

Number 6 ❖ April 2002

NOT IN MY BACKYARD II
The High-Tech Hypocrites of "Tort Reform"

By Emily Gottlieb and Joanne Doroshow

INTRODUCTION

No one likes a hypocrite. Yet one would be hard pressed to find more hypocrites than in the "tort reform" movement. That was the finding of the Center for Justice & Democracy's last *Hypocrites of "Tort Reform"* White Paper (January 2001)¹ where we took a look at the cases of a number of proponents of tort restrictions who do not "practice what they preach." We examined individuals and corporations that complain about lawsuits and argue that the rights of injured consumers to go to court should be scaled back because society is too "litigious." Yet when their company loses money or a family member is injured, they run straight to court.

In this, our second *Hypocrites of "Tort Reform"* White Paper, we focus on the high-tech industry, relatively new to the "tort reform" scene but now one of its leading players, particularly in Congress. Most recently, this industry has taken a central role pushing for federal class action legislation that would make it more difficult for consumers to win class action lawsuits against corporations that commit fraud and other violations of consumer health, safety and environmental laws. Before that, they actively lobbied Congress for legislation to limit the high-tech industry's liability in the event of Year 2000 computer software-related disasters, which fortunately did not transpire to the degree originally feared. To push for the bill, which passed in 1999, business lobbyists set up "the Year 2000 Coalition," which was comprised of 113 trade associations and included the Business Software Alliance (BSA), a tech-based trade association whose members included (and to this day include) Adobe, Apple, Compaq, IBM, Intel, Intuit, Microsoft and Novell.²

The high-tech industry was also a principal mover behind enactment of both the Private Securities Litigation Reform Act of 1995 (PSLRA) and the Securities Litigation Uniform Standards Act of 1998 (SLUSA), which limit the rights of defrauded shareholders to sue. In fact the 1998 law, which pulls shareholder lawsuits out of state courts and subjects them to a single set of federal rules, was

Center for Justice &
Democracy
P.O. Box 3326
Church St. Station
New York, NY 10008
Ph: 212.267.2801
Fx: 212.764.4298
centerjd@centerjd.org
web: centerjd.org

*"Fighting to protect the
right to trial by jury and
an independent judiciary
for all Americans."*

*Deputy Director and
Executive Director, Center
for Justice & Democracy.

© Copyright 2002, Center for
Justice & Democracy. All
rights reserved. No part of
this report may be
reproduced without
permission of the Center for
Justice & Democracy.

Because companies can't simply extinguish class actions altogether, they are doing the next best thing – pushing for legislation in Congress and in states around the country that would severely weaken consumers' class action rights.

the first major focus of the trade group TechNet. TechNet is a high-powered lobbying organization of Silicon Valley tech-companies that arose from their success in killing a 1996 California ballot measure that would have relaxed restrictions on shareholder lawsuits in state courts. Members of TechNet include high-ranking executives from AOL Time Warner, Apple, Compaq, eBay, Hewlett-Packard, Intuit, Oracle, Sun Microsystems and Texas Instruments, with officials from Cisco Systems, Hewlett-Packard, Intel and Microsoft serving on TechNet's Executive Council.

With the support of TechNet, the Securities Litigation Uniform Standards Act passed, ultimately becoming law in November 1998.³ TechNet is one of the leading trade associations behind the federal class action bill now before Congress.

ATTACKS ON CLASS ACTION LAWSUITS

The right of consumers to file class action lawsuits is a right that most companies would just assume annihilate. Class actions are a critical tool used by consumers to deter corporate misconduct and to seek compensation for injuries they suffer as a result of financial fraud, environmental pollution or other violations of health and safety laws. Class actions allow citizens to aggregate small claims that otherwise might not warrant individual litigation. Consequently, plaintiffs often use class actions in order to gain access to the courts in cases where a defendant may have gained a substantial benefit through small injuries to a large number of people.⁴

Because companies can't simply extinguish class actions altogether, they are doing the next best thing – pushing for legislation in Congress and in states around the country that would severely weaken consumers' class action rights. The bill currently being considered by Congress would provide reckless corporations with the authority to decide, in most cases, which court will hear a class action case that accuses them of wrongdoing. Its likely result will be thousands of complex state class actions put into the already overburdened federal courts, to the benefit of corporate defendants.

Many corporate supporters of this class action legislation enjoy unfettered use of the courts to recoup financial losses resulting from a host of troubles, from trademark violations, contract breaches, patent infringements and other unfair competition claims, to property damage, lost goods, unpaid bills or, ironically, fraud. While calling consumers' lawyers "greedy" and insensitive to the importance of keeping companies "litigation-free," their own corporate lawyers sue at the smallest provocation, targeting not only competitors but also tiny businesses that are sued into submission.

Federal Express sued a man who operated a 12-foot coffee cart in a suburban Oregon shopping center because the man had called his cart "Federal Espresso."

Federal Express, the world's largest express delivery company, is a case in point. Kenneth Masterson, Executive Vice President, General Counsel and Secretary of FedEx Corp., wrote a column in March 2002 complaining about "excessive and frivolous litigation."⁵ In the piece, Masterson said that the class action legislation was needed to "safeguard consumers and restore balance and fairness to the nation's civil justice system...while reigning in the outrageous abuses of the system that are placing a choke hold on the American economy."

