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The Civil Justice System Bridges the Great Divide in Consumer Protection

Christopher Placitella
Justin Klein

I. INTRODUCTION

One of the first lessons we are taught is that it's not a good idea to touch something if we don't know where it's been. This fundamental lesson protects us from the time we are children, and while we remain inexperienced or vulnerable members of society, unknowingly at risk of endangering ourselves. When we are adults, however, most of us appear to forget this sensible precept entirely, and to violate it every day. We swallow pills and capsules filled with mysterious substances, we cover our bodies with clothing and accessories we find hanging in retail stores, and we fill our homes with products that were manufactured far away in conditions utterly unknown to us. The extraordinary boldness of American consumers to put the unknown into, onto, and around their bodies springs from their confidence in the responsibility of manufacturers. That confidence is buttressed by the belief that government agencies like the FDA and the Consumer Product Safety Commission are actively working as watchdogs to insure that manufacturers live up to their responsibility. The consuming public relies upon manufacturers to take pains to ascertain that their products are not defective or unduly harmful when properly used. If a product were unusually or unexpectedly dangerous, people would depend upon a manufacturer to have the decency to alert potential buyers of the risk. American consumers draw their confidence from the conviction that manufacturers, like caring parents, are considerate of their customers' welfare. Each purchase an American consumer makes is nothing short of a leap of blind faith in the manufacturer and the governmental agencies who they trust to insure that the manufacturers are living up to their responsibilities. Recent events, particularly with respect to the pharmaceutical industry and the FDA, raise serious doubts as to whether that blind trust is uniformly justified.
II. INADEQUACIES OF GOVERNMENT REGULATION

One mission of the federal government is to promote consumer welfare and responsible manufacturing through laws and regulatory bodies. The Food and Drug Administration (hereinafter "FDA"), empowered by various Congressional acts, oversees the practices of the industries that produce and sell food, medicines, cosmetics, and therapeutic devices. The FDA can set standards for product quality and ingredients, require that new types of products be proven safe before they are marketed, demand that labeling and advertising be clear and truthful, and enforce the recall of hazardous products. Other government bodies, such as the Federal Trade Commission and the Consumer Product Safety Commission, perform similar duties with regard to different types of goods.¹

Unfortunately, government agencies like the FDA may fall under the influence of the very industries they are supposed to regulate, as well as under the sway of the political agendas of the Administration in power. During the first term of George W. Bush, the reputation of the FDA as an agency that insures the health and safety of America was repeatedly called into question.²

During the November 18, 2004 Senate Finance Committee Hearings concerning the pain relieving drug Vioxx, the consumer protection problems within the FDA were exposed. The hearings featured alarming testimony from Doctor David Graham, the Associate Director for Science and Medicine in the FDA's Office of Drug Safety. According to Doctor Graham, the FDA is "broken," and "as currently configured is incapable of protecting America against another Vioxx. We are virtually defenseless."³ Doctor Graham explained that a conflict of interest exists within the FDA because the officials responsible for approving new drugs have the ultimate say as to whether those drugs will be removed from the market.⁴ Graham recounted for Congress how senior FDA management continually pressured him to actually change his scien-

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². See, Phil B. Fontanarosa, Drummond Rennie, Catherine D. DeAngelis, Postmarketing Surveillance—Lack of Vigilance, Lack of Trust, 292 JAMA 2647-48 (2004) [hereinafter "Surveillance"].
³. United States Senate Hearing on Vioxx, November 18, 2004 [hereinafter "Hearings"] (testimony of Dr. David Graham).
⁴. Id.
tific conclusions and recommendations about the public health threat posed by dangerous drugs.\(^5\)

The *Journal of the American Medical Association* agreed with Dr Graham, arguing that "[i]t is unreasonable to expect that the same agency that was responsible for approval of drug licensing and labeling would also be committed to actively seek evidence to prove itself wrong (i.e., that the decision to approve the product was subsequently shown to be incorrect.)."\(^6\) The prestigious medical journal characterized the FDA’s post market approval surveillance system as an "under funded, understaffed, and haphazard system whereby post marketing information on drug safety and adverse events is gathered, despite marketed drugs causing thousands of deaths each year."\(^7\)

During the Senate hearings Doctor Graham explained that Vioxx is a prime example of the national tragedy that occurs when the FDA and the manufacturer are not doing their job to protect the American public. According to Graham, Vioxx "may be the single greatest drug safety catastrophe in the history of this country" that "largely could have been avoided but wasn’t."\(^8\) Doctor Graham estimated that 88,000 to 139,000 Americans were injured by Vioxx, 30% to 40% of whom probably died.\(^9\) In pointing out the magnitude of the loss of life, Graham explained that this "would be the rough equivalent of 500 to 900 aircraft dropping from the sky."\(^10\) Prominent members of the medical community agreed with Graham that countless deaths and much suffering could have been avoided had Vioxx been recalled when it should have been, more than four years before it actually was.\(^11\) An editorial appearing in the prominent medical journal *The Lancet* commented that both "Merck and the FDA acted out of ruthless, short-sighted, and irresponsible self-interest."\(^12\)

\(^{5.}\) Id.

