

The Truth About Philip Howard's "Common Good"

I. Executive Summary

Common Good and its founder, Philip K. Howard, are working to change United States law in ways that would benefit powerful corporate interests while harming workers, minorities and consumers.

Howard formed Common Good in 2002 to promote his views, "overhaul America's lawsuit culture" and "draw the line on who can sue for what." The group calls the legal system "a tool for extortion," and claims that "anyone can sue for almost anything."¹ Howard has written two books expounding this theory.

However, a close look at Howard's speeches, books, and comments in his current radio tour, coupled with an examination of the work of law firm Covington & Burling, where he is a partner, reveals a different picture of his fledgling organization.

Covington & Burling has routinely and vigorously defended a Who's Who of America's largest corporations, from pharmaceutical giants to health care corporations to the tobacco industry. The firm has acted as a pipeline to funnel millions in tobacco money to tort reform groups. And Covington & Burling has sought to limit attorneys' contingency fees, which would leave many people who otherwise would not be able to afford an attorney without legal representation.

Howard, in his speeches and books, reveals a belief that members of the medical profession are unjustly sued by patients, and expresses disdain for those who sue for reasons of discrimination. Covington & Burling has defended corporations against several such suits.

Little of this is generally known about either Howard or Common Good, which advertises itself as a friend of legal reform. Howard's works contain many examples of what he considers abuses of the system by lawyers and plaintiffs. Although reviewers have complained that his stories are anecdotal and do not reflect systematic, balanced research, the organization is trying to portray itself as disinterested in disputes between plaintiffs and defendants.²

In truth, Common Good is trying to rally public opinion to force changes in the law that would further entrench the advantages that corporations currently hold in the courtroom while whittling away individual legal rights including the 7th Amendment guarantee of trial by jury.

The search for Common Good's true agenda begins with the law firm of which Howard is senior corporate adviser and strategist, Covington & Burling.

II. Covington & Burling

Howard is a partner at Covington and Burling, where he focuses on mergers and acquisitions as well as regulatory, appellate, and litigation advice. In 2001, partners at Covington & Burling earned an average of \$655,000 a year.³ Howard's compensation is likely higher, as he reportedly earned more than \$1 million as a founding partner at Howard, Darby & Levin, before the firm's merger with Covington & Burling.⁴ Covington & Burling is known for its defense of major corporations, including defending the corporation against its own workers.

The firm advertises its legal expertise representing management in disputes with labor. "We have defended employers in actions involving allegations of harassment, discrimination and retaliation, claims for employee benefits and for breach of fiduciary duties under ERISA, overtime violations under the Fair Labor Standards Act, and tort and contract claims under state law," according to their website.

Covington & Burling has represented the pharmaceutical industry, Enron and other energy corporations, and health care corporations, among others. According to their literature, they've done it very well.⁵ A partial client list includes the American Automobile Association, the Association of American Railroads, the American Petroleum Institute, the American Business Alliance, the American Bankers Association, Eli Lilly, ExxonMobil, Goodyear, Microsoft, Procter & Gamble, Trane, UBS Warburg, and Union Pacific.

Covington represented UBS Warburg in its acquisition of Enron's natural gas and power trading business and Enron Online after the energy firm's collapse in financial scandal.⁶ Warburg had rated Enron stock a "strong buy" even though the firm knew it was headed for "certain disaster," according to investigators. Plaintiffs in stock fraud cases claim that Warburg knowingly deceived investors, encouraging employees to invest their 401(k) monies in Enron.

Covington & Burling also represents every major American tobacco company, including Brown & Williamson Tobacco Corp., Lorillard Tobacco Co., Philip Morris Inc., and R.J. Reynolds Tobacco Co, as well as the now-defunct industry trade association, the Tobacco Institute. The firm helped develop and coordinate the Whitecoat Project, an attempt to keep controversy alive regarding the dangers of passive smoking by hiring scientists to back up and attempt to give credibility to the tobacco industry's point of view that second-hand smoke is not a health risk.⁷

According to internal tobacco industry documents analysed in 1999 by Public Citizen and the Center for Justice and Democracy, Covington & Burling was a principle organizer and funding conduit for tort reform efforts on behalf of the tobacco industry.

