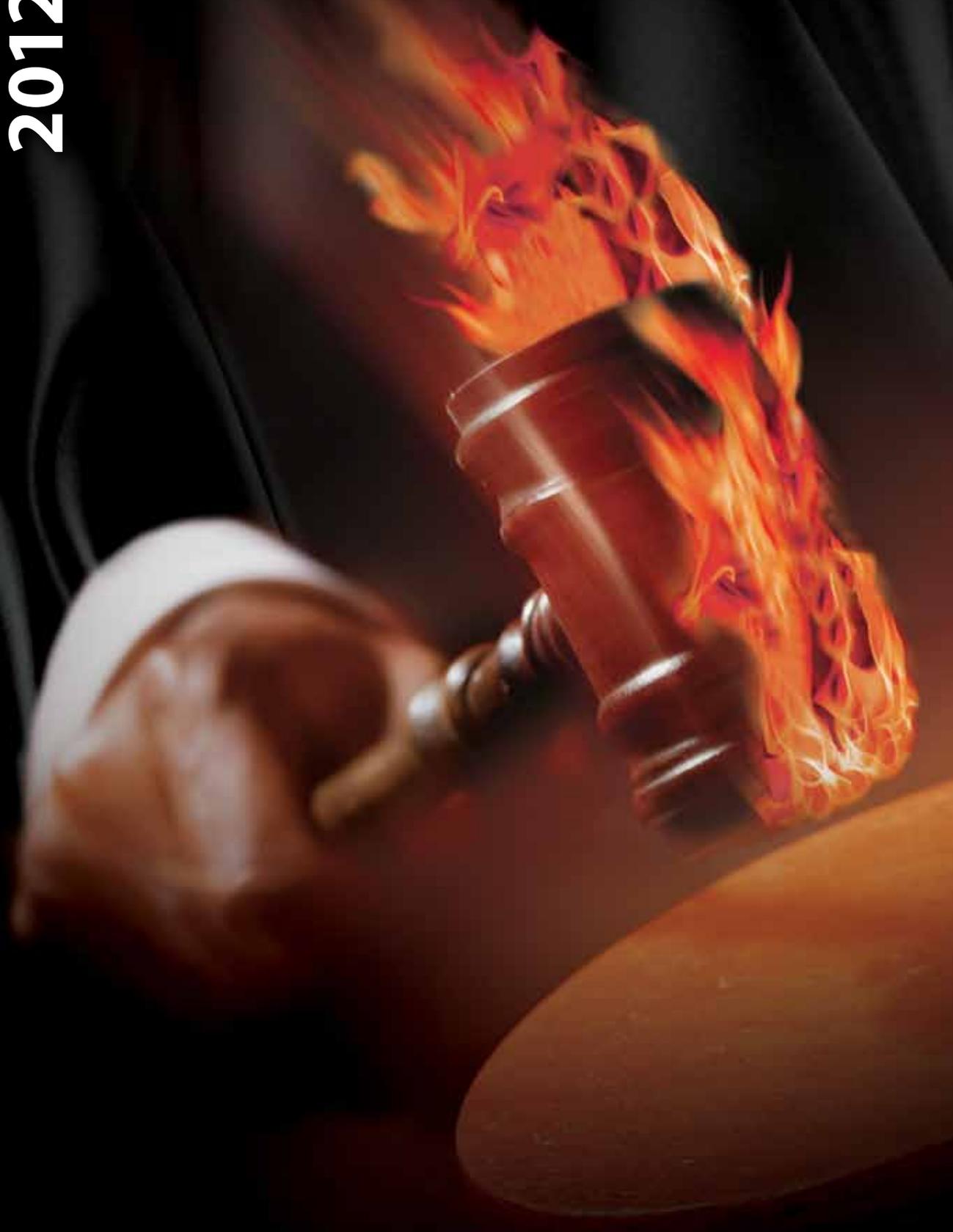


JUDICIALHELLHOLES[®]

2012/13

ATR
FOUNDATION



“What I call the ‘magic jurisdiction,’ [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges ... and it’s almost impossible to get a fair trial if you’re a defendant in some of these places. ... Any lawyer fresh out of law school can walk in there and win the case, so it doesn’t matter what the evidence or law is.”

—Richard “Dickie” Scruggs, legendary Mississippi trial lawyer who built an empire of influence suing tobacco companies, HMOs and asbestos-related companies, but who has since been disbarred and sentenced to federal prison after pleading guilty to conspiracy in an attempt to bribe a judge.

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PREFACE

Since 2002 the American Tort Reform Foundation's Judicial Hellholes® program has identified and documented in annually published reports (and more recently [year round](#)) **places where judges in civil cases systematically apply laws and court procedures in an unfair and unbalanced manner**, generally against defendants. Since the lawsuit industry has now begun aggressively lobbying for legislative and regulatory expansions of liability, as well, Judicial Hellholes reporting also has evolved to include such law- and rule-making activity, much of which can affect the fairness of a state's lawsuit climate as readily as judicial actions.

A recent [national survey](#) of registered voters conducted by the American Tort Reform Association (ATRA) and the grassroots Sick of Lawsuits campaign reaffirms the public's concern about an unbalanced civil justice system that imposes excessive liability, hurting economic growth, job creation and U.S. competitiveness. For example, the survey found that more than two-thirds of Americans believe that "our country's liability lawsuit system makes it harder for employers to do business and succeed," while more than 8 in 10 feel that the liability system needs to be improved. Particularly relevant to soaring healthcare costs and the availability of care, three-quarters of survey respondents say there must be reasonable limits placed on subjective awards for pain and suffering, which, as noted in this edition, were this year upheld by the Kansas Supreme Court and struck down by the Missouri Supreme Court.

Though entire states are occasionally cited as Hellholes, it is usually only specific counties or courts in a given state that warrant this citation. And, importantly, jurisdictions singled out by Judicial Hellholes reporting are not the *only* Judicial Hellholes in the United States; they are simply among the worst.

This annual Judicial Hellholes report compiles the most significant court rulings and legislative actions over the course of the year as documented in real-time online. The report also reflects feedback gathered from ATRA members (in an annual survey) and other firsthand sources. Because the program has become widely known, ATRA also continually receives information provided by way of its Judicial Hellholes website and other means. After interviewing such sources, Judicial Hellholes reporters work to confirm the information with independent research of publicly-available court documents, judicial branch statistics, press accounts and various studies.

To the extent possible, ATRF is specific in explaining how and why particular courts, laws or regulations can produce unfair civil justice outcomes in the jurisdictions cited. These states, cities, counties or judicial districts are frequently identified by ATRA members and other individuals familiar with the litigation. But because sources for Judicial Hellholes information may fear lawsuits or other retaliation in these jurisdictions, they sometimes prefer to have their names and cases kept out of the program's reporting.

(The Judicial Hellholes program considers only civil litigation; it does not reflect in any way on the criminal justice system.)

ABOUT THE AMERICAN TORT REFORM FOUNDATION

The American Tort Reform Foundation (ATRF) is a District of Columbia nonprofit corporation, founded in 1997. The primary purpose of the Foundation is to educate the general public about: how the American civil justice system operates; the role of tort law in the civil justice system; and the impact of tort law on the private, public and business sectors of society.

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EXECUTIVE SUMMARY

JUDICIAL HELLHOLES[®] 2012/13

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- 2 WEST VIRGINIA
- 3 MADISON COUNTY, ILLINOIS
- 4 NEW YORK CITY AND ALBANY, NEW YORK
- 5 BALTIMORE, MARYLAND

JUDICIAL HELLHOLES 2012/2013

The 2012-2013 report shines its brightest spotlight on five areas of the country that have maintained or newly developed their reputations as Judicial Hellholes:

#1 CALIFORNIA is the undisputed heavyweight champion of the consumer class action. Its plaintiff-friendly laws spur ridiculous lawsuits against companies that sell products ranging from breakfast cereal to bagged walnuts. California's small businesses have been under siege from trolling disability-access lawyers and their professional plaintiffs who look for technical rules violations, then demand thousands of dollars to settle. The state enacted modest reform this year only after a threat of federal intervention. Los Angeles is seeing a surge of asbestos cases, as personal injury law firms from elsewhere have moved into in Southern California. The once Golden State's limit on

pain and suffering awards in medical malpractice cases, which has contributed to a stable healthcare environment for many years, is under constant attack. Mounting cuts to the judiciary's budget, and loss of court staff, particularly in Los Angeles, leave litigants to worry about delays and even the ability to appeal adverse rulings.

#2 WEST VIRGINIA is feared by business defendants, who feel that some Mountain State judges tip the scales of justice against them. The lack of a full right to appeal adds to their anxiety. The state's personal injury law remains out-of-the-mainstream, although its high court deserves recognition for some sound rulings. The electoral defeat of West Virginia's long-serving Attorney General Darrell McGraw, Jr. in November 2012 came too late to affect the state's ranking, but could contribute to a fairer legal environment in the years ahead. AG McGraw was known for partnering with plaintiffs' lawyers to sue businesses on a contingent-fee basis and using settlement money for his own favored causes and self-promotion.

#3 MADISON COUNTY, ILLINOIS is known as the nation's asbestos court and this year is on track to beat its old record for new lawsuit filings. The county finally decided to abandon its unique and controversial system of assigning asbestos trial dates to favored local law firms after it was revealed that the judge who oversaw the asbestos docket received tens of thousands of dollars in campaign contributions from lawyers in those same firms. The money has since been returned and the asbestos docket is under new management. But the election of a former head of the Illinois plaintiffs' bar to the appellate bench overseeing its courts provides new reason for concern.

#4 NEW YORK CITY AND ALBANY, NEW YORK, the financial and political capitals of the state, have collectively fostered the Judicial Hellholes reputation of "Sue York." Each year New York City faces more than a half-billion dollars in tort liability from lawsuits alleging falls on sidewalks, inadequate care in hospitals or mistreatment by police. Businesses also face extraordinary liability, such as through a unique state law that imposes liability on those who undertake construction projects, regardless of who is at fault. The city also hosts more than its share of fraudulent claims, and the solid hold of the plaintiffs' bar over lawmakers continues to stymie needed reforms.

#5 BALTIMORE, MARYLAND, after several years on and off the Watch List, rounds out the Top 5. Three years ago ATRF noted that plaintiffs’ lawyers referred to Baltimore among the “home run jurisdictions” for asbestos cases. Since then asbestos filings have surged, largely driven by tort kingpin Peter Angelos, owner of the Baltimore Orioles. Angelos is seeking to consolidate thousands of claims, which, if permitted, would place expediency over fairness. Also on the minds of those who face litigation in Baltimore is a case before Maryland’s highest court, in which some plaintiffs’ lawyers – not elected state lawmakers – are seeking to end longstanding legal doctrine that bars recoveries by plaintiffs who are at fault for their own injuries. Such a significant change would disrupt many aspects of Maryland personal injury law, erode personal responsibility, and fuel more lawsuits.

WATCH LIST

Beyond the Judicial Hellholes this report calls attention to six additional jurisdictions that also bear watching due to their histories of abusive litigation or troubling new developments. Watch List jurisdictions fall on the cusp – they may drop into the Hellholes abyss or rise to the promise of Equal Justice Under Law.

PHILADELPHIA, PENNSYLVANIA takes the most significant drop in this year’s report, from the #1 Judicial Hellhole to the top of the Watch List. The judiciary, led by Court of Common Pleas Chief Administrative Judge John W. Herron unveiled a plan to level the playing field for mass tort cases handled by the Complex Litigation Center (CLC). The CLC also is under new management, providing another reason for optimism. A new state law now better aligns the liability of defendants with their share of responsibility. Enacting legislation that curbs forum shopping in personal injury cases, which allows so many lawsuits to flow to Philadelphia, is the next needed step to keep the city off the Judicial Hellholes list.

SOUTH FLORIDA has dropped from the Judicial Hellholes list, on which it had been cited the past nine years, largely as a result of gradual success at addressing excessive liability and litigation abuses highlighted in this report. The latest achievement is reform of the state’s no-fault auto insurance coverage law, which had led to an alliance between personal injury lawyers and fly-by-night clinics that milk the system and drive up Florida’s insurance rates. Florida still has its problems, such as gamesmanship of the state’s bad faith law. The outcome of a pending challenge to the state’s limit on noneconomic damages in medical malpractice cases, which has particularly improved access to healthcare in South Florida, could influence where this jurisdiction lands next year.

COOK COUNTY, ILLINOIS remains on the Watch List, after falling from previously perennial Judicial Hellholes status last year, largely because the litigation winds have remained relatively calm in Chicago. But many still regard Cook County as among the most unfavorable litigation environments in the country. It remains the home of expansive liability and excessive verdicts. Some are overturned on appeal, such as the \$3.9 million award to a teenager who was injured when he repeatedly attempted to jump aboard a moving train to show off for friends. Cook County is also facing scrutiny due to the retention of judges who received poor reviews from bar associations, including one who pled insanity.

NEW JERSEY showed signs of improvement in the past year with an important court decision that shields name-brand drug makers from unfair liability in claims involving generic drugs made by competitors, and with what may be a new trend toward fairness in other lawsuits against the state’s key pharmaceutical industry. But medical liability cases continue to pop up like weeds in the litigious Garden State, and there seems to be no shortage of “detestable” plaintiffs and personal injury lawyers otherwise willing to make outrageous claims against Little Leaguers, life-saving police officers and girlfriends who send their boyfriends text messages.

