Max Weber and Development

pp. 185-207

February 11, 1996

1. Weber seems to see a progression as to the types of law from formally irrational to substantively irrational to substantively rational to formally rational.
    a. He saw this rationality in law as part of the whole project of rationality in Western systems that allowed the rise of capitalism and material progress.
    b. The key point is that individuals are free from arbitrariness and can plan with some certainty that law will not undercut their ventures and will support them.
        (1) The 2 kinds of irrational systems make planning difficult unless they are a sham and hidden behind revelation and magic are real predictable patterns--we who count can count on the high priests.
        (2) Weber finds substantive rationality too uncertain for capitalism; there is a demand for real formal rules with answers. Thus, we get classic continental European law.

2. Does his theory play out empirically?
    a. He faced his "England" problem: Great Britain was a successful capitalism imperialist nation that exported its legal system. However, it had the common law which, at best, was a poor version of formal rationality mixed with a lot of substantive rationality.
        (1) Sterling and Moore suggest that the English system produced predictable results because "the courts favored capitalists in their use of precedent and denied justice to the lower classes." n&q5, pp. 196-200
        (2) To make capitalism work, how predictable must law be? Is a substantively rational system chaos? S & M suggest that standards can communicate rules of the game. We know the external values being pursued and we we know the judges--then we can make probabilistic judgments about how much risk we want to take.
    b. Look at the U.C.C. in the U.S. Are we lost in substantive rationality? Would the U.S. economy be different if we had formal rationality--a series of bright line rules? Note that the U.C.C. is a reform away from formal bright line rules.
        (1) Back to Macaulay in the last Chpt. When does K law play what role?
        (2) Key thing is getting the expected performance. That's what must be predictable. Law is but one factor in this. What about tort and products

(3) See Ronen Shamir, Formal and Substantive Rationality in American Law: A Weberian Perspective, 2 Social & Legal Sutides 45 (1993)

[A]t least in the United States, formally-rational law was developed from within a court-centered system wich relied on analogies and precedents, rather than statutory rules, as a basis for its 'rationalization'. In this configuration, codified law was considered as the ultimate embodiment of substantively-rational law. The enemies of statutory legislation viewed it as a manifestation of arbitrary considerations, as the invasion and corruption of autonomous law, as the enemy of formal rationality. The advocates of the transition from a court-centered system to a system that relied more heavily on statutory legislation, on the other hand, advanced the consciusly articulated claim that an enlightened law should be more responsive to social and political considerations and less self-protective by an illusion of an autonomous system of logical rules.

In short, I try to show that the legal realists led a movement in the direction of a 'German' legal system: one that relied on statutory rules, enacted by a strong federal state, and developed by academic legal experts at the direct and indirect service of the state. Unlike Weber's model, this movement was conceived by its carriers as a shift away from, rather than towards, formally-rational law. [46]

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[T]he interplay between ideally formal and ideally substantive law corresponds to the itnerplay between periods of stability and reform in the political arena... [63]

Autonomous law is discarded when its internal tensions and inconsistencies can no longer be sustained, but in order to institutionalize // and permanently root desired

Soviet Union move toward capitalism, they lack a western legal system to support Ks and to regulate transactions. USAID and Forbes call for the "rule of law."

A. How do transactions take place?
   (1) Barter and swaps.
   (2) Long-term continuing relationships where I will need you tomorrow and so

[redacted]

this forms the basis of trust.
   (3) Private government--from arbitration in Sweden to organized crime that protects transactions and persons.

B. Would it be enough to copy the laws of Germany or the United States? Cf. the Chinese laws on intellectual property and the pirating of CDs and computer software where there is such a gap between the law on the books and the law in action.

C. Nonetheless, it would make things better if there was, for example, a secured transactions system so that it would be easier to borrow or make long-term Ks with less risk.

4. There has been a great deal of capitalist development around the world w/o Weberian formal rationality. See Jane Kaufman Winn's article in n&q 13 on p. 207 about Taiwan.

