year,\(^ {27}\) not to mention the jobs those lost sales represent. Litigation diverts numerous non-legal personnel from productive work, costing businesses thousands of man-hours in foregone productive work,\(^ {28}\) and the riches transferred through the litigation system draws talented youth into law schools to become lawyers (both plaintiff and


\(^{25}\) Ibid.


\(^{27}\) Lawrence J. McQuillan, Hovannes Abramyan, and Anthony P. Archie, Jackpot Justice: The True Cost of America's Tort System (San Francisco: Pacific Research Institute, 2007).

defense), thereby drawing them away from alternative employment. Finally, the fear of lawsuits results in wasteful defensive actions, such as “defensive medicine,” making medical judgments on the basis of avoiding malpractice suits, rather than in the best medical interests of the patient.

When all direct or indirect costs are totaled, it is estimated that the U.S. tort system costs between $600 billion and $900 billion per year, or between 4.3% and 6.5% of GDP. These costs will only increase as pro-access reforms generate even more claims.

Third-Party Financing

In addition to the dangers of increasing access, generally, third-party financing also raises specific concerns about undue influence of the financier on the prosecution of any claims. Because a third-party financier stands between a tort victim and access to the courts, the financier is in a powerful position to exert undue pressure on a victim, in order to pursue the financier’s goals of maximizing return on investment, rather than pursuing the victim’s goal of obtaining redress. Lawyers working under a contingency fee arrangement face the same

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30 The U.S. Department of Health and Human Services reported that 79% of all physicians report ordering more tests than they believed were medically necessary because of litigation fears. The same survey indicated that 74% report referring patients to specialists, 51% report recommending invasive procedures, and 41% report prescribing more medications, than they believed medically necessary. U.S. Department of Health and Human Services, Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs By Fixing Our Medical Liability System, 24 July 2002. Doctors expended $124 billion dollars in unnecessary health care costs in response to the threat of medical malpractice lawsuits. McQuillan, et al., Jackpot Justice.

31 Frank, Protecting Main Street.

32 It should be noted that the maximization strategy of the contingent fee lawyer can result in settlement for less than necessary to fully compensate the client, due to the positive marginal costs of discovery and trial. Stephen Gillers, "Waiting for Good Dough: Litigation Funding Comes to Law." Akron Law Review 43 (2010): 677-695. Some journalists have argued that third-party financing is the litigation equivalent of payday loans, charging tremendous rates of return that can delete the entire settlement amount. See Binyamin Applebaum, "Lawsuit Loans Add New Risk for the Injured." New York Times, January 16, 2011, A1. While it is not certain that all financing would be detrimental to litigants, it is clear that the interests of financiers and litigants will not always coincide. See also John Beisner, Jessica Miller, and Gary Rubin, "Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States (Washington, D.C.: U.S. Chamber Institute for Legal Reform, 2009). To the extent the plaintiff’s attorney feels bound by the ethical duty to the plaintiff, that duty could counter any untoward pressure from the financier. However, counsel will also have an incentive to develop a good working relationship with financiers, with the expectation that those financiers will provide the lawyer with more work in the future. In fact, one possible form of third-party financing would appear similar to Health Maintenance Organizations in health care, with financiers essentially obtaining exclusive rights to the services of a group of lawyers for the purpose of prosecuting the cases invested in by the financier. Many lawyers would recognize the benefits of such an arrangement, and could use their influence to sway client sentiment to be more aligned with the wishes of the financier.
incentive to maximize net payout but, at least in theory, that incentive is countered somewhat by the ethical duty to the client.

In fact, while principal-agent problems have long been a concern in the legal realm, third-party financing may offer the worst of all worlds. Under a traditional, hourly-fee arrangement, lawyers have the incentive to maximize profits by inflating hours worked. These incentives are balanced out, somewhat, by reputational factors, in that lawyers who are known to win for their clients, and win big, are more likely to receive additional work. For the individual plaintiff, these two incentives may balance out, but for society at large, both factors serve to increase the cost of the tort system, increasing the work of lawyers and courts and increasing the amount of damages demanded by plaintiffs’ lawyers. Under contingency fees, the attorney has both reputational and monetary incentives to increase the value of the damages award, but now also has an incentive to minimize the lawyer’s own inputs into the production function, since his payout will be a fixed portion of the total damages awarded. The lawyer’s time constraints also serve to discourage bringing claims that have either a low-value payout or a low likelihood of winning a damages award. Under third-party financing, the financier has a financial stake in the damages award, and wishes to maximize damages subject to minimizing costs, but has no direct control over the lawyers who are responsible for total costs. Over time, the financiers may become sophisticated enough to police the lawyers, but in the short run, society will lose because of the push for increased liability and because lawyers’ incentives to minimize hours worked is removed.

