

The Year Tort Reform Must Happen

By Paul F. Oreffice

Editor's Preview: Are you a manufacturer thinking about adding a product to your existing line? Are you prepared, then, to be legally liable for that decision for the rest of your firm's lifetime, even if your product is altered, resold or misused? Are you prepared to pay insurance and legal fees which, even if you are *not* sued, may exceed your total production revenues? Although some states are currently experimenting with reforms, these problems still confront most current and would-be entrepreneurs.

One hears a lot about American competitiveness and its decline these days. *Liability*, says Dow Chemical head Paul F. Oreffice, is a critical factor. The whole climate of doing business in the United States suffers under huge legal responsibilities imposed on all areas of the profit and non-profit sectors. Ultimately, he notes, consumers are hurt too, because liability costs are passed along to them in the form of higher prices, discontinued on undeveloped goods and services.

This is a fabulous country. I should know, because I was born in Venice, Italy, in an era when civil rights meant little. My father was not a member of the fascist party. This was a crime, so he was beaten and jailed without due process of law and then the family was put under house arrest. But we were very fortunate; we managed to get out of Italy and emigrate to the United States. The experiences of my youth have inspired in me a tremendous respect for the American legal system. Basically, ours is a wonderful system of law. We are a just and compassionate society. We try to do what is right, but somewhere along the way, particularly in the last two decades, things began to change.



Five years ago I delivered a speech entitled "Science and Lawyers" remarking at the time that,

Somewhere along the way things began to go awry. The problem is law. Somehow we moved from being an innovative, creative and dynamic society to becoming the most litigious people on earth. If that trend continues, it would stop both our industry and our nation dead in its tracks. Many companies, including mine, The Dow Chemical Company, have stopped research in specific areas precisely because of the prospect of legal problems, and I'm not talking about legal problems in which a product is at fault; I'm talking about problems which are likely to arise because the product will be merely presumed to be at fault. I worry that we as an industry are meekly heading into legal slaughter that will cripple, if not downright devour all of our companies. . . . There are more students in law schools than in all the graduate schools in engineering, chemistry, physics

and the biological sciences combined. These are sad facts to contemplate for a nation trying to maintain or regain technological leadership.

But five years ago, our legal system wasn't the topic of hot debate it is now, with cover stories in all the leading magazines and special television reports on the "legal crisis." Of course, when I said these things five years ago most people said, "You only worry because you are in the chemical business." In other words, my warnings were not taken seriously.

But in the last few years it has become apparent to everyone that it is not merely a problem for the chemical industry. Soaring insurance rates, one of the consequences of the legal crisis, have awakened every industry, as well as school leaders, resort operators, and many others, except, of course, most of our politicians.

In the last five years, the system has gotten worse, not better. But chances for reform have skyrocketed as more sectors of society are hurt. In January 1987, I was invited to the White House along with five other business representatives, to discuss American competitiveness and to comment on the topics which were going to be addressed in the President's upcoming State of the Nation speech. A top administration official asked us what we thought were the most important issues and problems facing the country. One of our group, the chairman of the U.S. Chamber of Commerce, responded immediately: "Tort reform is number one on our agenda. It is the largest societal problem." I chimed in. The head of the National Association of Manufacturers also agreed. We emphasized that the government wasn't doing enough to promote tort reform, and that this was a major obstacle to regaining a competitive stance in the world market.

This is merely one personal experience; but the real arena for reform is the legal system itself. Currently, the system allows trial lawyers to play a game of illu-

sions. In my better moments, I call it S-4-S: Suing for settlement. Other times, I call it blackmail, because many suits are started, not in order to obtain a judgment but to pressure for an out-of-court settlement. A large company or a municipality or a large institution of any type really has no defense against suits of this kind. And as the dollar amount of court awards increase, they drive up the size of out-of-court settlements too.

One of the Dow Chemical Company's recent suits may be illustrative. The suit was brought privately by a small company which utilizes plastics. Its owners decided to sue every plastic producer on antitrust grounds, claiming that we producers have conspired to fix prices throughout the years. The plaintiffs had no case, but a few producers settled just to avoid the

"We must take the initiative and learn how to reform our courts from within. The first step is to educate ourselves about our voting options."

nuisance of litigating a suit. Here is the business decision I was faced with: Our lawyer said, "We have a better than 98 percent chance of winning this case. But we can expect that the discovery proceedings and the length of the court trial will cost us *between three and five million dollars* in lawyers' fees and lost time alone. The plaintiffs will settle for \$200,000. What is your business decision?" We paid \$200,000. It was pure and simple blackmail, but I could take no other reasonable action. As the manager of an enterprise, I have shareholders to whom I am accountable. I must do what's best for them. We don't settle all of the time, however, because we really believe that fighting is necessary if we are to overcome the legal crisis.