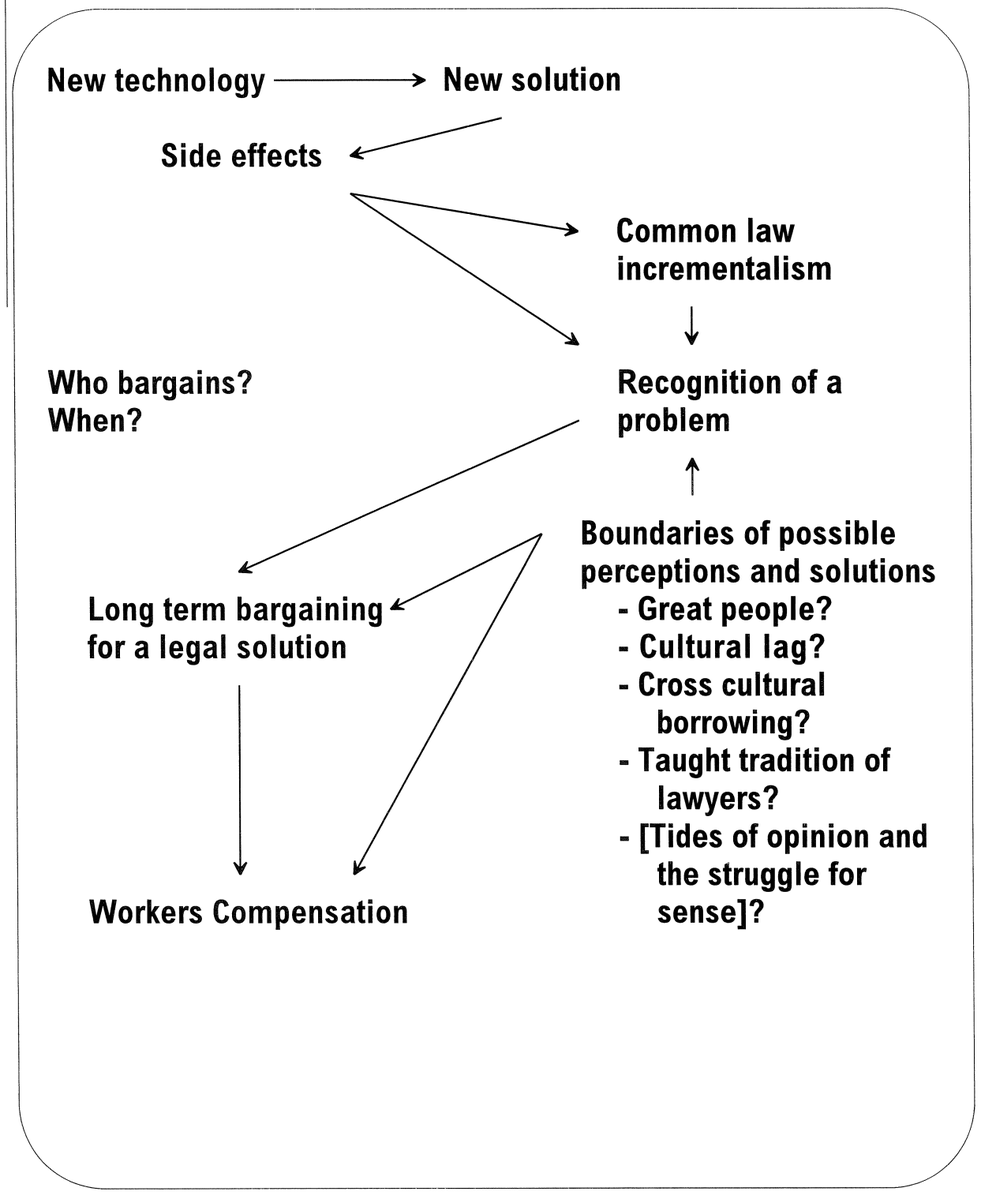
[insert excerpts from my Lima talk on DeSoto's "The Other Path"]

