

The quarterly newsletter of **TLPJ**

PUBLIC JUSTICE



Fall 1998

Environmental Enforcement Project Sues To Stop Illegal Mountaintop Removal Mining in West Virginia

Lawsuit Charges That Mining Process Violates Federal Environmental Laws

Trial Lawyers for Public Justice has filed a landmark suit to stop coal mining companies in West Virginia from shearing the tops off the state's mountains and dumping them into the valleys and streams below. The lawsuit, filed by TLPJ's Environmental Enforcement Project on July 16, 1998, charges that West Virginia's Department of Environmental Protection (DEP) and the U.S. Army Corps of Engineers are violating federal environmental laws by issuing permits that allow the extraordinarily destructive mountaintop removal mining process now taking place.

"The mountaintop removal mining now taking place in West Virginia blatantly violates federal environmental laws," said TLPJ Environmental Enforcement Attorney Jim Hecker, co-

counsel in the case. "Those laws clearly prohibit the coal companies from burying hundreds of miles of streams under billions of tons of waste.

TLPJ's lawsuit, *Bragg v. Robertson*, was filed in federal district court in Charleston, West Virginia, on behalf of 10 West Virginia citizens and the West Virginia Highlands Conservancy. It alleges that the Director of



Charite Archambault, U.S. News & World Report

Coal mining companies are shearing the tops off mountains and dumping them into valleys.

the DEP and three officials of the Corps are violating the federal Clean

See Mining, page 10.

TLPJ Urges High Court to Reject No-Opt-Out Future Victims' Class Asbestos Victims' Rights At Stake in *Ortiz*

Can a prearranged class action be used to limit the rights of all future asbestos victims – including those who presently have no physical injuries and do not even know they were exposed to asbestos? Trial Lawyers for Public Justice has urged the U.S. Supreme Court to answer this question with an emphatic "No" and strike down the proposed class action settlement in *Ortiz v. Fibreboard Corporation*.

"This no-opt-out, future victims' settlement is a brazen example of class action abuse," said TLPJ Foundation President Joseph A. Power, Jr., of Chicago's Power, Rogers & Smith. "The Fibreboard Corporation is seeking to

cap its mass tort liability through a class action settlement that violates its present and future victims' rights. Both the Federal Rules of Civil Procedure and the U.S. Constitution forbid it."

The proposed settlement in *Ortiz v. Fibreboard Corporation* (formerly known as *Ahearn*) is the second class action attempt to limit future asbestos victims' rights reviewed by the U.S. Supreme Court in the last two years. Last year, the Court threw out a proposed settlement of present and future victims' claims reached by 20 former asbestos manufacturers in *Amchem Products v. Windsor*. TLPJ had filed an

See Asbestos, page 6.

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Against All Odds...Justice Will Prevail

While ascending to the Presidency of this wonderful organization, I have repeatedly been inspired by the enormous personal commitment of our Board members and former Presidents to Trial Lawyers for Public Justice. Their contributions of time and financial support are simply overwhelming.

TLPJ allows each of us to give something back to society in furtherance of the public good. Under the stewardship of our former Presidents, the Board, Arthur Bryant, and the staff, we can move forward to the 21st Century with the confidence that justice will prevail.

As the lead story in this issue reflects, TLPJ is now handling one of the most important environmental cases we've ever brought. *The New York Times*, *Nightline* and other media outlets have chronicled the outrageous mountaintop removal mining now taking place in West Virginia – devastating the landscape, destroying hundreds of miles of valleys and streams, and leaving scores of towns and villages abandoned.

The coal companies literally take the interior of a mountain and associated waste material and dump it into nearby valleys and streams. This waste material has already filled in over 470 miles of free-flowing streams, and forced many residents to abandon their homes. Viable towns and villages have become ghost towns overnight.

Despite coal industry contentions and media reports to the contrary, our research has shown this practice is illegal. We intend to stop it. In July we filed a lawsuit charging West Virginia's Department of Environmental Protection and the U.S. Army Corps of Engineers with violating federal environmental laws for issuing permits that allow this destructive behavior. With your continued support and assistance, we will meet this challenge.

Over the years, TLPJ has prevailed in some seemingly impossible cases against corporate and government wrongdoers. Against all odds, we have won landmark victories in environmental protection, toxic torts, civil rights, consumer rights, federal preemption, worker safety, and the preservation of the civil justice system. What makes these victories possible is our members' help and support.

TLPJ allows us to give something back to the community. We have all been blessed with the privilege to practice law. As attorneys, we are responsible for fostering and advancing the public good.

In the cases we are handling now, as with all litigation, there will be bumps in the road. We are all aware that the forces of darkness who line up on the other side often prefer to spend hundreds of thousands for defense, instead of one penny for cleanup or just compensation. But, with our members behind us, ultimately justice will prevail.

We need your financial support to continue these "David v. Goliath" battles. Please help TLPJ continue its good work into the next millenium. ❖



Joseph A. Power Jr.

Executive Director's Report

The Larger Story

Our victory in the *Kleinhesselink* case, reported on page 3, is important in itself. But it's also part of a compelling larger story.

In 1981, Linda Marie Bell, a clerical employee at Macy's in California, was seven months pregnant. She started to feel severe abdominal pain, so she went to see the company nurse, who told her she was just having gas pains. Bell asked to see a doctor, but the nurse assured her that she did not need one. It turned out, however, that Bell's uterus had ruptured. Because of the delay in getting appropriate medical treatment, her child was born with severe brain and other damage – and died before the age of three.

The Bells sued Macy's, but, in a stunning 1989 decision, California's intermediate court of appeals threw the case out. It held that, because Linda Bell was a Macy's employee when the injury took place, California's Workers Compensation Act barred the Bells from suing Macy's – *even though the Bells were suing on their child's behalf and the Workers Compensation Act provided no compensation whatsoever for injuries suffered by the child.*

The result could hardly have been more outrageous or unjust. Macy's was literally free to kill the Bells' child and could not be forced to pay a penny. But the California Supreme Court refused to review the case.

We believed the decision was wrong and vowed to establish a clear legal principle: *workers compensation statutes don't bar claims for which they provide no compensation.*

That's the principle we helped establish with *Kleinhesselink*. In 1996, the Montana Supreme Court ruled in a companion case to *Kleinhesselink* that "the quid pro quo between employers and employees is central" to workers comp and that "there must be some possibility of recovery by the employee" for a workers compensation act to bar a lawsuit for damages.

And the circle has now been closed.

Late last year, as settlement discussions were beginning in *Kleinhesselink*, the California Supreme Court finally heard a case similar to *Bell*. In *Snyder v. Michael's Stores, Inc.*, it held that a child injured in utero when her mother's employer negligently filled her mother's workplace with toxic chemicals was *not* barred from suing the employer. It said the decision in *Bell* was simply wrong. ❖



Arthur H. Bryant

TLPJ Wins Settlement Against Stillwater Mine On Behalf of Emotionally Injured Employee

Confidential Settlement Terms Highlight Growing Problem of Court Secrecy

Employers in Montana can now be held accountable for their employees' emotional injuries incurred on the job. On September 23, 1998, TLPJ won a settlement against the former owners and managers of Montana's Stillwater Mine on behalf of Dan Kleinhesselink, a former mine safety coordinator who developed mental and emotional problems because of unsafe working conditions on the job. At the defendants' insistence and with the plaintiff's consent, the case has settled under confidential terms – notwithstanding TLPJ's general policy against and strong objections to secret settlements. The suit, *Kleinhesselink v. Stillwater Mining Company, et al.*, was pending in state district court in Stillwater County, Montana, and sought damages for the emotional injuries that Kleinhesselink suffered as a result of the mine's negligent disregard for safety.

"Despite its confidential terms, this settlement sends a clear message to employers that they cannot hide behind workers' compensation statutes to avoid paying for the psychological injuries they inflict on their employees," said TLPJ Foundation President Joseph A. Power, Jr. of Chicago's Power, Rogers & Smith. "The state district court had previously dismissed this lawsuit, ruling that Kleinhesselink's emotional injury claims were barred by Montana's Workers' Compensation Act, but the Montana Supreme Court later reinstated the case. We hope that earlier court ruling and this settlement will benefit all employees in the state of Montana and influence other states to protect their workers from mental and emotional injuries."

In November of 1994, TLPJ filed suit against the former owners and managers of the mine, charging them with negligence and failure to maintain a safe workplace. The suit sought compensation for Kleinhesselink, who suffered from depression and emotional problems after his supervisors repeatedly ignored his safety recommendations and several workers were serious-

ly injured or killed at the mine in Nye, Montana.

Over time, Kleinhesselink's emotional problems had worsened and he began to experience chronic fatigue, insomnia, nausea, headaches, muscle spasms, and digestive problems. Eventually he underwent psychological counseling, but because of his injuries, he was unable to return to work. Kleinhesselink, however, was unable to obtain workers' compensation because emotional and psychological injuries are not covered by workers' compensation in Montana.

While Kleinhesselink was on leave, ownership and management of the mine changed. Evidence developed in the case established that many of Kleinhesselink's recommendations were implemented by the new management team. The safety record at the mine improved significantly.

On October 19, 1995, the district court in Stillwater County dismissed Kleinhesselink's case, holding that Montana's Workers' Compensation Act banned him from suing his employer for the emotional injuries it caused him, even though the Act provided no compensation for emotional injuries. On July 24, 1996, the Montana Supreme Court reversed the district court's decision and reinstated Kleinhesselink's case, allowing him to seek damages for the emotional injuries he suffered. TLPJ's team prepared the case for trial and, in late September, a settlement was reached.

"The impact of this settlement is likely to extend beyond Montana em-

ployers and to send the message that employers have a duty to provide workers like Mr. Kleinhesselink with a safe workplace," said TLPJ lead counsel James Molloy of the Hunt & Molloy Law Firm in Helena, Montana. "Many

states, including Montana, exclude job-related mental and emotional injuries from coverage under workers' compensation plans. The Montana Supreme Court found that this did not bar Klein-



Dan Kleinhesselink won the right for employees to sue for job-related emotional injuries.

hesselink from suing the mining company. That decision, along with the settlement, may influence other companies and state courts to recognize that, regardless of the nature of the injury, workers have a right to compensation for their job-related injuries."

"Although TLPJ believes secret settlements are contrary to the public interest, we could not stand in the way of our client's desire to accept the settlement offer," said TLPJ's Adele Kimmel, co-counsel in the case. "The fact that the terms are confidential highlights the problem of court secrecy. Our system of justice should not allow defendants to insist on, much less obtain, a secret settlement."

The settling defendants include Chevron U.S.A. and Manville Mining, the former owners of Stillwater Mining Company, and Pittsburgh & Midway Coal Mining Company, which managed the mine. TLPJ's original lead counsel in the case was Donald W. Molloy, James' brother, who was sworn in as a U.S. District Judge for the District of Montana in August 1996. ❖

D.C. Circuit to Decide Whether Auto Manufacturers Can Be Sued For Failure to Install Airbags

Six States Have Rejected Preemption and Permitted Suits in Past Three Years

The United States Court of Appeals for the District of Columbia Circuit is about to become the latest battleground over whether injured crash victims can sue auto manufacturers for negligently failing to install airbags in their cars. On October 22, 1998, the court will hear TLPJ's oral argument in *Geier v. Honda Motor Company*, challenging the car maker's federal preemption defense and urging the court to allow the injury victim's claims to be heard.

"In the past three years, six state supreme courts have held that Congress intended to preserve all common law claims and rejected the auto industry's attempt to obtain immunity for its delay in installing airbags," said TLPJ Executive Director Arthur H. Bryant, who is handling the appeal. "We are hopeful that

the D.C. Circuit will join this growing trend."