Covington & Burling has acted as a pipeline to direct money from its tobacco industry clients to tort reform groups in the states and across the country. For example, in 1995, the tobacco industry allocated nearly \$5.5 million to the American Tort Reform

Association (ATRA), more than half of ATRA's \$10.2 million budget according to the Associated Press.⁸

A memo written by a Covington & Burling partner that year reveals the extent to which the law firm helped orchestrate the tobacco industry's tort reform agenda. Written to the industry's "Tort Reform Policy Committee," the memo called for an expansion of efforts, including a "communications program ... intended to enhance our ability to enact favorable legislation at both the federal and state level." The memo noted that "these media activities, to be effective, must not be linked to the tobacco industry."⁹

III. Philip K. Howard's Speeches and Writings

In books, speeches and media appearances, Philip Howard attempts to create a world dominated by fear of lawsuits by proclaiming that world exists, with little documentation for his anecdotal evidence.

In a speech to the American Association of Health Plans on Feb. 27, 2002, for example, he deplored the fact that those who take care of children at school have been removing playground equipment that is ostensibly hazardous. Howard thinks something other than children's safety is in play. Teeter totters and the like are being removed, he says, "not because ...they were ...dangerous, but because of fear of a possible lawsuit." In the same vein, he asserts that clergy have stopped giving marital advice to parishioners because they fear being sued if the couple get divorced.

Howard's books reveal his thoughts on minorities and what he sees as their propensity for finding racism where it doesn't exist. "Trivial perceived slights have ...become a preoccupation of some African Americans" he writes in "The Lost Art of Drawing the Line,"¹⁰ revealing a deep disregard for public use of the justice system, even when that use redresses some of the nation's deepest wrongs. Covington & Burling specializes in defending corporations against such charges, and should Howard's view prevail, the scales of justice would tilt further in their favor.

Howard also unequivocally tows the line for the medical insurance complex, yet offers insufficient proof, if any, for his claims. He says that the quality of medical care is declining because doctors who fear being sued withhold important information from patients; won't suggest treatment options in critical care situations; don't talk with each other about cases; and are reluctant to provide emergency medical care.¹¹

Though few, if any, of these supposed phenomena are documented, Howard still blames legal fear for everything from increases in medical costs to changes in healthcare, and the general removal of risk in society.

Convincing the public that the legal system is to be feared sets up Howard's agenda to dismantle those parts that are impartial and fair while preserving those that are skewed in favor of corporate interests. Howard believes that judges should dominate courtrooms because juries aren't predictable enough to make legal decisions. He would minimize the

jury's role in the justice system: "If you let every case come down to the vote of the jury you never know where you stand."¹²

United States Supreme Court Chief Justice William Rehnquist expressed a starkly different opinion of the importance of juries, saying "[T]hose who oppose the use of juries in civil trials seem to ignore [that] the founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary."¹³ Howard's push to phase average people out of the courtroom, and replace a jury of peers with decisions made by "expert judges," would eviscerate the 7th Amendment right to trial by jury.

IV. Attack on Consumers

Common Good has worked to weaken the contingency fee system in its crusade to give corporations the upper hand in the courtroom. Contingency fees give average citizens access to the justice system by allowing any victim, regardless of their financial situation, to bring a wrong-doing corporation, no matter how powerful, to court.