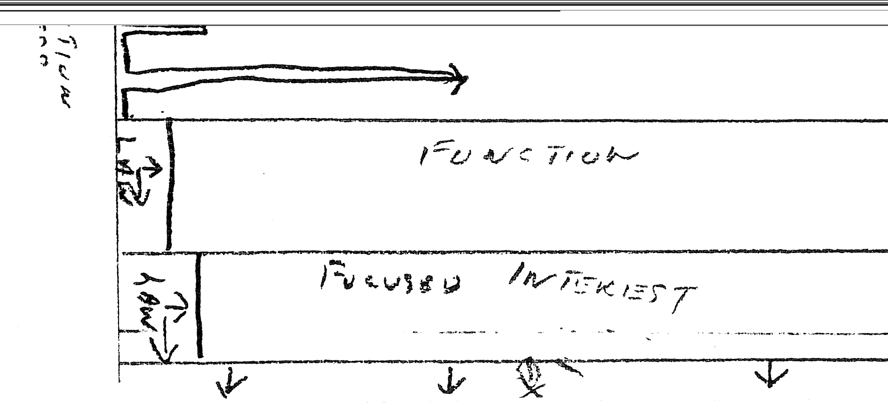
All of these articles have considered in some detail Hernando de Soto's *The Other Path*. [redacted]

participate in a second economy. Most significantly for this paper, de Soto calls for the courts to enforce the contracts of those now in the second economy to encourage planning and risk taking. He found that those in the informal sector use inefficient tactics to insure performance of agreements. They create and maintain trust, dealing

5. Does a Western legal system affect cultures based on communal organization? See Matsuda on pp. 201-204. She sees the legal system wrecking traditional Hawaiian ways, but she sees the Hawaiians flocking to it. Why? Not everyone liked the old hierarchy and traditional duties or their place in the scheme of things.

6. Note Galanter on "modern legal systems." [pp. 204-206]
   A. Isn't this saying that a modern system is one like Western Europe, the USA or Canada? But cf. Winn and the others who study the success of the 5 Dragons--Taiwan, Korea, Singapore, Hong Kong and ?
   B. If we read the statutes and constitution of Peru, wouldn't it come close to the picture painted by Galanter?
      (1) Is it enough to have a modern legal system on the books? Cf. the paper at the Lima conference on the tort system when most people don't have the money to pay judgments and few carry insurance.
      (2) Add in the institutions of bribery and preferential treatment to those whose families count.


New technology
New solution
Side effects
Common law incrementalism
Who bargains? When?
Recognition of a problem
Boundaries of possible perceptions and solutions
- Great people?
- Cultural lag?
- Cross cultural borrowing?
- Taught tradition of lawyers?
- [Tides of opinion and the struggle for sense]?
Long term bargaining for a legal solution
Workers Compensation


FUNCTION
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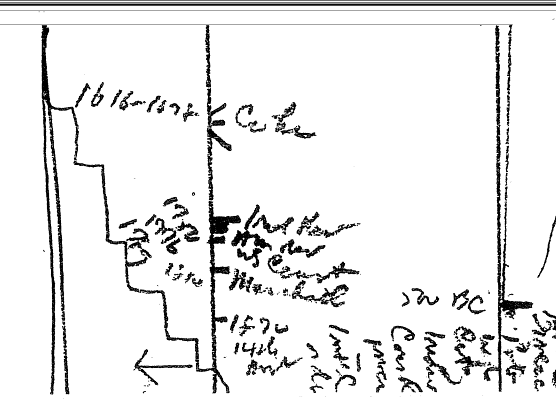
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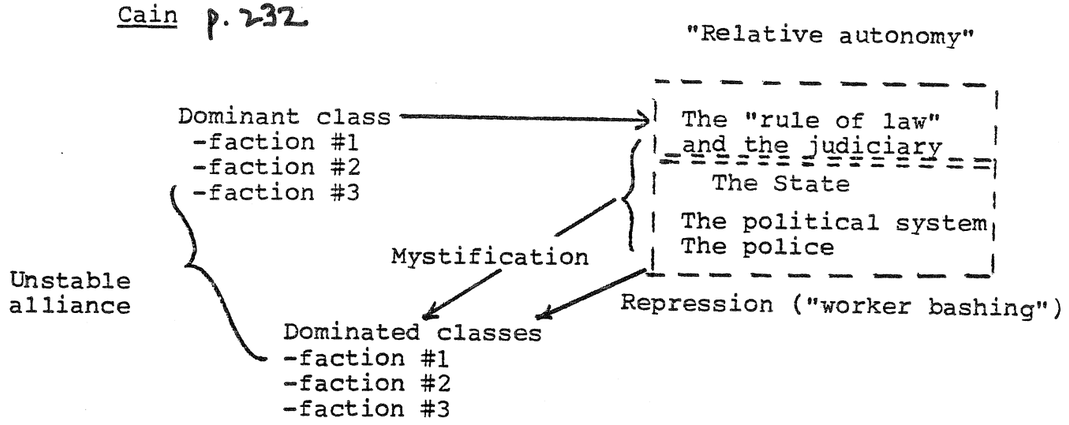
"Relative autonomy"
Dominant class
-faction #1
-faction #2
-faction #3
The "rule of law"
and the judiciary
The State
The political system
The police
Mystification
Unstable
alliance
Repression ("worker bashing")
Dominated classes
-faction #1
-faction #2
-faction #3