PHILADELPHIA, PENNSYLVANIA

SOUTH FLORIDA

COOK COUNTY, ILLINOIS

NEW JERSEY

NEVADA

LOUISIANA

NEVADA, which has been featured in past reports due to the influence of the personal injury bar and jackpot verdicts in Las Vegas, is of particular concern this year due to the state attorney general's aggressive use of contingent-fee lawyers to enforce state law. These private lawyers, who hail from places such as Washington, D.C., are compensated based on the amount of the fines they impose on businesses. The attorney general and those who have faced such lawsuits are battling in court over the propriety of such arrangements.

LOUISIANA has among the highest, and still rising, auto insurance rates in the nation, due to the state's litigious environment, aggressive personal injury bar, excessive damage awards, and plaintiff-friendly judges. The state's uniquely high monetary threshold for obtaining a jury trial ensures that plaintiff-friendly judges serve as juries, too, in many cases. But thanks to committed lawmakers, Louisiana also finally addressed "legacy lawsuits," which have unfairly targeted the state's oil and gas industry, costing thousands of jobs. Many still raise questions, however, about the influence of the plaintiffs' bar over Gov. Bobby Jindal and other state officials.

DISHONORABLE MENTIONS

Dishonorable Mentions in this report go to the **Missouri Supreme Court** for striking down the state's limit on subjective noneconomic damages in medical liability lawsuits, and to the **Washington Supreme Court** for imposing liability on makers of protective equipment if they do not warn workers of the dangers of contaminants that the equipment protects against.

POINTS OF LIGHT

This year's report again enthusiastically emphasizes the good news from some of the Judicial Hellholes and other jurisdictions across the country. Points of Light are examples of, among other things, fair and balanced judicial decisions that adhere to the rule of law and positive legislative reforms.

- ◆ Sound rulings by several courts, some of which are located in states that otherwise have reputations as inhospitable to civil defendants, are particularly worthy of note.
 - ◆ The **California Supreme Court** properly recognized that companies are not liable for products of others that are attached to their own products after sale.
 - ◆ The **Illinois Supreme Court** rationally found that landowners are not liable to trespassers who ignore obvious dangers.
 - ◆ The **Kansas Supreme Court** rejected an attempt to nullify the state's limit on subjective noneconomic damages in personal injury cases.
 - ◆ The **Mississippi Supreme Court** ruled that the state's attorney general cannot payout millions of dollars in state settlement money, which are public funds, directly to hired contingent-fee lawyers.
 - ◆ The **New Jersey Superior Court** recognized that brand-name prescription drug makers are not liable for the injuries alleged by those who used competing generic products.
 - ◆ The **Pennsylvania Supreme Court** rejected expert testimony asserting that exposure to any amount of asbestos fibers, no matter how small, can be a substantial factor in causing an asbestos-related disease.
 - ◆ The **Supreme Court of Texas** adopted the "learned intermediary" doctrine, which recognizes that drug makers have a duty to inform physicians of potential risks that may vary from patient to patient.
- ◆ **State legislatures** in **Alabama, Arizona, Iowa, Louisiana, Mississippi, Missouri, Ohio, Rhode Island, Tennessee** and **Wisconsin** all enacted positive reforms. Five states precluded a potentially radical expansion of the liability of home and business owners to trespassers. Three states enacted good government laws providing safeguards when state officials use contingent-fee lawyers to enforce state law, including Mississippi, where the state attorney general had routinely relied on such arrangements.

SPECIAL FEATURES

This year's report also includes two **special features**.

- ◆ **Food for Thought: Consumer Protection Lawsuit Abuse on the Rise** documents the personal injury bar's latest line of attack on food makers, such as Kellogg and Nature Valley, and restaurants, such as Taco Bell and McDonald's. State consumer laws, which were intended to provide a remedy for lost money in day-to-day purchases, are even being used as an alternative to showing the evidence necessary to recover in lawsuits for wrongful death and claims against drug makers.
- ◆ In the **Worst (and Best) Federal Appellate Court Decisions of 2012**, this report explores new turf by spotlighting U.S. Court of Appeals decisions similar to those long associated with Judicial Hellholes. The worst include: certification of a no-injury class action by the **Sixth Circuit**; the **First Circuit**'s complete disregard of a U.S. Supreme Court decision that found federal regulation, not lawsuits, govern generic drugs, and a **Fourth Circuit** decision allowing lawyers to sue first and later troll for clients through use of private DMV records.

JUDICIAL HELLHOLES

CALIFORNIA

This year's selection of the least fair civil court jurisdiction is California. And no one should be surprised since posts critical of California courts and policymakers have dominated the [Judicial Hellholes website](#) in 2012. The sheer number of atrociously abusive lawsuits filed all over the state would collectively make for the basis of a blockbuster Hollywood comedy were it not for their negative impact on the state's economy and the mendacity that too often drives them. For example, the National Insurance Crime Bureau [cites](#) California among the top-five states and Los Angeles among the top five cities for likely fraudulent slip-and-fall claims. And more broadly, this nearly insolvent state, with businesses fleeing in droves and without a tax-dollar for court resources to waste on meritless litigation, will almost surely see well more than [million new lawsuits](#) filed there again this year.



PREPOSTEROUS CONSUMER CLASS ACTIONS

As reported by the [New York Times](#) and CBS's [60 minutes](#), California, increasingly the home many of the nation's most preposterous consumer class actions, also has become ground-zero for a new attack on Big Food. It's no coincidence that the consumer lawsuits highlighted in this year's special feature targeting Nutella, Kellogg Frosted Mini-Wheats, Nature Valley granola bars and McDonald's Happy Meals were all filed in California (*see Food for Thought: Consumer Protection Lawsuit Abuse on the Rise*, p. 40). These claims are brought in the once Golden State because some judges have broadly interpreted the state's Unfair Competition Law (UCL) to require no proof of deception, reliance, or injury, while applying lax class certification standards.

Such class action lawsuits continue to be filed frequently in California despite the overwhelming support by voters in 2004 for a [reform](#) aimed at eliminating them. These class actions either primarily benefit lawyers with large fees at the expense of consumers or seek to regulate entire industries based on a special interest group's agenda that could not be achieved through the appropriate political process. A federal court in California even [certified](#) a nationwide class challenging health claims made by a seller of chopped walnuts, despite the fact that the individual who sued on behalf of the class continued to purchase the same walnuts after filing suit. Due to the high stakes of class action litigation, the company [settled](#) this year for [\\$3.45 million](#) including \$850,000 to cover the class action attorneys' fees.

DISABILITY ACCESS LAWSUIT EXPLOITATION

Abusive lawsuits brought to enforce technical standards of the Americans with Disabilities Act (ADA) in California may have reached an all-time high, making small business owners feel as though they have targets on their backs. The Judicial Hellholes website [highlighted](#) stories throughout the past year of instances of blatant abuse of the system.

Most recently, Tina Freeman, the owner of Tina's Tavern and T's Lounge in West Covina, California, [spoke out](#) about the frivolous lawsuits she has experienced as a small business owner. In the past two years, she was sued four times for alleged ADA violations. One lawsuit claimed that the restaurant did not have a table low enough to accommodate customers in wheelchairs, even though it did. She threatened to go to the media, and within 30 minutes, the attorneys showed up with dismissal papers in their hands. Freeman is disgusted by the legal extortion occurring in her home state. Freeman's own mother has been in a wheelchair since Freeman was 8-years old, and Freeman says she "would die before she'd go around filing these lawsuits. These people are making a living doing this."

Freeman is not the only California small business owner feeling the pressure. Del Graessley, the owner of a bar in Baldwin Park, is fighting his second ADA-related lawsuit. A “frequent filer” who has initiated over 100 disability-access lawsuits targeted his business, specifically looking for old construction built before ADA regulations went into effect. Lawyers defending small business owners have recognized the growing trend and say that plaintiffs usually ask for anywhere between \$4,000 and \$10,000 because they know it would cost more for a business to fight the suit than to settle.



The problem gained national attention when **U.S. Sen. Dianne Feinstein** (CA) sent a [letter](#) to **California Senate President Pro Tempore Darrell Steinberg** expressing her concerns that ADA lawsuits were threatening the viability of small businesses. In her letter she said state legislators should address the problem or she would take matters into her own hands by introducing federal legislation. Finally, after several years of inaction, the Sacramento lawmakers enacted [S.B. 1186](#) in September. Unfortunately, prior to final passage, the bill was [stripped](#) of a key provision requiring an attorney to notify a business owner of a violation at least 30 days prior to filing a claim. California Citizens Against Lawsuit Abuse [called](#) the compromise measure the “most serious attempt at ADA litigation reform to ever come out of the Legislature,” but added that it “does not go as far as we would have preferred.”

The most virulently active of California’s parasitic ADA plaintiffs are not likely to be deterred by this half-hearted reform law, and no one should believe for a moment that small business owners won’t soon be pleading again with Sacramento for real relief. But they’d be better off pleading their case again to Sen. Feinstein who has said enactment of a state reform wouldn’t necessarily preclude her from seeking preemptive federal reform. And since bogus disability lawsuits are now on the rise in other states, the senator and her colleagues in Washington would do well to amend the well-intentioned but now too-easily-exploited ADA.

HOME OF QUESTIONABLE UNINTENDED ACCELERATION CASES

Lawyers involved in all types of litigation have taken notice of California’s plaintiff-friendly courts and are flocking to the state to file their cases. This summer, **Los Angeles Superior Court Judge Anthony Mohr**, who is overseeing about 100 state court cases alleging sudden, unintended acceleration of Toyota vehicles, [ruled](#) that, instead of the wrongful death case he originally intended to bring to trial first, the jury will instead hear a consumer protection claim filed against the automaker. That move helps plaintiffs’ attorneys by allowing them to focus on inflammatory allegations that Toyota failed to disclose information related to consumers about the safety of the vehicles rather than the need to prove there was a defect in the cars that led to drivers’ or passengers’ injuries.



Additionally, more than 300 sudden acceleration lawsuits are consolidated before **U.S. District Judge James Selna** in Santa Ana, California. In what was seen as a [victory](#) for the plaintiffs in March, Judge Selna ruled that Toyota could not compel arbitration for the class of car owners who claim that their vehicles’ resale values had dropped as a result of alleged problems in other Toyotas.

ASBESTOS LAWSUITS OVERBURDEN COURT SYSTEM

Certain California courts have served as a magnet for asbestos lawsuits. According to the California court system’s [research arm](#), “the Superior Courts of Alameda, Los Angeles, and San Francisco Counties attract nearly all of the asbestos filings in California.”

While the San Francisco Superior Court has traditionally handled the largest asbestos caseload, the Superior Court of Los Angeles County experienced an increase in asbestos filings over the past five years as plaintiffs’ law firms from Texas (fleeing tort reform enactments) and Illinois scramble to open offices in Southern California. From 2006 to 2010, the number of new asbestos filings in the LA Superior Court [increased](#) by 80% (from 105 to 188 new filings). And this growth continued with 212 new filings in 2011 and 163 through July of 2012, setting a pace for more than 275 by year’s end.

This dramatic increase in filings has not gone unnoticed. In April 2011, **Supervising Judge Carolyn Kuhl** expressed concern that the number of pending cases at that time, 293, were bogging down the court's calendars. Judge Kuhl explained that the problem was compounded by other developments: budget cuts, a 33% increase in the number of civil cases assigned to each judge per month, reductions in the number of long-cause courtrooms (courts dedicated to trials of over 20 days) and complex courtrooms, and the elimination of the eminent domain department, resulting in the reassignment of these cases to existing courtrooms. Procedures and rulings on asbestos cases varied from judge-to-judge, leaving similarly situated litigants with different and unpredictable results.

The court's solution to the problem was to coordinate all asbestos cases pending in Los Angeles, Orange and San Diego counties under one judge. Since August 2011, **Judge Emilie Elias**, the Supervising Judge of the Los Angeles Superior Complex Civil Litigation panel, has served in this role. Judge Elias has considerable power to reshape the landscape of asbestos litigation in Southern California. Thus far defendants are not optimistic because it's perceived, for example, that Judge Elias largely refuses to grant motions for summary judgment and forum non conveniens. Add Los Angeles's storied plaintiff-friendly jury pool to the mix, and defendants can be left with little choice but to settle asbestos lawsuits out of fear of potentially gigantic verdicts – even in cases where they believe their products did not substantially contribute to alleged injuries.

MICRA UNDER ATTACK

Trial attorneys are launching legal challenges to the Medical Injury Compensation Reform Act (MICRA), the California law in place since 1975 that limits subjective damages for pain and suffering in medical malpractice cases to \$250,000 in order to preserve access to affordable healthcare. Damages for medical treatment and other losses, as well as punitive damages, remain unlimited in California. One pending [challenge](#) involves a case in which the jury awarded the plaintiff \$8.375 million, including noneconomic damages totaling \$3.75 million. The most recent attack on MICRA was [filed](#) in June 2012 in a case involving a \$1 million noneconomic damages award in addition to \$2.9 million in economic damages. These lawsuits generally argue that the noneconomic damages limit denies plaintiffs the right to a jury trial, violates equal protection under the state constitution since those who allege injuries stemming from medical malpractice are treated differently than other personal injury claimants, or that the circumstances underlying the law have changed.