Mr. Masterson did not advertise the fact that in 1997, Federal Express sued a man who operated a 12-foot coffee cart in a suburban Oregon shopping center because the man had called his cart "Federal Espresso." "They've been totally trying to bully me around and saying they'll take me to court," the owner said.⁶ Sure enough, in June 1997, FedEx filed a trademark infringement suit against the man and forced him to stop using the "Federal Espresso" name.⁷ FedEx's hounding of small businesses over use of its name did not stop there. In August 1997, FedEx filed another suit against a Syracuse, N.Y. coffee shop and its three owners for using the names "Federal Espresso" and later, "Ex-Federal Espresso."⁸ After nearly three years of litigation, the coffee shop was forced to change its name, with the owners deciding on "Freedom of Espresso," and settled the case confidentially.⁹

Not in My Backyard: The High-Tech Industry

In CJ&D's first *Hypocrites of "Tort Reform"* White Paper, we looked at corporate litigants who have lent financial or other support to groups like the American Tort Reform Association (ATRA), the Manhattan Institute and state business coalitions like New Yorkers for Civil Justice Reform (NYCJR).¹⁰ These industries complain about "too much litigation" against them by injured or defrauded consumers. But when these same companies believed they were wronged by a business competitor, they were the first to sue. As we noted then, *tort restrictions advocated by these organizations virtually never limit the rights of corporations to sue business competitors for commercial losses.*

Another trade association worth examining is TechNet, the high-powered lobbying organization of Silicon Valley tech-companies that has made enactment of the federal class action bill a top issue.¹¹ TechNet members include high-ranking executives from companies like AOL Time Warner, Apple, Compaq, eBay, Hewlett-Packard and Sun Microsystems, with officials from Hewlett-Packard, Intel and Microsoft serving on TechNet's Executive Council.¹² The Information Technology Industry Council (ITI) has also urged lawmakers to support the class action bill.¹³ ITI member

Like the current class action proposal, the 1995 and 1998 securities litigation laws were not “narrowly tailored” curtailing only “frivolous lawsuits.”

companies include Amazon.com, AOL Time Warner, Apple Computer, Canon USA, Compaq, Eastman Kodak, Hewlett-Packard, IBM, Intel, Microsoft, Motorola, Sony Electronics and Sun Microsystems.¹⁴

Similarly, nearly 100 high-tech executives, part of the so-called “Class Action Fairness Coalition,” have urged passage of the class action bill. Signatories to a recent letter to Congress included Intel’s President and CEO Craig Barrett and executives from Compaq, Hewlett-Packard, eBay and Sun Microsystems.¹⁵ The president of the Semiconductor Industry Association (SIA) also signed the letter.¹⁶ SIA member companies include Eastman Kodak, IBM, Intel and Motorola.¹⁷

In March 2002, Rick White, President and CEO TechNet, wrote to House Speaker Dennis Hastert complaining about “meritless” class actions that “waste time” and ostensibly force companies to hike consumer prices.¹⁸ Similarly, in February 2002, Peter N. Detkin, Vice President, Assistant General Counsel of Intel, testified on behalf of the Semiconductor Industry Association and Intel in favor of the class action bill then before the House Judiciary Committee.¹⁹ He complained, “We are seeing an aggressive move by a limited number of plaintiffs’ attorneys to file class actions against technology companies in areas such as allegedly defective products. It is obvious that many of these suits are brought as class actions because the injury alleged is either trivial, highly speculative, or wholly nonexistent.”

Detkin compared the need for class action restrictions to the rationale behind enactment of the 1995 and 1998 laws that limit lawsuits by defrauded investors – laws that some believe have become obstacles to those seeking restitution and justice in the Enron scandal. Using language nearly identical to arguments he now makes for class action legislation, Detkin asserted that the Private Securities Litigation Reform Act of 1995 (PSLRA) and the Securities Litigation Uniform Standards Act of 1998 (SLUSA) were “narrowly tailored” laws that curtailed only “frivolous” suits “without unduly impeding the ability of shareholders with legitimate claims to seek relief in federal court.” Moreover, he claimed, “[T]he record suggests that a similar response is now needed to address other forms of abusive class action litigation.”²⁰

Detkin could not be more wrong. Like the current class action proposal, the 1995 and 1998 securities litigation laws were not “narrowly tailored” curtailing only “frivolous lawsuits.” These laws had sweeping applications, which helped lead to the Enron disaster. As explained in a recent column by Hon. Abner Mikva, former Member of Congress, Chief Judge of the U.S. Court of Appeals for the District of Columbia and White House counsel, these laws “inhibit[ed] the rights of individuals to seek damages ...[and thus]

*To these companies,
the courts should
be theirs alone,
reserved
exclusively for their
patent, trademark,
breach of contract
and damaged
property suits to
recover money that
they believe has
been unfairly taken
from them.*

eliminated deterrence and fostered a culture of laxity.” Mikva continued,

While the stated aim of Congress was to put some limits on rapacious lawyers who abused the process, the effect was to remove many of the restraints on corporate officials and their accountants. Free markets respond to incentives. If perpetrators are not held accountable and the costs of their actions are not internalized within the companies that enable the offenders, fraud will increase.²¹

This experience should stand as a grim warning of what other abuses might result without the deterrent potential of consumer class actions.

HIGH-TECH HYPOCRITES

The high-tech industry does not like class action lawsuits, or any consumer suits for that matter. That much is clear. They lobbied heavily for retractions on suits by defrauded investors and now want legislation that would make it even more difficult for injured consumers to use class actions to win their cases.

To these companies, the courts should be theirs alone, reserved exclusively for their patent, trademark, breach of contract and damaged property suits to recover money that they believe has been unfairly taken from them. These companies have brought thousands of such suits in recent years, sometimes in an effort simply to browbeat small businesses or individuals into submission.

Take, for example, the trademark infringement and dilution lawsuit by Internet giant Amazon.com against Von Eric Lerner Kalaydjian and his company, Amazon Cosmetics and Tan Products, in 2000. Amazon sued this company for using the word “Amazon” to sell beauty products. Kalaydjian had sold only 100 bottles of tanning oil since he went into business. (The trial court dismissed the case on procedural grounds in February 2001.²²)

Or how about the aggressive August 2000 suit by Apple against Juan Gutierrez, an employee who had posted pictures of new Apple products on the Internet under the pseudonym “worker bee.”²³ Apple and Gutierrez settled the case the following year.²⁴

Or the 1998 nuisance and trespass lawsuit by Intel against former engineer Ken Hamidi after he sent mass e-mails critical of Intel to company employees. Intel’s actions raised critical First Amendment concerns. On March 27, 2002, the California Supreme Court agreed to hear the case.²⁵

In August 2001, eBay sued a company called BidBay, alleging that use of the word "bay" in its name and the overall appearance of the BidBay website infringed on the eBay trademark.

The following represent only a tiny sample of lawsuits brought by high-tech companies but illustrate the arrogance of an industry that places far more value on its right to sue and to be compensated for commercial losses than on allowing citizens to hold accountable those who damage the health, safety and financial security of all Americans.

