

James G. Basker ed., *AMAZING GRACE: AN ANTHOLOGY OF POEMS ABOUT SLAVERY 1660-1810* at 202 (Yale 2002); George Tolman, *JOHN JACK, THE SLAVE, AND DANIEL BLISS, THE TORY* (Patriot Press 1901-02); www.concordnet.org/dpw/hiway/html/cemetery%20-%20sleepy%20hollow.htm.

FRANKENSTEINS OF DEMOCRACY

“IT IS ONE OF THE HAPPY INCIDENTS of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” So spoke Justice Louis Brandeis in his famous dissent in *New State Ice Co. v. Liebmann*.

In recent years, some states – most prominently Mississippi and West Virginia – have engaged in some judicial experimentation with respect to deterrence and retribution: damages awards in the tens and hundreds of millions of dollars in products liability cases. For one Mississippi judge this exercise in Brandeisian courage has turned out to have the added benefits of being both fun and funny. In an affidavit filed in *Cosey v. Bullard* – a 1998 asbestos case that settled after a jury awarded \$48.5 million to the first twelve of 1700 plaintiffs and the trial judge informed the defendants that if they failed to settle all of the plaintiffs’ claims he would re-seat the same jury to hear all 1700 – a defense attorney described the following scene:

It was during this time that Judge [Lamar] Pickard [of Jefferson County, Mississippi] related a story to the assembled plaintiffs: he said that after the compensatory verdict was rendered, another lawyer not affiliated with this case contacted him and asked Judge Pickard if he felt like he had just caught a ten pound bass. Judge Pickard said he had replied to the lawyer that he did not feel like he had caught a ten pound bass, but rather he felt like he had been in the boat with someone who had just caught a ten pound bass.

While representatives of plaintiffs and

defendants debated the pros and cons of this approach, defendants – the businesses (mostly) on whom the Mississippi courts had been experimenting – decided that they would rather not be rats in a laboratory of democracy. They enlisted the U.S. Chamber of Commerce to conduct an experiment of its own: a novel advertising and publicity campaign launched last May to warn businesses about the dangers of operating in Mississippi and thereby exposing themselves to the Mississippi courts. (See the Chamber’s advertisement on the facing page.)

Facing a campaign with the potential to trigger a national commercial boycott of Mississippi, the state came to a sudden realization about laboratory work that Brandeis had neglected in the early 20th century, but that Mary Shelley had not in the early 19th. As she explained through the story of Victor Frankenstein and his monster, experiments can run out of control and return to haunt the experimenter. In effect, defendants were demanding of Mississippi the same thing that the monster sought from Frankenstein: “Oh, [Mississippi], be not equitable to every other and trample upon me alone, to whom thy justice, and even thy clemency and affection, is most due.”

Reasonable people might disagree about the relative merits of the Mississippi and Chamber of Commerce positions and procedures, but state lawmakers liked the idea of being lab rats about as much as the Chamber’s members did. During a special session dedicated to civil justice reform, House Bill 19 was passed by the Mississippi legislature on November 26 and signed by Governor Ronnie Musgrove on December 3. Here is how Musgrove describes the new law:

There were also a lot of people who didn’t think civil justice reform could, or would, ever be signed into law by a Mississippi governor. ... The call to the Legislature was clear. My position on the need for fair and balanced reform was also clear ... I started this special

THE CHAMBER OF COMMERCE OF THE UNITED STATES

A MESSAGE TO THE PEOPLE OF MISSISSIPPI

REGARDING THE MISSISSIPPI CIVIL JUSTICE SYSTEM

THE UNITED STATES CHAMBER OF COMMERCE IS CONCERNED THAT ITS MEMBERS AND OTHER BUSINESSES ARE AT SIGNIFICANT RISK FROM A FLAWED LEGAL SYSTEM WHEN DOING BUSINESS IN THE STATE OF MISSISSIPPI.

GENERAL COUNSELS RANK MISSISSIPPI LAST

Mississippi's liability system was rated the worst in America in a recent U.S. Chamber-sponsored Harris Interactive survey of more than 800 corporate counsels. The state was ranked last in terms of judges' competence, judges' impartiality, juries' fairness, the use of technical and scientific evidence, overall treatment of tort and contract litigation and timeliness of summary judgment/dismissal.

LAWSUITS COST MISSISSIPPI RESIDENTS JOBS AND MONEY

On April 16, Mississippians for Economic Progress released a study conducted by The Perryman Group showing that Mississippi loses more than 7,500 jobs a year because of its legal system, and the average family in Mississippi pays an additional \$264 a year for products and services. According to Mississippi's State Insurance Commissioner, as many as 71 insurance companies have left Mississippi in the past year because too many lawsuits are being filed.

CIVIL JUSTICE SYSTEM DENIES LEGAL RIGHTS

A recent analysis of Mississippi's legal system conducted by the national law firm of Wiley Rein & Fielding found that out-of-state businesses often do not receive fair and equitable treatment in Mississippi courts and are denied their constitutional rights of due process.

RECENT OUTRAGEOUS VERDICTS AND SETTLEMENTS

Before 1995, the highest reported jury verdict in Mississippi was \$9 million. Since then, at least 16 have topped that figure, resulting in jury awards in excess of \$1.8 billion. This amount does not include pre-verdict forced settlements amounting to billions of dollars.