'PHANTOM DAMAGES' LEGISLATION

Senate President Pro Tempore Darrell Steinberg and many of his trial lawyer-supported colleagues in Sacramento pushed in 2012 legislation to overturn a 2011 California Supreme Court [ruling](#) that required courts to base damage awards for medical expenses on the amounts plaintiffs or their insurers [actually paid](#) for treatment, not the initially billed amounts that were never paid by anyone. Insurers say the decision will save them, and their policy holders, billions of dollars a year in inflated lawsuit payouts, much of which had previously served to enrich trial lawyers.

As [reported by Dan Walters](#) of the Sacramento Bee, Sen. Steinberg introduced [Senate Bill 1528](#) and moved it “through the Senate as virtually an empty shell to be filled in later with language that would completely or partially overturn” the high court's decision. Walters reported that the personal injury lawyer lobby had “declared legislation to overturn this decision its highest legislative priority.” But thankfully, the ever vigilant [Civil Justice Association of California](#) and other commonsense allies managed to eventually kill the phantom damages bill, much to the benefit of every honest, hardworking health insurance premium payer in the state.

CUTS IN THE COURTS

In April 2012 the Los Angeles Superior Court, home of some of the nation's most preposterous litigation, [announced](#) the “most significant reduction of services in its history,” including 350 workers laid off, the closing of 56 courtrooms (24 of which hear civil cases), and an end to court reporter services for civil trials, which may negatively impact the appeals process.

More recently reported in November by the Wall Street Journal's [Law Blog](#), Los Angeles court officials now say they'll additionally "shutter 10 regional courthouses to address a [newly] projected \$50 to \$80 million budget shortfall." In all, reports Tom Scott, executive director of [California Citizens Against Lawsuit Abuse](#), state "courts have seen their budgets [slashed by \\$1.2 billion](#) – more than 24 percent – over the past five years."

"Average citizens are the ones impacted," Scott explains. "Civil cases will be backed up farther than the 405 Freeway on a Friday, and the cost of delayed justice for these citizens will be incalculable. Legitimate cases may take years to be heard. More frightening still, we don't know how many more cuts will be implemented."

Just before this report went to press, the Sacramento Bee [reported](#) that "Gov. Jerry Brown plans to slash another \$200 million from California courts to help balance his January budget, possibly resulting in a 'disastrous impact' for the legal system." And so long as California judges continue to welcome with open arms the same predatory lawsuits-without-real-injuries that are driving tax revenue-producing businesses to Arizona, Texas, Utah and overseas, it's reasonable to believe the death spiral of more lawsuits and more budget cuts will continue – at least until the state officially declares bankruptcy and/or there are no more businesses left to sue. Perhaps when mass layoffs of judges are finally considered, California courts will then begin to summarily dismiss non-sense lawsuits and hold in contempt the lawyers who file them.

Talk about California dreamin'.

SOME GOOD NEWS

In a bit of good news coming out the California state courts, the California Supreme Court held that plaintiffs' lawyers cannot sue companies, which sold pumps and valves to the Navy, for workers' exposure to asbestos-containing materials added to those products decades after their sale (*see* Points of Light, p. 35).

California voters also showed good sense in [soundly defeating](#) Proposition 37, a [trial-lawyer written ballot measure](#) that most significant California newspapers [condemned](#) as a "scam" to promote "shakedown" lawsuits against food companies that fly in the face of science. The ballot measure would have provided "a right" to know whether any food product contains genetically-modified ingredients, requiring special labeling, even though many common ingredients, such as varieties of corn, soybeans and other crops, are modified to resist diseases and insects and require fewer pesticides. Even if California's lawmakers and judges don't, voters there know better than to invite a new wave of "gotcha" lawsuits that would do little beyond raising food prices and making more lawyers rich.

WEST VIRGINIA

While there are occasional glimmers of hope that West Virginia will overcome its reputation as a Judicial Hellhole, in many ways, each year seems like déjà vu. With law that is out of the mainstream, a lack of appellate due process,

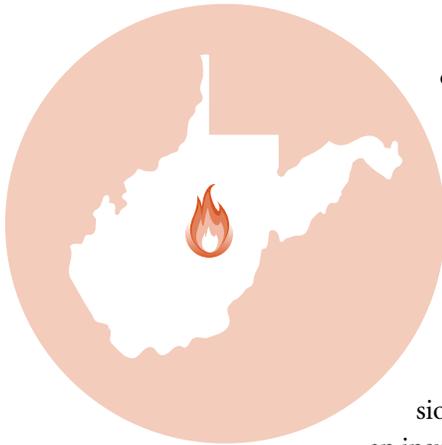
stunningly high verdicts, and an attorney general's office that was almost indistinguishable from a private-sector personal injury law firm, Wild, Wonderful West Virginia continues to astound. If there's a silver lining with respect to at least one of these elements, it may be found in the recent electoral defeat of 20-year incumbent **Attorney General Darrell McGraw, Jr.**



AG McGraw

THE UPS AND MANY DOWNS OF WEST VIRGINIA'S HIGH COURT

As noted in last year's Judicial Hellholes report, the West Virginia Supreme Court of Appeals has shown that, despite its checkered history, it can issue fair and reasonable rulings. For example, in [White v. Wyeth](#) (2010), the court properly interpreted the state's consumer protection law to require actual reliance and refused to apply it to products that are already tightly regulated by government agencies. The court followed with an encore, upholding the state's cap on noneconomic damages in medical malpractice actions in [MacDonald v. City Hospital](#).



These are welcome rulings, particularly considering some of the high court's liability-expanding, outlier decisions in years past. Such decisions have included allowing consolidation of thousands of claims, permitting juries to consider prejudicial evidence regarding punitive damages before determining a defendant's liability, rejecting the learned intermediary doctrine that recognizes the physician's role in discussing the benefits and risks of drugs with patients, allowing individuals with no present injury to obtain cash awards for medical monitoring, and upholding (or refusing to even review) excessive awards.

The West Virginia Supreme Court of Appeals issued another outlier decision in 2011, permitting a trial court to impose a protective order that required an insurer to destroy claimant records following litigation. Such protective orders, which are routinely used by some West Virginia judges, have the potential to place insurers in a position where they run afoul of document retention requirements set by state insurance regulators and inhibit insurers' ability to monitor and report fraud. The U.S. Supreme Court [declined](#) to hear an appeal of the 2011 decision and, this November, in two separate cases, the West Virginia Supreme Court of Appeals [allowed](#) the practice to stand.

LACK OF AN INTERMEDIATE APPELLATE COURT

West Virginia remains the only state that lacks the combination of an intermediate appellate court and full appellate review as a matter of right. The Supreme Court of Appeals can simply choose not to fully consider an appeal, leaving many parties with no recourse after unjust and biased trial verdicts.

Over the course of the past three years, some members of the high court have refused to acknowledge the need for an intermediate appeals court, even after the state Senate [passed legislation](#) that would have created such a court. The bill later failed in the House Judiciary Committee, as **Chief Justice Menis Ketchum** hoped it would. He continued to [reiterate](#) his position, backed by the plaintiffs' bar, that an intermediate appeals court is unnecessary. Tellingly ironic was what the president of the personal injury lawyers' trade group [called](#) this proposal to ensure everyone's right to a meaningful appeal: a "jackass stupid idea." Prior to recent legislative action, in 2010 the high court rejected an independent commission's [recommendation](#) to create an intermediate appellate court to address the thousands of appeals filed each year, opting instead for a marginal expansion of its own appellate review.



EXCESSIVE AWARDS

West Virginia also is known for excessive damage awards. One of the most recent examples occurred in October 2011, when a West Virginia judge [permitted](#) \$90 million of a \$91.5 million, single-plaintiff verdict against a nursing home to stand. It was the fourth largest verdict in the country over the past two years. The judge ruled that the state's limit on noneconomic damages in medical malpractice cases applied only to \$1.5 million of the award because 20% related to professional negligence while 80% related to ordinary negligence. In May 2012 the Supreme Court of Appeals [found](#) that the trial court judge erred by refusing to include the defendant's proposed verdict form in the record and sent the case back for further consideration. Upon last report, the trial court was [reconsidering](#) the size of the award.

The [Claims Journal](#) listed the West Virginia verdict among seven recent "super losses" in the healthcare sector, reporting that such extraordinary verdicts are on the rise. It also reports a study by Hiscox, an insurer of healthcare specialists, showing that such "large losses keep on getting larger with juries in the last two years alone awarding more than \$1 billion in total damages for just seven medical liability cases." Such decisions have real-life implications for the affordability and accessibility to healthcare services. For example, if allowed to stand, the \$90 million West Virginia verdict will likely dissuade some nursing care providers from operating in the state, leaving residents with even more difficult decisions about where and how to care for aging or disabled loved ones.

A TROUBLING ASBESTOS LITIGATION ENVIRONMENT

An overarching theme in many of this year’s Judicial Hellholes – West Virginia among them – is the overwhelming abuse of asbestos litigation. The Mountain State is a place where, for example, 15 plaintiffs [named](#) 190 defendants in 8 asbestos cases and, more recently, 14 plaintiffs [sued](#) 173 defendants in Kanawha Circuit Court. Serious questions have been raised about the filing of fraudulent claims in West Virginia state courts. CSX Transportation is pursuing a racketeering suit against a Pittsburgh law firm and a radiologist, alleging that they fabricated asbestos claims against the company. A trial court found that the railroad was too late in bringing its claim, but a federal appellate court [reversed](#) in late 2010 after ATRA and others filed a well-reasoned amicus brief in the case. Earlier this year, that lawsuit [survived](#) a motion to dismiss and the litigation is now moving forward.



MCGRAW-STYLE JUSTICE ON THE WAY OUT

As noted in prior Judicial Hellholes reports, a longstanding concern in West Virginia has been the type of “justice” meted out by Attorney General Darrell McGraw. But with his defeat at the polls in November, the perennial hellhole has a real opportunity to turn the page on the types of practices that raised concern among citizens and businesses alike.

AG McGraw frequently hired private lawyers through [no-bid contracts](#) to enforce state law, giving them a share of whatever damages or fines they could impose on businesses operating in the state. Not surprisingly,



Patrick Morrissey

McGraw [raised nearly half](#) his campaign funds from attorneys he hired to represent the state. He was also [repeatedly criticized](#) for using settlement funds collected on behalf of the public for his own [pet projects](#) and self-promotion. The U.S. Department of Health and Human Services even [sued](#) McGraw to recoup funds from a settlement his office made with Perdue Pharma over alleged Medicaid overbillings, a portion of which should have been used to repay Medicaid. Instead, the attorney general spent the money on a pharmacy school and community corrections programs.

In November, West Virginia voters decided they’d had enough. After two decades, they parted ways with McGraw, a former West Virginia Supreme Court Justice, and elected his reform-promising challenger **Patrick Morrissey**. Morrissey has [pledged](#) to change how the state hires outside counsel by utilizing a “competitive bidding process to make sure that we get high quality . . . services . . . at reasonable prices.” He has also [vowed](#) to return settlement money to taxpayers rather than spend it from the attorney general’s office, and he says he’ll end self-serving consumer awareness campaigns prior to elections for which McGraw had become notorious.

MADISON COUNTY, ILLINOIS

The combination of a change in judicial philosophy that curbed forum shopping, enactment of federal class action legislation, and adoption of state medical liability reform that has since been struck down, Madison County had managed to work its way off the Judicial Hellholes list in 2007. But progress has seemingly stalled, and the jurisdiction’s truly troubled past appears poised to repeat itself. In a recent [survey](#), lawyers who represent major employers named Madison County among the most “unfair” city or county litigation environments in the nation.



AMERICA'S ASBESTOS COURT

Madison County is to asbestos litigation what the Dallas Cowboys once were and would like to be again to professional football. In 2012 small, largely rural Madison County maintained its dominance over the rest of the nation when it comes to new asbestos claims. But there simply is no justification for a jurisdiction with .0008 percent of the nation's population to handle [25%](#) or more of its asbestos cases. Even worse is the fact that only about 1 in 10 of the county's asbestos cases are filed by people who actually live or work there, and asbestos claims comprise roughly 60% of all lawsuits seeking more than \$50,000.

The number of asbestos cases filed in Madison County in 2011 matched a previous [record high](#) of 953 reached in 2003. As of September 30, 2012, about 800 asbestos cases had been [filed](#) in the county, putting it on track to break



the mythic 1,000-new-cases barrier. Data on mesothelioma rates suggest there should be around [140 new cases](#) a year in the entire state of Illinois. But in Madison County, home to 2% of the state's population, plaintiffs filed seven times that many cases in 2011. Over \$1 billion in asbestos claims are settled annually in the county as most cases never go to trial, according to the [St. Louis Post-Dispatch](#). So do the math – a handful of local personal injury law firms divvy up a bounty of between \$300 million to \$400 million in contingent fees each year.

With that kind of loot available, it's no wonder that local asbestos lawyers last year made \$30,000 in campaign contributions to **Judge Barbara Crowder**, the judge who formerly oversaw Madison County's asbestos docket, just days before she coincidentally granted their firms the lion's share (82%) of 2013 trial slots. When the news broke, Judge Crowder was quickly [reassigned](#) from the asbestos docket by **Chief Judge Ann Callis**, but the sordid story was enough to create a major stink, even though the campaign contributions were reportedly [returned](#). In any case, Madison County voters seemed to have forgotten the whole thing by Election Day when they voted to [retain](#) Judge Crowder for another term.