The case arose in January 1992, when Alexis Geier was driving her friend's 1987 Honda Accord, wearing the car's manual lap belt and shoulder harness. Rounding a curve, she lost control of the vehicle, it collided with a tree, and Ms. Geier sustained grievous head injuries. She and her family contend that she would have walked away from the crash if the car had contained a driver's-side airbag. The district court held, however, that Honda was immune from suit because it complied with Federal Motor Vehicle Safety Standard 208, which allowed, but did not require, Honda to install airbags.

In the last three years, the highest courts of New Hampshire, Indiana, Arizona, Ohio, Texas, and New York have all

held otherwise, noting that the National Traffic and Motor Vehicle Safety Act of 1966 says, "Compliance with a Federal Motor Vehicle Safety Standard shall not exempt any person from any liability at common law." TLPJ has successfully represented the plaintiffs in a number of these cases and agreed to take on the Geiers' appeal.

"Congress enacted the 1966 Auto Safety Act to protect consumers, not leave unnecessarily injured crash victims without a remedy," said Bryant. "In our view, Alexis Geier and similarly situated crash victims have a right to their day in court."

The Geiers are also represented by Robert M.N. Palmer and William Petrus of the Law Offices of Robert M.N. Palmer, P.C., in Springfield, Missouri, and James W. Taglieri of Cadeau & Taglieri in Washington, D.C. ❖

Oregon Federal Court Orders Public Disclosure of Crash-Test Results in Defective Airbag Suit

Ruling on TLPJ's Motion to Disclose Crash-Test Videos Deferred Until After Trial

Consumers will be learning a bit more about the safety of Nissan Altimas as a result of TLPJ's latest Project ACCESS challenge. Granting one of TLPJ's requests, an Oregon federal court has ordered Nissan to release the results of crash tests performed on its 1994 Altima – a vehicle with allegedly defective airbags that have caused injuries to drivers and passengers in numerous incidents. The court deferred ruling, however, on whether to order disclosure of the videos of the crash-tests performed on the car until after the upcoming trial in *Swanson v. Nissan Motor Co.*, an Oregon product liability suit alleging that the plaintiff was blinded by the passenger-side airbag in her 1994 Nissan Altima.

The decision came in response to a motion filed by TLPJ on behalf of Parents for Safer Airbags, a nonprofit organization dedicated to promoting safer airbags through education, legislation and product liability litigation, and the Oregon Consumer League, a nonprofit consumer

advocacy and lobbying group. The motion challenged Nissan's designation of crash-test reports and videos as "confidential" pursuant to a stipulated umbrella protective order that prohibits public disclosure of all discovery materials in this case. TLPJ's motion contended that the information must be made available to the public because Nissan has not shown "good cause" for maintaining secrecy, and the public interest favors disclosure. The plaintiff in the case had filed a similar motion to unseal, requesting that the protective order be removed from the crash-test reports and videos.

In an August 27, 1998 decision, Federal Magistrate Judge Janice M. Stewart ordered Nissan to release the test results for the 1994 Altima, holding that since "the air bag technology has changed for 1994," Nissan has "no basis on which to oppose disclosure of those portions of its reports revealing the test methodology." As for the crash-test videos, the court held that it lacked sufficient evidence to determine whether

disclosure would cause Nissan competitive harm by revealing proprietary "testing methodology." Given the lack of sufficient evidence on this point, and the upcoming trial, the court deferred a ruling "until further submission of evidence, either through testimony at trial or supplemental affidavits, concerning the competitive value of [Nissan's] testing."

"We are pleased that the court ordered disclosure of the crash test reports, but disagree with the court's decision to give Nissan another chance to try to prove 'good cause' for concealing the videos," said TLPJ lead counsel Jeff Foote of Portland, Oregon. "We remain confident, however, that Nissan will not be able to meet its burden and will continue to pursue this information after the trial is concluded."

TLPJ's challenge in *Swanson* is part of Project ACCESS, its nationwide campaign against unnecessary court secrecy. ❖

Insurance Companies Seek Immunity from RICO Before United States Supreme Court

TLPJ Stresses Role of Federal Statute in Protecting Consumers Against Fraud

As stories of widespread consumer fraud and deception by insurance companies proliferate in the news, the U.S. Supreme Court is about to decide whether insurance companies are immune from one of the most powerful weapons against abuse in consumers' legal arsenal: the treble damage provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO). A health insurance company, Humana Inc., contends that it is exempt from RICO suits under the McCarran-Ferguson Act, a federal statute which leaves regulation of the insurance industry to the states. On September 18, 1998, TLPJ filed an *amicus* brief urging the Court to reject Humana's claims and allow the suit to go forward under RICO.

"Fraudulent activity in the insurance industry costs consumers millions of dollars in lost premiums and insurance coverage," said TLPJ Staff Attorney Sarah Posner, who authored the *amicus* brief with assistance from Staff Attorney Paul Bland. "RICO's treble damages provisions both deter and remedy these kinds of abuses. We do not believe Congress intended to exempt insurance companies from RICO's corrective reach."

The Supreme Court case stems from a class action filed in federal district court in Nevada. In *Forsyth v. Humana, Inc.*, policyholders under a preferred provider organization (PPO) contract with Humana alleged that Humana and a hospital in the PPO engaged in an elaborate kick-back scheme to defraud them. The class members charge that Humana secretly obtained discounts from the participating hospital and, rather than passing those discounts on to its policyholders in the form of reduced co-payments, engaged in a deceptive scheme to conceal the discounts. The discount was so large in some cases that the total hospital bill was less than the co-payments the policyholders were forced to pay.

Under the federal Employee Retirement Income Security Act

(ERISA), which limits a plaintiff's recovery to contractual damages, the district court ordered Humana to reimburse its policyholders the excess co-payment. The district court also held that the state law claims were preempted by ERISA, and that the policyholders' federal RICO claims (which could have entitled the injured consumers to treble damages) were barred by the McCarran-Ferguson Act. On appeal, the Ninth Circuit

affirmed the award of ERISA relief, but reversed the district court's ruling dismissing the federal RICO claims. The Supreme Court then granted Humana's petition for review to decide whether the McCarran-Ferguson Act precludes private civil RICO suits.

TLPJ's *amicus* brief makes three main arguments why the McCarran-Ferguson Act does not preclude civil RICO claims. First, allowing injured consumers to sue insurance companies under RICO does not violate the limitations that the McCarran-Ferguson Act places on federal regulation of insurance. Because Congress enacted RICO to bolster, not replace, state law enforcement efforts, civil RICO actions and state regulation of insurance can take place simultaneously with no intrusion on the states' regulatory efforts. Allowing lawsuits serves RICO's express purpose of eradicating systematic fraud and abuse in every

sector of the economy, including the insurance industry.

Second, TLPJ contends that RICO is a vital tool in combating insurance fraud. Recent congressional investigations have revealed that gaps in the reach and effectiveness of state insurance regulation have created a climate ripe for interstate and international insurance fraud. The investigations show that the states, acting alone, lack the resources to combat interstate and

international insurance fraud. TLPJ's brief notes that these investigations underscore the need for more powerful remedies – like RICO – to effectively prevent and deter insurance fraud.

Third, TLPJ's brief points out that preclusion of civil RICO suits by the McCarran-Ferguson Act would foster fraud in the insurance industry because no other remedies are as effective deterrents as RICO's treble damages remedy. The ERISA remedy is an inadequate deterrent, TLPJ argues, because it merely places Humana in the same financial position it would have been in had it not concealed the discounts.

"RICO makes a big difference," said Posner. "That's why we want to preserve it and that's why insurance companies want to eliminate it."

Oral argument in the case is scheduled for November 30, 1998. ❖



Sarah Posner

Did You Know? TLPJ Legal Briefs are Online

You can download many of TLPJ's legal briefs from our web site – free of charge! You will also find TLPJ press releases, case information, legal information packet order forms, and membership information online. If you haven't visited our web site yet, there's no better time than the present. The site can be found at <http://www.tlpj.org>. And while you're there, bookmark us! ❖

No-Opt-Out Deal Would Bind Future Victims

Asbestos, continued from page 1.

amicus brief in opposition to that settlement, too. See Summer 1997 *Public Justice*.

The proposed settlement in *Amchem* did not involve companies claiming their financial viability was at risk and did not seek to prevent class members from opting out. The Fibreboard Corporation, however, did claim that its financial viability was at risk and used that claim to justify binding some of its present and future victims' on a no-opt-out basis. The settling parties contend that the differences between the cases allow the *Fibreboard* settlement to stand, even though the *Amchem* settlement was struck down.

The *Fibreboard* settlement would establish a "limited fund" to compensate all persons exposed to asbestos manufactured by the Fibreboard Corporation who had not filed or settled claims against the company as of August 27, 1993. Fibreboard manufactured and distributed asbestos insulation products from 1928 until 1971. Many individuals who worked with its products later suffered from asbestos-related conditions and sued the company for their injuries. Some asbestos-related illnesses take as long as 25 to 40 years after exposure to manifest themselves.

By 1988, Fibreboard had exhausted nearly all of its insurance resources available to defend and indemnify asbestos lawsuits, with the exception of two disputed policies. In an effort to resolve all of its problems at once, Fibreboard entered into a proposed no-opt-out global settlement through which its insurers would establish a \$1.525 billion settlement fund. Fibreboard – worth an estimated \$235 million at the time and since sold for \$515 million – would contribute virtually none of its own assets to the settlement fund.

Under the proposed settlement, the class members – but not Fibreboard's other victims or creditors – would be forced to seek compensation through a private claims processing system. Settlement offers will be made based on a variety of factors. If a settle-

ment cannot be reached, the next steps are mediation and then arbitration. If an acceptable resolution still cannot be reached, class members can then file their own suits against the settlement fund, but are not permitted to sue Fibreboard and can recover a maximum of \$500,000 per person in compensatory damages. Punitive damages, prejudgment interest, and post-judgment interest are not available.

The settlement was approved first by the U.S. District Court in Tyler, Texas, and then by the U.S. Court of Appeals for the Fifth Circuit in July 1996. After the U.S. Supreme Court threw out the settlement in *Amchem*, it vacated that approval and ordered the Fifth Circuit to reconsider its ruling in light of the *Amchem* decision. On remand, the Court of Appeals issued a five-paragraph decision reinstating its earlier ruling, claiming that *Amchem* did not render the settlement improper. The Supreme Court then granted review for a second time to consider whether the settlement meets the requirements of Federal Rule of Civil Procedure 23 (which governs class actions) and the U.S. Constitution.

"We believe the Supreme Court should and will throw out this wholly unprecedented settlement," said TLPJ Executive Director Arthur H. Bryant, who co-authored the *amicus* brief with Staff Attorney Anne Bloom. "Class actions cannot properly be used to force a company's present and future mass tort personal injury victims to forfeit their rights to pursue their individual claims."

TLPJ's *amicus* brief, filed August 6, 1998, as part of TLPJ's Class Action Abuse Prevention Project, urges the Court to reject the settlement because it unconstitutionally creates a no-opt-out class to bind future victims. Under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, no-opt-out class actions can only be certified if individual adjudication of the claims would "substantially impair" the ability of all claimants to receive fair compensation. Typically, no-opt-out classes certified under this rule involve a limited fund and the class includes all people with claims against the fund, which is then divided among the class members. In these circumstances, creating a no-opt-out class is the only way to protect class members' interests and ensure that all who are subject to the risk of "substantial impairment" have an equal opportunity to obtain relief. Be-

cause these conditions are not met in the *Fibreboard* case, TLPJ's brief argues that certification of the class violates the basic purpose of Rule 23(b)(1)(B) and the rights of future victims in two distinct ways.