In a petition before the Supreme Court of Utah, Common Good sought to rewrite the law on contingency fees. The group's proposed limits on fees would have had the direct result of limiting, if not eliminating, the right to bring suit when wronged for anyone unable to afford an attorney. Similar petitions were filed in 11 other states.¹⁴

Steven T. Densley, Utah counsel for Common Good, and his law firm, Strong & Hanni, specialize in defending corporations facing insurance, product liability, personal injury, professional and medical malpractice claims. Indeed, Densley's law firm lists representative clients including at least 32 insurance companies and a smattering of other businesses, as noted in the case.¹⁵ The Utah Supreme Court has not yet acted on Common Good's petition, but the Supreme Courts of Alabama and Arizona rejected similar petitions in full. The American Bar Association also rejected the petition, and courts have refused to hear or act on it in nine other states.

Common Good's agenda would deal a crippling blow to the American legal system, using Common Good's criteria and serving the interests of Covington & Burling and its clients.

That blow's most immediate legislative manifestation is S. 1518, lavishly praised by Common Good and introduced into the U.S. Senate by Sen. Mike Enzi, R-Wyo. Enzi describes his bill, which he calls the "Reliable Medical Justice Act," as "innovative legislation ...designed to create a new, more reliable system of medical justice."¹⁶

Regardless of how the bill's provisions are implemented, each option will provide federal funds to states to take legal rights away from victims of medical error. Among the bill's proposals:

- Immunize health care providers in medical error cases from lawsuits so long as one party involved commits to some level of compensation to a patient. A payment for pain and suffering might be made, but only "if appropriate," and the amount would be capped. Patients could go to court, but only after the health care provider's time frame to make an offer had passed.
- Create classes of "avoidable" injuries and set up a bureaucratic administrative board to resolve claims. The state would develop a schedule of compensation for net economic loss without regard to the specifics of individual injuries. A patient could theoretically collect a capped payment for pain and suffering, but again, only "if appropriate."
- Eliminate juries by allowing states to set up a special court, with insiders from the medical field selected as judges, to rule on disputes over injuries "allegedly caused by" the health care error of their colleagues. The judges would "make binding rulings on causation, compensation, standards of care, and related issues."

The bill threatens fundamental legal protections for patients and leaves numerous questions unanswered. Who would appoint the judges or board members, and using what criteria? What will ensure they are not highly politicized, or controlled by the professions on trial? Who better than a jury to decide when pain and suffering compensation is "appropriate?" What is an "avoidable" injury? Many of these questions, once left to a jury of one's peers, would be shifted to the medical profession or insurers for an answer. Which is least likely to be biased against the patient?

A further glaring omission is the bill's failure to consider a central component of the medical justice system – the insurance companies that set malpractice premiums. Skyrocketing medical malpractice rates are what have doctors, and thus Senator Enzi, up in arms about the medical liability "crisis." By not even considering the shortcomings of an insurance system which has forced higher rates on doctors, the Common Good-backed Enzi legislation ignores the problem's most direct source and reveals its backers' true stance – for limiting access to justice.¹⁷

Enzi's proposal dovetails with that made by Howard in a Time Magazine article on June 2, 2003. In that piece, Howard again suggested setting up "special medical courts" staffed by "experts" to decide malpractice cases. He wants juries – who might sympathize with the victim – removed from the process.¹⁸

The underlying assumption in Howard's theories is that health care providers ought not to be held accountable because medicine is "particularly un-susceptible to proof."¹⁹ If his proposals to change the medical legal system are embraced, patients are unlikely to be able to prove harm, and thus receive justice, in US courtrooms.

V. Conclusion

Far from trying to clean up a messy legal system for the common good, Howard is trying to rally public opinion to force changes in the law that will help the corporate interests he and his law firm, Covington & Burling, have served for many years.

If this is the kind of change in the law Common Good seeks, what, then, is the organization really about? Philip Howard says that Common Good was organized "behind the idea, not of tort reform, which implies limiting claims, our point is to basically restore reliability."²⁰ Yet a balanced assessment of the civil justice system is not Common Good's agenda – as revealed in the writings and speeches of Common Good's founder, Covington & Burling's entanglements with the nation's biggest tort reformers, or the actions, such as the organization's petition in Utah, of Common Good itself.

Common Good wants to make it tougher for people who don't have money to get justice from corporations that do. It is doing this by attacking laws that protect ordinary people.