What's Your Name – And What's It Worth to You?

When it comes to "trademark infringement," high-tech companies are very "touchy" and extremely aggressive in court, as these examples show.

- In August 2001, **eBay** sued a company called BidBay, alleging that use of the word "bay" in its name and the overall appearance of the BidBay website infringed on the eBay trademark.²⁶ BidBay founder and chief executive officer George Tannous told the *E-Commerce Times* that he "began BidBay as an alternative to an eBay site that was more concerned with monopolizing the market than providing a customer-friendly product. BidBay's success and this subsequent lawsuit prove that I was right."²⁷ The case settled in February 2002, with BidBay agreeing "to change its name to AuctionDiner.com, design a new logo and pay eBay an undisclosed sum."²⁸
- In March 2000, **Motorola** filed a trademark infringement, dilution and unfair competition lawsuit against CheechInc. for using the name "MOJOROLA" on pager-type devices. Two months later, the parties agreed to an injunction in favor of Motorola, which, among other things, barred CheechInc. from using the "MOJOROLA" mark and transferred the domain name "www.mojorola.com" to Motorola.²⁹
- In December 1998, **AOL** sued AT&T for infringement of its "Buddy List," "You Have Mail" and "IM" trademarks. The trial court ruled in favor of AT&T with respect to each mark. The Fourth Circuit Court of Appeals upheld the lower court's decision regarding the "You Have Mail" and "IM" marks but vacated and remanded the lower court's ruling on the "Buddy List" mark, finding that its validity could not be resolved on summary judgment.³⁰
- In 1995, **Sun Microsystems** sued to prevent SunRiver Corp. from using the "SUNRIVER" trademark in connection with products sold by two newly acquired subsidiaries. A federal judge barred SunRiver from using not only the "SUNRIVER" mark or name but also any "SUN"-based mark or name on its products or promotional materials.³¹ That

Some high-tech companies see less value in using civil courts to protect the health, safety and security of consumers than to get their money back when someone has damaged or stolen their inanimate property.

same year, Sun Microsystems also sued Astro-Med, Inc. for trademark and trade name infringement and dilution, unfair competition and false and misleading statements over Astro-Med's use of the mark "SUNDANCE" on its label printer. The court ordered Astro-Med to stop using "SUNDANCE" or any "SUN"-prefixed mark or name on its products and promotional materials.³²

- In September 1997, **Hewlett-Packard** filed a trademark infringement suit against Xerox Corp. over its use of Hewlett-Packard's trademarks, like "LaserJet" and "HP," on Xerox's toner cartridge packaging.³³ After two years of litigation, the case settled, with Xerox agreeing to change its toner packaging.³⁴

Lost or Damaged Property? Defective Goods? Unpaid Bills? Sue the %*\$%#'s

As these examples show, some high-tech companies see less value in using civil courts to protect the health, safety and security of consumers than to get their money back when someone has damaged or stolen their inanimate property.

- In 1990, **Canon** sought over \$256,740 from carriers Nippon Liner System, Inc. and Jam Trucking, Inc. after 48 Canon copy machines were damaged while en route from Japan to Illinois.³⁵
- In 1997, **Motorola** filed a \$1.3 million negligence lawsuit against Fritz Company, Inc. and Fritz Air Freight after Motorola's satellites rolled off a Fritz truck and suffered permanent damage while being loaded at the airport. The parties settled before trial for \$115,000.³⁶ In 1999, Motorola and its insurance company sued freight forwarder Kuehne & Nagel, Inc. over damage done to shipments of equipment while en route from Texas to Japan. A federal judge awarded them over \$244,000.³⁷
- In April 1998, **IBM** sought \$1 million in a breach of contract suit against Burlington Air Express, Inc. (BAX) after IBM's computer memory cards were stolen from a BAX truck en route from Canada to Minnesota. The trial court granted IBM's preliminary motions and an inquest to compute damages.³⁸
- In December 1992, **Sony** sued the Stereo Factory, Inc. to recover more than \$468,000 for the unpaid portion of the cost of three shipments of tapes. A federal judge awarded Sony over \$266,000. The Fourth Circuit Court of Appeals upheld the award to \$468,000.³⁹

Litigation over patents has become a time-honored way for high-tech companies to do business.

- In 1993, **IBM** sued Fasco Industries for breach of contract, negligence and breach of the implied covenant of good faith and fair dealing, claiming that Fasco put malfunctioning blowers into IBM's Model 3390 data storage device.⁴⁰ The trial court found in favor of Fasco on the negligence claim but allowed IBM's other claims to go forward.⁴¹

Compassionate Concern Over Patents

Litigation over patents has become a time-honored way for high-tech companies to do business. The litigation "spiral" of claims and counterclaims is not unusual among high-tech industries trying to protect their patents while amassing a good deal of money.

- In March 1997, **Motorola** sued Qualcomm in Illinois federal court for trademark and trade dress infringement, unfair competition, trademark dilution, patent infringement, unjust enrichment, intentional interference and inducement to breach, deceptive trade practices, consumer fraud and deceptive business practices and counterfeit trademarks over the design similarities between Qualcomm's digital "Q" phone and Motorola's "StarTac" cellular phone.⁴² One month later, Motorola filed the same lawsuit against Qualcomm in California federal court.⁴³ Two months later, Motorola filed a new patent infringement lawsuit against Qualcomm concerning its "QCP" phones.⁴⁴ By the end of 1997, Motorola and Qualcomm had filed a total of seven claims and counterclaims against each other.⁴⁵ The companies agreed to drop their lawsuits in 2000.⁴⁶
- In 1990, **Eastman Kodak** sued Goodyear Tire and Shell Oil for patent infringement over a process that increased the molecular weight of polyester. The jury awarded Kodak and its co-plaintiff \$12 million; the Federal Circuit Court of Appeals upheld the award.⁴⁷
- In June 1999, **Intel** filed a breach of contract and patent infringement suit against Via Technologies for marketing Intel technology that was excluded from a license the two had companies signed.⁴⁸ In July 2000, the companies reached a partial settlement, which, among other things, had Via paying Intel an undisclosed lump sum and ongoing royalty payments.⁴⁹ In December 2001, Intel and Via settled the remaining claims.⁵⁰ Intel is currently pursuing other intellectual property lawsuits against Via in North America, Europe and Asia.⁵¹
- Things do not always go so well for **Intel**. In August 2000, Intel sued

Studies show that punitive damages are higher and more frequently awarded in cases involving business contracts than in those by individuals against corporations.

