

# Cocktail-party comebacks to tort ‘reform’ talk

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*Don't get blindsided the next time someone in your social circle criticizes trial lawyers or rails about 'frivolous' lawsuits. Be ready to refute the critics and show them how our civil justice system protects all Americans from corporate wrongdoing.*

For years, this magazine ran a column called “Dinner-Party Dialogue” to help readers figure out what to say when they heard uninformed remarks about their profession in social settings—from dinner party guests, the dentist, a golf partner, or a neighbor. We’ve all heard them: “Large verdicts are awarded by runaway juries,” “Medical negligence lawsuits raise the cost of health insurance and drive doctors out of business,” and so on. Many people will state, as if it’s established fact, that there are “too many lawsuits” and “our society is too litigious.”

These ideas have become such an accepted part of popular culture that people—among them, future jurors—accept them unquestioningly, not realizing that they’re simply parroting the tort “reform” message that is driven by corporations and insurance companies.<sup>1</sup>

And that’s understandable, because the “reformers” have a formidable array of public-relations tools and the money to use them far and wide. In fact, this spring, the U.S. Chamber of Commerce—the biggest pro-“reform” group of them all—ran a month’s worth of short films in movie theaters to highlight the purported evils of “lawsuit abuse.”<sup>2</sup>

Just as AAJ speaks out on these ongoing assaults, so can you. Speaking up

at social gatherings will help people learn the facts about our civil justice system and its importance to all Americans. Myths about civil lawsuits don’t just hurt our justice system; they damage the reputation of the trial bar and make people wary of all lawyers. Debunking these myths can help the public understand the good work that trial lawyers do and the importance of having their own advocate against large corporate interests.

So the next time you’re hit with one of these comments, be ready. Have the facts at the tip of your tongue and politely, but firmly, refute the talking points with truth.

## ‘Frivolous’ lawsuits

**Q:** *I recently read about a man suing an airline for \$1 million over a lost Xbox. And wasn’t there a judge suing a dry cleaner for \$65 million over a lost pair of pants? Or the woman who sued Victoria’s Secret for a rhinestone popping off her underwear and injuring her eye? Don’t frivolous lawsuits like these prove our civil justice system is broken?*

**A:** Cases like these are certainly not representative of most cases. In fact, a survey by the Federal Judicial Center—the research and education agency of the federal court system—found that most federal judges do not consider “frivolous” lawsuits a problem: 70 per-

cent of the 278 federal judges who responded declared that groundless litigation is either a “small problem” or a “very small problem,” and 15 percent said “it was no problem at all.”<sup>3</sup>

Three decades of research have shown that juries are not biased toward plaintiffs and that meritless cases rarely win.<sup>4</sup> And contrary to allegations that ordinary jurors can’t understand the intricacies of the law, the fact is that juries, judges, and independent reviewers reach the same conclusions when it comes to verdicts. And of the three, juries are most likely to rule in favor of defendants.<sup>5</sup>

**Q:** *Don’t the insurance companies raise our rates when they have to spend money to defend themselves against frivolous lawsuits?*

**A:** The claims about “frivolous” lawsuits are way overblown. For years, powerful corporate interests have circulated these myths to escape being held to account for their own bad behavior. Insurance companies are often the ones behind these lies.

Insurers raise rates to unreasonable levels or drop policyholders altogether and do everything they can to avoid paying claims that they’ve promised to cover. Meanwhile, these companies continue to lobby state legislatures for special-interest giveaways that let them escape accountability.

For decades, insurance companies have used underhanded tactics to delay and deny payment of fair claims. Meanwhile, these companies are enjoying record profits. Since Hurricane Katrina in 2005, the insurance industry has made an unprecedented \$169 billion in profit. AAJ’s report on the worst insurance companies for consumers shows a pattern of corporations putting profits over policyholders.<sup>6</sup>

The insurance industry is the only other industry, besides Major League Baseball, that enjoys an exemption from federal antitrust laws. This allows insurers to collude or conspire together—to the detriment of consumers.

## Torts and business

**Q:** *Aren’t lawsuits filed against businesses hampering American companies’ competitiveness and even causing some to*

*take their business overseas, hurting our economy?*

**A:** Actually, there are no reliable numbers showing that lawsuits have had a negative impact on companies or even that they’re a significant cost of doing business. This is another lie pushed by corporate front groups, hoping to persuade the public that corporations deserve complete immunity regardless of their negligence.