Soon after being appointed to replace Judge Crowder as the presiding asbestos judge, **Judge Clarence Harrison** encouragingly [eliminated](#), effective in 2013, the county's longstanding asbestos "trial slotting" system. In the [future](#), asbestos cases will be set for trial on a case-by-case basis by the court, rather than rewarded to favored firms with blocks of trial dates on a speculative basis. The order came just three days after Harrison [heard arguments](#) for and against overturning Judge Crowder's tainted order that assigned most trial dates to her political patrons.

Judge Harrison deserves credit for eliminating the patently unfair trial date allocation system that had enabled favored local law firms to market their inventory of empty trial slots to allied law firms across the country. But the new system he's implemented requires plaintiffs' lawyers to file motions to set cases for trial, and it is now being eyed as one reason 2012's new asbestos filings are expected to set a record. On its face, the new system would seemingly have no impact on the total number of filings. But in practice, Judge Harrison has increased the number of individual trial slots available on a given trial calendar, thereby increasing the overall capacity for cases and thus creating even greater pressure on defendants to settle since they can't reasonably be expected to defend themselves appropriately in multiple cases in a short timeframe.

MADISON COUNTY REMAINS THE PLAINTIFFS' LAWYERS COUNTY OF CHOICE

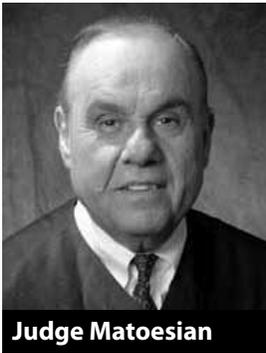
Judge Harrison also has sent mixed signals as to whether he will permit lawyers to file in Madison County cases that arise elsewhere around the country. Soon after he became presiding asbestos judge, he denied a defendant's motion to dismiss the case of a Texas resident who alleged that his exposure had occurred in West Virginia and Korea, and whose lawsuit had no connection to Illinois. In deciding the motion for dismissal in *Woody v. Air & Liquid Systems Corp.* (Mar. 2012), under the doctrine of forum non conveniens, which provides judges with discretion to dismiss cases that are more appropriately decided elsewhere, Judge Harrison gave considerable weight to the

fact that a few of the many defendant businesses sued were located in Illinois, while giving less credence to the fact that all of the witnesses, including experts and medical personnel for both sides, lived in West Virginia.

In more recent decisions, Judge Harrison has characterized forum non conveniens as an “arcane doctrine,” but nevertheless dismissed some claims as lacking a sufficient relationship to Madison County. In *Syrrakos v. A.W. Chesterton, Inc.* (Aug. 28, 2012), the plaintiff sued in Madison County when his exposure to asbestos and treatment occurred entirely in Wisconsin and Michigan, where he lived. In *Howard v. Kaiser Gypsum Co.* (Sept. 6, 2012), a near lifelong resident of Tennessee sued in Madison County even though he had never lived or worked in Illinois and no material evidence or witnesses were located in Illinois. Likewise, in *Belle v. Advance Auto Parts, Inc.* (Sept. 27, 2012), the plaintiff had lived in Virginia and Arkansas, where his exposure to asbestos occurred, and evidence related to the trial was primarily in Virginia. These decisions, however, come in what is only a miniscule portion of all the county’s nonresident asbestos filings.

OUTRAGEOUS VERDICTS

Lest anyone think that its largest-in-the-nation asbestos docket and a more-than-occasional willingness to entertain cases from near and far are the only things again qualifying Madison County as a Judicial Hellhole, here’s additional evidence: As reported by the [Madison Record](#), a recent \$1.25 million verdict for the plaintiffs – the daughter and brother of a man killed by a train at a railroad crossing on private property in Missouri – was thrown out by an appellate court that remanded the case for retrial.



Judge Matoesian

According to the [appellate court order](#), Madison County **Circuit Judge Andy Matoesian** “abused [his] discretion when [he] permitted the plaintiffs’ expert to refer to and to rely upon certain industry safety standards, regulations, and statutes to support their opinions on the Railroad’s standard of care, but prohibited the defendant railroad from presenting evidence and argument to show that the standards, regulations, and statutes were intended to address safety issues at public railroad crossings and were not binding at private crossings.” When defendant Union Pacific’s lawyers tried during trial to introduce evidence that delineated between private and public railroad crossings, Judge Matoesian dismissively quipped, “A crossing is a crossing.”

The appellate court did not take issue with a [litany](#) of other evidentiary and procedural rulings that favored the plaintiffs, including Judge Matoesian’s decision to bar the defense from introducing medical or police evidence that would have shown that the driver had the street drug “ecstasy” in his system and his brother, the passenger, had a .135 blood-alcohol level. But why confuse jurors with inconvenient facts that might help a defendant get a fair shake? At least the defendant will get another chance to make its case with a fresh jury. Meanwhile, the decision in *Webb v. Union Pacific Railroad Company* is all too typical of the raw deals defendants get in Madison County. Such blatant scale-tipping is what convinces out-of-state plaintiffs from all across the country to get their tickets punched for the “Madison County Express.”

But wait, there’s more! A trial court is [considering](#) reviving a nearly 10-year-old \$10.1 billion judgment against Philip Morris that stems from the marketing of light cigarettes. The judgment, which had been one of the largest in U.S. history, was thrown out many years ago by the Illinois Supreme Court. A plaintiffs’ firm has asked the trial court to reinstate the verdict on the basis that the U.S. Supreme Court ruled in a different case, five years later, that the Federal Trade Commission had not explicitly approved use of the terms “light” and “low tar,” which factored into the decision making of some of the Illinois Supreme Court justices. Still hoping to cash in on a massive payday, the plaintiffs’ lawyers have cried out that “new evidence” warrants pulling the old case out of storage. Madison County **Circuit Judge Dennis Ruth** held a [hearing](#) in August 2012, but he has yet to rule.

A POOR OUTLOOK FOR APPELLATE REVIEW

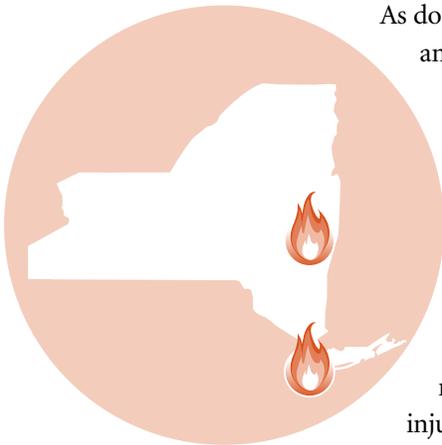
Given Madison County’s history of extraordinary rulings and questionable practices, a reliable appellate check is critical. So naturally many defendants are now concerned about the November election of St. Clair **Circuit Court Judge Judy Cates** to serve on Illinois’ Fifth District Appellate Court, which covers Madison County and 35 other southern counties in the state.

According to the Madison Record, Judge Cates, who once headed the organization that lobbies for Illinois’ trial lawyers, had gained a [reputation](#) as “a class action commando targeting successful businesses with crafty complaints.”

During the campaign, Judge Cates received tens of thousands of dollars from personal injury lawyers. Many of these contributions came from local and out-of-state asbestos attorneys and law firms. In one quarter alone, her campaign [reported](#) \$150,000 in plaintiffs’ lawyer contributions, including a \$10,000 donation from a California law firm. “Why would a California law firm care about who serves on the 5th District Appellate Court in Illinois?” [asked](#) Travis Akin of Illinois Lawsuit Abuse Watch. “The answer is simple. Personal injury firms in California and across the country have a vested interest in what happens in our Metro-East courts because they flock to these courts to file their junk lawsuits.”

Judicial Hellholes reporters hope that upon her elevation to the appellate court, Justice Cates will prove these concerns unfounded and decide cases in a fair and unbiased manner.

NEW YORK CITY AND ALBANY, NEW YORK



As documented by the Judicial Hellholes report in previous years, New York City and Albany, the Empire State’s capital, remain under the heavy influence of the plaintiffs’ bar as businesses and educated job seekers continue to leave the state in search of greener, less-litigious economic pastures.

Slip-and-fall racketeers, auto-accident fraudsters and others continue to make “Sue” York City the center of their lawsuit-loving universe, but that’s not to say that elements of New York’s tedious litigious class can’t be found elsewhere in the state. And though the primary obstacle to state-wide tort reforms resides in the legislature, where personal injury lawyer-turned-**Assembly Speaker Sheldon**

Silver and his allies manage to strangle nearly every liability-limiting bill in its cradle, proponents of evermore liability also can be found on the appellate bench where the trial bar’s campaign donations presumably hold less sway.

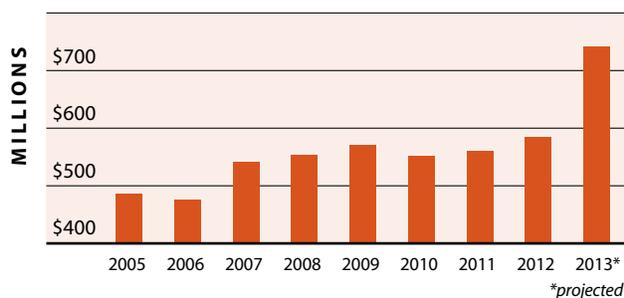


NEW YORK CITY’S TORT LIABILITY SOARS

Led by a record 2,004 lawsuits against the police department, New York City’s tort liability for the past fiscal year again exceeded a whopping half-billion dollars. Precise annual liability figures can be difficult to pin down, but the city’s Office of Management and Budget has projected 2013’s tort liability at considerably more than \$700 million (see nearby chart).

NEW YORK CITY TORT COSTS

Source: *Comptroller’s Comprehensive Annual Financial Report 2005-2012; 2013 Projection: Office of the Mayor*



In “[A Tort Time Bomb](#),” the New York World cited the [Mayor’s Management Report](#), which documented that a “flood of cases brought against the New York City police . . . has not subsided” – up 63 percent over the last decade. Since 2010, the NYPD has surpassed both the city’s Department of Transportation and Health and Hospitals Corporation as the fattest target for lawsuits, accounting for \$135.8 million of the city’s total expenditures for judgments and settlements, [according to the comptroller](#).

Supported by the plaintiffs' bar, the Big Apple's vigilant civil rights establishment points to "overly zealous" police tactics, including stop-and-frisks and arrests for marijuana smoking and trespassing, and hold out [Los Angeles and Chicago](#) as models for quickly settling lawsuits and "learning from" them. But New York City Councilman Peter Vallone argues instead that the city should aggressively defend itself against, rather than reflexively settle, such lawsuits.

What someone needs to explain to stuck-in-the-60s activists, however, is that both Los Angeles and Chicago – and California and Illinois more broadly – are all but bankrupt, in no small part because they roll over for any bogus slip-and-fall or accusation against a police officer. Councilman Vallone is the one reading the situation correctly. And though the city's outstanding Law Department (and taxpayers) can't afford to fight every nonsense lawsuit, challenging high-profile claims can send a valuable signal to plaintiffs' lawyers: No more easy paydays.

Speaking of nonsense lawsuits, during his November 2012 remarks to a gathering of state-based tort reformers in New Orleans, the New York City Law Department's chief litigator, **Lawrence Kahn**, spoke of the storied [case of Darryl Barnes](#), a street menace who, when ordered by a police officer to drop the Tec-9 he was brandishing, turned and opened fire on the officer. Struck by the officer's return fire, Barnes was paralyzed and confined to a wheelchair. But that didn't stop him and his lawyer from launching a decades' long legal battle against the city that actually resulted in two Bronx jury verdicts of \$76.4 million and \$51 million, both of which were eventually thrown out on appeal.



Of equal concern to Kahn and other city officials is the oppressive annual toll that more mundane lawsuits collectively take on the wallets of New York businesses and citizens. While appellate courts have limited some governmental liability and occasionally come to the rescue in extraordinary cases like Barnes', Kahn explained, they often enough do not and have lately been sustaining ever higher eight-figure awards in some medical liability cases. And with roughly 13,000 miles of sidewalks in the city, even smaller slip-and-fall verdicts add up, too. Since 2008, Kahn reports, about 4,500 new sidewalk related claims have been filed against the city each year, and annual payouts on those claims have averaged just under \$40 million.

(Incidentally, the NYPD recently announced that Monday, November 26, 2012 was the first day in memory when not a single violent crime was reported across the big city while the year's murder rate is expected to be the lowest since 1960. Does anyone believe there has ever been a day when New York City courts were open and not a single meritless lawsuit was filed?)

TAXPAYERS BEAR HUGE COSTS IMPOSED BY NY'S ANTIQUATED 'SCAFFOLD LAW'

If New York City is where the bulk of the state's economically destructive lawsuits are filed, Albany, the state's capital, is where these lawsuits are enabled by a legislative majority that generally fights reasonable limits on liability at every turn. A prime example of Albany's refusal to modernize state liability law was analyzed last July by New York Daily News columnist **Bill Hammond**, who [cited insurance data](#) that suggest taxpayers will pay \$100 million more to renovate the aging Tappan Zee Bridge across the Hudson River than they otherwise would were it not for the so-called "[scaffold law](#)," which automatically holds contractors and property owners liable for any on-the-job fall, regardless of their responsibility.