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Tuesday, January 4, 2000

Civil Action: Why Americans Look To the Courts to Cure The Nation's Social Ills

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From HMOs to Biotech, One Lawyer Says He Does The Jobs Congress Shirks

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Evolution of Mass Litigation

By Paul M. Barrett
Staff Reporter of The Wall Street Journal

WASHINGTON -- Is there a hot social issue that attorney Michael Hausfeld hasn't turned into a lawsuit lately?

His 30-lawyer firm here is helping lead courtroom assaults on managed-health-care companies and handgun manufacturers. Just as anxiety

On a typically harried morning, the 53-year-old lawyer juggles conference calls coordinating antitrust litigation against Microsoft Corp. and the vitamin industry, as well as a $5.2 billion settlement he helped negotiate on behalf of people enslaved 60 years ago by the Nazis and major German corporations. "It's a little crazy around here," he apologizes, cheerfully.

Some observers think his frenetic activities are crazy in another sense. "It's something new, the next stage," says Victor Schwartz, a veteran corporate defense attorney. Sophisticated plaintiffs' lawyers, he continues, "are playing off politics, anticipating the industries that will be vilified, then attacking en masse."

Boxes of bulging loose-leaf notebooks on Mr. Hausfeld's conference table underscore this impression. Expecting growing consumer resentment of HMOs, he began in the early 1990s to gather ammunition for a class action assault on

Corporate gadfly Jeremy Rifkin celebrates what he describes as the evolution of mass litigation into a full-fledged adjunct to lawmaking and regulating. Mr. Rifkin, who more than a year ago pushed Mr. Hausfeld to sue over genetically modified crops, speaks of the lawyer as an interest-group leader might speak of his Capitol Hill lobbyist: "Michael is using the courts as a bully pulpit, as well as an institution that arbitrates disputes."

Often inefficient and expensive -- sometimes perverse in its effects -- litigation has gone beyond being a quirk of American culture; it is a central

that judges lack the expertise to superintend entire industries and that cases are settled without a close look at the fate of alleged victims.

Mr. Hausfeld embodies the litigation society. Heavily influenced by accounts of the Holocaust he heard growing up in a left-leaning Jewish family in Brooklyn, N.Y., he went to law school thinking he could combine good works with good pay. He has used his firm's winnings from securities and antitrust suits to underwrite an ever-broadening portfolio of what he considers social-reform suits. These include successful

attorneys, he argues, makers of guns or cigarettes wouldn't come to the bargaining table.

Although he personally takes home more than $1 million in good years, Mr. Hausfeld is far from the nation's wealthiest or best-known plaintiffs' lawyer. To the chagrin of some of his partners, he handles certain cases for free and has invested millions in others that have flopped. Still, his burgeoning caseload reflects as well as any attorney's the stunning proliferation of issues that have become the subject of civil litigation.