\(^{6.}\) See, Surveillance, supra note 2, at 2647-48.

\(^{7.}\) Id.

\(^{8.}\) See, Hearings, supra note 4 (testimony of Dr. David Graham).

\(^{9.}\) Id. See also Memorandum from David J. Graham, M.D., M.P.H., Associate Director for Science, Office of Drug Safety to Paul Seligman, M.D., M.P.H., Acting Director, Office of Drug Safety, Risk of Acute Myocardial Infarction and Sudden Cardiac Death in Patients Treated with COX-2 Selective and Non-Selective NSAIDs, (2004).

\(^{10.}\) Id.


The media that had the opportunity to review confidential internal Merck documents agreed. Shortly after Vioxx was recalled from the market, a Wall Street Journal exposé provided insight as to what transpired inside Merck. According to the Wall Street Journal, “internal Merck e-mails and marketing materials as well as interviews with outside scientists, show that the company fought forcefully for years to keep safety concerns from destroying the drug’s commercial prospects.”\textsuperscript{13} The New York Times similarly concluded that “a detailed reconstruction of Merck’s handling of Vioxx, based on interviews and internal company documents, suggests that actions the company took - and did not take - soon after the drug’s safety was questioned may have affected the health of potentially thousands of patients, as well as the company’s financial health and reputation.”\textsuperscript{14} Even one the most highly respected medical journals in the United States concluded that “a recent investigation suggests that Merck was well aware of the dangers of rofecoxib [Vioxx] but made concerted efforts to conceal those findings.”\textsuperscript{15}

Was Vioxx an isolated problem within the FDA? No, not exactly. Vioxx was the ninth prescription drug to be forced off the market because of death and injury in the last seven years. The summer before the Vioxx debacle occurred, it was revealed that an unknown but large number of teenage suicides had occurred as a result of taking certain anti-depressants. It was again revealed that officials inside the FDA were responsible for the delay in communicating that information to the public. Dr. Andrew Mosholder, like Dr. Graham, worked as a reviewer at the Office of Drug Safety, and concluded that depressed children should not be prescribed most antidepressants because those medications have failed to show any beneficial effects against depression and may cause some to become suicidal. The Office of New Drugs and the Office of Drug Safety management together suppressed Dr. Mosholder’s report, and prevented him from presenting his findings at an FDA advisory committee meeting.\textsuperscript{16} In subsequent Con-

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gressional hearings, it was revealed that the FDA actually had prevented the companies from revealing negative studies in drug labels, and, in one case, "reversed a manufacturer's decision to amend its drug label to say that the drug was associated in studies with increased hostility and suicidal thinking among children." Drug manufacturer Glaxo Smith Kline PLC was subsequently sued by New York State Attorney General Eliot L. Spitzer, who alleged that Glaxo misled consumers and committed fraud by suppressing clinical studies that raised doubts about the safety and effectiveness of its top-selling antidepressant Paxil when used to treat children and adolescents. The *Journal of the American Medical Association* was also highly critical of the FDA's handling of the cholesterol-lowering drug Baycol. In this regard, the *Journal* concluded that the FDA failed to take appropriate steps to monitor the Baycol, resulting in numerous injuries.

So what has the FDA done in response to revelations of this kind? Do the FDA and the Bush Administration support compensation for the wrongfully injured in light of this kind of evidence? On the contrary, the Administration unleashed its lawyers to travel the country to urge judges that the cases of those devastated by injury and mortality should be dismissed. The lawyers argue the rights of these families should be extinguished because the FDA approved the drugs and labeling.

**III. FURTHER WEAKNESSES OF THE FDA**

Is the problem within the FDA limited to drug safety? The evidence is to the contrary. In their exposé of industry practices, *Trust Us, We're Experts!*, Sheldon Rampton and John Stauber describe the relationship between the FDA and Monsanto, a corporation specializing in agricultural applications of biotechnology and
genetic engineering, and a supporter of Genetically Modified (hereinafter "GM") agricultural and food products.

On the eve of the widespread appearance of GM foods in supermarkets in the early 1990's, Monsanto successfully lobbied the FDA to declare that GM foods are "substantially equivalent to conventional foods," thereby automatically qualifying GM foods for "GRAS," or "generally regarded as safe" status. As a result, in the eyes of the FDA, a genetically engineered tomato is no different than an un-engineered tomato, so GM foods require no special labeling or safety tests. This blanket approval allows for GM foods to be sold along side of, and even mixed in with, non-engineered versions of the same foods without so much as a label to allow consumers to distinguish between the two.