Not surprisingly, the labor unions and trial lawyers who reap great benefits from the scaffold law and dominate Albany politically, let Hammond have it. But the veteran columnist is no one to be bullied and, to his credit, struck back with [a follow-up column](#):

"[Y]ou don't have to take my word – or the construction industry's word – on how this law really works. Listen instead to the Court of Appeals, New York's highest court and the last word on interpreting state laws: "The scaffold law 'imposes liability even on contractors and [property] owners who had nothing to do with the plaintiff's accident,' **Judge Robert Smith** wrote for a [unanimous court](#) this past February. 'And where a violation of the statute has caused injury, any fault by the plaintiff contributing to that injury is irrelevant'

“Or listen to Rochester **Assemblyman Joseph Morelle**, a Democrat who has been fighting valiantly to reform the law for years. . . . What is true, Morelle explained, is that employers and owners can be held 100% liable for an injury, even if that injury was 99% the worker’s fault.”

In his earlier column, Hammond called the scaffold law a “19th century throwback” that is “unique to New York” in that it predates workmen’s compensation and unemployment insurance. He explained that it allows workers to “sue and collect damages even if they ignored their employers’ safety rules or were drunk or stoned on the job. . . . This is the big reason why, according to industry data, construction liability insurance costs an average of \$750 per \$1,000 of payroll in the New York City area – compared with just \$150 in Chicago.”

Though **Gov. Andrew Cuomo** has sought to advance marginal medical liability reforms, don’t expect him to support efforts to reform the antiquated scaffold law. He’s unlikely to cross Speaker Silver and the rest of New York’s politically generous personal injury bar by doing anything that would kill their golden goose. Meanwhile, New York taxpayers keep footing ever higher bills for public works projects, even while continuing to elect the same defenders of the status quo to Albany, election after election.

DESTRUCTIVE LITIGIOUSNESS SPREADING BEYOND THE ‘BIG APPLE’

For sheer volume and chutzpah, New York City overwhelmingly remains the state’s epicenter for lawsuit abuse, but aftershocks are increasingly felt further north and to the west. A [July 2012 report](#) in the Albany Times-Union summarized a [Rockefeller College survey](#) of state municipalities that estimates annual tort liabilities for cities and towns beyond the Big Apple exceed another \$1 billion annually.



Take the illustrative case of *Custodi v. Town of Amherst*, in which an experienced roller-blader injured herself after she caught her skate on the lip between a residential driveway and the street and fell. She promptly sued the homeowners, the Town of Amherst, the Highway Department, Erie County, the Village of Williamsville and the Department of Public Works. And though the trial court judge sensibly dismissed skater Robin Custodi’s lawsuit, agreeing with the defendants’ argument that she assumed the risk of injury when she went whizzing about on streets and sidewalks, the state’s highest court disagreed.

Writing for the [Court of Appeals](#), **Associate Judge Victoria A. Graffeo** explained that, as a general rule, assumption of risk defense should be limited to claims arising from sporting events, sponsored athletic and recreational activities, or athletic and recreational pursuits that take place at designated venues. The judge said that the doctrine did not apply here because Custodi was not rollerblading at a rink, a skating park or in a competition:

“[A]ssumption of the risk does not exculpate a landowner from liability for ordinary negligence in maintaining a premises. The exception would swallow the general rule of comparative fault if sidewalk defects or dangerous premises conditions were deemed ‘inherent’ risks assumed by non-pedestrians who sustain injuries, whether they be joggers, runners, bicyclists or roller-bladers.”

Good grief, your honor. Common sense dictates that runners, cyclists or roller-bladers should be obligated to watch where they’re going so as to hold property owners harmless, within reason.

In a similar if more [tragic case](#) from Western New York, Cybex, an American manufacturer of advanced exercise equipment faced possible bankruptcy and delisting from the NASDAQ Stock Market after Natalie Barnhard, a physical therapy assistant in Buffalo, awkwardly misused a leg-extension machine to stretch her shoulder muscles. The heavy machine toppled over on her and ultimately left her paralyzed and confined to a wheelchair. A 2010 trial resulted in a [\\$66 million verdict](#) against the manufacturer, which was [reduced](#) by an appellate court to \$44 million. Either amount would likely have put the company out of business. Earlier this year, Cybex agreed to [pay](#) Barnhard \$19.5 million and now struggles to retain its competitive position in a challenging global economy.

THREE NEW YORK LAWYERS CHARGED IN MAJOR INSURANCE SCHEME

On February 29, 2012, three New York attorneys were among 36 people charged in a massive scheme to defraud insurance companies of more than \$279 million through abuse of the state's no-fault auto insurance law. The alleged scam, as detailed in an [article](#) by the Wall Street Journal, was perpetuated for over 5 years and was rather robust and lucrative. The 36 individuals allegedly owned and operated fraudulent medical clinics where patients received unnecessary therapies, tests and other medical procedures and equipment. Prosecutors say patients were recruited into the clinic by "runners" or "ambulance chasers" who worked on behalf of the organization. Once recruited into the practice, the patients were coached to exaggerate injuries for treatment at the bogus medical clinics. The doctors at the clinic would then refer the patients to personal-injury lawyers who filed fraudulent lawsuits on their behalf and encouraged the patients to receive additional treatments to bolster their claims.

Among the 36 arrested were eight members and associates of a criminal group called the "No-Fault Organization." Ten doctors were charged as a part of the operation as well. The three New York lawyers involved



Matthew J. Conroy

were **Matthew J. Conroy**, a partner at the four-lawyer Matthew J. Conroy & Associates in Garden City, NY; **Maria Diglio**, an associate at the Conroy firm; and **Sol Naimark**, a partner at Naimark & Tannenbaum in Bayside, NY.

The suspects were arrested as part of a joint undercover operation with the FBI and the NYPD. In addition to the healthcare fraud charges, Southern District U.S. Attorney Preet Bharara announced racketeering [indictments](#) as well. Conroy is charged in the indictment with racketeering conspiracy, conspiracy to commit healthcare fraud, conspiracy to commit mail fraud and conspiracy to commit money laundering. Conroy also is accused of being a part of the organization, serving as a consultant and advisor on the criminal activity of the alleged ringleaders. The indictment also states that Conroy participated in laundering the organization's proceeds. Diglio and Naimark were charged in the health fraud and mail fraud conspiracies.

NEW YORK RANKS HIGH IN FRAUD AND MEDICAL LIABILITY PAYOUTS

Speaking of litigation fraud, no one was shocked by a May 2012 [National Insurance Crime Bureau](#) report that ranked New York second only to California, this year's #1 Judicial Hellhole, when it comes to manufactured or questionable slip-and-fall claims. Such claims rose by 12% nationally from 2010 through 2011, according to the NICB, and continue to cost honest insurance premium payers many millions of dollars annually.

Also costly to insurance premium payers are meritless lawsuits that target physicians, hospitals and other healthcare providers. As reported earlier this year by [Becker's ASC Review](#), analysis of 2011 data by [Diederich Healthcare](#) ranked the states from highest to lowest for their total medical lawsuit payouts, as recorded by the [National Practitioner Data Bank](#). In this very costly category, New York's nearly \$678 million more than doubled the just under \$320 million of second-place Pennsylvania, which includes Philadelphia, a recent #1 Judicial Hellhole that, unlike New York, is now showing promising signs of reform (*see* Watch List, p. 21).

THREE CHEERS FOR DISMISSAL OF 'BREAKFAST CLUB' SUIT

No matter how bad things get in Judicial Hellholes, and despite some critics' claims to the contrary, this report always looks for a silver lining. Among other laudable, no-nonsense New York judges deserving kudos this year is **Manhattan Supreme Court Justice Ellen Coin**, who brought her gavel down hard on a New York lawyer with nothing better to do than sue his posh health club for supplying what he alleged was an insufficiently luxurious breakfast.

As reported by [ABC News](#), Justice Coin dismissed the spoiled brat of a plaintiff's \$500,000 lawsuit, ordered him to pay for the health club's legal fees, and told him he "should be ashamed of himself." Hear, hear! Citizens of New York City owe this judge a debt of gratitude.



Justice Coin

BALTIMORE, MARYLAND

Baltimore has been described as an up-and-coming Judicial Hellhole for years, but don't just take our word for it. Plaintiffs' firms, such as Miller & Zois, [advertise](#) Baltimore as "a favorable jurisdiction for plaintiffs' injury lawyers." Here's why. . .

ASBESTOS

Asbestos filings in Baltimore grabbed all of the attention in the early 1990's and the litigation is again taking center stage. Since 2008, the asbestos docket in Baltimore City has increased at an alarming rate. As of August 31, 2012,



Henny Youngman

over 650 asbestos cases were filed in the Baltimore City Circuit Court alone, compared with a little more than 400 in all of 2011.

There's nothing funny about the growth of Baltimore's asbestos docket. But it oddly brings to mind the undisputed king of one-liners, the late, great **Henny Youngman**, who did a joke for decades that went like this: "I told my doctor it hurts when I do this. Doctor said 'Don't do that.'"

Now, with a [motion](#) and [memorandum](#) filed June 19 with the Baltimore City Circuit Court, famed mass tort kingpin **Peter Angelos** could sound a bit like Youngman: "I told the judge the asbestos docket is jammed. Judge said 'Stop filing lawsuits.'"

Of course, **Circuit Court Judge John Glenn** isn't likely to tell Angelos to stop filing asbestos lawsuits, and Angelos seems determined to make Charm City the new Philadelphia when it comes to unfairly consolidating claims and pressuring defendants into settlements they might not agree to if the cases were handled separately.

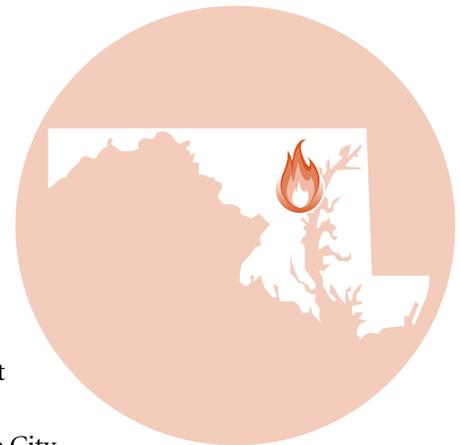
With his motion and memorandum, Angelos requested consolidation of 13,000 non-mesothelioma asbestos personal injury lawsuits, essentially arguing that, because he has filed so many cases, the court should help expedite them by stacking the deck against the targeted defendants. A hearing on the motion is scheduled for December 17, just after this report is to be released.

The Angelos memorandum lays out a detailed calendar and plan as to how he believes the court should resolve the cases. He notes that many of the cases have been on the docket since the mid-1990s and, because the docket is so full, they won't likely be resolved for many more years without consolidation. With little else by way of legal argument, he also cites his success in twice convincing Baltimore's circuit court to consolidate asbestos cases for him back in the early-1990s.

As Philadelphia's chief judge understood when he recently [ended consolidation](#) of asbestos cases there, this practice plainly advantages plaintiffs over defendants. There is no basis upon which to justify consolidating thousands of cases, other than the fact that they involve asbestos, so attention will be focused on how Judge Glenn handles the hearing and eventually rules on Angelos's motion.

Judge Glenn handles Baltimore's asbestos docket and has previously established a "rocket docket" that pushes cases through as quickly as possible, a practice that places the efficiency of the court and interest of the plaintiffs in collecting damages over the due process rights of defendants. The judge is known to lean hard on defendants and push the parties toward settlement. Defendants who opt to go to trial take a significant risk, since many consider the Baltimore City Circuit Court to be notoriously biased against business defendants, with a history of large awards.

Moreover, defense counsel are granted very few opportunities to interact with potential jurors during the *voir dire* process in Baltimore. Judges handle most of the questioning of jurors, leaving little time for attorneys to address specific concerns and effectively strike jurors who might not be able to reach a fair decision. Ultimately, defendants are left with jurors they know very little about and to whom they are then largely unable to tailor their arguments.



Peter Angelos

CONTRIBUTORY NEGLIGENCE

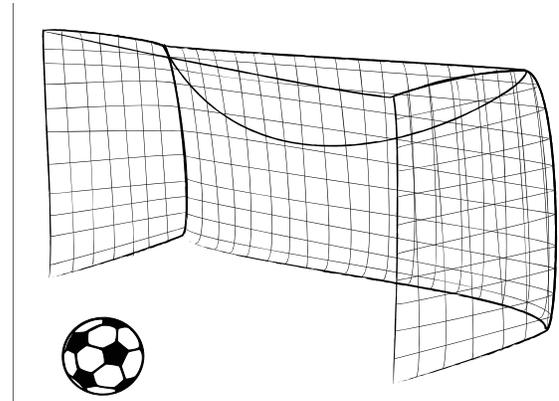
Beyond Peter Angelos-dominated asbestos litigation, an important case pending before Maryland's highest court has the potential to deepen personal injury lawyers' affinity for Baltimore and the rest of the state. On September 20, 2012, the Maryland Court of Appeals heard *Coleman v. Soccer Association of Columbia*, a case in which the plaintiff is seeking to overturn Maryland's long-held contributory negligence rule. This rule, which Maryland courts have followed for 165 years, provides that a plaintiff who is responsible for his or her own injury is not entitled to recover damages.

Joined by groups representing a variety of employers, physicians, and their insurers, ATRA submitted a "[friend of the court](#)" brief, urging the court to follow its own precedent, as well as the long-expressed will of the state legislature, which has repeatedly rejected such a change.