These corporate trade groups have lied so often, they’ve gotten caught in their own falsehoods. A business survey conducted by the National Association of Manufacturers ranked lawsuits *last* among the corporate world’s 10 biggest concerns. And the National Federation of Independent Business, the leading group representing small businesses, conducted a survey that found litigation ranked 65th out of 75 concerns.<sup>7</sup>

Corporations complain about “frivolous” lawsuits, but they are quick to use the civil justice system for their own causes. Companies rely on the objectivity of our civil justice system to enforce their contractual obligations.

In fact, one reason foreign businesses flock to the United States is the unsurpassable quality of our courts and their strict enforcement of contracts. The American civil justice system is not the Achilles’ heel of our economy, as some contend; it is the basis of our economic stability and strength.

It’s become clear that Americans can’t look to corporations or insurance companies—even those that have taken their payments in exchange for a promise to help them out. CEOs are reluctant to take responsibility for the harm their companies cause—whether it’s squandering employees’ pensions or denying policyholders’ fair claims after a hurricane. The civil justice system is often the last resort for ordinary Americans who are looking for justice and fairness.

**Q:** *Why do you accuse corporations and groups like the U.S. Chamber of Commerce of trying to destroy the civil justice system? Aren’t they just trying to stop abuses?*

**A:** The U.S. Chamber of Commerce is a stand-in for this country’s giant multinational corporations, who want to twist the legal system to their own

benefit by keeping ordinary people out of the courtroom and from holding them accountable. And yes, it’s all part of a plan: U.S. Chamber of Commerce President Tom Donohue has said, “For the first time, the business community is challenging America’s litigation explosion in a comprehensive and coordinated way.”<sup>8</sup>

Let’s clear up a few misconceptions. First, despite its claims, the U.S. Chamber does not represent small businesses. In fact, it relies on corporate dollars to fund its agenda. Don’t confuse it with your state and local chambers of commerce—these do serve the interests of small businesses and local merchants.

The U.S. Chamber, by contrast, is a front group for huge multinationals: oil, tobacco, insurance, and drug companies, for instance. It even created another front group to make sure people can’t get justice in the courtroom, called the Institute for Legal Reform. Financial records show that corporations like AIG have given millions of dollars to fund these efforts.

Donohue and others cite “frivolous” lawsuits as the reason they want to restrict people’s rights. But surveys of judges and small-business owners make clear that this is not a real problem. Corporations hoping to evade accountability are at the core of this campaign, not small businesses or the American people.

## Patient safety

**Q:** *What do you have against doctors?*

**A:** Lawyers aren’t against doctors at all. In fact, attorneys and doctors are equally committed to protecting patients and improving lives. And both groups have seen how insurance companies try to raise doctors’ premiums, deny patients’ coverage, refuse payments to doctors, and do everything in their power to hoard profits at the expense of everyone else.

**Q:** *But isn’t it true that lawsuits by trial attorneys are driving doctors out of business?*

**A:** No. Once again, insurance com-

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panies and other special-interest groups are behind this lie. It's nothing but a scare tactic.

According to the American Medical Association, the number of doctors has *increased* in every state for years. Forty-six of 50 states have seen growth faster than their overall population; the other four states have damages caps. In fact, states with caps have slower doctor growth than states without caps. In all specialties, the number of doctors has either held steady or risen year-over-year.<sup>9</sup>

**Damages caps**

**Q:** *What's wrong with setting a cap on pain and suffering damages at \$250,000 or another amount?*

**A:** Let's look at what a cap is. It's a limit on the amount of money a jury can provide in every case, regardless of how severe the injury was, or how extensive the negligence.

For example, even if a medical provider disregarded all the rules of proper patient care, his or her unfortunate patients would receive the same amount of damages for the death of a child, the abuse of a grandparent in a nursing home, loss of limbs, blindness, paraplegia, or gross disfigurement. The same cap would apply if a surgeon operates under the influence of drugs or alcohol and harms a patient; if a hospital mixes up patient files, causing someone to have unnecessary surgery; or if a patient gets a lethal dose of the wrong drug because of negligent record-keeping.