Any reasonable consumer would want to make an informed purchase when it comes to food; but, in the case of GM foods, they are not able to do so. The FDA has forced consumers to purchase and eat genetically modified products unwittingly, when many people might have chosen not to do so had they known what they were biting into. Rampton and Stauber report that "[a] 1999 industry-sponsored opinion poll found that 62 percent of Americans were still unaware that GM foods were already widely marketed," while by that year "about a third of the U.S. corn crop and more than half of the soybeans planted were estimated to be genetically engineered varieties." The agriculture industry was supplying Americans with a completely new breed of food on a massive scale, and the government had permitted them to do so without letting consumers in on the change that had occurred in their own diets.

The FDA's handling of GM food products is an indication of how government regulatory bodies can be egregiously negligent of consumer's concerns. In exempting GM foods from special labeling and safety testing, the FDA took from American consumers of their freedom to choose whether or not to buy GM products. At the same time, the FDA failed to pressure Monsanto and other GM industries to make doubly sure that their new technology was safe before selling its fruits to unsuspecting consumers. In this case, the FDA, rather than performing its duties of protecting and informing consumers, was complicit in Monsanto's efforts to keep

22. Id. at 170.
23. Id.
24. Id.
consumers in the dark as to the origin of and potential risks associated with their food.

The FDA's failure in the case of GM foods might be explained by the powerful means of influencing the government that are available to manufacturing corporations and industries. Monsanto "makes large donations to both the Democratic and Republican parties and to congressional legislators on food-safety committees, [according to] the Toronto Globe and Mail."\(^2\) The ability of corporations to contribute large sums to the campaigns of key legislators and to offer comfortable post-public service employment opportunities to friendly government officials can be strong tools for influencing public policy. Disturbingly, Michael Taylor, one of the FDA officials who formulated the FDA's stance on GM foods, was a former attorney for Monsanto, who, some time after he had helped the FDA adopt its Monsanto-friendly policy, left the government and ultimately returned to the employ of the biotechnology giant.\(^2\)

Lobbying firms are another tool of influence on the government at the disposal of corporations. These organizations employ various strategies to affect public policy, or, as the website for lobbying firm Stateside Associates puts it, perform "issue management." One technique mentioned on the website is the creation of grassroots support for a client's agenda by "educating" different target groups of citizens and "mobilizing" them to contact the government in support of the client's position. Another method practiced by Stateside is to "develop 'champions,'" including politicians, businesspeople, and "community influentials" who will advocate that the federal government take action favorable to the lobbying firm's client.\(^2\) Lobbying firms give corporations the crucial opportunity to cultivate friendly political contacts who will bear the corporation's interests in mind when it comes time to regulate industry. In addition, the grassroots strategy allows corporations to create and organize the appearance of independent public support for their own private agendas. These lobbyist-generated shows of popular enthusiasm for industries' agendas may help convince lawmakers that, to please the people, they must adopt the policies that just happen to please industry. As these are just a few of the

\(^{25}\) Id. at 181.

\(^{26}\) See, Rampton, et al. at 170.

powerful tactics of lobbying firms, it is no surprise that in 2003, for example, the pharmaceutical industry earmarked $4.9 million to lobby the FDA.\textsuperscript{28}

The average consumer who is injured by a defective product has neither the financial resources nor the political connections to be able to match the kind of influence that industries can have over governmental regulatory bodies such as the FDA. Government bodies can grow so comfortable interacting with the manufacturers who are applying to them for product approval that a routine pattern of relations between the two begins to form. When the FDA starts to view the manufacturers as partners, rather than applicants, in the product approval process, regulators may come to be less critical in accepting the advice, studies, and outlooks with which industry provides them.\textsuperscript{29} The danger of such a close industry-government relationship developing is inherent in the nature of government regulation. It is relatively simple for the FDA to communicate with an individual company about its product, while it is logistically impossible for the FDA to devote equal consideration to the multitude of individual consumers with product complaints and concerns. The government has a better chance to make direct contact with a company than it does with a consumer, and where there is contact, there is consideration. The result of the closeness which can develop between the government and industry is that the government becomes alienated from the public it is supposed to protect, and is transformed into little more than a rubber stamp for industry interests.

Though government bodies like the FDA continue to defend the safety of American consumers in a multitude of vital ways, the potential for these groups to become overly compliant with, or tools of, the interests of industry is alarming. When an industry has a problem with a government regulation, it has a potent arsenal for influencing the government. Including lobbyists, monetary contributions, and political friends in high places, which can afford industry direct access to decision makers of a kind that the average individual cannot hope for. Where a corporation might call on one of its old executives now working for the government to put in a good word for them, the average individual may write a letter to a Senator and hope it is actually read by someone. Ultimately, the

\textsuperscript{28} See, Surveillance, supra note 2, at 2647.
\textsuperscript{29} See, Rampton, et al. supra note 21 at 181-82.
government alone is not equipped to adequately address the concerns of the individual consumer in all situations.