Let me describe some of the other effects such a crisis has on a company like Dow Chemical. There is constant concern about America's competitive role in the world. Many people ask, why aren't we competing better? Fortunately, for Dow, the chemical industry still has a favorable balance of trade of approximately eight billion dollars. We are the technological leaders of the world. Despite the fact that places like Saudi Arabia, Mexico and Canada have cheaper raw materials, we are still beating them handsomely in the international market. Yet, our advantage continues to diminish steadily.

The fastest growing department in our company, without question, is the legal department, because, while we hire many outside attorneys, we simply have to have our own staff to manage our daily caseload. Our fastest growing single cost is insurance. Another trend which is directly related to our increased liability

About the Author

A native of Venice, Italy, Paul F. Orefice first came to the United States with his family at the age 12. A graduate of Purdue University with a B.S. degree in chemical engineering and Korean veteran, Mr. Orefice joined the Dow Chemical Company in 1953 and currently serves as chairman, president and chief executive officer. The recipient of numerous honorary degrees and international awards for his contributions to education, business and the chemical industry, he also holds positions on a wide variety of national advisory councils and has been a prominent leader in the tort reform movement.

is that we have had to dedicate a number of really top-notch financial experts to our insurance department when we could be making better use of them elsewhere. The difficulties of obtaining insurance today require, however, that we relegate some of our best talent to the task.

Other changes are more alarming. Some of our most useful products, like vaccines and an anti-nausea drug we once provided for expectant women, have been discontinued. Why? I think, a prime example is the drug Bendectin which was originally produced by Merrell. We bought the Merrell pharmaceutical division from the Richardson Merrell Company a number of years ago and created Merrell-Dow Pharmaceuticals. Bendectin was a Merrell drug which had been given to 33 million women around the world, proven safe throughout the decades. The U.S. Food and Drug Administration and the equivalent organization in Great Britain have declared after testing and retesting that the drug is completely safe. But three percent of all children are born with some defect whether the mother takes anything or not. Now, three percent of 33 million means that there are approximately one million birth defects in this total group and some smart lawyer decided to round up a few hundred mothers in order to file suit against us. Why did we discontinue manufacturing Bendectin? At one point our sales in the United States were \$20 million a year, but our legal and insurance costs alone reached \$18 million. Considering the cost of producing and marketing the product which also has to be taken into account, we were losing so much money that we felt forced to discontinue providing Bendectin. Twelve thousand doctors in this country officially protested, citing that it was a useful drug, but we just could not cooperate with them.

The same situation exists in vaccine production. Research and development in several fields has come to a grinding halt. The whole posture of companies, of discovery versus risk, has changed in the last few years because of the legal crisis. Even when we feel we have made some discoveries which might constitute a breakthrough, the risk has often become so great that our discoveries can't be implemented.

Other costs enter in, too. Our management, including myself, spends an enormous amount of time being deposed and appearing in court. I wasted more than 20 working days in 1986 alone on legal cases. In February of 1987, I was deposed as a witness in a case against some other company. Dow Chemical was merely a customer of theirs, and the plaintiffs' lawyers calculated that I wouldn't bother to show up. This was part of their strategy to eventually win a settlement. But I fooled them; I did appear. But, it meant hours of deposition, following hours of time spent in preparation. I lost one full working day in order to make a deposition that didn't even involve a suit against Dow Chemical but against a company that merely sold us

a product. This is one of the most powerful weapons the trial lawyers possess: the ability to draw a suit out over time and keep many people tied up in court.

Dow Chemical has approximately \$11 billion in annual sales: Some \$6 billion abroad and \$5 billion in the U.S. In 1986, however, the Company's legal and insurance expenses in the United States totalled more than \$100 million! Less than \$20 million was spent abroad for comparable coverage, even though the majority of our sales were there. This suggests that the legal crisis is uniquely an American problem, one which dramatically inhibits competitiveness.



One high-ranking Treasury official suggested recently in a public forum that American industry is unable to compete in the world market because it is forced to support huge and largely unnecessary corporate staffs. Yet, if I fire everybody in our corporate group—everybody, including myself—all our salaries, our offices, our transportation, and all of our expenses would only account for about \$75 million in expenses, much less obviously, than our domestic legal and insurance costs.