His first job out of law school was at a big corporate law firm, Arent Fox Kintner Plotkin & Kahn in Washington, with a salary, he says, that "was hard to turn down." But six months later, after

class description to be counted as part of the class, unless they explicitly withdrew. That greatly multiplied the potential liability of corporate defendants. State courts soon followed the federal lead, and the enactment of new consumer rights statutes in the 1970s expanded the grounds on which class actions could be brought.

The courtroom balance of power continued to shift toward plaintiffs in the 1980s, as attorneys specializing in personal injury pooled thousands of cases on behalf of shipyard and petrochemical workers exposed to asbestos. Mr. Hausfeld and a few colleagues in 1986 formed their own firm -- Cohen, Milstein, Hausfeld & Toll, or CMH&T -- to focus on securities and antitrust

says Mr. Hausfeld. One example was industrial pollution.

The Hausfeld firm was one of dozens that assailed Exxon, now part of Exxon Mobil Corp., after the Exxon Valdez tanker ran aground in Alaska's Prince William Sound in 1989, spilling 11 million gallons of oil. "You had the usual entourage of ambulance chasers and a total mess," says David Oesting, a commercial litigator in Anchorage who usually defends companies. The Hausfeld firm landed as clients a group of 5,400 native Alaskans, a

pressure on corporate defendants to settle before trial and pay healthy legal fees. Even among skeptics of large lawyer payouts, however, CMH&T's "reputation is generally good," says Brian Wolfman, an attorney with Public Citizen Litigation Group, a pro-consumer firm that regularly intervenes in class actions to try to reduce legal fees.

Mr. Hausfeld blames greedy rivals for tarnishing the reputation of the plaintiffs' bar. He says he deplores the

relationship that grew out of earlier legal work Mr. Hausfeld had done for free for other Native Americans seeking to recover artifacts from museum collections.

Mr. Oesting, who in this

the 1990s in which consumers received discount coupons redeemable only by buying more products from the very corporate defendants they had sued, while lawyers walked away with millions in cash. "That's abuse of the system,"

million in fees -- more than $1.5 million of which went to CMH&T. Mr. Hausfeld says that many of the coupons were collected by companies that were plaintiffs and whose employees travel frequently, putting the discounts to good use. But he says his firm hasn't done another coupon settlement since.

A source of great pride -- but also internal strain -- at the Hausfeld firm is his work on behalf of Holocaust victims. For decades, the German government and major German companies, including some affiliated with U.S. corporations, stonewalled tens of thousands of survivors who claim they were forced to work for Nazi industry. Swiss banks accused of improperly keeping assets of Holocaust victims were equally unwavering

American lawyers like Mr. Hausfeld.

In 1998, the case against the Swiss banks was settled for $1.25 billion. Last month, the separate forced-labor case was settled for another $5.2 billion. There has been intense and highly visible feuding among some of the American lawyers, largely over how much they should be paid. Mr. Hausfeld notes that even though his firm worked for three years on the Swiss banks case-hiring a dozen researchers to pore over archival documents-he made it clear from the outset that CMH&T won't ask for a dime in payment.

He says that this sort of sacrifice justifies the large rewards gained from other cases. Some of his partners

years, as little as $200,000, which is what senior associates receive at the premier corporate firms.

In 1998, CMH&T was borrowing heavily to finance the Holocaust litigation and other cases. After tense internal debate, Mr. Hausfeld agreed that the firm would seek a yet-to-be-determined fee in connection with the slave-labor case. The concession, he admits, dilutes the impressiveness of having done the Swiss banks case for free, and will lead inevitably to friction with other firms.

The irony, says Mr. Hausfeld, is that if his partners had listened to him years earlier about tobacco, they wouldn't be arguing about money now. CMH&T received feelers in the early 1990s about joining other firms representing various states as they prepared suits against cigarette makers. Mr. Hausfeld wanted to plunge in. Mr. Toll, fees. Mr. Toll acknowledges regret. "We could have done a lot" with a slice of the tobacco money, Mr. Hausfeld says.