The case, which arose in Howard County, Maryland, involves a youth soccer coach who foolishly jumped up on an unused auxiliary soccer goal, grabbed the crossbar and swung on it until it fell backward on him. Medical records indicated he had smoked marijuana earlier in the day. The trial court found he was not entitled to any damages because he largely caused his own injury.

Abolition of the contributory negligence doctrine in Maryland would distort and disrupt many aspects of personal injury law in the state. If the high court eliminates contributory negligence as a defense, Maryland joint and several liability law would need to be altered to provide fair treatment for defendants. If such significant change in the law is to be made, it should be made by Marylanders' elected legislators in the General Assembly, with their capacity to hear from *all* interested parties and not simply the two parties before the court in this single and unique case.

The Maryland Court of Appeals is expected to render its decision in the *Coleman* case by early 2013. If the court chooses to usurp legislative power and abandon the state's longstanding doctrine of contributory negligence, the result will surely be a growing docket of personal injury cases in plaintiff-friendly Baltimore and a growing reputation as a Judicial Hellhole.



WATCH LIST

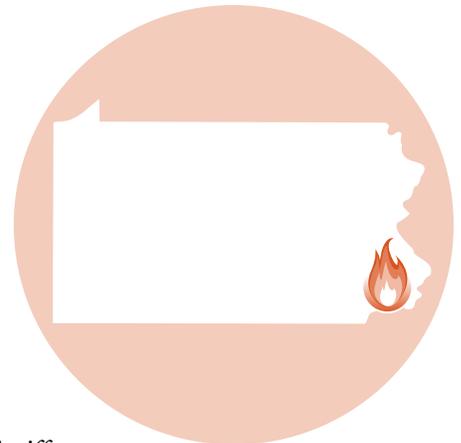
The Judicial Hellholes project calls attention to several additional jurisdictions that bear watching, whether or not they have been cited previously as Judicial Hellholes. These are jurisdictions that may be moving closer to or further away from Hellholes status as their respective litigation climates improve or degrade.

PHILADELPHIA, PENNSYLVANIA

As regular readers of this report and its related [website](#) know, Philadelphia ignominiously reigned as the nation's #1 Judicial Hellhole for the past two years. Under the direction of plaintiff-friendly judges, the Court of Common Pleas' Complex Litigation Center (CLC), designed initially for the more efficient handling of mass tort cases, had become a magnet jurisdiction for lawsuits from across the country. During the past five years, nearly [9 out of 10](#) active asbestos or pharmaceutical cases in the CLC had no connection to Philadelphia, and less than a third of them had even a connection to Pennsylvania.

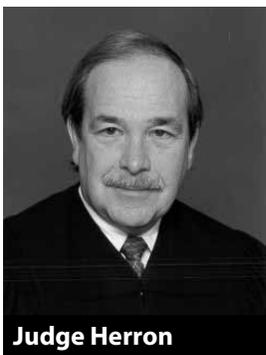
Local rules and procedures had evolved in a manner advantageous to plaintiffs, and the significant risk of inordinately high jury verdicts in the "[City of Unbrotherly Torts](#)" effectively forced most defendants to seek peace with generous settlement offers – even when they believed the facts and law were on their side, and that in a more fairly balanced court they might win their cases.

But unwelcomed, relentless attention from Judicial Hellholes reporters and other civil justice reformers has now sufficiently motivated fair-minded judges in Philadelphia and lawmakers in Harrisburg to initiate what is hoped will be an era of sustained positive change. And while it comes with many caveats and a pledge to keep the white-hot Judicial Hellholes spotlight firmly fixed on the jurisdiction for as long as necessary to prevent backsliding, it is in the spirit of giving credit where credit is due that this year's report appropriately eases Philadelphia out of the Hellholes rankings and onto the Watch List.



JUDGE HERRON LEADS REFORM DRIVE

Though personal injury lawyers may not have been quite as depressed as Philadelphia Eagles fans watching their team remain without a Super Bowl title year after year, many were nonetheless sadly disappointed on



Judge Herron

February 15, 2012, when **Court of Common Pleas Chief Administrative Judge John W. Herron** announced a 15-point reform order aimed at better leveling the playing field in Philadelphia's CLC.

Upon considering comments and recommendations from attorneys and others, Judge Herron signed off on [General Court Regulation No. 2012-01](#), which, among other positive steps, eliminates reverse bifurcation, limits consolidation in all mass tort cases, including asbestos cases, and limits the number of cases that can be tried by out-of-state attorneys annually.

Judge Herron's order also critically acknowledges the "dramatic" explosion of the CLC's asbestos docket that began when "this Court's leadership invited claims from other jurisdictions. In 2009, when published comments were offered encouraging the filing of claims in Philadelphia, out-of-state filings soared to 41% and in 2011 reached an astonishing 47%."



Along with other judges implicated by Judge Herron's damning reference to court leadership that invited out-of-state claims was then CLC **Supervising Judge Sandra Mazer Moss**. The new reform order also laid the ground work for Judge Moss to be moved respectfully but firmly out of the CLC, effective at the start of 2013. Many CLC defendants are quietly relieved both by that move and by the apparent commitment to reform and fairness thus far demonstrated by her replacement, **Judge Arnold L. New**.

With purpose, Judge Herron picked Judge New to redirect the CLC. Their reform efforts have the continuing support of Pennsylvania **Supreme Court Chief Justice Ronald D. Castille**, who in turn had [appointed](#) Judge Herron with the intention of giving the high court "more direct control and



involvement in some of the issues" facing Philadelphia courts. That support and control seems well-founded in light of preliminary statistics on new mass tort case filings.

As [reported](#) in September 2012 by the Legal Intelligencer, the "Philadelphia Court of Common Pleas is projecting that 60 percent fewer mass tort cases will be filed this year than were filed in 2011." With only 628 such cases having been filed through the end of August, the court projects only 1,068 new filings for all of 2012, compared to 2,690 in 2011. The fresh scent of fairness is likely discouraging new filings from plaintiffs' attorneys who'd grown accustomed to having an unfair advantage in Philadelphia.

MORE PROGRESS CAN BE MADE

As reported earlier this year by [Becker's ASC Review](#), analysis of 2011 data by [Diederich Healthcare](#) ranked the states from highest to lowest for their total medical lawsuit payouts, as recorded by the [National Practitioner Data Bank](#). In this very costly category, Pennsylvania's nearly \$320 million in such payouts was second in the nation only to New York's mindboggling \$678 million. One shudders to think how high the Keystone State's payouts might have been had it not undertaken venue reform for medical liability cases in 2003.

Reflecting on the success of that venue reform, which directs medical plaintiffs to file claims "only in a county in which the cause of action arose," Philadelphia Magazine's "[Be Well Philly](#)" blog in May 2012 reported that Pennsylvania's high court and legislature sought to curb runaway medical lawsuits in Philadelphia 10 years ago and have succeeded in dramatically reducing the abuse of the system as it then existed. A [collection of data](#) issued by Pennsylvania's Supreme Court shows, according to the blog post, "in 2002, medical malpractice plaintiffs whose cases were heard in Philly courts were more than twice as likely to win jury trials as the national average – and more than half their awards were for \$1 million or more."

Now, in "Pennsylvania overall, medical malpractice lawsuits are down 44.1 percent from the base years of 2000-2002; **in Philly, they're down a whopping 65 percent**. The total number of med-mal filings in the city fell from 1,365 in 2003 to 577 in 2011 – a 58 percent decrease." And Chief Justice Castille [says](#) that "serious cases and the cases that deserve compensation are being handled well in the system" since reforms were undertaken.

So if venue reform has served to tamp down the filing of meritless medical lawsuits in Philadelphia and throughout Pennsylvania more broadly, surely the legislature and high court should be motivated to apply similar reform to all civil litigation. After all, as one Pennsylvania court has candidly [acknowledged](#), "Pennsylvania does not forbid 'forum shopping' per se – to the contrary, our venue rules give plaintiffs various choices of different possible venues, and plaintiffs are generally free to 'shop' among those forums and choose the one they prefer."

Following enactment of the Fair Share Act in 2011, which moved Pennsylvania into the mainstream and largely holds defendants that are less than 60% responsible for a plaintiffs' injuries liable only for their share of damage (with some exceptions), Pennsylvania policymakers can and should maintain their reform momentum in 2013 by tightening venue rules, too.

After all, it was venue shopping by personal injury lawyers from all around the country, enticed by plaintiff-friendly judges and procedures, that had helped make Philadelphia the Judicial Hellhole it had become. There's no

reason Pennsylvania taxpayers should foot the bill for court resources consumed by out-of-state and out-of-county plaintiffs or otherwise be obligated to serve on juries in cases that belong elsewhere. Other states have adopted broad venue reforms over the last decade, and Pennsylvania should now join them.

POST-SCRIPT

Despite the distracting denials and protests that have come from some Philadelphia judges, plaintiffs' lawyers and self-described consumer advocates since the jurisdiction's fairness problems began to be spotlighted and [fully documented](#), ATRA is encouraged to know that serious-minded jurists there took criticisms as they were constructively intended. Their desire to render justice fairly for all parties with matters rightly before them in Philadelphia courts is the basis for Judge Herron's reform order. ATRA applauds the courage of these judges in challenging the status quo, and it encourages Keystone State policymakers to redouble broader reform efforts.

Climbing out of a judicial hellhole isn't easy. But it has been done by other, ultimately reform-minded jurisdictions, and Philadelphia has now joined them. Assuming trial judges will live up to both the letter and spirit of Judge Herron's reform order, and hopeful that Pennsylvania will broaden civil justice reform further, ATRA members would like to see Philadelphia stay off the Judicial Hellholes list indefinitely.

SOUTH FLORIDA

For the past nine years, South Florida has claimed a spot among the Judicial Hellholes due to its aggressive personal injury bar and plaintiff-friendly rules. It reached its low point in 2007, claiming the #1 ranking, and placed second in 2006, 2008 and 2009. Over the past three years, however, Florida lawmakers, with the support of **Gov. Rick Scott**, have improved the fairness of the state's litigation environment. In 2010, they addressed the excessive liability exposure imposed on Florida businesses for slip-and-fall claims and enacted safeguards when the government contracts out its law enforcement authority to lawyers who are paid based on the amount of damages or fines they impose.

Last year Florida enacted automobile "crashworthiness" reform, which allows a jury to consider a driver's fault when he or she claims a car should have provided more protection in an accident. Prior law had kept jurors from knowing that a driver was drunk, texting or otherwise distracted when the accident occurred.

As a result of these reforms and the most recent enactment of legislation aimed at reducing automobile insurance fraud, the Sunshine State's reputation for civil justice is improving. But there is still much more work to be done. And if the appeal of a reasonable limit on medical liability now pending before the state's highest court breaks bad, and if lawmakers otherwise fail to make additional progress, South Florida could quickly find itself ranked again among the worst of Judicial Hellholes.



THE LATEST SUCCESS: AUTO INSURANCE REFORM

This year Florida addressed rampant fraud in automobile insurance claims by reforming its Personal Injury Protection (PIP) law, which provides "no fault" coverage of medical bills up to \$10,000. PIP abuse was cited as one of the primary reasons for South Florida's ranking as a Judicial Hellhole last year. The PIP system encouraged litigation and permitted excessive fees for lawyers that sometimes dwarfed their clients' medical expenses. As a result, Florida drivers pay [relatively](#) high insurance rates, though they may soon feel some relief.

Here is how the system is abused. Many healthcare clinics involved have close [alliances](#) with personal injury attorneys. These clinics or "[PIP mills](#)," provide a means to perpetrate fraudulent records of medical procedures that [never occurred](#) or for injuries that are greatly exaggerated. Regulators had acknowledged that "[the filing of \[PIP\]](#)

lawsuits is out of control.” Robin Westcott, the Office of Insurance Regulation’s director of Property and Casualty Financial Oversight, warned that “you will see carriers leave the state,” if the abuse continues unchecked.

When a medical clinic that treats a person with a PIP claim does not receive full compensation for its bill from an insurer within 30 days, lawyers send a demand letter to the insurer demanding that they pay within an additional 30 days. Then they sue. Especially in South Florida, lawyers fight over amounts as small as \$1, and then are entitled to collect thousands of dollars in legal fees. If an insurer is suspicious about the validity of charges and fails to pay, it risks such a lawsuit. Some Florida personal injury lawyers reportedly submitted inflated bills for 26-hour days, meetings with the dead, or meetings that otherwise never took place.



Thankfully, the reform legislation enacted in May 2012 will address many forms of PIP abuse. The new law caps non-emergency benefits at \$2,500, bars massage and acupuncture from PIP coverage, and places reasonable limits on attorney fees. Florida Chief Financial Officer Jeff Atwater of North Palm Beach said the new law will “release the chokehold that fraud has on Florida’s insurance consumers.” Not surprisingly, personal injury attorneys immediately vowed to challenge the PIP reform in court.

MORE WORK TO BE DONE

As noted in prior reports, Florida courts continue to follow a relaxed standard for the admission of expert testimony, still allowing junk science into the courtroom despite efforts to raise the standard to that of federal courts and the vast majority of state courts. The courts have also allowed plaintiffs’ attorneys to recover excessive damages for unpaid and future medical expenses.

Gamesmanship with Florida’s bad faith insurance law is of particular concern, both to insurers and Florida residents who pay high premiums as a result. Florida courts’ perceived unwillingness to dismiss meritless bad faith cases encourages claimants to manufacture litigation rather than settle within policy limits, and it pushes insurers toward large settlements as opposed to even more expensive trials.