First, the brief argues that the settlement cannot be reconciled with the class members' constitutionally mandated right to receive meaningful notice and an opportunity to be heard. Due process requires that class members be afforded an opportunity to present their objections to a settlement that releases their claims. The brief points out that this requirement is violated by the *Fibreboard* settlement, which attempts to release the claims of hundreds of thousands of future victims who have no way of knowing that they are included in the class. In *Amchem*, the Supreme Court recognized the "highly problematic" impediments to adequate notice in class actions involving future asbestos victims.

Second, TLPJ's brief argues that the proposed settlement violates the future victims' constitutional right to adequacy of representation, which is protected by Rule 23(a)(4). As *Amchem* makes clear, Rule 23(a)(4)'s adequacy of representation requirement could never be met in a case of this sort, which encompasses a huge number of present and future personal injury victims who have fatally conflicting interests in the distribution of the settlement proceeds. Equally important, the class representatives in this case lacked authority to release the future personal injury claims of exposure-only class members. The authority of class representatives is limited to the claims they possess in common with other members of the class. This principle is clearly violated in a case where – as here – the settlement seeks to extinguish future personal injury claims that, by their very nature, do not exist.

The *Ortiz* objectors are represented by Fred Baron, Brent Rosenthal, and Steve Baughman of Dallas' Baron & Budd, along with Harvard Law School Professor Laurence Tribe and Brian Koukoutchos of Cambridge, Massachusetts, and Jonathan Massey of Washington, D.C. Oral argument is scheduled for December 8, 1998. ❖

TLPJ Renews Efforts to Snuff Out Class Action Abuse by The Liggett Tobacco Company

Company Turns to Alabama State Ct. After Defeat in West Virginia Federal Ct.

When it comes to class action abuse, the Liggett tobacco company doesn't want to take "no" for an answer. One year after TLPJ snuffed out Liggett's attempted no-opt-out class action settlement of all present and future tobacco-related claims against it in West Virginia federal court, the company has sought approval of a strikingly similar settlement in Alabama state court. TLPJ filed a formal objection to the "new" settlement in *Fletcher v. Brook Group, Ltd.*, on September 9, 1998, and argued against preliminary approval of the deal before Mobile County Circuit Court Judge Braxton L. Kitrell, Jr. on September 10.

"This is flagrant forum shopping by a tobacco company to further its class action abuse," said TLPJ cooperating counsel Steve Baughman of Baron & Budd in Dallas. "The proposed settlement should be no more acceptable in Alabama state court than its nearly-identical twin was in West Virginia. It provides virtually no relief for the class and violates the class members' rights to opt out."

The proposed settlement in *Fletcher* is actually Liggett's third attempt to use the class action device to cut off potential tobacco-related claims against it. First, on March 20, 1997, Liggett filed a class action settlement in Alabama in *Fletcher* that included all exist-

ing tobacco-related claims against it, as well as any future claims that might accrue over the next 25 years. Eight days later, however, the Alabama Supreme Court issued a ruling in *Ex Parte Holland* which suggested that the proposed class certification in *Fletcher* was not proper and would not be permitted in the state.

Liggett then abandoned the *Fletcher* settlement and filed a virtually identical deal in West Virginia federal court in *Walker v. Liggett Group, Inc.* The *Walker* settlement received quick preliminary approval in May 1997, but TLPJ then spearheaded a challenge to it. Shortly after the U.S. Supreme Court issued its decision in *Amchem v. Windsor*, a hotly contested class action settlement involving millions of asbestos victims nationwide, Chief Judge Charles H. Haden II of the Southern District of West Virginia agreed with TLPJ that Liggett's deal was unapprovable on its face. Although Liggett appealed that decision, it repeatedly delayed briefing of the appeal on the ground that it was attempting to work out a new settle-

ment with the plaintiffs.

Liggett has now abandoned the federal courts of West Virginia and refiled a third settlement in Alabama state court.

TLPJ contends, however, that the revised settlement suffers from the same basic defects as its predecessors and should be rejected outright. Although there are some nominal improvements to the deal and a cosmetic restructuring of its terms, TLPJ maintains that it still cannot withstand scrutiny in light of the decisions in *Amchem* and *Ex Parte Holland*.

"Liggett's serial efforts at class action abuse must

be stopped," said TLPJ Staff Attorney Leslie Brueckner, co-counsel for the objectors. "In addition to providing no real relief to the majority of class members, this proposed settlement is riddled with conflicts between the present and future personal injury victims. There is simply no basis for certifying a mandatory class of this type."

TLPJ's legal team in this case also includes Henry Brewster of Stein & Brewster in Mobile. Our work in *Walker* and *Fletcher* is part of TLPJ's Class Action Abuse Prevention Project. ❖



Steve Baughman

Polybutylene Plumbing Claims Process Underway

You or somebody you know may be eligible for relief under the polybutylene plumbing settlement. **To find out more or to submit a claim, call 800-876-4698.**

Polybutylene plumbing was installed in an estimated six million homes, town houses, mobile homes, and other properties since 1978. It consists of flexible plastic pipes joined by plastic or metal fittings held in place by small aluminum or copper bands about the size of a wedding band. In installations since 1990, the plastic insert fittings often have been replaced with metal insert fittings, but the tubing generally remains the same. ❖

Update to Class Action Abuse Prevention Information Packet Now Available

TLPJ has just completed the October 1998 update to the CAAPP Information Package, including recent cases, press clips, and briefs relating to the dangers of class action abuse and how to fight it. The original Information Packet contains materials up to September 1996; Update # 1 covers September 1996 to October 1997; and Update # 2 covers October 1997 to October 1998. Each can be purchased separately by TLPJ Foundation members for \$75 and by non-members for \$100, or the combined packet and updates can be purchased by members for \$175 and non-members for \$250. To order a copy, contact Clarisia Lovelace at TLPJ headquarters. ❖

Class Action Abuse Prevention Project News

TLPJ's Class Action Abuse Prevention Project reports these other key developments:

Cusack v. Bank United of Texas

TLPJ has appealed the decision of the federal district court in Chicago approving a coupon class action settlement in *Cusack v. Bank United of Texas* and prohibiting anyone from learning how many class members redeem the coupons provided by the settlement. The coupons would provide compensation to class members for mortgage escrow overcharges only if they refinanced or obtained new mortgages from the same company that allegedly cheated them. The settling parties introduced no evidence to prove that the coupons were likely to be used, and the defendant refused to commit to make any minimum payment to the class. The appeal has been briefed and argued before the U.S. Court of Appeals for the Seventh Circuit, and we are now awaiting a ruling.

Dansby

In *Dansby v. Queen Carroll*, TLPJ filed an *amicus* brief urging the Alabama Supreme Court to hold that it

violates due process for a class action involving substantial damages to be settled on a no-opt-out basis. TLPJ filed the brief because of a concern that the growing trend of no-opt-out class action settlements has helped defendants limit their liability for wrongdoing at the expense of the constitutional rights of their victims. We are awaiting a decision.

Hayden

TLPJ is still awaiting a ruling in *Hayden v. Atochem North America, Inc.*, pending in federal district court in Houston. The proposed no-opt-out class action settlement in *Hayden* would establish a fund to compensate individuals who lived or worked near an agricultural plant in Bryan, Texas, that spewed arsenic into the surrounding area. TLPJ's *amicus* brief urged the court to reject the settlement on the grounds that the denial of the right to opt out and the release of claims for future personal injuries violate class members' due process rights. The district court has not decided whether to approve the settlement. Several objectors have moved to decertify the class based on

the Supreme Court's decision in *Amchem*.

In Re: Cincinnati Radiation Litigation

TLPJ is awaiting a ruling in *In Re: Cincinnati Radiation Litigation*, where TLPJ filed an *amicus* brief challenging a no-opt-out class action settlement. The plaintiffs are family members of persons subjected to Defense Department-funded radiation experiments at the University of Cincinnati Hospital. The parties seek to settle claims for punitive and compensatory damages on a no-opt-out basis, claiming that the defendants have a "limited fund," even though they conceded that they have adequate funds to pay claims for compensatory damages. The parties also seek to settle on a no-opt-out basis, arguing that injunctive relief such as an apology from the federal government "predominates" over the \$4.25 million provided by the settlement. At the close of the fairness hearing, the settling parties and objectors agreed to mediate. The court is withholding its ruling on the motion to approve the settlement while the mediation progresses. ♦

Threat to Attorney-Client Privilege Delayed

Proposed Changes to ABA Model Rule 4.2 Put on Hold

With substantial help from TLPJ activists, the dangerous proposed changes to Model Rule 4.2 of the American Bar Association's (ABA) Model Rules of Professional Responsibility have been delayed. On August 6, 1998, the Conference of Chief Justices of the state courts formally resolved to postpone taking any action on the proposed new rule because of the controversy it generated.

The proposed changes to Rule 4.2 would give all federal, state, and local government attorneys broad latitude to communicate *with represented persons outside the presence of their counsel*. Model Rule 4.2 now prohibits a lawyer from communicating with a person the lawyer knows to be represented by counsel unless the lawyer has the other counsel's consent, or is authorized to do so by "constitutional law, statute or an agency regulation having the force of law."

Under the proposed new rule, any government lawyer could communicate *ex parte* with a represented person (1) before the person is charged or arrested in a criminal proceeding or named as a defendant in a civil proceeding; or (2) after the person is charged, arrested, or named as a defendant, if the communication is made under certain conditions.

The fight against the proposed rule changes is far from over. The Conference of Chief Justices is delaying action in part because the ABA is considering another rule change that would similarly erode the attorney-client privilege by permitting unjustifiable *ex parte* contacts. It is possible that the ABA Standing Committee will bring its proposed rule change to the House of Delegates at the ABA's mid-year meeting in Los Angeles in January 1999. If the House of Delegates votes to adopt the proposed rule, the

rule will then become the official ABA Model Rule, which is often adopted by the states without alteration.

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States is also considering adopting a version of the proposed rule change as part of its draft Federal Rules of Attorney Conduct. The Federal Rules of Attorney Conduct, however, are not likely to be published for public comment until at least next summer. The Committee is therefore at least two years away from adopting such a rule change.

We will keep our members apprised of important developments on these proposed rule changes, including information on how to help battle these dangerous threats to the attorney-client privilege. For more information, please contact TLPJ Staff Attorney Sarah Posner. ♦

TLPJ Defends Constitutionality of Title IX

Commonwealth of Virginia Claims Statute Cannot Be Applied to State Schools

In a startling, but not completely unexpected, defense to a sexual harassment case, the Commonwealth of Virginia has launched a frontal assault on Title IX, arguing in *George Mason University v. Litman* that Title IX's prohibition against sex discrimination cannot constitutionally be applied to state universities. Defending the statute, TLPJ has fired back. On August 11, 1998, TLPJ filed an *amici* brief in the U.S. Court of Appeals for the Fourth Circuit rebutting Virginia's arguments on behalf of a coalition of public interest groups.

"Virginia's position is both outrageous and untenable," said TLPJ Staff Attorney Sarah Posner, who primarily authored the *amici* brief. "Title IX is the law of the land. All educational programs receiving federal funds -- including those in Virginia -- are prohibited from discriminating on the basis of sex."

Former George Mason University student Annette Litman filed suit against GMU in 1997 alleging sexual

harassment by one of her professors. The suit was brought under Title IX, which prohibits sex discrimination by educational programs receiving federal funds. The Commonwealth of Virginia, representing the university, filed a motion to dismiss on the ground that it was immune from suit under Title IX because Congress did not take constitutionally sufficient steps to overcome the Commonwealth's immunity from suit under the 11th Amendment.