Attorney Advertising

Modern attorney advertising is ubiquitous, sophisticated and targeted, especially in the mass torts industry. As noted, research indicates that in an ideal world professional advertising can promote quality, choice, and lower prices. Certain types of professional advertising, such as direct-to-consumer advertising of pharmaceuticals can alert consumers to the potential for untreated health problems and the potential availability of treatments, thereby prompting them to consult with a physician about treatment, or simply provide a reminder to take a prescribed medication. In general, most of these beneficial conclusions hold in the context of attorney advertising as well. In some instances, especially advertising in mass tort cases, the benefits of attorney advertising seem smaller and the costs larger than in the standard scenario.

33 To be certain, many lawyers feel bound by rules of professional conduct, which would constrain their ability to inflate legal fees. However, it would seem an easy task to amass anecdotal evidence of lawyers who do not feel bound by the rules of professional conduct, leading to very little confidence that professionalism is an effective counter to the monetary incentives to cheat.

34 Beisner, et al., Buying Trouble.

35 Kelly, DTC Advertising's Benefits; Frosch, et al., A Decade of Controversy.
Attorney advertising in mass tort cases also appear to lack many of the external benefits associated with other types of advertising, such as direct-to-consumer advertising of pharmaceuticals. One common form of advertising is print or website advertisements designed to look like informational public service announcements, but which are actually “fronts” for law firms to which the website visitor is referred. Attorneys have also become proficient at garnering free news coverage about the harm caused by the product or exposure, an effort often facilitated by consumer advocacy groups “closely aligned with mass tort lawyers.”

Internet advertising also grown rapidly in recent years, but again its benefits appear smaller than for other types of professional advertising. Internet advertising is especially effective because it is extremely inexpensive and easy to produce very rapidly, but also enables a very high degree of targeting messages to relevant consumers. One study in CMAJ, the journal of the Canadian Medical Association examined the growth in Internet websites following the publication of a study in the New England Journal of Medicine that a particular antibiotic (gatifloxacin) was strongly associated with the development of hypoglycemia and hyperglycemia among elderly outpatients. The researchers found that within a week of the article’s online pre-release of the study there were almost 100 Internet websites providing information on personal injury lawsuits with respect to the drug. Within one week of full publication in print there were over 300 websites. Two months after the study was released the drug was withdrawn from the market, leading to another spike in personal injury litigation websites to almost 400. One year later there were 522 websites soliciting personal-injury claimants. This rapid proliferation of personal injury websites is suggestive of the intensity of Internet-based advertising.

Internet advertising also illustrates the difference between modern lawyer Internet advertising and other types of professional advertising. Even when it comes to what would be expected to be health-related information, lawyer advertising crowds out traditional health information. Under Google Adwords, advertisers can bid to have their advertisements appear first on the list of advertisers that arise when a consumer inserts a specific search term. The price that is paid is then the price that the sponsoring website pays to Google when its linked is clicked. A review by MediaPost News (Sullivan 2009) in 2009 found that the price for the search term “mesothelioma” for September 2009 reached $99.44 per click. “Mesothelioma” was also the highest-priced keyword on Yahoo that same month, at $60.88 per click. A 2006 review of Google Adwords found that the list of highest-priced keywords was dominated by lawyers

36 Brickman, Litigation Screenings, p.1226.

37 Ibid, p.1226. For example, the silicone breast implant litigation was given a major boost by a widely-viewed but completely unsupported television news broadcast by reporter Connie Chung.

advertisements for keywords related to mass torts.\textsuperscript{39} For example, the top four health-related keywords were variations on searches for “mesothelioma”: “peritoneal mesothelioma” ($48.38 per click), “mesothelioma” ($33.83), “mesothelioma symptoms” ($31.41), and “mesothelioma info” ($25.79). The remainder of the top ten highest-priced keywords were dominated by “mesothelioma” and “asbestos”-related search terms. As these extremely high prices for Internet keyword search terms indicates, the ability of lawyers to reach consumers directly by highly-targeted Internet advertising is extremely lucrative. The web domains “mesothelioma.com” and “asbestos.com” are both owned by law firms, and are designed to recruit litigation plaintiffs, rather than to provide health information.

While attorney advertising can be economically beneficial, subject to general concerns about increased litigation, even these benefits are less clear in the mass tort context there are substantial costs that may not be present in other contexts. The difference arises primarily out of the way mass tort claims are structured and pursued. In a traditional tort case, an individual who is harmed seeks out an attorney who then aids in seeking redress for the specific harm. By contrast, mass torts begin with identifying the mere possibility of harm to a large number of people, after which advertising serves to recruit those that might have been exposed to the particular risk. Once potential plaintiffs begin to respond to the advertising, they must be “screened,” a process that has been found to be rife with fraud.\textsuperscript{40} Because plaintiffs’ lawyers need only present the named plaintiffs to the jury, the most attractive or credible or those with the most credible theory of harm will be selected, obscuring the fact that many or most claims are weak or even fraudulent.