Missing the tobacco fight made Mr. Hausfeld all the more determined to get involved in its progeny, the wave of municipal lawsuits against the gun industry that started in late 1998. Though his partners generally share his desire for more gun control, some complained that the relatively small gun industry lacks the cash flow to fuel substantial settlements. Mr. Hausfeld prevailed on this one; the firm is helping represent Boston, San Francisco and other cities suing gun makers.

He points out that many of his current activities have deep personal roots. In the 1970s, he filed suit to try to force the federal government to ban bullets as an excessively dangerous product. That effort failed. In the

His collection of loose-leaf notebooks serves a dual purpose: holding course material for law-school teaching he has done and charting potential courtroom targets. As managed health care expanded in the early 1990s, the volume on HMOs swelled. Congress, in his view, has failed to protect patients' rights. Late last year, he and a cadre of class-action lawyers launched mass suits against major HMOs. A CMH&T suit filed in federal court in Miami alleges that Humana Inc. has defrauded millions of people by concealing the financial criteria used in coverage decisions. (Humana spokesman Tom Noland calls the suit "groundless," adding that the company makes numerous disclosures to regulatory bodies and members.)

Mr. Schwartz, the corporate defense attorney, says that mass lawsuits against entire industries, such as health care, make a mockery of legislators, who for years have been struggling over HMO regulation. Leave it to Congress, he says.

But deferring to Congress doesn't always work for corporate advocates. Mr. Schwartz, a partner with the Washington firm Crowell & Moring, has made a good living for many years, lobbying lawmakers on behalf of business interests who want to rein in the plaintiffs' bar. Some restrictions on securities litigation were enacted in 1995, but beyond that, Congress has generally allowed plaintiffs' lawyers to roam free.

In the future, Mr. Hausfeld predicts, the plaintiffs' bar won't wait to attack until after Congress gets bogged down in controversies such as those over cigarettes, guns or HMOs. He offers his class-action suit against Monsanto as a model.

In the winter of 1998, long before popular anxiety over genetically modified crops migrated from Europe to the U.S., a mutual acquaintance arranged for Mr. Hausfeld to have lunch with Mr. Rifkin, the anti-bioengineering activist. Their discussion blossomed 18 months later into the lawsuit filed against the St. Louis-based food and pharmaceuticals giant in December. In the suit, a group of farmers accuse the company of failing to adequately test the safety of genetically modified corn and soybean plants and of trying to monopolize how staple crops are grown. Nine other plaintiffs' firms are backing CMH&T in the case, which Mr. Rifkin predicts will become a centerpiece in a campaign to

roll back the widespread U.S. planting of genetically modified crops.

Monsanto denies wrongdoing and predicts the suit will be thrown out. The Wall Street Journal's editorial page used the case as an occasion to brand Mr. Hausfeld a "corporate shakedown artist."

The epithet irritated him a little, he says. But then, he says, he decided that the notice signals that he has truly arrived.

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Wednesday, January 5, 2000

Letters to the Editor: Strong Feelings About Lawsuits

Who says you have to suffer an injury in order to collect damages in a lawsuit? Beaumont attorney Wayne Reaud avoided that obstacle in his successful $2.1 billion settlement against laptop giant Toshiba. ("Beaumont's Wayne Reaud Takes New Tack on Torts," Dec. 15.)

While the charge of producing a flawed floppy-disk controller sounds serious, here is the oddity: No consumer has ever claimed any actual harm.

It takes such an extreme situation for the flaw to show itself that one wonders if any users ever experienced data loss. Besides, laptop owners rarely use their floppy drives to store data, preferring instead the more-reliable modern transmission of files.

And, unlike the more-traditional class-action lawsuits, not even the two named plaintiffs, or "national representatives" as they are called, had to experience the problem in question.

It reminds me of the lawyer spoof from "Saturday Night Live": "Let us help you collect the money that you didn't even know you were entitled to."

No reported customer complaints, no proof of harm, yet five million Toshiba laptop owners will soon be lining up for their cash rebates, coupons and software fix. The two named plaintiffs receive $25,000 each. For their part, the trial team from Beaumont pockets a handsome $147 million.