Broadcom for \$82 million, alleging that the company had infringed on five Intel patents – three relating to digital video compression, one relating to networking and one relating to chip packaging.⁵² In December 2001, a unanimous jury found that one of the patents was invalid and that Broadcom hadn't violated either patent.⁵³ A second trial, which covers the remaining three patents, has yet to be conducted.

- In October 1999, **Amazon** sued Barnesandnoble.com for patent infringement of its one-click ordering technology, which allowed returning customers to make purchases with one click of a computer mouse.⁵⁴ The case was settled confidentially in March 2002.⁵⁵
- In May 1996, **Apple** filed a lawsuit against Articulate Systems, Inc., alleging that its PowerSecretary voice recognition software violated four Apple patents.⁵⁶ Dragon Systems, Inc. was later added as a defendant after it had acquired Articulate's PowerSecretary line. The court narrowed the allegations of infringement to a single patent, which it then found invalid.⁵⁷ In October 1997, Apple filed another lawsuit against Dragon alleging its NaturallySpeaking voice recognition software violated three Apple patents.⁵⁸ The companies later settled confidentially.⁵⁹

Suing For Punitive Damages? What's Wrong With That?

While punitive damages are easy rhetorical targets of corporations seeking to limit consumer lawsuits, studies show that punitive damages are higher and more frequently awarded in cases involving business contracts than in those by individuals against corporations. Professors Michael Rustad and Thomas Koenig's on-going analysis of business tort cases – what they term “Goliath versus Goliath” cases – shows that the vast majority of hundred-million-dollar verdicts arise in business litigation. According to their findings:

Intellectual property disputes, indemnification of pollution cases, real estate development, trade secrets litigation, and general corporate bad faith cases is where large punitive damages awards are more common. Rand's Institute of Civil Justice, the American Bar Foundation study, and [Rustad's] summary of all punitive damages research ... confirms that if there is any problem in punitive damages as a remedy, it is likely to be in the field of business versus business.⁶⁰

In August 2000, Sony sued Grass Valley Group, Inc. for punitive damages, claiming that it had interfered with a pre-existing contract to install Sony audio-visual equipment in Ohio's Paul Brown Stadium, home to the Cincinnati Bengals' football team.

Businesses love suing for punitive damages. Sometimes they even win:

- In 1995, **IBM** filed a breach of contract lawsuit against Diamond & Diamond Merchant Banking Group and its agent after they failed to pay IBM \$2.5 million for its claim rights against a bankrupt technology company. The trial court found the defendants liable, with a federal magistrate judge recommending that the defendants pay IBM over \$4.4 million, \$2.5 million of which were punitive.⁶¹
- In August 2000, **Sony** sued Grass Valley Group, Inc. for punitive damages, claiming that it had interfered with a pre-existing contract to install Sony audio-visual equipment in Ohio's Paul Brown Stadium, home to the Cincinnati Bengals' football team. The trial court dismissed the complaint. Sony then filed an amended complaint in January 2001, alleging tortious interference with business relations and civil conspiracy. On March 22, 2002, an Ohio appeals court ruled: 1) that the trial court had properly dismissed Sony's claims, and 2) that Sony had no right to amend its complaint after the trial court had formally granted Grass Valley's motion to dismiss Sony's lawsuit.⁶²
- In July 1999, **Apple** sued Daewoo Telecom of Korea and Future Power, its joint venture that sold PCs in the US, for punitive damages in California state court, alleging that they illegally copied the design of Apple's iMac computer.⁶³ Under the terms of a June 2001 settlement, Future Power was prohibited from selling its look-alike E-Power computer until February 2004.⁶⁴

Microsoft Sues to Protect Its Software Again, and Again, and Again, and Again ...

- In September 1992, **Microsoft** filed a copyright infringement suit against U-Top Printing Company, U-Win Printing Company and their owners for manufacturing and trading illegal copies of Microsoft software. The trial court awarded Microsoft \$24.8 million in damages, plus attorney fees, court costs and pre-judgment interest.⁶⁵
- In May 1993, **Microsoft** sued Golden Dragon Systems, LTD. Canada, G.D. Systems America, Inc. and its field manager, among others, for copyright and trademark infringement related to their distribution and sale of counterfeit copies of Microsoft software programs. A federal judge entered a permanent injunction against the defendants, barring them from distributing or selling products bearing Microsoft's marks "MS-Dos" or "Windows," and ordered them to pay all profits, treble

Microsoft sues to protect its software again, and again, and again, and again . . .

profits and \$88,000 in attorney's fees to Microsoft.⁶⁶

- In February 1994, **Microsoft** sought damages from Direct Wholesale and its sole shareholders and officers, alleging that they had infringed on Microsoft's copyrights and trademarks by selling and distributing counterfeit copies of its software. The trial court issued a permanent injunction against the defendants and awarded Microsoft over \$4 million in compensatory damages.⁶⁷
- In March 1999, **Microsoft** lodged copyright and trademark infringement claims against Logical Choice Computers, Inc. for having resold pirated copies of Microsoft software obtained from unauthorized dealers.⁶⁸ A federal judge awarded Microsoft \$1.5 million in compensatory damages.⁶⁹
- In March 1999, **Microsoft** sued software reseller Compusource for counterfeiting, copyright infringement and other violations after it resold unauthorized or counterfeit software purchased from suppliers at substantially lower prices. The trial court granted Microsoft's motion for summary judgment and awarded the company \$535,000.⁷⁰
- In July 1999, **Microsoft** filed copyright and trademark infringement claims against Software Wholesale Club, Inc. and its owner, claiming that they had distributed and sold counterfeit copies of Microsoft software and end user license agreements. A federal judge granted Microsoft's motion for summary judgment and awarded the company \$440,000.⁷¹
- In 2000, **Microsoft** sued A&A Technology and its president for copyright and trademark infringement through A&A's sale and distribution of counterfeit Microsoft software. The parties reached a settlement in 2001, barring the defendants from committing future trademark and copyright violations.⁷²