The district court upheld that assertion but, at the same time, ruled that GMU could be sued under Title IX because it had waived its right to immunity under the 11th Amendment by accepting federal funds. At GMU's request, the Fourth Circuit then granted interlocutory review. Concerned about the national implications of GMU's arguments, TLPJ filed its *amici* brief, urging the court to allow the suit to go forward.

TLPJ's brief demonstrates that Congress did constitutionally eliminate the states' immunity from suit

when it enacted Title IX, for two separate reasons. First, the Fourteenth Amendment to the United States Constitution empowers Congress to override state immunity from suit when adopting laws for the purpose of ensuring equal protection. That was Congress' purpose in enacting Title IX. Second, the Constitution also authorizes Congress to pass laws that condition states' acceptance of federal funds on their waiver of immunity. Thus, as the district court properly held, GMU consented to being sued by accepting federal funds.

TLPJ was joined in the *amici* brief by the American Civil Liberties Union (ACLU) of Virginia, the ACLU's Women's Rights Project, the National Women's Law Center, the American Association of University Women, and the American Association of University Women Legal Advocacy Fund. The United States of America has also intervened in the case, opposing Virginia's position. Oral argument is not yet scheduled. ❖

Win a Week's Stay in the French Quarter

Enter Phase II of the 1998 Member-Get-a-Member Contest

Sign up the most new or renewed members
between July 1, 1998 and December 31, 1998,
and you'll win a week's stay

in a historic French Quarter condo in New Orleans, Louisiana,
donated by Lanny Vines of Emond & Vines in Birmingham, Alabama.

The condo is located just a block off Bourbon Street and
around the corner from Preservation Hall.

Rules:

- 1) All contest participants must be current members of The TLPJ Foundation.
- 2) Any person or organization that has not already paid 1998 membership dues to The TLPJ Foundation may be signed up as part of the contest.
- 3) The recruited member's dues must be paid in full for the recruiter to get credit.
- 4) The recruiter's name must appear on the completed membership application or renewal form submitted to The TLPJ Foundation.

Membership/State Network Co-Chairs Tom Dempsey, Larry Trattler, and Mike Withey are happy to offer expert advice on recruiting and renewing techniques as well as answer any questions you may have. For membership applications or recruitment materials, contact TLPJ Foundation Membership Coordinator Susan Gombert at TLPJ headquarters.

Good luck!

TLPJ Sues to Stop Illegal Mining

Mining, from page 1.

Water Act and the Surface Mining Control and Reclamation Act of 1977 (or SMCRA) by issuing permits that allow illegal mountaintop removal mining in the state.

"Mountaintop mining was supposed to be carefully conducted to benefit local communities and encourage their economic development, but it is destroying them instead," said co-counsel Joseph Lovett of Mountain State Justice in Charleston. "The coal companies are simply cutting off mountaintops and dumping them into West Virginia's streams, harming the communities and the environment in the process. The streams are the arteries of West Virginia's natural environment. Filling them up will inevitably cause damage to the entire system."

The filing of the lawsuit and the general destructive nature of mountaintop removal have been attracting a lot of attention in the media of late. The havoc wreaked by mountaintop removal mining has been highlighted in recent stories on ABC-TV's *Nightline*, *The New York Times*, *The Washington Post*, National Public Radio, and *U.S. News and World Report*.

As some of the stories note, mountaintop removal mining is an increasingly common coal company practice. Old-time strip mining, severely limited by SMCRA in 1977, stripped layers of coal from the sides of mountains. Mountaintop removal mining, in contrast, uses

enormous machinery to cut off entire mountaintops – as much as 400 feet – and reach the valuable low-sulfur coal seams underneath. The huge volumes of rock and earth removed from these mountaintops are then dumped into nearby streams in waste piles called valley fills. The largest valley fills can each bury more than a mile of free-flowing streams under hundreds of feet of rock.

While federal law places stringent limits on the practice of mountaintop removal mining, the DEP has ignored these limits and routinely issued permits to mining companies to build these valley fills. As a result, hundreds of miles of West Virginia's streams are now filling up with waste. The mammoth mines also cause so much dust and noise, and consume so much land, that residents who live near them are being forced from their homes.

"These mountaintop removal mines are destroying streams at an astonishing rate," said TLPJ's Hecker. "If mountaintop removal mining is going to take

federal strip mining law, by failing to ensure that mountaintop removal mining permits meet minimum federal requirements. For example, one requirement is that no mining activities can take place within a 100-foot "buffer zone" near streams unless several restrictive environmental conditions are satisfied. DEP, however, has routinely granted buffer zone variances to mountaintop mines that do not satisfy those conditions. Another requirement is that mines must comply with state water quality standards, one of which prohibits activities that degrade existing uses of streams. But DEP has routinely permitted valley fills, even though they bury streams and destroy their existing uses.

The suit also charges that the U.S. Army Corps of Engineers cannot legally issue "dredge and fill" permits under the federal Clean Water Act for these valley fills. Under that law, the Corps can only issue those permits for fill material, not for waste disposal. But the sole purpose of valley fills is to dispose of mine waste. Waste disposal permits can only be issued by EPA or an authorized state, not by the Corps, and mining companies have never requested or received such permits for valley fills.

The suit seeks a declaratory judgment that the defendants have violated the federal laws, an injunction requiring them to come into compliance, and legal costs and fees. Patrick C. McGinley and Suzanne M. Weiss, both of Morgantown, are also serving as co-counsel in the case.

Shortly after our case was filed, the federal govern-

ment agreed not to issue additional permits for mountaintop removal mining in West Virginia for sixty days. TLPJ has asked for a hearing on its motion for a preliminary injunction in early December. ❖



Jim Hecker



Charlie Archambault, U.S. News & World Report

The former mountains of West Virginia

place in West Virginia, it needs to comply with federal laws, which prevent this destruction from taking place."

The suit charges that DEP Director Michael Miano has violated his nondiscretionary duties under SMCRA, the

Clean Air Act Suit Dismissed, But Prompts Record State Penalty Against Crown Central Petroleum

Justice Department Joins in TLPJ's Motion for Reconsideration of Dismissal

In an unexpected ruling on August 3, 1998, U.S. District Court Judge Vanessa Gilmore dismissed TLPJ's Clean Air Act citizen suit against Crown Central Petroleum refinery in Pasadena, Texas, shortly after Crown was penalized and forced to appoint independent consultants due to pressure from the lawsuit. TLPJ has filed a motion for reconsideration of the ruling, supported by a brief from the U.S. Department of Justice and the U.S. Environmental Protection Agency (EPA).

"We and the federal government sincerely believe that the district court's ruling was contrary to the law -- and are hopeful that, upon reconsideration, it will be rescinded," said TLPJ Environmental Enforcement Attorney Mark Wenzler, lead counsel in the case. "The U.S. Department of Justice rarely files an *amicus* brief at the district court level. Its decision to do so in this case demonstrates the severity and disturbing nature of this ruling."

TLPJ filed suit against Crown in July 1997 on behalf of a coalition of environmental groups and local citizens. The suit alleged that Crown had massively exceeded federal limits on sulfur dioxide pollution since at least 1992. The EPA has listed sulfur dioxide as an "extremely hazardous substance." When inhaled, it causes serious respiratory problems. The plaintiffs in TLPJ's suit testified that a yellow fog that stinks of sulfur often hangs over their homes, and that they have traced this sulfur pollution to Crown by direct visual observation.

After TLPJ filed suit, the state's enforcement agency, the Texas Natural Resources Conservation Commission (TNRCC), entered into an administrative agreement with Crown that addressed some of the violations alleged in TLPJ's suit. The court held that the combination of this 1998 agreement and an earlier enforcement action by TNRCC showed that the State was "diligently prosecuting" Crown for air pollution violations, thereby precluding TLPJ's suit. The Clean Air Act plainly states, however, that government en-

forcement can preclude a citizen suit only when it covers the same violations in the citizen suit, is filed before the citizen suit, and is filed in court. TNRCC's administrative enforcement was commenced after the citizen suit, was not filed in court, and does not cover all of the violations alleged in the citizen suit.

"The ruling is dispiriting both because of its legal analysis and because it leaves dozens of families who live near Crown at the mercy of a state agency that has been unable and unwilling to stop Crown's illegal pollution," said Wenzler. "The facts demonstrate that the state's prosecution of Crown has



Texas residents live with Crown's illegal air pollution.

been far from 'diligent'. Our motion for reconsideration tries to make that particularly clear."

As the motion points out, TNRCC's 1998 settlement does not actually require Crown to stop its illegal pollution; instead, it allows the company to appoint consultants to study its problems and recommend remedies to the agency. TLPJ's motion contains a detailed engineering report showing that Crown needs to take specific steps *now* to end the illegal pollution. Also, TLPJ submitted an economic study showing that Crown made \$14 million by delaying the installation of equipment it needed to comply with the law. Yet TNRCC imposed only a \$1 million penalty on the company.

Both the EPA and the pollution control agency in Harris County, Texas, sent letters to TNRCC that were highly critical of its settlement with Crown, urging the state to require effective remedies now and to increase the penalty. According to Rick Abraham, Director of Texans United, a plaintiff in the case, "TNRCC's enforcement order makes breaking the law good business. It also fails to protect the families who must breathe Crown's continuing pollution."

TNRCC's recent settlement with Crown would probably have been much worse if TLPJ had not filed suit. For instance, in the 1998 settlement,

TNRCC increased Crown's penalty from \$675,000 to over \$1 million based on TLPJ's arguments that the state was undercounting Crown's violations. This is the largest Clean Air Act penalty ever assessed by TNRCC. Also, without pressure from TLPJ, it is unlikely that TNRCC would even have required Crown to appoint

independent consultants to recommend remedies. In the past, TNRCC had simply let Crown select its own remedies.

TLPJ's Clean Air Act citizen suit was filed on behalf of a coalition of residents and environmental groups, including Texans United for a Safe Economy Education Fund, the Lone Star Chapter of the Sierra Club, and the Natural Resources Defense Council. The suit is one of a series of suits being filed by TLPJ's Environmental Enforcement Project to make polluters comply with the law and pay for violating it.

TLPJ's legal team in this case also includes co-counsel Mike Caddell and Joe Phillips of Caddell & Chapman in Houston. ❖

Virginia District Court Decision Threatens Viability of Consumer Class Actions

TLPJ Urges Fourth Circuit to Overturn Dangerous Ruling

A Virginia federal district court's recent ruling in *Toms v. Allied Bond and Collection* – if allowed to stand – will effectively prohibit consumer class actions in Virginia's federal courts. TLPJ has joined in an *amici* brief with the National Association of Consumer Advocates (NACA), the Virginia Trial Lawyers Association, the Virginia Poverty Law Center, and the ACLU of Virginia to urge the U.S. Court of Appeals for the Fourth Circuit to overturn this dangerous precedent.

Robert Toms filed a class action suit against Allied alleging unfair debt collection practices. He had contracted with his attorneys to pay his *pro rata* share of the costs incurred in the class action suit. The district court denied his motion for class certification and dismissed the case, holding that the suit violated Virginia's ethical rules because Mr. Toms was not willing to pay *all* the costs of the litigation. TLPJ and the other *amici* assert in their brief that the district court's decision incorrectly applies Virginia's ethical rules and conflicts with Rule 23 of the Federal Rule of Civil Procedure, which governs class actions.

For many years, the American Bar Association's (ABA) Model Ethical Rules appeared to prohibit attorneys from advancing costs in litigation, including counsel for plaintiffs in a class action. In 1983, however, the ABA

changed its model rule to clarify that class counsel *could* advance expenses in a class action. Virginia is one of the few states that did not adopt the model rule change. On the federal level, several courts have held that class counsel may advance and be responsible for expenses – despite ethical rules like Virginia's – on the ground that such ethical rules are inconsistent with Rule 23.