IV. THE MEDIA AND CONSUMERS

An alternative venue for consumer protection is the media. Investigative journalism and reporting can alert millions of consumers about possible risks associated with products, most importantly when the manufacturer and the government have failed or chosen not to do so. However, the line between information and misinformation in the media is sometimes blurred. Many reporters have neither the time nor the desire to research and disclose to their audiences information about the credibility and backgrounds of their sources. Thus, we may witness a news story in which an “expert” laughs off the risks associated with a product, and never be informed that the expert receives funding from, or is associated with, the manufacturer of that product. When we read a newspaper or witness a new broadcast on a certain topic, unless we already have prior knowledge about the story, we are at the mercy of the reporter. We know only what the media chooses to allow us to know; and for many Americans, the media is one of the only practical means of learning what is going on in the nation. Some parties, certain industries and manufacturers among them, actively work toward polluting the media with inaccurate, confusing, and biased reporting in order to serve their own purposes. When the media is manipulated in this manner, so is the public that depends upon it for information.

For example, some industries hire public relations firms to produce Video News Releases (hereinafter “VNRs”) for distribution to news networks. These VNRs are pre-packaged news stories designed to resemble conventional TV news segments. They are given to networks that can choose to air them in part or in their entirety during their own news broadcasts. VNRs are little more than commercials in disguise, ways for companies to tout the supposed benefits of their products in the guise of a news story. For instance, a drug company might produce and distribute a VNR about the benefits of a drug they manufacture. Networks often do nothing to indicate to viewers that the footage they are watching has been supplied by a private company, so the public receives the information in a VNR as though it were a story reported by the

30. Id at 194.
news network, rather than industry-provided material. VNRs offer industry a persuasive and covert means of influencing the public. Furthermore, since a VNR is technically not a commercial, companies can make claims about their product that would never be legally allowed to appear in a paid advertisement: A drug company's VNR could contain testimony from a doctor insinuating that their drug might be effective for treating an ailment when neither scientific evidence nor the FDA has cleared the drug for such a use.\(^3\)

The influence of industry-supported "experts" and press releases litters the media. *Trust Us, We're Experts!* quotes a 1980 *Columbia Journalism Review* study that found that over half the stories of a *Wall Street Journal* paper "were based solely on press releases." Often the releases were reprinted "almost verbatim or in paraphrase," with little additional reporting, and many articles carried the slug "by a *Wall Street Journal* Staff Reporter."\(^2\) Rampton and Stauber then produce an alarming statement from a public relations executive, who claims that "most of what you see on TV is, in effect, a canned PR product. Most of what you read in the paper and see on television is not news."\(^3\)

When the media chooses, out of bias or laziness, to act as a mouthpiece for companies and other organizations, readers and listeners are rarely, if ever, aware of the true source of the information they are presented with. Hiding its own opinions and interests inside the Trojan Horse of the media, industries can infiltrate and influence the minds of unsuspecting consumers.

V. THE PROBLEM OF THE GULF

Though the above analysis of manufacturers, government regulation, and the media, is cursory, at least one impression comes through definitively: These bodies alone are not enough to satisfactorily ensure the safety of the American consumer.

Certainly, a manufacturer can be moral, if it chooses to. The media can thoroughly investigate and reveal the background of its sources with an eye out for potential biases, if it chooses to. And the government can remember to put the interests of the people before those of business, if it chooses to. It is choice, or the lack of it on the part of the people, that constitutes the problem. In many

\(^31\) Id. at 22-24.
\(^32\) Id. at 22-23.
\(^33\) Id. at 23.
cases, the government, media, and corporations tend to determine their policies toward the public without much direct input from the members of the public itself. It is as though there exists a gulf, a gaping canyon that isolates individuals from these entities that have such power over their daily existences.

The gulf separates the people from the companies that manufacture products for them. These manufacturers sit in board rooms on their side of the canyon, reading reports on how to maximize sales and minimize costs, seldom paying a glance across the gulf at the actual human lives their products can affect. When they do look out the window to get a glimpse of the public, all they see is statistics. On the other side, the consumers find the products in retail stores, delivered there from some far away factory, made by some faceless corporation. They read the labels, use common sense, and hope for the best.

Cut off from the people as well, government regulatory bodies peer across the gulf, barely able to make out the public they are supposed to protect on the other side. Their vision is obscured by a haze of political contributions and other, subtler forms of influence that often becomes too thick for their eyes to penetrate. When the public cries out, it is too faint to hear, or sometimes it is in so many conflicting voices at once that no one complaint can be understood.

Also on the far side of the gulf, seemingly inaccessible and inscrutable, are the members of the media and their sources. The public can hear their reports trumpeting over loud speakers from the distance, but cannot get close enough to inspect the sources for themselves. Huddled in confusion, the people have no idea whether the information poured into their ears is from reasonably unbiased lips or from some industry-paid mouthpiece. The gulf separates powerful social institutions such as manufacturers, the government, and the media from contact with, and therefore responsibility to, individual persons. Ultimately, where there is no contact, there can be no consideration.

One of the main factors contributing to this alienation is that the size of the population of the country fosters an impersonal attitude in the institutions that deal with the public at large. In the eyes of a corporation that serves millions each day, it is possible for the injury of seven hundred customers to seem “statistically insignificant.”