Toshiba, meanwhile takes a $1 billion charge-off, an immediate downgrading of its credit rating and a slippage in its share price.

Requiring a public notice or a product recall would have made more sense for consumers; but then again, it wouldn't have produced hundreds of millions for lawyers.

Cora Sue Mach

Executive Vice President

Mach Industrial Group

Houston

Texas Civil Justice League lobbyist George S. Christian was probably being disingenuous when he professed ignorance about the "social benefit" of suing unruly corporations.

Still, the corporate lobby does need schooling. Mr. Christian's quote appeared in an article discussing lawsuits filed against:

-- Oil companies (the League's founders) that exposed workers to asbestos;

-- Companies that lied about the addictiveness of tobacco and marketed it to kids;

-- A nursing home responsible for the death of an Alzheimer's patient;

and

-- A company that knowingly sold a computer that corrupted data.

The social benefits of these lawsuits are elementary: Companies that harmed workers or consumers got punished; victims got compensated; and society sent a deterring message to other would-be wrongdoers.

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Craig L. McDonald

Director

Texans for Public Justice

Austin

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The Wall Street Journal

Tuesday, January 4, 2000

Technology & Health

Toshiba Explains Accord as Other PC Firms Study Suits

Questions on Chip Flaw Affect H-P, Packard Bell, Compaq and eMachines

By David P. Hamilton and Robert A. Guth
Staff Reporters of The Wall Street Journal

When Toshiba Corp. settled a personal-computer related lawsuit for $2.1 billion in October, it left a lasting mystery: Why did the Japanese giant surrender without a court fight and on such relatively generous terms?

Moreover, just how serious is the defect?

class-action lawsuits. If the Toshiba case is any indication, the potential cost of these cases could be considerable. Only Compaq has announced its intention to fight; the others have for the most part declined to comment.

The threat of increased legal scrutiny is unnerving to the fast-moving, $189 billion-a-year PC industry, which tolerates a far higher degree of imperfection than many other consumer industries. PC officials, in fact, often argue that because the hardware and software components of PCs evolve so quickly, and are produced by such a large array of suppliers, it is almost inevitable that PCs are prone to unexplained lockups, mystifying bugs and unexpected crashes.

At the heart of the Toshiba matter is a technical flaw in a PC chip known as a floppy-disk controller, one that under certain circumstances could damage or destroy data stored on floppy disks. Although that defect was discovered 13 years ago and was corrected a few years

What may have made Toshiba particularly vulnerable to the suit, however, is the fact that in addition to making notebook computers that exhibited the data- corruption problem, it also produced the defective floppy-disk controllers as well -- chips it has supplied to other PC makers for years. What is more, some Toshiba engineers had been aware of the problem in its chips for more than a decade, an individual close to the company says, but declined to fix it because they considered the likelihood of data-damaging errors remote. A Toshiba spokesman declined to comment.

The floppy-disk bug was first uncovered in late 1986 by Phillip Adams, then an engineer at International Business Machines Corp., who noted that under certain circumstances floppy-controller chips made by NEC Corp. of Japan could damage data stored on floppy disks. Intel Corp., which had licensed the floppy- disk controller chip design from NEC, also produced a chip that exhibited the problem.

Even then, the companies say, the problem was difficult to detect, since it didn't result in data loss except in unusual situations, such as when two programs attempted to use the floppy disk drive at the same time. Such conditions could prompt a common data-writing error known as an overrun. The defective chips, however, failed to detect the error and prevent the accidental destruction of existing data.

Both NEC and Intel fixed the problem in subsequent generations of chips released within a few years, and in 1990 and 1991 NEC even ran eye-catching ads warning of the problem and urging PC makers to switch to its newer chips. Neither NEC nor Intel ever received any complaints about data loss related to the controller problem, the companies say.

But the problem wasn't restricted to NEC and Intel chips. A few years earlier, Toshiba semiconductor engineers had reverse-engineered the NEC chip. When NEC found out, the two companies huddled in negotiations that eventually led to a "nonassertion agreement" in 1986. Under its terms, Toshiba agreed to make royalty payments to NEC but acknowledged no wrongdoing. Toshiba continued to produce its controller chip.