Never Mind Those Pesky Defrauded Investors – Here's Some REAL Fraud

In what may be the ultimate irony, companies that lobbied hard to restrict the rights of defrauded investors often themselves sue other companies for fraud. Compaq is a case in point:

- In October 2000, **Compaq** filed a \$17 million-dollar breach of contract and fraud lawsuit against The Baxter Group, a Canadian-based

consulting group, and its owner, alleging that they had misrepresented the existence of an FAA contract to supply equipment to American airports. The case settled in February 2001 (details of the settlement were not disclosed).⁷³

- In August 2001, **Compaq** sought to recover more than \$20 million from Millennium Technology Group Inc., Creative Resources Group, Inc. and their executives, who had allegedly conspired to defraud Compaq through illegal brokering schemes.⁷⁴ The case against Millennium settled confidentially that same month.⁷⁵

In what may be the ultimate irony, companies that lobbied hard to restrict the rights of defrauded investors often themselves sue other companies for fraud.

NOTES

¹ See, *Not In My Backyard: The Hypocrites of "Tort Reform,"* Center for Justice & Democracy, No. 1, January 2001, <http://centerjd.org/lib/white.htm>.

² "Clinton signs Y2K lawsuit bill," *USAToday.com*, July 21, 1999, found at <http://www.usatoday.com/life/cyber/tech/ctf643.htm>; John Leming, "President says he'll veto Y2K bill," *Journal of Commerce*, June 22, 1999; "Senate Passes Bill To Limit Y2K Liability In Face Of Veto Threat," *Liability Week*, June 21, 1999; Joe Warminsky, "Y2K liability bill clears Senate," *United Press International*, June 15, 1999; John Leming, "Senate bill backed by business groups," *Journal of Commerce*, June 14, 1999; Stephen Barr and Juliet Eilperin, "Lobbyists Given Key Role In Y2K Relief Legislation; GOP Solicits 'Wish List' of Ways to Guard Against Lawsuits," *Washington Post*, April 22, 1999; John G. Spooner, "BSA Stumping For Reform," *PC Week*, February 15, 1999. For a list of BSA members in 1999, see <http://www.bsa.org/usa/press/newsreleases/1999-06-07.287.phtml>. A list of current BSA member companies can be found at <http://www.bsa.org/intnatl/membercompanies.phtml>.

³ See, e.g., Courtney Macavinta, "Securities litigation reform passed," November 3, 1998, found at <http://news.cnet.com/news/0-1003-200-334927.html?tag=mainstry>; John Borland, "House Passes Shareholder-Lawsuit Reform," July 22, 1998, found at <http://www.techweb.com/wire/story/TWB19980722S0020>; John Borland, John, "High Tech Flexes Its Political Muscle," *TechWeb.com*, October 13, 1997 (on file with CJ&D). See a list of members at <http://www.technet.org/who/list.alpha.phtml>.

⁴ Public Citizen Fact Sheets, found at <http://www.citizen.org/congress/civjus/classaction/factshts/s353fact.htm>.

⁵ Kenneth Masterson, "America's In The Midst Of A Class Action Crisis," *Commercial Appeal*, March 21, 2002.

⁶ "Legal – Unflattered By Imitation, FedEx Sues Coffee Cart Operator," *Commercial Appeal*, June 18, 1997.

⁷ "Federal Espresso and Federal Express Settle Trademark Lawsuit," *PR Newswire*, March 2, 1998; "Legal – Unflattered By Imitation, FedEx Sues Coffee Cart Operator," *Commercial Appeal*, June 18, 1997.

⁸ *Federal Express Corporation v. Federal Espresso, Inc.*, 201 F.3d 168 (2nd Cir. 2000).

⁹ "Coffee Shop Settles Fed-Ex Infringement Claim," *Daily Record*, June 20, 2000; "Coffee shop changes name, again, to satisfy Federal Express," *Associated Press*, June 17, 2000; "Coffee Shop Faces Powerhouse," found at <http://www.teaandcoffee.net/0800/world.htm>.

¹⁰ Information relating to specific corporate sponsorship of ATRA and the Manhattan Institute was based on John Gannon's article, "Tort Deform – Lethal Bedfellows" (Essential Information, 1995), citing Kenneth Chesebro, "Galileo's Retort: Peter Huber's Junk Scholarship," 42 *Am. U.L. Rev.* 1637 (Summer 1993). Very few state "tort reform" groups publicly list their corporate members. One of the few that does, with the most

comprehensive public list available, is New Yorkers for Civil Justice Reform. NYCJR's list can be found at the organization's website, <http://www.nycjr.org/support.html>.

11 "Class Action Reform," found at <http://www.technet.org/issues/class/phtml>; "On The Hill," *National Journal's Technology Daily*, March 13, 2002.

12 <http://www.technet.org/who/list.alpha.phtml>.

13 "On The Hill," *National Journal's Technology Daily*, March 13, 2002.

14 <http://www.itic.org/whoweare>. See, "On The Hill," *National Journal's Technology Daily*, March 13, 2002.

15 "Capitol Hill," *Washington Internet Daily*, March 14, 2002; "High tech CEOs Press For Movement On Class Action Measure," *National Journal's Congress Daily*, October 12, 2001. The letter, "Technology Industry Supports The Class Action Fairness Act," can be found at <http://www.uschamber.com/NR/rdonlyres/968A6007-BD1F-498C-9FD6-EC4B338FEC0E/classaction1101.pdf>.

16 The letter, "Technology Industry Supports The Class Action Fairness Act," can be found at <http://www.uschamber.com/NR/rdonlyres/968A6007-BD1F-498C-9FD6-EC4B338FEC0E/classaction1101.pdf>.

17 http://www.semichipw.org/mem_list.cfm. For SIA support of "Class Action Fairness Act," see, Testimony of Peter N. Detkin, Vice President, Assistant General Counsel, Intel Corporation, On Behalf of the Semiconductor Industry Association and Intel Corporation, Before the Committee on the Judiciary, U.S. House of Representatives, February 6, 2002, found at http://www.semichips.org/pre_stat.cfm?ID=103.

