The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law by Walter K. Olson

By D. Eric Schippers

"What has happened is that the legislatures ... have failed," boasted trial lawyer John Coale to the *New York Times.* "Congress is not doing its job [and] lawyers are taking up the slack."

While Mr. Coale was referring, in this instance, to the legal war against the tobacco industry, the quote is much more symbolic of how the trial bar views its role in society. With an unlimited amount of money, well-heeled judicial and political allies, an adoring press and an endless stream of industries to wage war on, the nation's new "litigation elite" sees itself as "rescuing the process of lawmaking from the lawmakers," according to Walter K. Olson in *The Rule of Lawyers*.

A senior fellow at the Manhattan Institute and author of *The Litigation Explosion*, Olson serves up an eye-opening, jaw-dropping, behind-the-scenes look at how the self-anointed "Fourth Branch" has managed to infiltrate every corner of America's legal and political landscape. The author paints in lurid detail an incestuous picture of the trial lawyers' well rehearsed "three prong" strategy comprised of legal, political and public relations efforts, bolstered by open checkbooks, lies, deceit and, dare we say, extortion.

Starting with the $246 billion tobacco settlement, *The Rule of Lawyers* covers the big-city suits against gun manufacturers, the spurious silicone breast-implant affair and the past and ongoing asbestos suits, among others. In each case, Olson exposes the trial bar's dirty tricks-of-the-trade and explains how lawyers were able to manipulate the legal and political systems to bring down entire industries and force the largest redistribution of wealth ever seen in this country.

To understand the origins of stratospheric class action and personal injury suits now regularly splashed across newspaper front pages and trumpeted on nightly "newsmagazine" shows, Olson takes us back to the 1970s, the beginning of the American legal establishment's "love affair with the lawsuit."

While much of the nation was preoccupied with the aftermath of Vietnam and Watergate, not to mention the ubiquitous disco ball, mood rings and the pet rock, a team of lawyers, inspired by Ralph Nader, was busy at work hashing out novel legal theories to support the proliferation of class action lawsuits against American businesses.

Drawing up a laundry list of perceived harms they claimed could be traced back to the doorstep of corporate America, liberal activist lawyers put forth what one might consider a rough blueprint for today's explosion of mass tort litigation. Everything from "junk food" and alcohol consumption, to air and noise pollution made the list.

By the mid-1970s, many of the old barriers to big ticket litigation had been, or were in the process of being, knocked down. "Rules of procedure were drastically liberalized to make it easier to sue and harder to get a suit dismissed," explains Olson. "Notice pleading" allowed lawyers to "sue first and then begin rummaging around to see whether they had a case." Fishing expeditions were greatly aided by the liberalization of pretrial discovery. "Long Arm" jurisdiction made it easier for lawyers to venue shop. And, in 1977, the U.S. Supreme Court affirmed the constitutional right of lawyers to advertise.

Those important ingredients, combined with new developments in product-liability law in the late 1960s — which provided that "companies could (retroactively) be sued for failing to warn about harmful characteristics of the products they sold" — provided a winning recipe for the trial lawyers to launch their assault on the asbestos industry and others.

By 2001, the wacky legal theories of Ralph Nader's acolytes from a bygone polyester era had officially made a comeback. Suddenly, Olson explains, the notion of "universal enterprise liability — in which Schick and Gillette would pay for your razor nicks, Toyota for your bad driving skills, and Baskin-Robbins for the extra pounds you owed to its Jamoca Almond Fudge — was now the stuff of respectable discourse."

Today, as the line between class action and personal injury claims continues to blur, lawsuits have been filed against McDonald's on behalf of customers who claim the company's "junk food" made them fat. Trial lawyers are targeting the managed-care industry, lead paint manufacturers and pharmaceutical makers over drug pricing; some have even gone after cell phone makers for an unsubstantiated link between cell phones and brain cancer.

And what benefit do the plaintiffs receive from actions such as these? Generally they might end up with "non-monetary relief" in the form of a redeemable coupon, or in some cases, nothing at all. Olson points out a well-known class action suit in Alabama in the mid-1990s against a mortgage lender over escrow practices. In that case, many of the class members were awarded benefits that were "actually smaller than the legal fees deducted from their accounts, leaving them poorer in various instances by $100, $150, or more." As for the trial lawyers, their relief is frequently hard to fit on a calculator.

While the trial lawyers continue to prowl for the next big score, *The Rule of Lawyers* provides valuable ammunition for those who march under the banner of legal reform. Perhaps more important, it serves as a wake-up call to those who have long turned a blind eye and a deaf ear to the crisis of "jackpot justice" in our courts and the growing influence of trial lawyers in public office.

As trial lawyer John Coale boasted to *The New Yorker* in regard to lawsuits filed against gun manufacturers: "[We] have the resources to start a war instead of taking little pot-shots ... Well, we've started a war."

With former trial lawyer-turned-Senator John Edwards throwing his hat in the ring for President, it looks as if the trial bar is now in the market for a Commander-in-Chief.