For example, in a ruling this summer, the judges of a Florida appellate court couldn’t even agree that an insurer had not acted in bad faith after the insurer repeatedly attempted to offer a settlement to the family of a woman who was in a coma after a car accident. The insurer called the injured woman’s mother seven times to offer a settlement within policy limits, with the first call coming just four days after the accident.

On the first call, the adjuster was told that the mother had hired an attorney, but the attorney’s name was not provided. Once the adjuster learned that the family had hired an attorney, he was precluded by ethics rules from negotiating directly with family members. All subsequent calls over the next six weeks to obtain the attorney’s contact information were to no avail. When the adjuster was finally able to locate the attorney nearly two months later, the attorney did not respond and then rejected the offer.

Nevertheless, the family sued the insurer for bad faith, alleging that it should have immediately sent a check for the policy limits. A trial court dismissed the case and, after years of costly litigation, the appellate court affirmed. Despite the insurer’s exhaustive efforts to settle the claim, one member of the three-judge panel actually wanted the case to go to trial, exposing the insurer to significant potential liability.

This decision could have gone the other way. The previous year, Florida’s Third District Court of Appeal affirmed a multi-million dollar verdict against an auto insurer whose attempts to settle were also met with no response. In that instance, the insured, who was driving while intoxicated, ran a stop sign and hit the car of a state

judge, killing him and his passenger. Immediately following the accident, the insurer sent a check for the policy limits for bodily injury, even before the judge's family contacted the insurer. Two months later, without explanation or counteroffer, the estate returned the check. Repeated calls from the insurer to the estate's lawyer went unreturned. Years later, a \$5.2 million judgment obtained against the drunk driver was assessed against the insurer through a bad faith lawsuit.

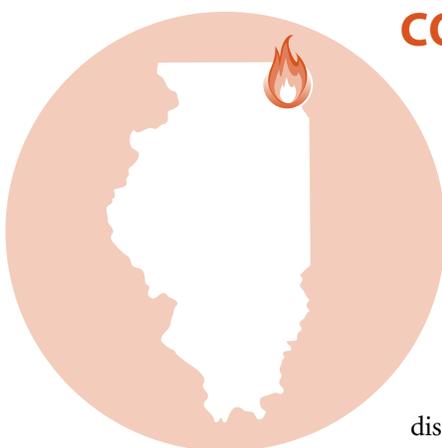
While the Third District majority effectively [validated](#) the bad faith claim and the attorney tactics used to engineer the claim, **Chief Judge Linda Wells** dissented. She found that the case should have never gone to a jury since the insurer "received no notice, claims or demands whatsoever," but nonetheless "issued a check for its bodily injury policy limits within a day of learning of the accident." She rejected the reason eventually given in litigation for returning the check – that it was accompanied by a general release of liability – because the check was not conditioned on accepting the release, and, more significantly, the family did not respond to the insurer's attempts to settle the claim. Rather, she found that "[t]his action presents just such a case where counsel for an injured party refuses to communicate or negotiate following a good faith offer by an insurer and after dodging information requests via vague responses by office staff, brings an action for bad faith." Judge Wells concluded, "As deeply sympathetic as this case is and as in need of a deep pocket as it is, I simply cannot agree that the facts support a bad faith claim." The result was that the drunk driver who caused the accident did not pay a dime even though he purchased the minimum amount of auto insurance in Florida, while the insurer, who immediately responded to the claim and promptly offered the insured's policy limits was made to pay out several million dollars for its efforts.

Efforts to provide modest safeguards in Florida's bad faith law have thus far been troublingly [unsuccessful](#).



THE LOOMING THREAT OF OUT-OF-CONTROL MEDICAL LIABILITY

South Florida's healthcare environment continues to improve due to medical liability reforms adopted a decade ago, but the helpful law could be wiped off the books by the Florida Supreme Court. As noted in last year's Judicial Hellholes report, observers are closely watching for the state high court's ruling on a challenge to a [law](#) enacted in 2003 that limits medical liability damages for pain and suffering to \$500,000 in most cases and \$1 million in cases of catastrophic injury or death. Still, the wait for a decision in *Estate of McCall v. United States* continues. Should the Florida Supreme Court strike down Florida's medical liability reforms, the healthcare environment, particularly in South Florida, may return to the abysmal condition it was in prior to the law's enactment. At that time, "concern over litigation and the cost and lack of medical malpractice insurance [had] caused doctors to discontinue high-risk procedures, turn away high-risk patients, close practices, and move out of state," as the [Select Task Force](#) on Healthcare Professional Liability Insurance found. "In some communities, doctors [had] quit delivering babies and discontinued hospital care."



COOK COUNTY, ILLINOIS

Cook County fell from its more typical perch high among the Judicial Hellholes to the Watch List last year, where it remains because the winds of litigation have stayed relatively calm in Chicago. That does not mean Cook County has improved in any significant way. In fact, when the U.S. Chamber Institute for Legal Reform recently [asked](#) lawyers representing major employers which cities or counties had the least fair and reasonable litigation environments, Chicago/Cook County was the most frequently cited.

Lawyers who represent defendants in civil litigation are [furious](#) with a "pilot project" by the Cook County Circuit Court that requires them to disclose reports by expert witnesses at the same time those who have sued them disclose their expert reports. The program went into effect in early 2012 over their

objections. Typically in courts across the country, plaintiffs file their expert reports first, allowing defendants to consider the claims against them and have their own expert respond. Defense lawyers point out that under the “simultaneous disclosure” program, they may need to hire experts they do not even need, since what is in dispute may not be clear. And they fear they could hurt their clients by addressing issues plaintiffs never thought to raise. The court says the new rule is “designed to speed up the cases and save time,” but for whom and [at what cost](#) to a fair proceeding? Local defense lawyers have [vowed](#) to fight on.

JUDGING THE JUDGES

The Cook County Circuit Court needs to get its house in order. In November, **Judge Cynthia Brim**, who was arrested and suspended from the bench after shoving a court deputy, was [“happy to be re-elected”](#) to another six-year term. The next day, she was back in court, not to get back to work but to [plead insanity](#) in her criminal case. Even before she tried to convince folks she’s insane, Judge Brim’s performance on the bench had been [harshly criticized](#) by local attorneys, the Judicial Performance Commission of Cook County, and the *Chicago Tribune*. Like Judge Brim, other judges who’d received similarly [poor reviews](#) from bar associations for their knowledge of the law, judicial temperament or [work ethic](#) were all reelected, too, including one who was caught sunbathing by her pool and running errands on workday afternoons. Cook County voters are apparently a forgiving bunch insofar as [only one](#) sitting Circuit Court judge has failed to win reelection in the past 22 years.



As for the conduct of non-judicial Circuit Court employees? A 17-year court staffer was arrested in 2012 for taking home court files and [shredding](#) them at her kitchen table. The employee was responsible for handling case files for a judge in the law division, which deals with civil lawsuits from medical malpractice to personal injury. So is it any wonder that litigants have concerns about getting a fair shake in Cook County?

GOOD NEWS

As more fully detailed in this report’s Points of Light section (*see* p. 35), the Illinois Supreme Court made a big stand for personal responsibility in 2012 when it [threw out](#) a \$3.9 million Cook County award to a teenager, who, knowing the obvious risk, attempted to jump on board a moving freight train, with tragic results. An appellate court also [overturned](#) a \$32 million Cook County verdict for a popcorn factory worker who claimed the butter flavoring ingredient caused him breathing problems. The appeals court said the trial court had improperly denied one of the popcorn company’s defenses and made other errors with respect to admissible evidence and jury instructions. It had been the [largest](#) “popcorn lung” verdict ever. The next Cook County case likely to face scrutiny on appeal is a [\\$64 million](#) verdict rendered in November 2012 for a steelworker who was rendered a paraplegic from a fall after he chose not to use the safety harness required by his employer.



Finally, credit is due to Cook County **Circuit Court Judges Mary Mikva and Neil Cohen** for putting an [end](#) to lawsuits by underemployed law school graduates who alleged their law schools’ marketing had misled them about their job prospects in the long-saturated legal labor [market](#).

Come on, kids, stop your whining and grow up. If you were smart enough to do well on the LSAT, you should have been smart enough to glance at a newspaper or legal journal occasionally. If you had, you’d know law firms have been downsizing for years.

NEW JERSEY

New Jersey's Atlantic County has often found itself in the glare of the Judicial Hellholes spotlight, primarily for its uneven handling of mass tort cases against the state's pharmaceutical industry. But 2012 actually brought good news on this front as ATRA closely watched some important cases before **Superior Court Judge Carol Higbee**.

In June, Judge Higbee issued her particularly [strong and well-reasoned ruling](#) that refused to hold brand-name drug manufacturers liable for injuries allegedly resulting from use of generic versions of their drugs made and sold by competitors (*see* more details in Points of Light, p. 36). In April, also before Judge Higbee, Merck & Co. [successfully defended](#) itself against a claim involving its osteoporosis drug, Fosamax – the second such recent win in Atlantic County and the company's fifth win in six cases that have gone to trial in New Jersey.

The Merck wins are an encouraging sign that Atlantic County courts may be moving toward greater fairness for all parties in a lawsuit. Such fairness is essential to providing a more business-friendly environment, which can lead to stronger economic growth and increased job opportunities for the citizens of New Jersey.

Of course, a few sound court decisions in a former Judicial Hellhole are hardly grounds for unbridled rejoicing. In fact, some defendants remain convinced they cannot get a fair trial in Judge Higbee's court. Nevertheless, Atlantic County and much of the rest of the Garden State remain highly litigious, warranting sustained, vigilant observation.



WHO IS NEW JERSEY'S MOST UNPOPULAR PLAINTIFF?

A [June 2012 blog post](#) by ATRA ally AnnMarie McDonald of the [New Jersey Lawsuit Reform Alliance](#) told the tale of an ungrateful woman who is suing local police even though a brave and fast-acting officer saved her life when she was taken hostage by a knife-wielding parolee at a shopping mall.

Carteret resident **Ellen Shane** was shopping at a mall with her husband when she was [grabbed by the parolee and taken hostage](#). The parolee held a knife to her throat and dragged her by her hair to a nearby department store, in full view of her distraught husband who was unable to free her. Fortunately a Woodbridge police officer was able to do so, shooting and killing the man who ignored the officer's command to let Shane go.

But rather than showing her gratitude for saving her from an armed and dangerous madman, Shane instead opted to [sue the Woodbridge Township police department](#) for \$5 million. She incongruously claims the department "failed to protect public safety" and that she was "injured as a result of the officer's actions." Though she may have suffered a bump or a bruise when her suddenly lifeless attacker dropped her to the ground, bumps and bruises beat a slit throat any day.

Let's just hope the fear of multimillion-dollar lawsuits don't prompt our fine men and women in blue to hesitate the next time someone is threatened by a violent criminal.

In any case, if Ellen Shane's lawsuit isn't sufficiently nauseating, how about that of **Elizabeth Lloyd**? She this year sued a former Little Leaguer (and his family), claiming an errant bullpen toss struck her in the face as she sat nearby.

As reported by the [Huffington Post](#), "Lloyd is seeking more than \$150,000 in damages to cover medical costs stemming from the incident at a Manchester Little League game two years ago. She's also seeking an undefined amount for pain and suffering."

Lloyd [claims](#) she was sitting at a picnic table near the bullpen when she was hit with a ball thrown by then-11-year-old warm-up catcher Matthew Migliaccio. Had she been hit with a ball thrown by a professional ballplayer, one might conclude said ballplayer did so purposefully. But 11-year-old Little Leaguers don't have the same accurate command of their throws, and any spectator who attends baseball games, courts have consistently ruled, assume certain risks.



So the only question left for the court of public opinion is this: Who is New Jersey's most unpopular plaintiff? Ellen Shane or Elizabeth Lloyd?

COSTLY MEDICAL LAWSUITS LIMITING ACCESS TO HEALTHCARE

As cited elsewhere in this report, a data analysis by [Diederich Healthcare](#) earlier in 2012 ranked the states from highest to lowest for their total medical lawsuit payouts in 2011, as recorded by the [National Practitioner Data Bank](#). Not surprisingly, New Jersey, with more than \$220 million in such payouts ranked #4, behind only super-duper litigious New York, Pennsylvania and Illinois.

Less surprising still is the costly impact that such medical liability litigation has on physicians' insurance premiums in New Jersey and thus the availability of healthcare as younger doctors choose to practice in less-litigious states, and experienced veterans opt for early retirement. In any case, New Jersey remains treacherous ground for physicians and hospitals, and if legislators fail to fix the problem, say [some observers](#), the state may soon face a crisis.

J. Richard Goldstein, president and CEO of the New Jersey Council of Teaching Hospitals, sums up: "A physician shortage crisis is right around the corner in New Jersey if we do not take immediate steps to change course. National health reform, while laudable and needed, will only work to accelerate the time when there simply will not be enough doctors to serve New Jersey's adults and children."

Meanwhile, medical liability lawsuits are practically as common as weeds in the Garden State. For example, in 2011, New Jersey's 630 new medical liability claims more than doubled those in Ohio, a state with roughly 2.5 million more residents. Even Texas, a state with nearly three times New Jersey's population, had fewer new claims with 550. Go figure.