18 Letter from Rick White, President and CEO TechNet, to House Speaker Dennis Hastert, dated March 11, 2002, found at <http://www.technet.org/issues/updates/2002-03-19.84.phtml>.

19 Testimony of Peter N. Detkin, Vice President, Assistant General Counsel, Intel Corporation, on behalf of the Semiconductor Industry Association and Intel, before the Committee on the Judiciary, U.S. House of Representatives, February 6, 2002, found at http://www.semichips.org/pre_stat.cfm?ID=103.

20 Testimony of Peter N. Detkin, Vice President, Assistant General Counsel, Intel Corporation, on behalf of the Semiconductor Industry Association and Intel, before the Committee on the Judiciary, U.S. House of Representatives, February 6, 2002, found at http://www.semichips.org/pre_stat.cfm?ID=103.

21 Abner J. Mikva, "Share and Shares Alike Now let's fix the 'reform' of our securities laws," *Legal Times*, April 8, 2002.

22 *Amazon.com, Inc. v. Kalaydjian*, 2001 U.S. Dist. LEXIS 4924 (W.D. Wash.). See also, "Domains: Judge Throws Out Amazon Domain Suit," *National Journal's Technology Daily*, February 27, 2001; Troy Wolverton, "Judge tosses Amazon trademark lawsuit," *CNET News.com*, February 26, 2001.

- 23 Brad Gibson, "Apple names employee as source in trade secret leaks," *MacCentral Online*, August 29, 2000, discussing *Apple Computer Inc. v. Doe 1*, CV791550 (Santa Clara Cty. Super. Ct., filed August 2, 2000), found at <http://maccentral.macworld.com/news/0008/29.lawsuit.shtml>; Ian Fried, "Yahoo hit with subpoena in Apple lawsuit," *CNET News.com*, August 3, 2000; Peter Cohen, "Apple sues to stop leaks," *MacCentral Online*, August 2, 2000, found at <http://maccentral.macworld.com/news/0008/02.lawsuit.shtml>; Ian Fried, "Apple sues over alleged leak of trade secrets," *CNET News.com*, August 2, 2000, found at <http://news.com.com/2100-1040-243972.html?legacy=cnet>.
- 24 Ian Fried, "Apple settles with 'worker bee,'" *CNET News.com*, August 7, 2001, found at <http://news.com.com/2100-1040-271221.html?legacy=cnet>.
- 25 *Intel Corporation v. Hamidi*, 94 Cal. App. 4th 325 (2001), review granted, 2002 Cal. LEXIS 1883. See also, Terry Carter, "E-Mail Excess; Ex-employee's 'Spam' Cooks Up a Case," *ABA Journal eReport*, April 19, 2002, found at <http://www.abanet.org/journal/ereport/a19email.html>; Paul W. Sweeney, Jr., "Blocking Incoming E-mails and Internet Postings – The Empire Strikes Back," *E-Commerce Law Report* (February 2002); "Intel makes case out of Internet Trespassing," *USAToday.com*, January 3, 2002, found at <http://www.usatoday.com/life/cyber/ccarch/2002/01/03/sinrod.htm>; Jill Westmoreland, "Multimedia Docket Sheet: Recent and Pending Cases," *Multimedia & Web Strategist* (May 1999), citing *Intel Corp. v. Hamidi*, No. 98AS05067 (Sacramento County Super. Ct., Cal., decision April 27, 1999).
- 26 Sandeep Junnarkar, "BidBay returns fire in eBay lawsuit," *CNET News.com*, August 10, 2001, found at <http://news.com.com/2100-1017-271430.html?legacy=cnet>; Steven Bonisteel, "Ebay Lawsuit Aims To Curb 'Copycat' Auction Service," *Newsbytes*, August 1, 2001, found at <http://www.newsbytes.com/news/01/168586.html>.
- 27 Mark W. Vigoroso, "BidBay Fires Shot Back at eBay," *EcommerceTimes.com*, August 10, 2001, found at <http://www.newsfactor.com/perl/story/12732.html>.
- 28 "eBay settles lawsuit against similar site BidBay," *Associated Press*, February 20, 2000, found at <http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2002/02/20/financial1817EST0122.DTL>.
- 29 *Motorola, Inc. v. CheechInc.*, 2000 U.S. Dist. LEXIS 6727 (N.D. Ill.).
- 30 *America Online, Incorporated v. AT&T Corporation*, 243 F.3d 812 (4th Cir. 2001), affirmed-in-part, vacated-in-part and remanded, cert. denied, 122 S.Ct. 388 (2001).
- 31 *Sun Microsystems, Inc. v. SunRiver Corporation*, 1995 U.S. Dist. LEXIS 19008 (N.D. Cal.), amended by 1995 U.S. Dist. LEXIS 19012.
- 32 *Sun Microsystems, Inc. v. Astro-Med, Inc.*, 1996 U.S. Dist. LEXIS 4267 (N.D. Cal.).
- 33 Victoria E. Briant and William N. Hebert, "Fair-use defense applies in aftermarket situations," *National Law Journal*, May 1, 2000, discussing *Hewlett-Packard Co. v. Xerox Corp.*, No. C97-3850 (N.D. Cal. 1998).