MISSISSIPPI'S ABUSIVE LEGAL SYSTEM BURDENS U.S. TAXPAYERS

In one case, a Canadian company filed a claim against the U.S. Government for \$750 million, alleging that abuse by the Mississippi court system constituted a violation of the North American Free Trade Agreement. If the federal government loses this case, American taxpayers will be the ones paying the bill.

MISSISSIPPI GOVERNMENT FAILS TO ENACT LEGAL REFORMS

Unfortunately, the prospects for reform of Mississippi's civil litigation system are bleak. In the past four months, the state Legislature had numerous opportunities to enact meaningful legal reforms. All but one of the legal reform bills proposed were killed by the Legislature, and the Governor vetoed the one that passed.

COMPANIES NEED TO EVALUATE THEIR POSITIONS

This concern is not communicated lightly. The U.S. Chamber recognizes that companies must make their own judgments, using a variety of factors, about where to conduct business. Even if a company chooses not to do business in Mississippi, it is not entirely insulated from risks associated with the state's legal system.

U.S. CHAMBER EXISTS TO CREATE JOBS

Some plaintiffs' trial lawyers in Mississippi have become millionaires because of this abusive legal system, but their lawsuits have not created any meaningful employment opportunities for the average citizen. In contrast, the U.S. Chamber of Commerce exists to promote business and investment that will create new jobs. Contrary to claims that we care only about "big business," the U.S. Chamber is the voice of all businesses, large and small. Of our 3 million members of the Chamber federation, 96% have less than 100 employees, three-fourths of which have fewer than 10 employees.

HOW THE PEOPLE OF MISSISSIPPI CAN SOLVE THE PROBLEM

We urge Mississippi residents to take the following actions:

- Tell the Governor to convene a special session of the Mississippi Legislature for the purpose of passing meaningful legal reform measures.
- Learn all you can about the fairness of judges running in this November's elections.
- Think twice before you join a frivolous lawsuit.
- If you serve on a jury, remember that your decisions can affect jobs, employers and shareholders in and outside Mississippi.



Mission Statement of the U.S. Chamber of Commerce

"To advance human progress through an economic, political, and social system based on individual freedom, incentive, initiative, opportunity, and responsibility."



For more information on how you can help, visit www.litigationfairness.org.

session with a call for serious debate on civil justice reform, and a promise to sign a bill that would accomplish meaningful reforms. Today, I'm proud to stay true to that promise.

And here's the Chamber of Commerce's take:

The Mississippi tort reform bill contains many important improvements, including:

Caps punitive damages for small businesses worth less than \$50 million at a maximum of 4% of net worth; big businesses are subject to a graduated scale, with a cap of \$20 million.

Protects "innocent retailers" who are sued for selling defective products they did not design or manufacture.

Limits venue to where the cause of action occurred or the plaintiff's home county.

Allows proportionate liability for non-economic damages and improves joint and several liability for economic damages.

Who knows whether all of this action and optimism will in fact shut down the judicial laboratories in Mississippi, or whether this approach will upset fewer people than the previous one. And will it, or should it, have any influence in other states? Let's just hope the conflict doesn't end like Shelley's novel.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Affidavit of Jeffrey P. Hubbard, *Cosey v. E.D. Bullard Co.*, Civ. No. 95-0069 (Miss. Cir. Ct. Jefferson County 1998); Mary Shelley, FRANKENSTEIN (1818); www.litigationfairness.org; www.governor.state.ms.us; www.uschamber.com.

SUPREME CREDIT

THE GREEN BAG MAY THINK that Stern & Gressman is the only authoritative treatment of Supreme Court practice (see *Old-and-Improved*, 6 GREEN BAG 2D 5 (2002)), but the authors of Stern & Gressman disagree. In footnote 8 of the Preface to their

eighth edition they

acknowledge our long and continuing exchange of information with Bennett Boskey about the rules and practices of the Court. Mr. Boskey, a former Supreme Court law clerk and now a practicing lawyer in Washington, D.C., is the author of *B. Boskey, WEST'S FEDERAL FORMS, SUPREME COURT*, Vols. 1, 1A, and 1AA (5th ed. 1998, with annual pocket supplements). These volumes contain forms and samples of all types of petitions, motions, and briefs used in Supreme Court litigation, accompanied by comprehensive treatment of the Court's rules and practices. In addition, Mr. Boskey has co-authored with Professor Gressman a series of articles describing various Supreme Court rule revisions and jurisdictional changes.

The admiration is mutual. Boskey writes, in the Introduction to his 2002 pocket part for each of his three *Federal Forms* volumes:

It would be a disservice to the profession not to mention that the 8th edition of Stern and Gressman et al.'s *Supreme Court Practice* is just becoming available for consultation. This excellent work is an indispensable tool. It explains what the Court has done, what it now does, and which former precedents can no longer be relied on. The lawyer who fails to partake of the book's knowledge and wisdom acts at his or her peril.

All of which leaves the *Green Bag* in the old "everything I say is false" quandary: if the *Green Bag* says that Stern & Gressman is the one-and-only last word on Supreme Court practice, and Stern & Gressman says that it shares the last word with Boskey, then Stern & Gressman is not the one-and-only. On this issue we will defer to Stern & Gressman.

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *SUPREME COURT PRACTICE* xi (BNA 8th ed. 2002); Bennett Boskey, *WEST'S FEDERAL FORMS, SUPREME COURT Vol. 1* (2002 Pocket Part).