

Shakedown: How Corporations, Government, and Trial Lawyers Abuse the Judicial Process

by Robert A. Levy

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Reviewed by George C. Leef

If you want money, one way of getting it is to produce and trade with others who desire what you have to sell. Sociologist Franz Oppenheimer famously called that the “economic means” of obtaining what one wants. Alas, many people prefer another way of getting money, namely, the use of force and/or threats to compel others to hand over some of theirs. Oppenheimer called that the “political means.”

Criminals use the political means. So do government officials (over and above the regular pillage known as taxation), as well as many lawyers and business executives. In *Shakedown*, Cato Institute legal scholar Robert Levy demonstrates how those groups have figured out how to manipulate the legal system to achieve through the respectable, bloodless process of litigation results that would leave the greatest of criminals gasping in awe at the size of the take. When it comes to rip-offs, the most successful thieves are minor leaguers compared to today’s shakedown experts.

The book has two parts. In the first, “Tort Law as Litigation Tyranny,” Levy explains in detail how the tort bar in the United States has honed to perfection its weapons of legal extortion to extract great amounts of wealth from businesses and their shareholders. Trial lawyers used to play that game on a small scale, but in the 1980s they started to go for much larger jackpots, suing not just for millions, but hundreds of millions and even billions. The really big scores, Levy writes, are apt to occur when three tactics are combined under government auspices: parallel litigation (simultaneous lawsuits in several jurisdictions to stretch the defendant’s resources to the breaking point); the use of private attorneys working for government on a contingency-fee basis; and the misuse of the judiciary as quasi-lawmakers.

That was the game plan for the assault on the tobacco industry. Up until the mid-1990s the industry had won every lawsuit brought against it on the grounds that smokers had known and voluntarily assumed the risks of their tobacco use. A cabal of state attorneys general then came up with a stupendous plan to break the tobacco companies — they would claim that their states needed to recoup the cost of Medicaid expenses incurred due to smoking, unleashing a swarm of private lawyers to sue, while getting their legislative allies to change the legal rules so as to wipe out the industry’s ability to defend itself. The plan worked like a charm, with the tobacco industry eventually agreeing to the Master Settlement Agreement (MSA) obligating the firms to pay enormous sums to the states and their hired attorneys.

Levy points out many legal flaws in the case against the tobacco industry that the judges ignored. For example, there is the long-established legal doctrine of “unclean hands,” which says that a plaintiff seeking damages must have taken any reasonable steps to minimize its damages. Levy pointedly asks, “[I]f the correctness of Florida’s position was so apparent, why did it take 30 years after the Surgeon General’s initial warnings for the state to press its claims? Why didn’t Florida opt out of Medicaid, or ask the federal government to exclude smoking-related illnesses from its list of covered treatments?” But the deck was stacked against the tobacco defendants. No legal rules would be allowed to stand between the states and the oceans of money they were drooling over.

Is the MSA itself legal? Levy strongly argues that it isn’t, calling it “the mother of all antitrust

violations.” In order to ensure the steady flow of tobacco money into government coffers, the MSA in effect creates a huge cartel that shields the big cigarette firms from competition. The author is no friend of antitrust, but demonstrates that if we take that law seriously we must regard the MSA as illegal. The state, however, turns a blind eye to its own attacks on competition.

Levy then examines the lawsuits against the firearms industry, lead paint, fatty foods, and alcohol. More of the same tactics, although so far the shakedown artists have not repeated their tobacco “success.”

The second part of the book is Levy’s attack on antitrust law, which he calls “corporate welfare for market losers.” He begins by arguing that the most basic concept of antitrust law is erroneous. “The assumption of would-be regulators — that inefficiencies, especially in high-tech markets, can lock a company into a position from which it cannot be unseated — is a myth,” Levy writes. Far from protecting consumers against monopolies, antitrust is really a means for both government and less-successful firms to squeeze “damages” out of market winners. The book’s analysis of the antitrust case against Microsoft is utterly devastating.

Shakedown is ultimately a brief in favor of freedom and the rule of law. If you favor those ideas, you’ll love this book.