- 34 “Hewlett Packard settles Xerox lawsuit,” *San Francisco Business Times*, January 5, 1999.
- 35 *Canon USA, Inc. v. Nippon Liner System, Ltd.*, 1991 U.S. Dist. LEXIS 5599 (N.D. Ill.). The trial court denied Nippon and Jam’s motions for partial summary judgment and granted Canon’s motion for partial summary judgment against Nippon.
- 36 *Motorola, Inc. v. Fritz Company, Inc.*, No. 01-25-21 (San Francisco County Super. Ct., Cal.).
- 37 *Motorola, Inc. v. Federal Express*, 2000 U.S. Dist. LEXIS 16366 (N.D. Cal.).
- 38 *International Business Machines Corporation v. Burlington Air Express, Inc.*, 2000 U.S. Dist. LEXIS 9203 (S.D.N.Y.).
- 39 *Sony Corporation of America v. Bank One*, 85 F.3d 131 (4th Cir. 1996), *rehearing and suggestion for rehearing en banc denied*, 1996 U.S. App. LEXIS 16145.
- 40 *International Business Machines Corporation v. Fasco Industries*, 1995 U.S. Dist. LEXIS 22141 (N.D. Cal.).
- 41 *International Business Machines Corporation v. Fasco Industries*, 1995 U.S. Dist. LEXIS 22140 (N.D. Cal.).
- 42 *Motorola, Inc. v. Qualcomm, Inc.*, 1997 U.S. Dist. LEXIS 23969 (S.D. Cal.), discussing *Motorola, Inc. v. Qualcomm, Inc.*, 97-CV-1616 (N.D. Ill., filed March 10, 1997).
- 43 *Motorola, Inc. v. Qualcomm, Inc.*, 1997 U.S. Dist. LEXIS 23969 (S.D. Cal.), discussing *Motorola, Inc. v. Qualcomm, Inc.*, 97-615J (S.D. Cal., filed April 10, 1997).
- 44 *See, Motorola, Inc. v. Qualcomm, Inc.*, 1997 U.S. Dist. LEXIS 21955 (S.D. Cal.). *See also*, Daryl Lindsey, “Motorola Sues Qualcomm in Handheld Dispute,” *Wired News*, June 6, 1997, found at <http://www.wired.com/news/print/0,1294,4304,00.htm>; Motorola Press Release, “Motorola Files Major Patent Infringement Lawsuit Against All Qualcomm CDMA Phones,” June 5, 1997, found at http://www.motorola.com/GSS/CSG/Help/PR/pr970605_qual.html.
- 45 Benton Foundation, “Communications Related Headlines for March 29, 2000,” found at <http://www.benton.org/News/032900.html>.
- 46 “Qualcomm Announces Second Quarter Results Pro Forma Earnings Per Share \$0.26,” April 18, 2000, found at www.qualcomm.com/Art/PDF/1_qcom_q2.pdf; “Qualcomm, Motorola End Cell-Phone Patent Suits,” *Wall Street Journal*, March 29, 2000.
- 47 *Eastman Kodak Company v. Goodyear Tire & Rubber Company*, 114 F. 3d 1547 (Fed. Cir. 1997). *See also*, “Fed. Cir. Rejects Appeal Of \$12 Million Judgment In Suit Over PET Process,” *Intellectual Property Litigation Reporter*, June 4, 1997; “Chemical Company Prevails In Patent Infringement Suit,” *National Law Journal*, June 25, 1995, citing *Eastman*

Kodak Co. v. Goodyear Tire & Rubber Co., Civ-2-90-221 (E.D. Tenn. 1995). Kodak has brought suit in numerous other patent infringement cases. For example, in 1993, Kodak filed a patent infringement case against Sony for use of a magnetic recording system used in VCR machines, camcorders and other products. “Japan-America patent war,” *Business Line*, April 14, 1998; “Kodak Sues Sony Over Patent,” *The Record*, April 1, 1993. In February 2001, Eastman Kodak sought compensatory damages from Agfa, Sanyo and Seiko Epson for patent infringement of its digital imaging and red-eye technologies. Two months later, Kodak reached a settlement with Sanyo and dropped all charges against Agfa and Epson. “Kodak drops patent infringement suit,” *dpreview.com*, April 26, 2001, found at <http://www.dpreview.com/news/0104/01042601kodakdropssuit.asp>; “Kodak sues over patent infringement,” *dpreview.com*, March 1, 2001, found at <http://www.dpreview.com/news/0103/01030106kodaksues.asp>.

⁴⁸ *Intel Corporation v. Via Technologies, Inc.*, 2000 U.S. Dist. LEXIS 18744 (N.D. Cal.). See also, Dan Goodin and Michael Kanellos, “Intel revokes Via’s chipset license, files lawsuit,” *CNET News.com*, June 25, 1999, found at <http://news.com.com/2100-1001-227697.html>.

⁴⁹ Ian Fried and Michael Kanellos, “Intel, Via bury most of hatchet in chipset lawsuit,” *CNET News.com*, July 5, 2000, found at <http://news.com.com/2100-1001-242800.html?legacy=cnet>.

⁵⁰ Michael Kanellos, “One Via-Intel suit wraps up,” *CNET News.com*, December 13, 2001, found at <http://news.com.com/2100-1040-277020.html?legacy=cnet>.

⁵¹ Michael Kanellos, “One Via-Intel suit wraps up,” *CNET News.com*, December 13, 2001, found at <http://news.com.com/2100-1040-277020.html?legacy=cnet>. In addition, in November 1997, Intel sued Silicon Storage Technology, Inc., claiming that it had violated four Intel patents on portable electronic storage devices. The parties settled confidentially in May 1999. *Intel Corporation v. Silicon Storage Technology, Inc.*, 20 F. Supp. 2d 690 (D. Ct. Del. 1998); Dan Goodin, “Intel, Silicon Storage settle suit,” *CNET News.com*, May 13, 1999, found at <http://news.com.com/2100-1001-225831.html?tag=mainstry>; “Intel, Silicon Storage Settle,” *San Jose Business Journal*, May 13, 1999, found at <http://sanjose.bizjournals.com/sanjose/stories/1999/05/10/daily13.html>.

⁵² *Intel Corporation v. Broadcom Corporation*, 2001 U.S. Dist. LEXIS 23106 (D. Ct. Del.). See also, Ian Fried, “Intel sues Broadcom, claiming patent infringement,” *CNET News.com*, August 30, 2000, found at <http://news.com.com/2100-1001-245143.html?legacy=cnet>.

⁵³ “Bet-the-company suit leaves chip-maker afloat,” *National Law Journal*, February 4, 2002; Brenda Sandburg, “Intel Strikes Out with Patent Cases,” *The Recorder*, December 17, 2001; James S. Granelli, “Intel Loses Patent Case Against Broadcom,” *Los Angeles Times*, December 15, 2001.

⁵⁴ *Amazon.com, Inc. v. Barnesandnoble.com, LLC*, 73 F. Supp. 2d 1228 (W.D. Wash. 1999), vacated and remanded, 239 F.3d 1343 (Fed. Cir. 2001). See also, “Appeals Court Lifts Injunction Against BN’s Online Ordering Method,” *Telecommunications Industry Litigation Reporter*, March 15, 2001; “Amazon wins round in patent suit,” *USAToday.com*, December 2, 1999; “Amazon.com sues Barnesandnoble.com,” *USAToday.com*, October 22, 1999.