Most Americans believe in the concept of a level playing field. Common Good & Howard believe in just the opposite. They say they want to bring "common sense" to the law, but use carefully selected anecdotes to draw a misleading picture of a legal system that does not exist in reality, and seek to rally the public against victims who want only their day in court. Finally, Common Good wants to change the law to make it harder for victims to seek recompense.

Despite the "let's get back to common sense" image it is trying to project, Common Good seems dedicated to an altogether different principle: that corporations and the corporateers who run them should not be held accountable. That goes against the deep American belief that individuals should take responsibility for their actions. "Common Good" indeed.

ENDNOTES

¹ Common Good. <http://cgood.org/about/>

² Wise, Daniel. "NY Moves to Limit Attorneys' Contingency Fees," *New York Lawyer*, May 7, 2003.

www.nylawyer.com/news/03/05/050703a.html

³ www.law.com/special/professionals/amlaw/amlaw200/aug01/chart_new_high.html

⁴ Blum, Vanessa. "Covington Opens Up: Old-Line Firm Gives Up Some Control to Get New York Merger Partner," *Legal Times*, Sep. 27, 1999.

⁵ Practice: Employment and Executive Disputes. Covington & Burling.

<http://www.cov.com/practice/3/area/area23.html>

⁶ News Release. Covington & Burling. www.cov.com/new/pressreleases/176.html

⁷ Dehlavi, Naj & Sandford, Amanda. "The Tobacco industry, ETS and the hospitality trade," *Action on Smoking and Health*, May, 2003. www.ash.org.uk/html/workplace/html/hospitality_ets.html

⁸ "Report Says Tobacco Industry Quietly Backed Tort Reform," *Associated Press*, February 21, 1999; Tort Reform Project Budget, Covington & Burling, October 3, 1995, Document #2041201160 et seq.

⁹ Memo from Keith A. Teel to Tort Reform Policy Committee, January 24, 1995, Lorillard Files, Document #91881092/1095.

¹⁰ Howard, Philip K. *The Lost Art of Drawing the Line*, New York, Random House, 2001.

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- ¹¹ Howard, Philip K. Speech to American Association of Health Plans, Feb. 22, 2002. www.aahp.org
- ¹² Howard, Philip K. AirTalk with Larry Mantle, KPCC 89.3, Jan. 5, 2004.
- ¹³ Justice Rehnquist, dissenting opinion, *Parklane Hosiery Co. Inc. v. Shore* (1979).
- ¹⁴ Neff, Elizabeth. "Plan Would Cap Contingency Fees," *Salt Lake Tribune*, May 25, 2003. www.sltrib.com/2003/May/05252003/business/59906.asp
- ¹⁵ Petition filed in the Supreme Court of Utah to revise the ethical standards relating to contingency fees. Memorandum in opposition.
- ¹⁶ "Sen Mike Enzi Introduces the Reliable Medical Justice Act." Common Good. www.cgood.org/news-all
- ¹⁷ In California, skyrocketing medical malpractice premiums came under control only when state voters passed insurance rate regulation with Proposition 103. The ballot initiative ordered insurance companies to roll back rates and imposed stringent regulation of the insurance industry including "prior approval" of rates. Prop 103 forced insurance companies to refund over \$1.2 billion dollars to Californians and has blocked over \$23 billion in automobile insurance rate increases since 1988. Most recently, FTCR has challenged medical malpractice rate hikes under the initiative's provisions, and saved doctors over \$45 million in unjustifiable premium increases. FTCR's report is available at: <http://www.consumerwatchdog.org/healthcare/rp/rp003103.pdf>
- ¹⁸ Howard, Philip K. "Yes, It's A Mess- But Here's How to Fix it," *Time Magazine*, June 2, 2003.
- ¹⁹ Howard speech to AAHP. www.aahp.org
- ²⁰ Howard, Philip K. AirTalk, Jan. 5, 2004.