“The district court's decision displays indifference at best, and hostility at worst, to the use of class actions,” said TLPJ Staff Attorney F. Paul Bland, Jr. “Class actions are a very effective way to obtain justice, when used appropriately. The district court's decision would improperly deprive Virginia consumers of the ability to pursue entirely proper class actions.”

The *amici* brief contends that the district court's decision is erroneous for two main reasons. First, the brief notes, the district court held that the plaintiff would not be in sufficient control of the litigation if he did not agree to be responsible for all class action costs. But neither Virginia law nor Rule 23 requires a named plaintiff to exhibit a personal financial commitment to fund the entire class action. Moreover, as costs in cases like this may exceed thousands of dollars, lower income litigants cannot possibly take on the responsibilities for all case costs. To

require litigants to do so would deny courtroom justice to many small, but important claims. This would, in effect, lead to the end of most class actions in Virginia's federal courts.

Second, the brief points out that the court erred in ruling that class counsel were inadequate solely because they entered into a fee agreement requiring that the plaintiff pay his *pro rata* share of the costs – which, the brief explains, was not in violation of Virginia's ethical rules. The brief contends that the district court's requirement that class representatives pay all costs of a class action would make the maintenance of most class actions nearly impossible because many litigants cannot afford the case costs and would choose not to litigate important claims. “Adequate class counsel” usually agree to advance such costs for that very reason. Far from being inadequate, such fee agreements are usually critical in bringing the case.

The *amici* brief further notes that federal courts have repeatedly held that a class representative need not be responsible for more than his or her *pro rata* share of litigation expenses. For example, in *Rand v. Monsanto*, the district court held that a named plaintiff need not be responsible for the entire costs of the class action. The *Rand* court further held that, even if some state or federal district purported to require the named plaintiff to bear all of the expenses of prosecuting a class action, the requirement would be invalid because it would be inconsistent with Federal Rule of Civil Procedure 23: “[I]f [a local rule] indeed requires the representative plaintiff to underwrite all costs personally, it is inconsistent with Federal Rule of Civil Procedure 23 because it would cripple the class action device that rule creates.”

Oral argument in this case has not been scheduled yet. Patricia Sturdevant of NACA authored the *amici* brief, with input from David Rubenstein of the Virginia Poverty Law Center, TLPJ Executive Director Arthur H. Bryant, and TLPJ's Bland. ❖

TLPJ's Mission

Trial Lawyers for Public Justice is a national public interest law firm that marshals the skills and resources of trial lawyers to create a more just society. Through creative litigation, and innovative work with the broader public interest community, we:

- Protect people and the environment;
- Hold accountable those who abuse power;
- Challenge governmental, corporate, and individual wrongdoing;
- Guard access to the courts;
- Combat threats to our judicial system; and
- Inspire lawyers to serve the public interest. ❖

Recent developments in TLPJ cases that are not the subject of separate articles in this newsletter are summarized below.

Toxic Torts

Bullock v. Northeast Utilities & Walston v. Northeast Utilities (Connecticut State Court)

These suits seek damages for brain cancer victims harmed by electromagnetic radiation from an electrical substation and high tension power lines near their homes. Michael Koskoff of Bridgeport, CT, and John T. Ward of Baltimore are co-lead counsel. Michael Withey of Seattle, James Horwitz of Koskoff's firm, and TLPJ's Leslie Brueckner are co-counsel. In *Walston*, the plaintiffs withdrew their appeal of the trial court's grant of summary judgment. *Bullock* has also been voluntarily dismissed by the plaintiffs.

Guzman v. Amvac Chemical Corp.

(Washington Federal Court)

This case seeks to hold the manufacturer and distributor of the pesticide Phosdrin accountable for the poisoning of three farmworkers. The plaintiffs have asserted design defect claims against the manufacturer, as well as negligence claims against both defendants. On October 14, 1997, the court granted defendants' motions for summary judgment, dismissing the case in its entirety based on FIFRA preemption and its interpretation of state law. Plaintiffs filed a motion for reconsideration, which the court denied. Plaintiffs appealed the dismissal to the U.S. Court of Appeals for the Ninth Circuit. The appeal has been fully briefed, and oral argument is set for November 3, 1998. Marcia Meade of Spokane is TLPJ's lead counsel. Co-counsel are Eugene Moen and Michael Withey, both of Seattle, and TLPJ's Adele Kimmel. Patti Goldman of Earth Justice Legal Defense Fund in Seattle and Brent Rosenthal of Baron & Budd in Dallas authored TLPJ's



appellate briefs, with assistance from Adele Kimmel.

NY City v. Lead Industries Ass'n (NY State Court)

This lead paint abatement case seeks reimbursement from the lead industry for the cost of removing lead paint from the city's public housing. Neil Leifer of Boston and TLPJ's Arthur Bryant are assisting the city's Corporation Counsel. Discovery is continuing.

Phillips v. Knotts (Washington State Court)

This suit was brought on behalf of two farmworkers poisoned by pesticides that drifted from a neighboring orchard after being improperly sprayed by unlicensed applicators. It alleges that the defendants violated Washington law by failing to properly train, supervise, and license the applicators. Discovery is proceeding, and the trial is scheduled to begin in January 1999. Eugene Moen of Seattle is TLPJ's lead counsel. TLPJ's Adele Kimmel is co-counsel.

Consumer Rights

Reimer v. Columbia Medical Plan (Maryland Federal Court)

This putative class action alleges that an HMO which pursued subrogation claims against all of its injured members who recovered monies from third parties violated Maryland law. The district court dismissed the claims of all plaintiffs who are members of the HMO through an ERISA-covered plan, holding that their claims are preempted by ERISA. TLPJ filed an appeal in the U.S. Court of Appeals for the Fourth Circuit, and oral argument is scheduled for January 1999. The plaintiffs are represented by Maryland attorneys Kieron F. Quinn of Baltimore, Robert K. Jenner of Rockville, Bryant Welch of Potomac, and Bruce Plaxen of Columbia. TLPJ's Paul Bland is lead appellate counsel, and TLPJ's Sarah Posner assisted in drafting the appellate brief.



Environmental Enforcement Project

Texans United v. Exxon Company, U.S.A. (Texas Federal Court)

This citizen suit under the Clean Water Act and the Resource Conservation and Recovery Act was brought against Exxon's Baytown refinery for discharging stormwater runoff contaminated with untreated process wastewater. The court dismissed the five Clean Water Act claims.



Plaintiffs agreed not to appeal this decision after EPA issued a new permit severely limiting Exxon's discharges. In March 1998, the court ruled that Exxon's method of sampling the benzene in those discharges violated RCRA and ordered corrective action. The court subsequently stayed this decision pending the state's issuance of Exxon's renewal RCRA permit. Jim Hecker is lead counsel, and attorneys Valorie Davenport of Houston and Robert Fugate of Mansfield, Texas, are co-counsel.

Civil Rights

Cohen v. Brown University (Rhode Island Federal Court)

In this precedent-setting sex discrimination lawsuit, the U.S. Court of Appeals for the First Circuit upheld the district court's ruling that Brown University is in violation of Title IX for discriminating against its female athletes. The Supreme Court then denied Brown's petition for review. In June 1998, Brown agreed to a settlement that will require it to provide women with opportunities to participate in intercollegiate athletics at a rate tracking their undergraduate enrollment rate and to guarantee enhanced funding and treatment to four women's teams. The final hearing on the proposed settlement is scheduled for October 8, 1998, before U.S. District Judge Ernest Torres. Lynette Labinger of Providence, Rhode Island, is TLPJ's lead counsel. Amato DeLuca and Ray Maccario, both of Providence, Sandra Dug-

gan of Philadelphia, and TLPJ's Arthur Bryant and Leslie Brueckner are co-counsel.

Cureton v. National Collegiate Athletic Ass'n
(*Pennsylvania Federal Court*)

This national race discrimination class action challenges the NCAA's freshman eligibility rules. The suit charges that, by misusing standardized college admissions tests, the NCAA's rules violate Title VI of the Civil Rights Act of 1964 and its implementing regulations, depriving hundreds of academically qualified African-American student-athletes of the opportunity to receive athletic scholarships and compete in intercollegiate sports at major universities. The NCAA filed a motion to dismiss, which the court denied on October 9, 1997. On September 8, 1998, the NCAA filed a motion to amend the court's order denying its motion to dismiss, requesting that the court certify for immediate appeal the question of whether there is a private right of action for disparate impact discrimination under Title VI and its implementing regulations. Plaintiffs will be filing an opposition to this motion. Discovery is proceeding, and the trial is scheduled to begin in May 1999. Although the NCAA publicly announced that it planned to propose changing its freshman eligibility rules to abandon the use of minimum scores on standardized admissions tests, a majority of the Division I member schools that responded to an NCAA survey this summer indicated that they do not want to change the current rules. André Dennis of Philadelphia is TLPJ's lead counsel. Co-counsel are Danielle Banks of Philadelphia, J. Richard Cohen of the Southern Poverty Law Center, and TLPJ's Adele Kimmel.

Williams v. Wasserman
(*Maryland Federal Court*)

TLPJ is co-counsel in this federal trial of the Maryland Disability Law Center's challenge to Maryland's practice of warehousing individuals with traumatic brain injuries in psychiatric hospitals. TLPJ cooperating counsel George Shadoan of Rockville, Maryland and Nicole Schultheis of Baltimore,

along with TLPJ's Leslie Brueckner, assisted with the trial by cross-examining several of the defendant's expert witnesses. The trial concluded in September 1997, post-trial submissions have been filed, and we are awaiting a decision. Nathaniel Fick of Towson, Maryland is also TLPJ co-counsel in the case.

Amicus Briefs

Access to the Courts

In *In re Inquest of Robert Wayne Guy*, TLPJ filed an *amicus* brief in support of a family's challenge to the constitutionality of a King County, Washington Executive Order providing that indigents have no right to counsel at an inquest, although public funds are used to pay for counsel of public officials present at the inquest. Robert Wayne Guy died while in the custody of King County police officers, possibly as the result of excessive force. The inquest was ordered to determine the cause of Guy's death. The King County Superior Court initially granted the Guy family's motion for a temporary restraining order requiring the County to pay its attorney's fees, but later dissolved the TRO and denied the family's motion for a preliminary injunction. The Washington Court of Appeals affirmed. The decedent's family has filed a petition for review by the Washington Supreme Court.

Attorney-Client Privilege

In *Swidler & Berlin v. USA*, TLPJ and other groups filed an *amicus* brief urging the U.S. Supreme Court to reject Independent Counsel Kenneth Starr's argument that the attorney-client privilege does not survive the client's death and that the attorney work product doctrine does not apply with full force to all of the attorney's meetings with the client. On June 25, 1998, the Court agreed with TLPJ's position and held that the attorney-client privilege does survive the client's death. The Court did not address the work-product doctrine.

Environmental Justice

In *Chester Residents Concerned for Quality Living v. Seif*, TLPJ filed an *amicus* brief urging the Third Circuit to recognize an implied private right of action for disparate impact discrimina-

tion under EPA regulations promulgated under Title VI of the Civil Rights Act of 1964. The plaintiffs alleged that the Pennsylvania Department of Environmental Protection (PADEP) violated the EPA's discriminatory effect regulations by approving a disproportionate number of waste facility permits in predominantly African-American neighborhoods. TLPJ, joined by the Southern Poverty Law Center, filed



the *amicus* brief because of the issue's relevance to its suit against the NCAA. On December 30, 1997, the Third Circuit reversed the trial court's dismissal of the case, ruling that plaintiffs had a right to sue under EPA's Title VI regulations. The U.S. Supreme Court had granted review of the case, but, on August 17, 1998, dismissed the appeal and vacated the Third Circuit's ruling as moot after learning that PADEP had revoked the permit for the waste treatment plant.

