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## A COMMENT ON CALIFORNIA'S PROPOSITION 64

By RAYMOND TITTMAN\*

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For California trial lawyers, Proposition 64's passage brings the "judgment day" Gov. Arnold Schwarzenegger promised in his now-famous "girlie man" speech. But "judgment day" is not over, as the proposition should by no means be seen as a total victory for tort reform advocates. Proposition 64, however, may have set the pace for reform in other areas that these advocates highlight as priorities.

Proposition 64, winning with 59% support, will limit certain civil lawsuits to plaintiffs actually injured in some way. California voters responded overwhelmingly to Gov. Schwarzenegger's election-eve rallies and commercials describing the serious damage to businesses under the status quo, where trial attorneys are alleged to "stalk innocent small businesses that create jobs."<sup>1</sup> Nor is there much doubt Gov. Schwarzenegger deserves credit for the measure's passage. A Field Poll three weeks before the election, before the governor fully engaged, showed Prop. 64 stymied at only 26% support.<sup>2</sup> Like another popular actor-turned-Governor from this state, Gov. Schwarzenegger did not just talk tough, he delivered.

Yet, when compared with some other states, California is by no means leading the pack when it comes to tort reform.

Ohio Gov. Bob Taft, for example, signed legislation this year limiting asbestos claims to plaintiffs with actual injuries. Mississippi, previously rated the country's worst legal system, corrected venue laws, reined in punitive damages, and limited a seller's liability when the manufacturer should be responsible. Arkansas, Oklahoma, Texas, West Virginia, Kansas, Arizona and Idaho all passed significant reform in the last two years, not to mention the dozens of states passing reform even earlier. These reforms regulate abusive class actions, reform product liability laws, and correct forum-shopping.

It will not be easy for California to catch up, as illustrated by recent legislation to moderate excessive punitive damage awards. Gov. Schwarzenegger sought the legislation as part of his economic reform agenda. Nineteen states have already enacted punitive damage reform. Even the United States Supreme Court, in *State Farm v. Campbell* (2003), curbed what it had called "skyrocketing" punitive damages "run wild."

Gov. Schwarzenegger's punitive damages measure would have addressed the plaintiffs' lawyers' incentive to seek punitive damages by giving 75% to the state and limiting trial attorneys' fees to a portion of the remaining 25%. But legislators removed key measures, letting plaintiffs' attorneys continue recover from the full 100%. As enacted, reform experts believe jurors tempted to satisfy benevolent or self-interests might actually award punitive damages more frequently and in larger amounts.

Notwithstanding, Proposition 64 puts trial lawyers on

the defensive, an advantage tort reform advocates will likely press. Legislation to address skyrocketing asbestos litigation would mark a significant step forward. Over seventy companies have declared bankruptcy due to asbestos-related liabilities. Even the United States Supreme Court has recognized the asbestos litigation "crisis." Trial attorneys filed over 100,000 new claims in 2003, "the most in a single year." Estimates suggest 90% of precious assets are exhausted paying uninjured plaintiffs, leaving fewer funds for truly injured plaintiffs.

An evident solution to this situation has already been enacted in jurisdictions most familiar with the problem, including Ohio, where Cuyahoga County alone counts 40,000 of the country's 300,000 pending cases. These jurisdictions reformed the system by prioritizing claims for truly injured plaintiffs, preserving claims by uninjured or "unimpaired" plaintiffs for if and when they become sick. The solution has proven effective and many reformers consider it to be just.

Asbestos litigation reform would turn the clock sharply forward on the "judgment day" Gov. Schwarzenegger promised. Advocates of tort reform argue that, more importantly, such measures will improve California's business climate. But, given the trial attorneys' resources and vigorous opposition, Gov. Schwarzenegger will have to make tort reform a priority in order to effect continued progress in this arena. Ultimately, the success of further tort reform efforts in California will depend on whether or not California voters resist the temptation to watch this unfold passively, as we watched Sarah Connor save the human race from the terminator, and perceive the litigation status quo as a genuine threat.

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### Footnotes

<sup>1</sup> Steve Lawrence, *Schwarzenegger Sides with Business Groups on Two November Props*, ASSOCIATED PRESS, Sept. 10, 2004.

<sup>2</sup> Press Release, Field Research Corporation, ...Plurality Intends to Vote No on Prop. 64 (Oct. 16, 2004)