It is true that certain conscientious and ethical manufacturers, government officials, and journalists make the effort to remember and acknowledge the best interests of the individuals on the other side of the canyon. However, when a manufacturer, government regulator, or journalist fails to adequately consider the good of the public, they are often inaccessible to public reproach and reprimand. The gap is too wide. How is a single individual who is injured by an unsafe product going to reach a manufacturer, influence government policy, and spread the truth about what has happened?

To best preserve the interests of the public, it is clear that more than the occasional benevolence of a manufacturer, government regulatory body, or investigative journalist is needed. A person hurt by a defective product should not have to wait to be lucky enough to be featured on “Seven on Your Side,” or to meet a Senator or executive at a cocktail party, in order to have his or her grievances be made known and addressed. There must be a way for a single wronged person to overstep the chasm between him or herself and the manufacturer of a dangerous product, to take the initiative to challenge a corporation as an individual and not a statistic, to confront the maker of a faulty commodity face to face, with the facts physically in hand, and to demand that responsibility be taken -- in a word, to demand justice.

VI. THE CIVIL JUSTICE SYSTEM

“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” So wrote Chief Justice John Marshall in his opinion on the 1803 Supreme Court case of Marbury v. Madison. The operative party in Justice Marshall’s statement is the individual. The courtrooms of the American civil justice system are among the few places in the nation where it is the individual who has the power to initiate action.

The average consumer is lucky if he or she can make contact in any way, let alone directly speak with, a person with decision-making power in a corporation, government body, or the media. It is normally left to the discretion of these bodies to determine whose concerns they will hear and consider. But when the lowliest individual files a civil suit against a corporation, attention must be paid. Suddenly the complaints of consumers can not be so easily brushed aside, and the manufacturer runs the risk of being fined and punished by the court if it does not somehow address the
consumers' allegations. No matter which party the court decides in favor of, the consumer wins the victory of compelling a manufacture to listen to and to consider his or her concerns. The mightiest corporation is brought to the ground, and must meet the consumer at eye level. The civil justice system allows the consumer to demand that personal contact with a manufacturer that is absent in the world outside the courtroom. When a manufacturer is forced to directly confront its accuser before a judge and jury, the help of PR firms, lobbyists, and government regulators becomes useless. The manufacturer has no choice but to respect and respond to the consumer.

The civil justice system makes manufacturers responsible to the individual, and therefore is a powerful recourse for a citizen harmed by a defective or dangerous product that has somehow been allowed to appear on the market.

VII. ENFORCING THE UNWRITTEN LAW

Sometimes government laws and regulations not only fail to protect consumers, but become tools of the very industries that are endangering the public. The civil justice system is eminently equipped to expose manufacturers who manipulate and hide behind the law.

A classic case of the civil justice system acting as a check on companies that have usurped federal regulations for their own purposes involves the textile industry's use of flammable fabrics. In 1953 Congress passed the Flammable Fabrics Act, which mandated that fabrics pass a particular flammability test in order to be declared safe for use in clothing. This test was developed by the American Association of Textile Chemists and Colorists, a textile industry association that had been "instrumental in guiding the government toward drawing up regulations and specifications." It is not surprising that the government would rely on the textile industry's expert advice in developing such regulations, for who knows more about textiles than a textile manufacturer? However, this reliance raises the alarming possibility that the textile industry might use its influence over the government to encourage the adopting of standards more favorable to its own interests than to those of consumers.

36. See Id.
It became clear to at least one manufacturer, the Riegel Textile Corporation, that the federal standards were woefully inadequate, and that dangerously flammable products were being cleared for marketing. The head of research at Riegel once alerted a high ranking Riegel official that newspaper had passed the federal flammability test as safe for use in clothing, indicating that the test was nearly meaningless as an assessment of fabric safety. Riegel was aware of numerous instances in which flannelette, a fabric type produced by Riegel that had passed the federal test, had lead to severe burn injuries in wearers. A memo written in 1956 by a Riegel executive expressed the worry that “we are always sitting on somewhat of a powder keg as regards our flannel-ette being so inflammable.”

Three years after the textile industry association had counseled the government to adopt its flammability test, Riegel knew that the test was allowing unsafe, harmful fabrics to be marketed to consumers. Rather than pull the highly flammable flannelette off the market or use available chemical treatments to make their flannelette more flame-retardant, Riegel continued to market the fabric in its hazardous state, without a warning to consumers. They were able to do so because their product was in compliance with federal standards, and no one had chosen to reveal how faulty those standards were. Riegel allowed the inadequate federal safety test to stand, risking the lives of consumers rather than risk a downturn in sales.