- 55 “Amazon Settles Barnes & Noble Patent Suit,” *Seattle Post-Intelligencer*, March 8, 2002; “Technology Briefing Internet: Online Booksellers End Dispute,” *New York Times*, March 8, 2002.
- 56 *Apple Computer, Inc. v. Articulate Systems, Inc.*, 991 F. Supp. 1189 (N.D. Cal. 1997).
- 57 *Apple Computer, Inc. v. Articulate Systems, Inc.*, 991 F. Supp. 1189 (N.D. Cal. 1997). The Federal Circuit Court of Appeals affirmed-in-part, reversed-in-part and remanded the case back to the lower court. *Apple Computer, Inc. v. Articulate Systems, Inc.*, 234 F.3d 14 (Fed. Cir. 2000).
- 58 David Frith, “Dragon speech plan makes Mac complete,” *The Australian*, May 18, 1999.
- 59 Stephen Beale, “Mac Speech Recognition Gets a Boost,” *Macworld.com*, May 2, 1999, found at <http://www.macworld.com/1999/05/02/wwdc/dragon.html>.
- 60 E-mail correspondence from Professor Michael Rustad, April 25, 2001. *See also*, Thomas Koenig and Michael Rustad, *Civil Wrongs: Tort Rights Under Siege*. New York: New York University Press (2001); Erik Moller et al., “Punitive Damages In Financial Injury Jury Verdicts,” 26 *J. Legal Stud.* 283, 332 (June 1999); Michael Rustad, “Unraveling Punitive Damages: Current Data And Further Inquiry,” 1998 *Wis. L. Rev.* 15, 37-39.
- 61 *International Business Machines Corporation v. Diamond*, 1995 U.S. Dist. LEXIS 15608 (N.D. Ill.).
- 62 *Sony Electronics, Inc. v. Grass Valley Group, Inc.*, 2002 Ohio App. LEXIS 1304.
- 63 Apple Press Release, “Apple Sues Future Power and Daewoo for Illegally Copying iMac Design,” July 1, 1999, found at <http://www.apple.com/pr/library/1999/jul/01fp.html>; Cheri Paquet, “Apple sues, alleging iMac design rip-off,” *IDG News Service*, July 1, 1999, found at <http://www.idg.net/idgns/1999/07/01/AppleSuesAllegingIMacDesignRipOff.shtml>.
- 64 Bryan Chaffin, “Remember That iMac Copy? Apple Settles With iMac Clone Maker Future Power (With Pic),” *Mac Observer*, June 6, 2001, found at <http://www.macobserver.com/article/2001/06/06.12.shtml>; Daniel Drew Turner, “Apple settles iMac-alike lawsuit,” *eWEEK*, June 6, 2001 (on file with CJ&D).
- 65 Microsoft Press Release, “Microsoft Applauds Law Enforcement Officials For Arrest Of Key Suspect In Massive Software Piracy Case,” September 19, 1996, found at <http://www.microsoft.com/presspass/press/1996/sept96/piracy.asp>. *See also*, *Microsoft Corporation v. U-Top Printing Corporation*, 1995 U.S. App. LEXIS 414 (9th Cir.).
- 66 *Microsoft Corporation v. CMOS Technologies*, 872 F. Supp. 1329 (Dist. Ct. N.J. 1994).
- 67 *Microsoft Corporation v. Grey Computer*, 910 F. Supp. 1077 (D Ct. Md. 1995). *See also*, “Microsoft Awards Damages, Injunction Against DOS and Windows Infringers,” *Computer Lawyer* (February 1996).
- 68 *Microsoft Corporation v. Logical Choice Computers, Inc.*, 2001 U.S. Dist. LEXIS 479

(N.D. Ill). *See also*, Neil B. Cohen and Gerald T. McLaughlin, “Article 2 Warranty Against Patent and Trademark Infringement,” *New York Law Journal*, February 26, 2001; Robert Manor, “Tips lead Microsoft to sue 10 local dealers for piracy,” *Chicago Sun-Times*, March 3, 1999; “Microsoft sues 10 companies accusing them of software piracy,” *Associated Press*, March 3, 1999.

⁶⁹ Carol King, “Microsoft Wins \$1.5 Million in Piracy Case,” *internetnews.com*, February 1, 2001, found at http://www.internetnews.com/bus-news/article/0,,3_576811,00.html; Microsoft Press Release, “Federal Court in Illinois Awards Microsoft \$1.5 Million in Software Piracy Case,” February 1, 2001, found at <http://www.microsoft.com/presspass/Press/2001/Feb01/02-01IllinoisPR.asp>.

⁷⁰ *Microsoft Corporation v. Compusource Distributor, Inc.*, 115 F. Supp. 2d 800 (E.D. Mich. 2000).

⁷¹ *Microsoft Corporation v. Software Wholesale Club, Inc.*, 129 F. Supp. 2d 995 (S.D. Tex. 2000). *See also*, Joseph Panettieri, “Microsoft sues retailers over piracy,” *ZD Net News*, July 20, 1999, found at <http://zdnet.com.com/2100-11-501147.html?legacy=zdn>.

⁷² *Microsoft Corporation v. A&A Technology, Inc.*, 2001 U.S. Dist. LEXIS 10853 (N.D. Cal.).

⁷³ Lee Lester, “Industry Insider,” *CanadaComputes.com*, April 17, 2001, found at <http://www.canadacomputes.com/v3/print/1,1019,6416,00.html>; Compaq Press Releases, “Baxter Group Lawsuit,” found at <http://www.compaq.com/corporate/graymarket/baxter.html>.

⁷⁴ “Compaq files \$20M lawsuit,” *Washington Business Journal*, August 9, 2001, found at <http://washington.bizjournals.com/washington/stories/2001/08/06/daily30.html>.

⁷⁵ Compaq Press Release, “Compaq Reaches Quick Settlement of Suit Against Harry Martin, Millennium Technology Group Inc., and Shafiq Ahmad,” found at <http://www.compaq.com/newsroom/pr/2001/pr2001081302.html>.