Legal Duties of Gun Owners

In *McGrane v. Cline*, TLPJ joined an *amicus* brief authored by the Center to Prevent Handgun Violence, urging the Washington Court of Appeals to rule that owners of guns have a legal duty to safely and securely store their guns to prevent theft and misuse by third parties. The court heard oral argument in the case on September 15, 1998.

Reach of Title IX

In *Smith v. NCAA*, TLPJ joined an *amicus* brief authored by the National Women's Law Center urging the Third Circuit to find that the NCAA is subject to the requirements of Title IX. TLPJ joined the brief, in part, because of the issue's relevance to its Title VI suit against the NCAA. On March 16, 1998, the Third Circuit reversed the trial court's dismissal of the case, ruling that the NCAA may be subject to Title IX by virtue of its agency relationship with its member colleges and universities, all of which receive federal funds and pay annual membership dues to the NCAA. The NCAA's request for rehearing *en banc* was denied, and it filed a petition for review with the U.S. Supreme Court. The National Women's Law Center filed an opposition to the *cert.* petition, but the Court granted review on September 29, 1998. ❖



TLPJ Hosts Open House During ATLA Convention

TLPJ and The TLPJ Foundation staff rolled out the red carpet for an open house at national headquarters in Washington, D.C. on Friday, July 9, the opening day of the annual convention of the Association of Trial Lawyers of America (ATLA). The event drew so many guests, the office was positively overflowing.

“It was very inspiring to see the numbers of people interested in Trial Lawyers for Public Justice and its precedent-setting work,” said then-Foundation President Fred Baron of Baron & Budd in Dallas.

Guests included consumer advocate Ralph Nader, who gave a short impromptu speech, along with Foundation officers and members, representatives from other public interest groups, and interested ATLA convention attendees.

The open house provided a great opportunity for socializing, networking, and signing up new members. It was a wonderful time for all. ❖



Joan Claybrook and Joe Power



Ralph Nader addresses the crowd.



Larry Trattler and Stan Marks



Paul Stritmatter, Mike Withey, Bill Snead



J.D. Lee and Susan Saladoff



Rich Hailey, Mary Parker, Fred Baron

Nationally Televised Membership Meeting Spurs Enthusiasm, Interest in TLPJ's Public Interest Work

Ciresi's Keynote Speech Inspires Attendees and TV Audience

The first-ever nationally televised TLPJ Foundation Membership Meeting, held July 12 in Washington, D.C., was a rousing success. Broadcast throughout the country by C-SPAN, the meeting featured extraordinary speakers, drew over 200 attendees (in spite of large traffic jams and the nearby street fair), and generated enormous interest in TLPJ nationwide.

The meeting began with outgoing TLPJ Foundation President Fred Baron welcoming everyone and quickly turning the podium over to TLPJ Environmental Enforcement Attorney Mark Wenzler.

Wenzler spoke about our recent victory against New Jersey Steel, which garnered the largest Clean Air Act settlement in New Jersey history. This formerly illegal polluter will no longer be endangering the health of New Jersey residents. See Spring 1998 *Public Justice*.

Jim Hecker, the head attorney of TLPJ's Environmental Enforcement team, spoke next about the horrors of the mountaintop mining now taking place in West Virginia -- and TLPJ's plans to bring it to an end. TLPJ filed suit against West Virginia and the U.S. Army Corps of Engineers just four days later, on July 16. See story, page 1.

TLPJ cooperating counsel Peggy Goldberg Pitt then spoke movingly about the dangers of increasingly common confidentiality agreements in settlements, and urged all in attendance to fight this growing trend. Pitt successfully settled a case against Blue Cross/Blue Shield of Michigan for discontinu-

ing medical treatment to a severely disabled child, but could only do so under the shroud of confidentiality. See Summer 1998 *Public Justice*.

TLPJ Executive Director Arthur Bryant next gave an overview of TLPJ's

received a standing ovation before he was able to begin his remarks, spoke eloquently on his long yet successful battle against "Big Tobacco" in Minnesota. Ciresi and his team reviewed over 39 million pages of materials, unsealed a broad array

of explosive tobacco industry documents, and won a landmark settlement on the eve of Ciresi's closing argument. The final settlement agreement will go a long way towards protecting individuals, especially children, from the dangers of smoking.

Just two days after his speech, on the evening of July 14, Mike Ciresi and his

co-counsel Roberta Walburn (also of his firm) and State Attorney General Hubert H. Humphrey III were presented TLPJ's 1998 Trial Lawyer of the Year Award for their extraordinary work. See stories, pages 18 and 20.

The meeting ended with outgoing president Fred Baron turning the gavel over to incoming (and now current) president Joe Power of Chicago's Power, Rogers & Smith. Additional new officers were elected, new Foundation President Power sounded a call to arms, and the meeting was adjourned.

For a transcript of Ciresi's speech, contact Clarisia Lovelace at TLPJ headquarters. If you would like to purchase a videotape of the speech, contact Communications Director Theresa Henige. ♦



Mike Ciresi gave an inspiring speech on his lawsuit against "Big Tobacco".



Mark Wenzler



Jim Hecker

activities during the past year, touching on many of our cases, including but not limited to *Brown University, Georgine, Williams, Swanson, Liggett*, federal pre-emption, Project ACCESS, federal rules, the Class Action Abuse Prevention Project, and mandatory arbitration. He also shared TLPJ's plans for the year ahead.

Last up, keynote speaker Michael Ciresi of Robins, Kaplan, Miller & Ciresi in Minneapolis, who re-



Michael Pitt, speaker Peggy Goldberg Pitt, Roberta Ashkin, Arthur Bryant, Jeff Goldberg

Party Guests "Let Justice Swing" in Washington, D.C.

A capacity crowd filled the Sequoia Restaurant on the waterfront of historic Georgetown in Washington, D.C. on July 13 to "Let Justice Swing" at The TLPJ Foundation annual party. Enjoying a fabulous view of the Potomac from the terrace, TLPJ members and friends participated in a lively auction to benefit TLPJ, congratulated award winners, dined on fabulous cuisine, and danced to the Big Band sounds of Doc Scantlin and His Imperial Palms Orchestra.

The evening began with a cocktail reception and a silent and live auction. **Roxanne Barton Conlin** and **Mike Withey** conducted the highly charged auction, which raised over \$50,000.

Ed Ricci was the winning bidder on the hottest item of the evening - four days and three nights at **Fred Baron** and **Lisa Blue**'s indescribably magnificent Aspen house. A big thank you to Ed for his generous bid!

Paul Minor and **Denise Dunleavy**



Simon Walton and Nicole Schultheis enjoy the auction.

each won a stay at a luxurious French Farmhouse, donated by **Nicole Schultheis** and **Simon Walton**. **Don Holland** placed the winning bid on a sailing trip in the South Pacific, and **Reagan Silber** will be attending a Baltimore Orioles game with **Ralph Nader**, in the team owner's seats, generously contributed by **Peter Angelos**.



Our auctioneers!

The most contested auction item, however, was a 1st edition signed copy of **Ralph Nader's** 1965 book "Unsafe at Any Speed," which exposed the dangers of the Corvair. **Fred Baron** and **Jeff Goldberg** ferociously bid back and

forth, until it was agreed that they would each receive a book at a very high final bid.

We extend a special thank you to all our donors and bidders, too numerous to list here, who made our "Bidding for Justice" auction truly exciting.

Following the auction, guests enjoyed a mouth-watering dinner. President **Fred Baron** then began the award presentations. First, Baron presented **Don Holland** of Holland Shipes Vann, P.C., Certified Public Accountants, and **Kevin O'Connor** of SRA, International, Inc. with special Public Justice Contribution Awards for their extraordinary contributions of time and assistance setting up TLPJ's new state-of-the-art computer network. As Baron said, "We simply couldn't have done it without them."

Each of the finalists for the Trial Lawyer of the Year Award was honored, and then **Mike Ciresi**, **Roberta Walburn**, and Minnesota Attorney General **Hubert H. Humphrey III** (who was

unable to attend) were presented with the 1998 Trial Lawyer of the Year Award. In addition to being honored as finalists, the Illinois Trial Lawyers Association Constitutional Challenge Committee then received the Public Justice Achievement Award for successfully getting Illinois' Tort Reform Act struck down as unconstitutional. Finally, in the evening's most emotional moment, Executive Director **Arthur Bryant** presented **Abe Fuchsberg** with a special Champion of Justice Award in recognition of his years of outstanding support for TLPJ. **Jim Ackerman** (unable to attend) was also named a Champion of Justice. Outgoing President **Baron** then turned the podium over to our new President **Joe Power**, who ended the program with pride.



Larry Trattler

The evening was topped off with dancing to Doc Scantlin and his Imperial Palms Orchestra. Dressed in a tuxedo and spats with his hair slicked back, Doc thrilled the crowd with his renditions of "Puttin' on the Ritz," the "Charleston," plus more. Baron and Power were even

called up on stage at one point to participate in the festivities. Guests danced up a storm, especially **Mary Parker**, who most definitely had her dancing shoes on! (Sorry, no pictures available.)



Gene Pavalon

The successful and enjoyable evening would not have been possible without our generous sponsors, who are listed on page 22. We send a special thank you out to all those involved, and we'll see you next year in San Francisco! ❖



Fred Baron presents the Illinois TIA with the Public Justice Achievement Award.



Patty and Bill Snead



Ryan Power takes a break.



Richard Halpern, with auctioneer Roxanne Conlin.



Ralph Nader and Joe Power



Champion of Justice Abe Fuchsberg



The dancers



Joe Power and Fred Baron were part of the entertainment!



Gerald Holtz, Isaac Byrd, Larry Rogers



Doc Scantlin and his Imperial Palms Orchestra

Attorneys Mike Ciresi, Roberta Walburn, and MN State Attorney General Hubert H. Humphrey III Win 1998 Trial Lawyer of the Year Award

Michael V. Ciresi and Roberta B. Walburn of Robins, Kaplan, Miller & Ciresi in Minneapolis and Minnesota Attorney General Hubert H. “Skip” Humphrey III were awarded the 1998 Trial Lawyer of the Year Award for their work on *State of Minnesota and Blue Cross and Blue Shield v. Philip Morris, Inc., et al.* The nationally prestigious award is bestowed annually by The TLPJ Foundation upon the trial lawyer or lawyers who have made the greatest contribution to the public interest by trying or settling a precedent-setting case.

Outgoing TLPJ Foundation President Fred Baron announced the winners and presented the award to Ciresi and Walburn in person at the annual TLPJ Foundation party on July 13 in Washington, D.C. See story, page 18. Attorney General Humphrey was unable to attend the event.

“Mike, Roberta, Attorney General Humphrey, and their entire litigation team have set an example for us all in demonstrating how justice can be won, even when fighting against the most powerful and wealthy corporations in the country,” said Baron. “We are proud to honor them for their tireless work and success against ‘Big Tobacco.’”

Ciresi, Walburn, and Humphrey won \$6.6 billion and unprecedented injunctive relief in the settlement, which is a milestone in the battle to hold the tobacco industry accountable for its decades-long campaign to deceive the public. Ciresi and his team sued the industry based on unique theories of liability under consumer protection and antitrust laws.

To achieve this remarkable settle-

ment – finalized the last day of the 4-month trial’s closing arguments – Ciresi’s team reviewed more than 30 million pages of documents, the vast majority of which had never been produced in any tobacco lawsuit, and exposed the industry’s concealment of scientific evidence of the link between smoking and disease. Ciresi’s team also convinced the judge that 40,000 pages of documents withheld by the industry as attorney-client privileged should be made public, fighting the tobacco companies all the way to the U.S. Supreme

every aspect of our public and private lives?..