Juries should decide what's fair in cases that involve serious injuries. Do you think legislators or insurance companies that lobby for these caps should say what your life is worth?

The premiums that doctors have to pay for medical malpractice insurance are too high—that's true. But it's not because of malpractice lawsuits or payments to injured patients, which are actually declining. Instead, the insurance industry is price-gouging doctors to make up for its investment losses.

A study by the former insurance commissioner of Missouri looked at the official filings of the biggest med-

ical malpractice insurers. Over a five-year period, the study found, insurance companies had drastically raised their insurance premiums by more than double, even though claim payments had been flat, or in some cases, gone down.<sup>10</sup>

In 2004, malpractice insurers' total premiums were three times higher than their total payouts.<sup>11</sup> This is final proof—from the industry's own numbers—that insurance executives are ripping off doctors and lying to Congress and the public about it.

Insurance industry price-gouging needs to stop to prevent further victimization of American families who have already been harmed once by a medical tragedy. We need to reclaim our health care system from the insurance industry and return it to doctors and patients, where it belongs.

These answers give you grounding in facts you can use when you're talking with friends or community groups about civil justice. More than ever, it's important to speak frankly about the importance of the civil justice system and explain how it lets ordinary Americans hold wrongdoers accountable and get justice when they're hurt. Person-to-person contact is a critical way to share this knowledge, fight for justice, and improve the image of trial attorneys, even among the biggest of skeptics. ■

Notes

1. For more ideas, see TRIAL's series of articles, *Dinner-Party Dialogue*, which ran in the Justice in Motion section from September 2005 to November 2007.
2. Ashby Jones, *Coming Soon, to a Movie Theater Near You: Tort Reform Videos!*, Wall St. J. Law Blog (Apr. 27, 2009), <http://blogs.wsj.com/law/2009/04/27/coming-soon-to-a-movie-theater-near-you-tort-reform-videos>.
3. Mark A. Hofmann, *Federal Judges Don't See Problem with Frivolous Suits*, Bus. Ins. (Apr. 11, 2005), [www.businessinsurance.com/cgi-bin/news.pl?newsId=5365](http://www.businessinsurance.com/cgi-bin/news.pl?newsId=5365).
4. Carmel Sileo & David Ratcliff, *Straight Talk about Torts*, TRIAL 42 (July 2006), [www.justice.org/cps/rde/xchg/justice/hs.xml/4760.htm](http://www.justice.org/cps/rde/xchg/justice/hs.xml/4760.htm).
5. Philip G. Peters Jr., *Doctors and Juries*, 105 Mich. L. Rev. 1453 (2007), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=929474](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929474).
6. Am. Assn. J., *The Ten Worst Insurance Companies in America: How They Raise Premiums, Deny Claims, and Refuse Insurance to Those Who Need It Most*, [www.justice.org/resources/AAJ\\_Report\\_TenWorstInsuranceCompanies\\_FINAL.pdf](http://www.justice.org/resources/AAJ_Report_TenWorstInsuranceCompanies_FINAL.pdf).
7. Natl. Assn. Mfrs., *National Manufacturing Week 2006 Annual Survey Results* (2006). The association has removed the link to this study from its Web site, [www.nam.org](http://www.nam.org). Last viewed on June 27, 2007. See also Natl. Fed. Ind. Business, *Small Business Problems and Priorities* (June 2008), <http://nfib.com/portals/0/ProblemsAndPriorities08.pdf>.
8. Thomas J. Donohue, President and CEO, U.S. Chamber of Commerce, *Opening Remarks at the Institute for Legal Reform Summit* (Oct. 14, 2004), [www.uschamber.com/press/speeches/2004/041014tjd\\_jlrreform.htm](http://www.uschamber.com/press/speeches/2004/041014tjd_jlrreform.htm).
9. Am. Med. Assn., *Physician Characteristics and Distribution in the U.S.* (AMA 2008).
10. Jay Angoff, *Falling Claims and Rising Premiums in the Medical Malpractice Insurance Industry*, Ctr. J. & Democracy (July 2005), [www.dcinjuryfacts.com/law-justice-1045429.html](http://www.dcinjuryfacts.com/law-justice-1045429.html).
11. *Id.*