NEC Chairman Hajime Sasaki, who previously ran the company's semiconductor division, says NEC informed

Toshiba of the floppy-disk controller bug once it learned of it. Toshiba, however, took no action, and the bug was apparently forgotten. A Toshiba spokesman declined to comment.

From the moment the suit was filed last February, however, Toshiba officials in Tokyo monitored it closely. Their first step was to commission internal studies at Toshiba's PC factory in Tokyo in an attempt to re-create the data problems, efforts that were initially unsuccessful.

But matters soon took a turn for the worse. The first shock came when Toshiba officials realized one of the plaintiffs' attorneys was Wayne Reaud, a key figure in successful class-action lawsuits involving asbestos and tobacco. Heightening Toshiba's concerns was the fact that the suit had been filed in federal court in the Eastern District of Texas, an area renowned for jurors hostile to large corporations-and even less friendly to foreign concerns.

"If you study class-action cases in the past, especially in Beaumont, we were in a terrible position," one Toshiba official says.

Toshiba's management had taken heart from the fact that the company would defend the suit alongside its crosstown rival NEC, which had also been named as a defendant. But in August, NEC was dropped from the suit after it demonstrated it had fixed the problem years earlier. At roughly the same time, a consulting firm hired by Toshiba's U.S. lawyers finally succeeded in duplicating the data error on Toshiba notebook computers, although only under rare conditions. Still, it was anything but good news.

As expected court proceedings in November drew near, tension ran high within Toshiba. Officials feared that an adverse verdict might require Toshiba to refund the average value of five million notebook PCs, at least $9 billion. And with the judge pressing the sides to come to terms, Toshiba officials gritted their teeth and recommended that President Taizo Nishimuro settle the case.

"Initially, I wanted to go to trial," Mr. Nishimuro says. "Unfortunately, the lawyers said that there is close to a 100% chance that we would lose." In the end, Toshiba officials decided it was safer to swallow the settlement than risk a fight that might drag on for years, cost them billions of dollars and taint the Toshiba brand.

The total cost to Toshiba is facing the suits manufacture floppy disk controllers

likely to be somewhat less than the $2.1 billion headline figure for the settlement. Although the Japanese company is required to pay cash reimbursements of $597.5 million and plaintiffs' attorney fees of $147.5 million, most of the rest of the $2.1 billion consists of coupons for Toshiba products that must be redeemed by Toshiba notebook owners under fairly restrictive conditions.

Other PC makers may be better-positioned should they decide to contest the suits. Several lawyers not connected to the suits argue that the cases rest on a shaky legal foundation, since they allege both breach-of-warranty claims and violations of a federal law that criminalized computer fraud.

"There is a clear question as to whether you can turn a federal criminal statute into a breach-of-warranty case," says Michael Traynor, an attorney in San Francisco. "The real harm here is very questionable."

themselves.

A spokesman for the plaintiffs' lawyers in the class-action cases, all of whom are based in Beaumont, said the team is convinced it can demonstrate harm caused by the floppy-disk defect. The spokesman added that the lawyers remain confident in the legal standing of their case.

Legal experts such as Susan Koniak, a law professor at Boston University, argue that the remaining cases are unlikely to ever make it to trial. Should they get that far, Ms. Koniak and some others argue, the plaintiffs will have a tough time proving that consumers suffered serious harm from the controller problem, which they say in the worst case could cause only economic damage, not personal injury or death.

The Disk-Drive Bug

-- What it is: A flaw in the chip that controls the way data is written to floppy disks. PCs with the flawed

and Intel, but was fixed within a few years. Toshiba also used the original NEC design for its own chips, apparently allowing the flaw to persist until now.

-- Where it is now: Lawyers for the class-action plaintiffs say the bug is present in PCs from Toshiba, Compaq, eMachines, Hewlett-Packard and Packard Bell NEC.

-- How serious it is: The $2.1 billion question. Plaintiffs' lawyers insist the bug is extremely hazardous,given that it could corrupensitive data, but so far haven't offered any public proof of actual harm.