The federal safety regulations had become a shield for Riegel to use while for over a decade they marketed their highly flammable flannelette for use in clothing such as children's pajamas. The government was unaware of the iniquity being committed because Riegel’s practices were camouflaged in legality. Only the consumers who had been victims of the flammability of flannelette were aware that something was not right with the fabric, that it was inherently dangerous. The civil justice system empowered these victims to challenge the safety of Riegel’s fabric in a way that the federal regulations did not. When four year old Lee Ann Gryc was scarred for life on one fifth of her body due to second and third degree burns she suffered after her flannelette pajama top set on fire, her family eventually came to sue Riegel in the 1980 civil case.

37. Id.
38. Id.
39. 297 N.W.2d at 734.
of *Gryc v. Dayton-Hudson Corp.* The family alleged that a fabric which burned so quickly and at such a high temperature should not have been used in children’s clothing, or at the least should have carried a warning.\(^\text{40}\)

During the trial, Riegel mounted the defense that it could not be held responsible for Lee Ann’s injuries, since their flannelette had met with federal flammability standards. However, internal company memos, documents, and testimony that Riegel was forced to submit to the court revealed the truth about Riegel’s conduct, that Riegel had known for years that their product was dangerous and that the federal test was inadequate, yet they had continued to market their flannelette regardless. When asked why they had not included a flammability warning along with their fabrics, Riegel argued, in part, that it had feared that a warning would “stigmatize” its product in the eyes of consumers, hurting sales. After these facts had been exposed, the civil court did what the government had been unable to do: It held Riegel accountable for its immoral and cruel conduct. The jury required that Riegel pay $750,000 in compensatory damages and $1,000,000 in punitive damages to Lee Ann Gryc.\(^\text{41}\)

The court not only succeeded in securing justice for the Gryc family, but also acted in the interest of the safety of consumers in general. A judge who had presided over the case viewed the substantial sum of money that Riegel was forced to pay in punitive damages as a means by which civil courts could check unscrupulous manufacturers who had escaped the notice of the government. It appeared that Riegel had felt that as long as it superficially complied with federal standards, it had carte blanche to sell whatever dangerous fabrics it wanted that could pass the far-too-lenient test. Once they had hijacked a congressional act to conceal their own misconduct, they had assumed that they were untouchable, that they could endanger the public with impunity. “A legal tool is needed,” wrote a justice presiding over the case, “that will help to expose this type of gross misconduct, punish those manufacturers guilty of such flagrant misbehavior, and deter all manufacturers from acting with similar disregard for the public welfare. The punitive damages remedy is such a tool.”\(^\text{42}\)

\(^{40}\) Id. at 730.  
\(^{41}\) Id. at 729.  
\(^{42}\) Id. at 732.
The results of the Gryc case sent a message to manufacturers: The law itself cannot be used hide misbehavior; the court will always hold companies responsible for endangering the public when they knew better, or should have.

The civil justice system is a vital safety net that makes sure that manufacturers comply not only with the letter of the law, but also with the unwritten laws of human morality and decency. Riegel did not need any federal regulation to tell them that marketing a product they knew was too flammable to safely wear was wrong; no federal regulation could justify such a practice. The attempted defense employed by the textile company in this case was reminiscent of the argument made by several ex-Nazi officials at Nuremberg: that though they had participated in the organization of mass murder, they could not be held personally responsible because their actions had been supported and approved by the government. On a less dramatic scale, Riegel too had attempted to deny the personal responsibility it bore for its decisions by citing government approval; but just as the Nazi officials' own common sense would have informed them of their government's moral bankruptcy, Riegel's officials knew of the federal test's inability to determine fabric safeness. Both parties made a conscious decision to do the wrong thing, and both were made to answer to the court. Only a civil trial could penetrate Riegel's façade of technical legality, expose the stark immorality behind their actions, and communicate that Riegel, and all offenders of a similar sort, will be met with severe chastisement.

VIII. AN UNMEDIATED VIEW

One might think that a body that empowers the average individual against the forces of injustice would be the subject of public reverence, respect, and appreciation, but such is hardly true for the civil justice system. By and large, the popular representation of the court is an unfavorable one. A composite of the various negative public conceptions of the civil court would portray it thusly: a corrupt, imbecilic body before which greedy, equivocating, ambulance-chasing lawyers bring baseless, trifling cases and win multimillion dollar settlements from suing corporations with deep pockets for any frivolous reason they can dream up. The internet, airwaves, and legislatures of America abound with cries for the limiting of “lawsuit abuse,” and for “tort reform.”

Of course, the civil justice system and the lawyers who argue before it are not perfect, but neither is any other body or profession.
Why then, are the members of the civil justice system, and trial lawyers in particular, singled out as more likely to be duplicitous than members of any other profession?

Perhaps lawyers are slapped with the epithet “liar” not because of any genetic or professional disposition to falsify, but because every argument they make, and every conflict in which they participate in the resolution of, is by definition disputable. Frequently, when someone reads about a case in the newspaper and dismisses it as frivolous, they do not so much possess any information proving that the case is without merit, but merely disagree with the attorney’s and the court’s interpretation of the available information.