In the context of mass torts, then, attorney advertising turns the process on its head, allowing attorneys to craft novel new claims of liability and then recruit those who are willing to claim injury in order to get their share of what the attorneys promise will be a significant

\textsuperscript{39} "Top Paying Keywords," Impact Lab, January 22, 2006, http://www.impactlab.net/2006/01/22/top-paying-keywords/.

\textsuperscript{40} Brickman estimates, for example, that in the average litigation screening for occupational exposure to asbestos, 50-60 percent will be diagnosed with asbestosis, compared to only 3-4 percent who would be diagnosed in a clinical setting. Brickman, Litigation Screenings. Pendell reports that between 1986 and 2004 there were “at least four impartial panels of scientists who ... evaluated the accuracy of litigation-related asbestos diagnoses, and they have found the rate of false positives from the screening companies to range from 66% to 97%. Judyth Pendell, "Regulating Attorney-Funded Mass Medical Screenings: A Public Health Imperative?" Working paper, AEI-Brookings Joint Center for Regulatory Studies, September 2005, available at http://regulation2point0.org/wp-content/uploads/downloads/2010/04/phpZI3.pdf. See also Joseph N. Gitlin, Leroy L. Cook, Otha W. Linton, and Elizabeth Garrett-Mayer, "Comparison of 'B' Readers' Interpretations of Chest Radiographs for Asbestos Related Changes." Academic Radiology 11 (2004): 843-856. In the class action cases involving 10,000 silicosis claims generated by litigation screenings, United States District Court Judge Janis Jack concluded based on the testimony of the screening company principals, the doctors who rendered the diagnoses on which the claims were brought and the lawyers who ordered the screenings, that they were “willing participants” in a scheme manufacture diagnoses for money. In re Silica, 398 F. Supp. 2d 563.
payout. As a result, most of the benefits of advertising are absent. There is no indication that advertising for mass tort lawsuits results in lower prices. Advertising is also of less value in providing a reputational bond for lawyers to consumers and less valuable in enabling entry of new lawyers into the market, due in large part to the fact that the massive up-front funding cost of mass tort suits acts as a barrier to entry by new law firms.

Attorney advertising in the mass tort context can also facilitate improper forum-shopping behavior by plaintiffs. Mass media advertising such as television or Internet advertising, makes it possible to recruit class members from across the country. Thus, rather than being constrained to filing a case in the plaintiff’s place of residence, attorneys can select the court with the most favorable likely result and then recruit class members from around the country to join the class. Brickman observes that improper forum shopping was made easier by the very liberal joinder rules in Mississippi and West Virginia, two states with unusually pro-plaintiff courts. Brickman observes that often lawyers found at least one properly venued plaintiff who had an especially compelling case, “such as a malignancy coupled with extensive occupational exposure.” The lawyer, however, would then join that case to hundreds or thousands of more dubious cases recruited by litigation screenings. This ability to put forth an attractive local plaintiff at the front of the mass led defendants to fear that a local jury would award compensatory and punitive damages that could bankrupt the company. In light of this risk, and the inability to effectively weed out the weak claims from the strong, defendants often are driven to a mass settlement of frivolous and meritorious claims alike.

What To Do?

Clearly, increased access to the courts is beneficial in an ideal world, but considering the current state of our legal system, it is difficult to conclude that we live in an ideal world. It is legitimate to question whether the costs we identify here are sufficient to reject pro-access reforms entirely or whether, as Ribstein and Kobayashi suggest, we should address the problem of wasteful litigation head-on, rather than coming at the problem indirectly by “restricting the

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41 In one advertising, plaintiffs were recruited with the sales pitch: “Find out if you have Million Dollar Lungs.” Pendell, Medical Screenings.


43 It should be emphasized that not all forum shopping is necessarily bad. Ex ante forum-shopping, such as by contractual choice of law, likely conduces to economic efficiency. One-sided ex post forum shopping in the tort class action context, however, is likely to create suboptimal outcomes. (Zywicki 2006).

44 Brickman, Litigation Screenings, p.1230.
financing of legally permissible activities." As a general rule, we believe that advice to be sound, especially when access to the courts implicates moral questions of justice and, in the case of attorney advertising, fundamental rights such as free speech. However, even the strongest general principles must allow for exceptions in those cases which are, in a word, exceptional.

If the evidence presented by other contributors to this volume is correct, we have moved well beyond the efficient level of litigation, and society suffers because of it. More to the point, it is precisely those who now argue in behalf of increased access who are responsible for creating the inefficient liability regime described in the other chapters. The financial incentives to expand liability were, perhaps, so great that it would be unreasonable to expect any group of self-interested actors to resist. But judges, the last line of defense in maintaining stability in our legal system, have also proven unwilling or incapable of holding the line on liability. Without some effective means of policing the legal profession, including judges, increased access to the courts promises to flood the system with new claims, magnifying the costs and distortions.