

LAWLINE
by John Ritter

THE LITIGATION EXPLOSION

"Citizens should fear litigation more than anything but sickness and death," said a famous American judge in 1950. This is why the best lawyers traditionally counsel clients to avoid lawsuits. So why are we in the middle of a litigation explosion in late 20th century America? The reasons seem obvious: too many lawyers, contingency fees, jury unpredictability, and lawyer advertising. But what do I know -- I was wrong. These are just a byproduct of the real reasons.

A recent book on the litigation explosion by Walter Olson explains the reasons persuasively and thoroughly. A century of assault on legal certainty and strictness in pleadings, discovery, and evidence rules has brought on the anything-goes philosophy of American law today. It's as if a team of highly paid lobbyists for litigation lawyers has been at work most of this century, convincing judges to weaken legal rules.

The first change came with relaxed rules of notice pleading. The Federal Rules of Civil Procedure, approved for federal courts by Congress and the U.S. Supreme Court in the 1930's, allowed nonspecific complaints to be filed, inconsistent claims to be sued upon, and changes in pleadings to be made even during and after trial. Lawsuits multiplied because they could no longer be dismissed at an early stage for failure to word claims specifically and thoroughly.

The most radical change came with broadened pretrial discovery in all civil cases. Merely allowing it was a major step -- in England it does not exist. Then the standard of

what could be discovered before trial was broadened to anything that could lead to discovery of relevant evidence. Now, even the federal courts are complaining about the expense and time consumed by fishing expeditions and intrusion into private information that are now standard parts of the litigation process.

At the same time that rules of civil procedure were liberalized to allow vague notice pleading and pretrial discovery, legal rules became more indefinite and unpredictable. Child custody law has eliminated presumptions, divorce law divides property based on equitable distribution, and commercial law allows many exceptions to the statute of frauds and parol evidence rule. Appeals courts impose balancing tests which give total unpredictability, while legislators pass statutes with vague standards like reasonableness which likewise give no predictability. Certainty is gone, inviting all parties to go to court and roll the legal dice.

The same vagueness and lack of specificity has invaded the law of damages. It used to be that speculative damages could neither be sought nor awarded, only direct and certain ones. Now all we see are unlimited compensatory damage verdicts because of elimination of the direct and certain rule, and runaway verdicts for punitive and emotional distress damages.

Two more entrenched legal rules fell in the latter half of the 20th century, opening the floodgates of litigation. First was the choice of law rule that required courts to apply the law of the place of the accident to injury case; now it is the law of the state with the most significant contacts. This allows every litigant to seek maximum damages from insurance companies. Then came the death of contracts through new doctrines like

unconscionability allowing courts to ignore part or all of a contract. The lack of ability to count on written contracts means either side can threaten a long expensive lawsuit to invalidate an agreement. So now we have everyone from athletes and entertainers to public housing tenants ignoring written contracts and asking to renegotiate or change terms and amounts.

The Olson book concludes that we are feeling the side effects of ill-advised medicine for our legal system -- allowing litigation to be stirred up too easily, and encouraging lawyers to profit from the litigation they stir up. The answer is to take steps to make litigation an exception and last resort rather than business as usual. The beginnings are here -- mediation, tort reform, lowering of contingency fees -- but the 21st century will have to see even greater steps if we are to be saved from drowning in floodwaters of litigation.