Why does the insurance system impose such tremendous costs? Essentially, because liability is no longer based on fault. The prevailing attitude among juries is that if someone has been hurt, someone else should pay, regardless of fault. We've been lucky so far; in the instance of the drug, Bendectin, we have won every single case except one and it is under appeal. In one suit, the jury pronounced its judgment that the product was not defective, and that Merrell-Dow was not negligent. Yet the same jury awarded \$1,160,000 to the plaintiff. Our innocence was written into the decision, but it made no difference. Do some of these kinds of cases get overturned? Yes, in fact, this one was, but the plaintiff's lawyers are appealing it again.

Another case didn't involve our company, but it is pertinent to this discussion. It involves a company located near ours, so that's how I happened to hear about it. A woman was on this company's premises for a meeting, and as she walked out of the building she stepped off a sidewalk, fell, and broke her leg. She sued the building owners. She sued the company. She sued everybody and wound up settling for a very large sum of money. There was no ice and no moisture build up on the cement; she just simply wasn't looking where

she was going, stepped off the sidewalk, injured her leg, and collected.

We need to reform the law so fault is once more a consideration. How can we do this? We can attack on several fronts. Much tort law, that is, civil law involving damages, is created in the courtroom, not by legislation. Everyone spends a great deal of time worrying about who we ought to elect as president, as governor, as mayor and who we ought to send to Congress, but we spend relatively little or no time at all worrying about who our judges are. Instead it is the trial lawyers who concentrate their efforts and money on electing judges, and that is one of the reasons why our legal system has suffered. We've all shown up at the election booth only to suddenly realize that we know next to nothing about the judicial candidates. But this is a trend we can do something about. We must take the initiative and learn how to reform our courts from within. The first step is to educate ourselves about our voting options.

Another problem which must be tackled is how to ensure that one may be tried by a jury of his or her peers. It is almost impossible for a large organization like Dow Chemical, for example, to demand a jury of its peers. Most of the time, qualified jurors who have an important position in another organization are challenged or must drop out. In a suit against us in Washington, DC, the court sent a letter to a potential juror saying, in effect, "This is going to be a long case; you'll probably be tied up for five or six weeks. If you can't take that much time off, you'll be excused." The result is, of course, that anybody who has any kind of significant job may be excused. In this case, 11 of the jurors we ended up with were unemployed. I don't consider that a jury of our peers, nor would anyone else.

We must also call upon people in all walks of life to formulate a federal standard for liability legislation. Changes on the state level are already under consideration or have been implemented in all 50 states. Volunteer groups like the American Tort Reform Association which was founded by the Dow Chemical and other concerned organizations have helped to create an environment for reform.

Consumer groups ought to be just as interested in pushing for reform, yet Ralph Nader, inexplicably, has joined forces with trial lawyer groups opposing a return to fault-based liability. If he truly is a consumer advocate, then Mr. Nader should campaign for tort reform, because consumers even more than corporations, are paying the heaviest price for the current system. The price of high insurance, high court awards and high out-of-court settlements eventually goes in the price of *every* product and *every* service in this country.

Mr. Nader's opposition notwithstanding, we've taken a leadership position at the Dow Chemical Company with a grass-roots campaign in favor of reform. We have

"The price of high insurance, high court awards and high out-of-court settlements eventually goes in the price of *every* service in this country."

started with an optional education program for our 25,000 employees in the United States and we hope to reach thousands more people with the message that liability is a serious problem affecting everyone.

We have asked them to consider a fault-based standard for product design and the appropriateness of safety warnings. (In other words, if a product is properly designed and has all the safety warnings, then it's up to the user to handle it properly. The presumption is that a product which meets federal standards is reasonably safe.)

Another reform involves limiting the defendant's liability to his or her percentage of fault. A requirement should also be that the damages in a suit reflect the extent to which the plaintiff himself has contributed to the injury. Today, a plaintiff may be completely guilty for his own injury and still receive an award. Furthermore, there are rules prohibiting admission of evidence showing that the plaintiff is already receiving some sort of compensation for his injury, creating tremendous double-dipping in regard to medical costs, which ought to be revised.

We also need to limit the number and size of punitive awards. Punitive awards were intended to discourage willful negligence but now they are being applied without discretion.

The agenda is long and the task is difficult, but for the first time in years, I feel the chances for tort reform are good. Some of these reforms have been legalized at the state level and for the first time, coalitions unifying small and big businesses, educational institutions, municipalities, and professionals have been established.

What we need now is to let the politicians know where we stand. If we tell our story truthfully and convincingly, we can not only see significant changes in 1987, but carry the momentum into the future and make tort reform into a positive rather than a negative political issue.