“We thought about bringing an action on behalf of the State of Minnesota and some other entity. And the best entity that came to mind was an insurance company. So we started talking in late ‘93 and in early ‘94 made the decision that we were going to sue this case out..

“There were over 200 motions filed during the course of the case. We had in excess of 12 appeals to our intermediate court of appeals, to the Minnesota

Supreme Court and, indeed, we had two petitions for *cert* to the United States Supreme Court. They had approximately 30 law firms on the other side of us. Two to three hundred, four hundred lawyers, five hundred lawyers... They spent hundreds of millions of dollars during the course of this litigation..

“A special master was appointed. Actually, we had recommended his name

and the other side agreed to it... We couldn’t agree on anybody. We couldn’t agree on former chief justices, we couldn’t agree on former judges of the district courts. We couldn’t agree on Mohammad, if he was available...

“Some of the games they played in the document production was amazing. We got all kinds of documents regarding tobacco beetles, etc., that had nothing to do with the case. They’d unstaple documents. You’d find one document over here, one page, another page way over in some other place. It was unbelievable stuff the way the attachments were not attached all of a sudden...

“The defenses that we faced, I think, are the ones that you are all fa-



(l-r) Executive Director Arthur Bryant, Trial Lawyer of the Year Award Winners Roberta Walburn and Mike Ciresi, Foundation Past President Fred Baron, Consumer Advocate Ralph Nader.

Court.

Following are excerpts from a speech given by Mike Ciresi at TLPJ’s membership meeting in which he detailed the work on this case, from conception through settlement. See membership meeting story, page 17.

“It was in 1989, I believe, when Roberta and I started musing about the tobacco industry, which we felt was perpetuating what was, I think, the most massive fraud that has ever been perpetrated in the country. It was the number one health problem in the country and they had never ever been held accountable for their action. So, we said, how do we go after an industry so powerful and so pervasive in this society and whose tentacles reach into

See Award, page 21.

1998 Trial Lawyers of the Year

Award, from page 20.

miliar with. Common knowledge was a big one. You know, everybody knows that smoking causes every disease in the world and these people smoked. They tried the individual smoker's defenses. The assumption of risk and comparative fault. We got all of that thrown out because these were direct actions. That was the very basis of how we started this lawsuit. This was not a subrogation issue, which they continually fought. They continually said the only way you can bring this action is on a subrogation basis. We prevailed on that...

"They used what I can only refer to as the Hitler defense. And that's, 'Oh what the hell, I mean, you know, if you smoke, you die early, so we save you money.' ... That one the judge didn't buy. In fact, I think he said he was offended by the suggestion of that..."

"They had eight or nine law firms at trial, and we had to sit there and negotiate the configuration of the courtroom. 'I want the table this way.' 'No, it's got to be this way.' They actually had measuring tapes..."

"One of the guys was on... and the point I was trying to make is what they had done publicly was just a ruse. So I say, 'Well this is just a ruse, isn't it?' He said, 'A what?' I said, 'A ruse. You know what a ruse is?' He said, 'No, is that a Minnesota term?' Honest, I was so tempted to say, 'Ya, you betcha!' So I said, 'Well, let me put it this way. Maybe I'll use a term you may understand. A smoke screen.' He said, 'Oh I do understand that.' And so we went on..."

"All of the protective orders that were in place were dissolved. They are being used by everybody, by lawyers across the country... These depositories are going to be open for ten years at the expense of the defendants... We've gotten an injunction against the defendants taking any action directly or indirectly to target children in Minnesota in the advertising, marketing, or promotion of cigarettes. There's an injunction against any contract, combination, or conspiracy to limit information about the health hazards of tobacco. And suppressing research into smoking and health. We got an injunc-

tion against the marketing or distribution of any promotion items. We got a ban on the defendants making any payment directly or indirectly for movie makers to use cigarettes. And that's national. So they can't do that at all. We got them to dissolve the Counsel for Tobacco Research. We got a public health foundation formed and funded in Minnesota by them to take into account the human and economic consequences of tobacco use, and we have a national research institute set up in Minnesota that they are going to fund to the tune of \$100 million to research these issues. Dr. Koop called it one of the most significant health developments of the second half of the 20th Century, and obviously that makes all of us very, very proud..."

"It was a long, long hard fight. I'm sure many of you know we took a very hard line with regard to settlement early on. Attorney General Humphrey, when we started this action, told me that political considerations would never enter into decisions. No immunity. The FDA has authority and we're not going to impair the FDA's authority. Full disclosure of the documents. Public health provisions in fair and full compensation for past damages... So Skip was out there sort of alone from the standpoint of the AGs and I'm mightily proud of him. Regardless of your political leaning or affiliations, he's a true public servant in the best notion of the word..."

"It makes you reflect on what it's like to be a trial lawyer. I'm very proud to be a trial lawyer. And I'm sure many of you have read 'I Do Not Choose To Be A Common Man.' (Just insert woman.) I've read it and I've sort of paraphrased it, and I would like to share it with you. I call it 'I Choose To Honor My Profession As a Counselor And A Trial Lawyer.'

"It is my right to be uncommon if I can. I do not wish to navigate in calm seas humbled by the sameness of the risk. I want to take the calculated risk. To dream and build. To fail and to succeed. I refuse to barter incentive for certainty. I prefer the challenge of new and unique to the guaranteed existence. The thrill of fulfillment, the stale claim of Utopia. I will not trade freedom, ever, for beneficence. Nor my dignity for a stipend. I will never cower before any master, nor bend to any threat. It is my heritage and my duty to stand erect, proud, and unafraid. To think for myself, to enable my clients, and I underscore my clients, to enjoy the benefits of my advice and the creations and to face the world boldly and say, 'This I have done.'

"All this, ladies and gentlemen, is what I think it means to be a trial lawyer. So in the final analysis, all of us as trial lawyers in courts have to come

together and find common ground for the system that we so tremendously cherish and revere. We must act in the public interest and we will serve the interest of justice as has been written by Saul Lenowitz. We must avoid the allure and temptation of dancing in the shadows of the laws ambiguity. For in the final analysis, we are servants to the law. The law first and then to our clients."

The outstanding work of all of the finalists for the Trial Lawyer of the Year Award, including the Illinois Trial Lawyers Association Constitutional Challenge Committee, which won the Public Justice Achievement Award for coordinating a successful constitutional challenge to the Illinois Tort Reform Act, is chronicled in *Trial Lawyers Doing Public Justice*, published by The TLPJ Foundation. Contact TLPJ headquarters for copies. ❖

We must avoid the allure and temptation of dancing in the shadows of the law's ambiguity. For in the final analysis, we are servants to the law. The law first and then to our clients.

Prominent Chicago Trial Lawyer Joseph A. Power, Jr. Elected President of The TLPJ Foundation

Nationally prominent trial attorney Joseph A. Power, Jr. of Power, Rogers & Smith in Chicago was elected President of The TLPJ Foundation on July 12 at the organization's annual membership meeting in Washington, D.C. He will hold the post for one year.

A lifetime member of TLPJ, Power specializes in medical malpractice/professional negligence, motor vehicle, wrongful death, and product liability law. He is an active member of the Illinois Trial Lawyers Association and the Association of Trial Lawyers of America, as well as a frequent lecturer.

"Joe is one of our nation's most dedicated advocates of public justice," said outgoing TLPJ Foundation President Fred Baron of Baron & Budd in Dallas. "We are honored to have such an outstanding attorney serve as our President."

Additional TLPJ Foundation Board

Members from Chicago are Jeffrey M. Goldberg of Goldberg & Associates and Past President Eugene Pavalon of Pava-

Schultheis & Walton in Baltimore; Vice-President **Susan Vogel Saladoff** of Davis, Gillstrap, Hearn & Welty in Ashland, Oregon; Treasurer **Paul Stritmatter** of Stritmatter Kessler Whelan Withey in Hoquiam, Washington; and Secretary **Larry Trattler** of Malman, Trattler & Dehncke in Denver.

Five attorneys and one legal consultant were elected as new TLPJ Foundation Board members:

James Bartimus of Bartimus, Kavanaugh, Frickleton & Presley in Kansas City, Missouri; **Gerri Colton** of Technical & Medical Advisors in Newport Beach, California; **Richard Hailey** of Ramey & Hailey in Indianapolis; **Gerald Holtz** of Holtz & Foret in Chevy Chase, Maryland;

Randy McClanahan of McClanahan & Clearman in Houston; and **James Sturdevant** of The Sturdevant Law Firm in San Francisco. ❖



Joe Power and Fred Baron

lon, Gifford, Laatsch & Marino.

Other attorneys elected as new officers of The TLPJ Foundation are: President-Elect **Nicole Schultheis** of

Thank You to Our Generous Party Sponsors

Charleston (\$5,000)
Baron & Budd
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Jitterbug (\$2,500)
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Richard H. Middleton, Jr.
Eugene I. Pavalon
Schultheis & Walton, P.A.

Tango (\$500)
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Anthony Newman
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Larry Trattler
Mona Lisa Wallace
Michael Williams & Gayle Troutwine
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Other
Hugh W. Fleischer (\$100)
Betty A. Thompson (\$150)
Gordon Tobin (\$50)
Turner & Associates (\$100)
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Table Captains (\$1,200)
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Trial Lawyers Association of
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Sponsor of Toast to Joe Power
(\$5,000)
Illinois Trial Lawyers Association
❖

Foundation Receives \$200,000 in *Cy Pres* Awards

In the past six months, we have been extremely fortunate to receive *cy pres* awards in support of our public interest work resulting from settlements in several class actions. We are both grateful for -- and honored by -- these generous awards.

First, we again want to thank **Lanny Vines** of Birmingham's Emond & Vines, through whom we recently received another \$11,000 in *cy pres* funds. This is in addition to the \$175,000 *cy pres* award he presented us with early this year from his work on *Jordan v. Brad Ragan, Inc. See Winter 1998 Public Justice*. This brings his 1998 *cy pres* total to over \$269,000!

Second, **Mark A. Chavez** of San Francisco's Chavez & Gertler and **Beverly C. Moore** of Moore & Brown in Washington, D.C. recently designated The TLPJ Foundation as the recipient of *cy pres* funds remaining in *Bailey v. Loma*. In this class

action case, the defendants allegedly charged property inspection fees in violation of mortgage contracts and state law. The case settled earlier this year, and Chavez presented us with a check for almost \$143,000 in late July.

Finally, there were *cy pres* funds remaining in *State Farm et al. v. The Texas Attorney General et. al. Marc Stanley, Roger Mandel, and Mark Iola* of Stanley, Mandell & Iola in Dallas, and **Fred Baron** of Baron & Budd, also in Dallas, generously designated The TLPJ Foundation as a recipient of over \$36,000. This lawsuit was brought against State Farm for its failure to comply

with a Texas statute that encourages the recovery of deductibles by policyholders where a negligent third person was responsible for the accident. As a result of the litigation, State

Farm refunded the necessary deductibles plus interest and paid a small amount of damages.

The TLPJ Foundation is extremely grateful to be the designated recipient in the above cases,

and sends a special thank you to all involved! If you are interested in more information on designating The TLPJ Foundation as a *cy pres* award recipient, please contact Development Director Kathryn Mitchell. ❖

The TLPJ Foundation is extremely grateful to be the designated recipient... and sends a special thank you to all involved!