Part of the beauty of the civil justice system is that every case involves several different ways to view a situation, and that both parties are given a fair chance to argue for the fitness of their own interpretation. It is essential that cases that seem frivolous at first glance, but have the tiniest reasonable possibility of merit, be argued before the court. Many opinions that we today consider fundamental pillars of society were once decried as fallacies. There was likely a time when the majority of Americans would have considered Brown v. The Board of Education to be a frivolous case. Ultimately, society is enriched and enlightened by the court’s critical process of considering all reasonable outlooks, rather than dismissing unlikely but possible arguments off hand.

Those who bemoan the presence of supposedly frivolous cases in the civil justice system are actually subscribing the very principal of disputability upon which the court is founded. Their disagreement exemplifies the clashing of informed points of view that is meant to occur in the court room, and to lead to a better understanding of the truth. The key word of the previous sentence is “informed.” In the course of everyday life, the average citizen has no source but the media for information about the world outside of his or her personal existence. Most citizens do not have the time to research and check the information communicated to them via the media, and therefore must either believe what they are told, or resign themselves to uncertainty. This dilemma often leaves the public vulnerable to adopting incomplete, inaccurate, and biased reports from the media as the truth. Its dependence on the media often renders the public ill-equipped to form informed opinions about many issues, including the merits of civil court cases.

The way in which a juror learns about the parties involved in a civil suit is the opposite of the way in which the average American
learns about the outside world. In everyday life, the information Americans receive tends to come from the media, but the information a jury receives is unmediated; it comes directly from the sources, to whom the court has uninhibited access. The people making statements in a trial are held personally accountable in a way that people making statements for the media are not -- there is no distance between speaker and audience, no buffer between making a claim and being held responsible for making it.

It is in the courtroom, more than in any other place, that the facts of a case become most accessible to the people who must make a decision based upon them. Manufacturers are made to produce internal documents, memos, letters, and test results that never would appear in their official press releases. Witnesses and experts must give testimony under oath, before the scrutiny of judges and attorneys, with jurors looking into their eyes. Public relations techniques and biased news reporting, tools often employed by manufacturers to misinform and mislead the public, cannot be used to sway a jury. Within the walls of a courtroom, many of the distractions are stripped away that, in the outside world, prevent the full truth from being readily and directly exposed to public knowledge.

The sources of information are at the beck and call of the court; they are at the disposal and service of the people who need to learn the truth from them, rather than in the control of any private interest.

IX. THE COMPARATIVE ENLIGHTENMENT OF THE JURY

When Stella Liebeck successfully sued the McDonald's Corporation in 1994 after she received burns from spilling McDonald's coffee on herself, The Wall Street Journal reported that "public opinion [was] squarely on the side of McDonald's." The court's finding against McDonald's seemed an outrageous violation of common sense. Everyone knows that coffee is supposed to be hot, and one ought to use caution in handling it; if you spill it and burn yourself, that's unfortunate, but it's your own fault and no one else's. The jury members, many assumed, must have been morons.

In actuality, at least three members of the jury expressed that, before the trial began, they too had felt that the Ms. Liebeck's case

43. See, Gerlin, supra note 34.
would turn out to be ridiculous. By the end of the trial, though, a complete transformation had taken place. It took the jury only four hours to reach a unanimous verdict against McDonald's. What witchcraft had Ms. Liebeck's lawyers employed to turn a group of sensible people into a "runaway jury"? What was the difference between the jury members and the preponderance of the public, which was so convinced of the frivolity of the case? The jury had direct exposure to the facts.

Jurors are brought to a state of comparative enlightenment by their participation in the trial; they learn details first-hand that they otherwise would probably never have known. One juror remarked that the facts presented were "overwhelmingly against the company." By coming into contact with the facts in a way in which the most of the media had not chosen to present them, the jurors gained an insight into the case unavailable to the general public, and was better equipped to ascertain the true extent of the wrongdoing, if any, committed by McDonald's.

News articles and oral gossip circulating at the time often glossed over the specific nature of the burns that Ms. Liebeck had sustained from the coffee spill, merely noting that she had been burned. When most people think of being burned by spilled coffee, they picture a red patch, perhaps even a blister. During the trial, the jury learned that Ms. Liebeck had received third degree burns on her groin, inner thighs, and buttocks, killing the full thickness of her skin down to the nerves and blood vessels, that required a week in the hospital, skin grafts, and two years of rehabilitation and therapy. The jury was also shown pictures of her injuries. No longer could the jury members join with the majority of the public in dismissing Ms. Liebeck's injuries as trifles. She had been hurt to a degree of seriousness that most people would not have expected as a result of spilling a cup of coffee.