Lanny Vines



Mark A. Chavez



Beverly C. Moore

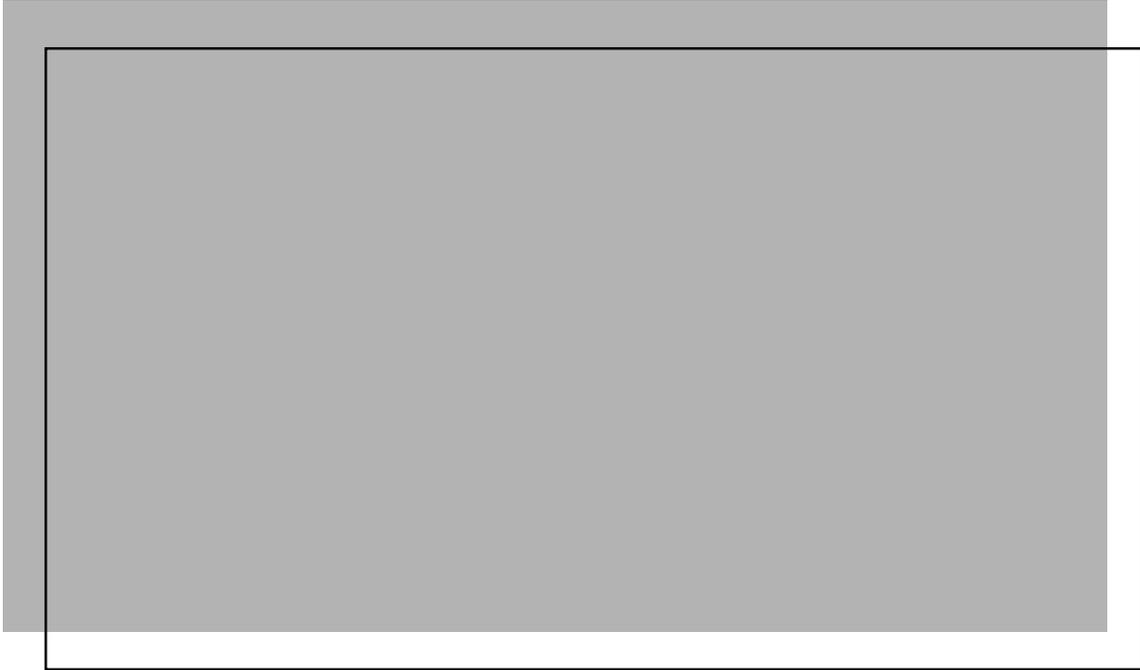


Mark Iola



Fred Baron

Team TLPJ



Back row: F. Paul Bland, Jr., Jim Hecker, Arthur Bryant, Barbara Reeves, Kathryn Mitchell, Paula Athey, Sandra Peters, Leslie Brueckner, Clarisia Lovelace, Jeff Zimmer. Front row: Tory Nugent, Jeff Barnett, Denise Aleman, Theresa Henige, Cassandra Goings, Adele Kimmel, Sarah Posner, Mark Wenzler. Not pictured: Susan Gombert, Mary Tolley, Julia Lee.

Show your support by ordering t-shirts and mugs for the whole staff!

Send us photos of your children (or your colleagues!) proudly showing off TLPJ gear, and maybe we'll feature them in a future issue of *Public Justice!* Send photos to Communications Director Theresa Henige.

Our heavy, preshrunk 100 percent cotton t-shirts are available in natural color, with blue and black print or in black with blue and white print (only available sizes in black are L and XL). T-shirts in adult sizes S, M, L, or XL, are just \$15, and children's sizes 24 months, 2-4, 4, 5-6, 6-8, 10-12, are just \$10. Our 12 oz. cobalt blue ceramic coffee mugs with gold lettering also are just \$10. They are made in the USA and microwave safe. Our durable Land's End © black briefcases with an embroidered TLPJ logo sell for just \$100. Please add \$2 shipping/handling for each order.

Simply fill out this form and mail it into us: The TLPJ Foundation, 1717 Massachusetts Avenue, NW, Suite 800, Washington, D.C. 20036, or fax it to us at 202-232-7203.

Name: _____

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Item	Size	Quantity	Cost
Shipping/Handling			
Total Cost			

Special Gift Contributors Keep On Giving

It is the strong loyalty and commitment of our members that allows TLPJ to continue to take on cutting-edge cases in the public interest. The TLPJ Foundation would like to acknowledge the following contributors who keep on giving.

First, we wish to thank **Richard Halpern and The Halpern Group** in Springfield, New Jersey, for their enormous generosity. Thus far in 1998, The Halpern Group has contributed over \$27,000. We truly are grateful for this

heartfelt giving.

We would also like to thank **David Hudson** of Hull, Towill, Norman & Barrett in Augusta, Georgia, and his co-counsel, Ben Hogan, for their generous contribution of \$12,000. In addition, we wish to acknowledge and thank **Rosalind Fuchsberg Kaufman**, President of The Fuchsberg Family Foundation in New York, for a \$7,000 contribution; **Larry Abernathy** of Laurel, Mississippi for his \$5,000 contribution; **Roberta Ashkin** of New York's Baron & Budd

for her \$2,500 contribution; and **Gerald Holtz** of Holtz & Foret in Chevy Chase, Maryland for contributing arbitration fees totaling \$2,200 this year.

Thanks to these donors and all our members across the country, we will continue our quest to expose the truth and make wrongdoers pay. If you are interested in upgrading your membership or making a tax-deductible contribution to any of The TLPJ Foundation's Special Gift Campaigns, contact Development Director Kathryn Mitchell. ❖



Richard Halpern



David Hudson



Rosalind Fuchsberg Kaufman



Larry Abernathy



Roberta Ashkin



Gerald Holtz

A Year-End Stock-ing Stuffer!

As the year comes to a close and you plan your holiday giving, please consider a gift of stock to The TLPJ Foundation. You can advance the cutting-edge public interest litigation of Trial Lawyers for Public Justice and, at the same time, lower

your 1998 income taxes with a year-end transfer of securities. With your gift of appreciated stocks or bonds, you will avoid payment of capital gains taxes on the increased value of your securities, PLUS receive a tax deduction for the full market value of your transferred

securities.

So, when you're compiling your holiday gift list, think about adding a year-end stock-ing stuffer to The TLPJ Foundation. For further information, contact TLPJ Development Director, Kathryn Mitchell. ❖

State Activists Advance TLPJ's Public Interest Work

Our network of TLPJ Foundation volunteers continues to advance our mission throughout the country. While TLPJ's cooperating attorneys are mentioned elsewhere in this newsletter, we acknowledge here other activist members who devote their time and talents to identifying and developing public interest cases, recruiting new members, educating the public about precedent-setting legal issues, and networking with other activists. These individuals are part of our nationwide State Network. Their efforts help give a voice to our message of justice.

Colorado -- State Coordinator and Membership/State Network Committee Co-Chair **Larry Trattler** is working with **Mari Bush** to put on a Colorado membership meeting November 11. The event will feature updates on TLPJ cases, as well as substantive looks at the approaches TLPJ is taking on specific precedent-setting issues.

District of Columbia -- **Gerry Holtz** was consulted about assisting with a potential case.

Kansas -- *Kansas Lawyer* published a front-page article with photograph on TLPJ Founder and State Coordinator **Gene Schroer**. The article highlighted Gene's involvement with TLPJ and provided a thorough description of the scope of TLPJ's public interest litigation.

Maine -- **Jeffrey Thaler** submitted TLPJ articles to both the Maine Trial Lawyers Association and the *Maine Lawyers Review*.

Maryland -- President-Elect **Nicole Schultheis** and State Coordinator **Simon Walton** are working with the ACLU and Latino Leadership Counsel to get a speaker to address issues of employment discrimination relating to immigrants and Latinos.

Massachusetts -- **James Swartz** submitted a TLPJ article to the Massachusetts Bar Association's *Lawyers Journal*.

Mississippi -- **Roland Lewis** submitted TLPJ articles to the Mississippi State Bar Association, the Mississippi Trial Lawyers Association, the *Clarion Ledger* and the *Jackson Advocate*.

New York -- **Elise Alpert** and **Seymour Fuchsberg** are coordinating TLPJ's presence at ATLA's "Weekend With The Stars" this December. In addition, Elise has begun making contacts with various minority and women's bar associations in the New York area.

Ohio -- **Jack Landskroner** met with a representative from Ohio Citizen Action, and discussed areas of possible precedent-setting litigation. Jack also submitted TLPJ articles to the *Beacon Journal*, *Toledo Blade*, *Plain Dealer*, *Cleveland Bar Journal*, Cleveland Academy of Trial Attorneys, *Columbus Dispatch*, Cleveland's *Daily Legal News*, the Ohio State Bar Association's *Ohio Lawyer* and the Ohio Academy of Trial Attorneys' *Ohio Trial*.

Oregon -- **Kathryn Clarke** obtained and staffed a TLPJ booth at the recent Oregon Trial Lawyers Association convention.

We would like to thank all of these Coordinators and Activists for helping TLPJ realize our vision of justice. Each effort is truly appreciated! ❖

New Members & Upgrades

Following is a list of members who joined The TLPJ Foundation or upgraded their membership since our last issue. Their recruiters are listed next to them in italics.

Patrons

Mark H. Iola
Roger L. Mandel
Marc R. Stanley
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Abigail Williams

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D. Bruce Coles - *Larry Trattler*
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Paul Lesti - *Gary Gwilliam*
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Heather Clark
Kitty G. Grubb - *ATLA*
John Kamarados - *Harry Deitzler & Jim Peters*
Debbie Tidwell
Jim Toscano ❖

The TLPJ Foundation's State Coordinator Network

Have a Case?

If you have a potential case, please contact your State Coordinator or TLPJ's national headquarters. ♦

Alabama

Clay Hornsby - (205)329-2000

Arizona

Stanley J. Marks - (602)254-6071

Arkansas

Laura J. McKinnon - (501)521-1555

California

J. Gary Gwilliam - (510)832-5411

ggwilliam@giccb.com

Joseph L. Dunn - (714)347-8855

jdunn@robinson-pilaw.com

Monica M. Jimenez - (714)542-7395

Colorado

Larry Trattler - (303)777-5770

Connecticut

Robert I. Reardon - (860)442-0444

reardonlaw@aol.com

District of Columbia

Gerald I. Holtz - (301)656-1888

Georgia

Thomas Beiswenger - (706)546-9008

Hawaii

Wayne Parsons - (808)845-2211

Illinois

Jeffrey M. Goldberg - (312)236-4146

Joseph A. Power, Jr. - (312)236-9381

p-r-s@juno.com

Indiana

Roger Pardieck - (812)523-8686

Kansas

Dwight A. Corrin - (316)263-9706

dcorrin@ibm.net

Kentucky

Kevin George - (502)569-2727

Louisiana

Joseph J. McKernan - (504)926-1234

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PUBLIC JUSTICE

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Public Justice is edited and produced by Theresa Henige, with assistance from Mary Tolley.

Staff Update

We would like to take this opportunity to introduce you to our newest staff members.

We are pleased to welcome **Victoria (Tory) Nugent**, who joined the staff in September as our Consumer Rights



Fellow. This two-year fellowship was funded by TLPJ Foundation member Jeff Goldberg, an anonymous donor, and the National Association for Public Interest Law (NAPIL). Tory will be working with TLPJ staff attorneys on a diverse docket of consumer law cases, including litigation against the banking and insurance industries. She spent the past seven years at Public Citizen, a national public interest

advocacy organization, where she was special assistant to the President, Joan Claybrook. Tory received her law degree from Georgetown University and her undergraduate degree from Wesleyan University in Connecticut.

Mary Tolley joined the staff of The TLPJ Foundation in July as Communications Assistant to Communications Director Theresa Henige. She also assists the Development Department with filing, mailings and special projects. Her main duties are updating the press list, producing news clippings, responding to information requests, and assisting with publications, press releases and the web site.



Mary previously worked as an Auto Insurance Claims Representative at Progressive Casualty Insurance Company. She holds a B.S. in Communications from East Carolina University in North Carolina. ❖

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