Another advantage that the jury had over the general public was that they were able to witness in person the attitude McDonald's took toward Ms. Liebeck and her injuries. One McDonald's executive testified that although they knew most customers would

45. See, Gerlin, supra note 34.
46. See, Brill, supra note 44.
not assume that a spilled cup of coffee could result in such severe
burns, much less skin grafts and years of recuperation, the com-
pany had chosen not to warn consumers about these dangers.48 In
response to the fact that internal documents from McDonald's con-
firmed that the company received at least 700 burn complaints of
varying severity over a ten year period, McDonald's argued that
700 injuries are "statistically insignificant" compared to the mil-
lions upon millions of cups of coffee sold that did not result in in-
jury. No burn expert had been consulted by the company to ad-
dress the issue, though McDonald's had already had to settle sev-
eral burn complaints by paying the victims, sometimes more than
$500,000. The company appeared distinctly dismissive of both the
danger of their coffee and the individuals it had hurt.49 Nothing
could substitute for being physically present to see McDonald's
acknowledge that they knew of 700 injuries of varying degrees of
similarity to the horrific burns suffered by Stella Liebeck, and yet
brush off the issue, stating that, "there are more serious dangers
in restaurants."50 The jurors saw McDonald's as few members of
the public would ever be able to see the corporation.

In an argument similar to that employed by the Riegel Textile
Corporation in the Gryc case, McDonald's claimed that it had sim-
ply complied with coffee industry standards that suggested coffee
be held at around 180 to 190 degrees Fahrenheit for the best taste.
When a witness for McDonald's testified that any liquid above 130
degrees Fahrenheit could cause third degree burns, implying that
the specific temperature of McDonald's coffee did not matter, a
witness for Liebeck noted that the hotter the liquid, the quicker
severe injuries are inflicted. Coffee at 190 degrees could cause a
third degree burn in less than three seconds, while coffee at 180
degrees would take 12 to 15 seconds, and at 160 degrees, it would
take about 20 seconds.51 Ms. Liebeck would have had more time to
remove her coffee-soaked clothing, thus reducing the severity of
her burns, had her drink been served at a lower temperature.

When the jury was clearly presented with the facts of the plain-
tiff's case, and was able to size them up next to what they discov-
ered about McDonald's' attitude toward its customers' burn inju-
ries, the decision was relatively simple. The fact that a coffee in-

48. See, Gerlin, supra note 34.
49. Id.
50. Id.
51. Id.
dustry association says that coffee tastes best at a certain temperature does not necessarily make coffee safe to drink at that temperature. McDonald's admitted it was fully aware of the dangerous nature of its coffee, and was receiving an average of 70 burn complaints a year, yet had written off these injuries, deciding neither to warn consumers of the unexpectedly serious burns that might result, nor to investigate as to why so many people were being badly hurt by a McDonald's product. It became obvious to the jury that McDonald's was shirking its responsibility to alert and protect its customers from a danger that McDonald's itself knew of, but that many of its customers did not.

The jury found that Ms. Liebeck bore 20% of the responsibility for her injuries, as it was she who had spilled the coffee. However, the rest of the responsibility was found to rest upon McDonald's, whose active disregard for the safety of its customers led directly to the fact that the coffee Ms. Liebeck spilled on herself was hot enough to nearly instantly destroy the skin that it touched. Had the jury not learned from internal documents of the 700 previous complaints, and had the jury not heard McDonald's admit that it knew of the injuries, knew of the danger and of the consumer's unawareness, but that in the end it didn't attach enough importance to the issue to do anything about it, perhaps then the jury could have gone on believing with the rest of the public that the case was a frivolous joke. But the trial process had exposed the jury to a truth that the general public is not often allowed to access in its unadulterated, unmediated form -- a corporation had knowingly endangered people for the sake of a more marketable product.

Only in court could a consumer force a corporation like McDonald's to provide the private, internal information and to answer the embarrassing questions that would exhibit the extent of their relative disregard for their individual customers. The civil justice system, in a way that even a well-researched work of investigative journalism cannot, brings a manufacturer into sharp focus for the eyes of the audience, the jury, to inspect. There is no way to be closer to the subject of an inquiry than to be in the same room, to hear the words from the source. It is in court, where such first hand contact occurs, that the most well-informed judgments about a dispute can be made.

52. *Id.*
53. *See, Gerlin, supra* note 34.
All three of the bodies discussed above, the government, the media, and the civil justice system, have proven themselves capable of upholding the interests of the consuming public. However, only one body, the civil justice system, not only defends but empowers the consumer. The people depend on bodies like the media and the government, just as children depend upon their guardians, to defend them from defective products and to punish immoral manufacturers who would hurt them. The civil justice system, on the contrary, allows the individual consumer to take the safety of the public and the chastisement of industrial wrongdoers into his or her own hands; the consumer is no longer a child reliant on the advocacy of the government, media, or any other body. It is only in the context of the civil justice system that the consumer, in his or her own right, can demand the respect and accountability of the most powerful elements of society.

In a nation of millions, in which the average individual is all but totally isolated from the forces that influence and control daily life, the civil justice system provides a special environment in which, truth, accountability, and contact, rather than remoteness, become realities. Beyond protecting the rights of consumers, the civil justice system brings to light the known dangers of countless products, such as the recently produced drugs Vioxx, Baycol, and Paxil, thereby guarding the physical safety of the public.