BUT ALL IS NOT LOST

If only New Jersey **Gov. Chris Christie** and lawmakers in Trenton could do for doctors what they did earlier this year for good Samaritans who use portable defibrillators to try to save the lives of sudden heart attack victims.

As reported by [NJToday.net](#), the new reform law "eliminates language in state statute that requires a person using an automated external defibrillator (AED) to have received training in both CPR and the usage of the AED." More importantly, it "provides immunity from civil liability to any lay person who uses an AED and fails, in good faith, to request emergency medical assistance as soon as practical."

The measure also provides immunity to the organization that acquired the AED. Roughly 300,000 people in the U.S. suffer sudden cardiac arrest each year, and health experts say there is a 90 percent chance of survival if defibrillation is performed within the first minute of the crisis.



TEXTING LAWSUIT DELETED, MAKE THAT DISMISSED

In one more bit of good news out of New Jersey, a May 2012 ruling that almost made the final cut for a judicial Points of Light citation in this year's report, a judge in Morristown dismissed a lawsuit that sought to hold the sender of a text message liable for an accident caused by the reader of that message.

As reported by the [Star-Ledger](#), **Superior Court Judge David Rand** agreed with the defendant's lawyer and dismissed claims against a young woman who had sent a text message to her boyfriend just before the boyfriend, while driving his car, crossed into oncoming traffic and gravely injured a middle-aged couple on a motorcycle.

Plaintiffs' attorney Stephen Weinstein had argued that the texter should have known her boyfriend was driving when she texted him and was therefore partly responsible for his client's injuries.

But the texter denied in an earlier deposition that she knew her boyfriend was driving at the time. The boyfriend "pleaded guilty to distracted driving, admitting he was using his cellphone and acknowledging a series of text messages . . . around the time of the accident."

Judge Rand said texters can reasonably assume recipients will behave responsibly, adding that drivers face many electronic distractions these days.

Presumably bringing sighs of relief from shock jocks, billboard owners, commercial and noncommercial enterprises

with signs out front, and many others vying for our attention as we drive, Judge Rand said, “Were I to extend this duty to this case, in my judgment, any form of distraction could potentially serve as the basis of a liability case,” noting that his decision is not intended to minimize drivers’ responsibility to pay attention to the road and what’s in front of them.

Though the judge expected his decision to be appealed, he nonetheless deserves credit for holding the line of rationality against evermore creative theories of liability ginned up by personal injury lawyers.

NEVADA

The Nevada litigation environment continues to alarm ATRA members. Of rising concern is **Attorney General Catherine Cortez Masto’s** repeated use of private law firms to enforce Nevada law and her office’s compensation of these outside lawyers based on the amount of fines they impose on those who do business in the state.



JACKPOT VERDICTS

The last two Judicial Hellholes reports highlighted a [half-billion dollar](#) verdict in 2010 and another [\\$162 million](#) verdict in 2011 against generic drug maker TEVA Pharmaceuticals and distributor Baxter Healthcare stemming from the misconduct of a clinic that inappropriately, and against the directions of the manufacturer, used vials of the anesthetic Propofol for multiple colonoscopy or endoscopy patients.

The clinic’s misconduct resulted in a hepatitis C outbreak, and clinic owners and staff face criminal charges. But TEVA and Baxter, as “deep pockets,” were civilly blamed for selling vials that were large enough to be used for multiple injections. The astounding verdicts and the unfairness of the trials that led to them pushed Clark County from the Watch List back up to the Judicial Hellholes list in 2010, where it remained last year. This year, the drug maker [settled](#) most of the lawsuits, opting not to take the risk of the Nevada Supreme Court affirming the awards.

AGGRESSIVE PLAINTIFFS’ BAR

Other issues of ongoing concern in Nevada include the aggressive and politically-influential personal injury bar in Las Vegas and frustration with some local judges who appear to favor plaintiffs in their rulings, as documented in prior reports.

Now attention is focused on whether the judiciary will rein in AG Masto’s use of contingent-fee lawyers to enforce state law. Masto has hired Washington, D.C.-based plaintiffs’ class-action law firm, Cohen Milstein, to challenge the business practices of homebuilders and mortgage lenders. Given that Nevada has among the [highest foreclosure rates](#)



in the country, such lawsuits are politically popular. But by pursuing such actions through contingent-fee arrangements, these lawsuits become influenced by outside lawyers who are motivated primarily by profits and self-interest, and not necessarily by justice in the public interest.

Nevada’s attorney general has provided no good explanation as to why her own substantial taxpayer-funded staff cannot handle the litigation, and why she is letting an out-of-state private law firm [drive](#) massive litigation in the Silver State. If the D.C. lawyers are successful, they could take home a significant portion of the state’s recovery.

Homebuilders Pulte Homes and Lennar [fought back](#) with lawsuits of their own in federal court to stop AG Masto’s use of contingent-fee agreements. Their suits were voluntarily dismissed when the cases settled.

Now another company, [Lender Processing Services](#), has taken its concerns to the Nevada Supreme Court. In July LPS filed a petition asking the state’s high court to invalidate the attorney general’s agreements with the private lawyers. The company also filed a [lawsuit](#) against the AG in federal court. The challenges note that a longstanding Nevada

[statute](#) unambiguously prohibits the state from hiring outside counsel absent a conflict of interest precluding the state from using its own lawyers, or without specific authorization from the legislature. This law is purposefully clear to avoid circumstances that may give rise to the serious due process concerns that are implicated when state power is delegated to private individuals with profit motivations. ATRA filed an [amicus brief](#) in the case now pending before the state high court and will continue monitoring the attorney general's use of such arrangements.

LOUISIANA

Despite determined reform efforts by certain lawmakers in Baton Rouge, Louisiana's civil litigation environment, especially in Orleans and St. Landry parishes, remains a concern thanks to laws that still permit excessive liability, plaintiff-friendly judges, and close relationships between the plaintiffs' bar and some state government officials.



REFORM EFFORTS

In citing Louisiana on the Watch List last year, the Judicial Hellholes report focused on the hundreds of "legacy" lawsuits that served primarily as a [profit-making venture](#) for a select group of landowners and plaintiffs' lawyers. Roughly [1,500 energy production companies](#) were accused of contaminating the environment with their past drilling activities. Together, these affected companies represented more than half of the state's crude production – and by extension, a significant portion of Louisiana's economy. A [study](#) by LSU estimated that the lawsuits had cost Louisiana 30,000 jobs and \$10.5 billion in economic output.



Chairman Abramson

Led by **Chairman Neil Abramson of the House Civil Law and Procedure Committee**, the legislature in 2012 finally passed, and **Gov. Bobby Jindal** [signed](#), legacy lawsuit reform legislation that limits this litigation by requiring the state's Department of Natural Resources to determine the extent of any environmental damage prior to litigation.

Lawmakers also managed to take a modest step to address [venue shopping](#) in connection with class action litigation. But bills that would have reduced the [threshold](#) for receiving a jury trial and provided more [transparency in asbestos litigation](#) were [not enacted](#). And for some small businesses owners and their employees, such as those of [Mike Carter](#) at Monroe Rubber and Gasket, additional tort reforms can't be enacted soon enough. Carter's business never manufactured asbestos materials but has nonetheless been swamped by a flood of asbestos lawsuits and may be forced to close and lay off workers.

EXCESSIVE LIABILITY

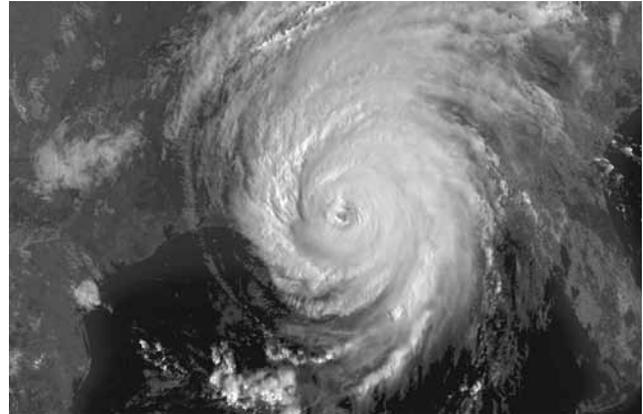
Meanwhile, auto insurance rates have climbed steadily in Louisiana in recent years and are among the [highest in the nation](#), with the average driver paying an annual premium of over \$2,500 or about [5.5%](#) of their annual income for auto insurance alone. Observers note that among the reasons for Louisiana's high insurance rates are the state's litigious environment, an aggressive personal injury bar, and judges who tend to favor plaintiffs.

There have been several breathtaking verdicts in recent years. For example, in August Louisiana's Third Circuit Court of Appeals upheld a \$258 million St. Landry Parish verdict against Janssen Pharmaceutical and Johnson & Johnson, which found the companies had not fully disclosed the risk of weight gain and related side effects for those who took the anti-psychotic drug Risperdal. The lawsuit was brought on behalf of the state by private lawyers, hired on a contingent-fee basis, who will take home \$70 million in fees and \$3 million in court costs. On appeal, the defendant companies [argued](#) that the trial judge had stopped them from introducing evidence that weakened the state's case, while allowing the state's lawyers to make inflammatory and improper arguments. The appellate court rejected these arguments and also [found](#) that the private lawyers could recover civil penalties on behalf of the state without having to show that anyone had been actually harmed.

Coincidentally, the same appellate court was featured in this report last year after it [upheld](#) a similarly astonishing \$15 million St. Landry Parish [verdict](#). In that case, after the gas company had lawfully shut off the gas to a residence for unpaid bills, the homeowner forcibly accessed the gas line with a wrench and, in doing so, managed to blow up his own house. But in St. Landry Parish, where facts and law are no obstacles to legal extortion, the homeowner won his crazy case against the innocent gas company.

Another recent astronomical verdict is the [\\$17.5 million](#) award in February 2012, in Calcasieu Parish in a case where a worker alleged that he developed leukemia from exposure to benzene while working on the ships of three oil companies. Also in 2012 an Orleans Parish jury awarded \$12 million to a Louisiana man who was exposed to asbestos when he worked in several jobs as a shipbuilder and alleged he was not warned of the risks.

While some of these cases may eventually make their way to the Louisiana Supreme Court, defendants' chances of fair rulings there also seem slim. For instance, just after publication of last year's Judicial Hellholes report, a majority of the state's high court [reinstated](#) \$93 million in civil penalties (\$110 million with interest) against Louisiana Citizens Property Insurance Corp., the state's property insurer of last resort, for failing to pay out on an influx of claims following hurricanes Katrina and Rita within 30 days. The decision is troubling because, unlike two dissenting justices and an intermediate appellate court, the high court majority found that the insurer could be hit with millions in fines even if it acted fairly and in good faith and regardless of the difficulty in tracking down policy holders or assessing property damage for many weeks following the storms. The U.S. Supreme Court [declined](#) to [hear](#) the insurer's appeal.



In recent years, the Louisiana Supreme Court also has allowed recovery of both “hedonic damages” and “phantom damages.” While some states permit juries to consider lost enjoyment of life when determining compensation for pain and suffering or a physical disability, Louisiana [allows](#) plaintiffs to get an additional, separate award for hedonic damages. In some cases Louisiana law also [permits](#) recovery of the billed rate for medical treatment even if the plaintiff's healthcare provider eventually accepted far less than originally billed. Such excessive liability leads to higher insurance rates and hurts the economy by imposing unnecessary costs on employers.

The Louisiana Supreme Court does deserve some credit, however, for [reaffirming](#) this March the constitutionality of the state's \$500,000 cap on general damages in medical malpractice lawsuits and finding that the limit applies to all qualified healthcare providers, including nurse practitioners.

BENCH TRIALS BEFORE PLAINTIFF-FRIENDLY JUDGES

Some have expressed [concern](#) that the lack of jury trials in smaller civil cases may allow some Louisiana trial court judges to favor plaintiffs' lawyers who happen to be their political patrons. In Louisiana a party can request a jury trial only in cases where there is more than \$50,000 at stake. In lesser cases the judge alone determines the outcome.



AG Caldwell

A [study](#) by Louisiana Lawsuit Abuse Watch found that Louisiana's threshold is, by far, the highest in the nation.

INFLUENCE OF PERSONAL INJURY LAWYERS OVER STATE OFFICIALS

In addition to their influence with judges, Louisiana's personal injury bar also has clout with other state officials. As the \$258 million Risperdal verdict shows, state **Attorney General Buddy Caldwell** hires [politically-supportive](#) personal injury lawyers to enforce state law in exchange for lucrative fees based on the fines they impose. He has done so despite a 1997 Louisiana Supreme Court [decision](#) that found such arrangements are illegal without legislative approval. Now, some companies are fighting back.

GlaxoSmithKline has challenged this practice in a lawsuit in which the state claims the drug maker's marketing of diabetes drug Avandia was unlawful. Glaxo argues that, under Louisiana law, only government lawyers can litigate the case. "If you're charged with a serious matter by the state, you don't want the prosecutor to have a financial stake in the outcome," [said](#) P.D. Villarreal, Glaxo's senior vice president for global litigation. "We're entitled to be sued by someone whose job it is to do the right thing, not by people who are just out to make money." Melissa Landry of Louisiana Lawsuit Abuse Watch [points out](#) that "[s]everal of the lawyers in these private law firms have contributed more than \$60,000 to Caldwell, and at least two of them have held leadership roles in his campaign. These relationships give the appearance of impropriety and potentially a 'pay-to-play' scandal in the making."

Some observers have also [questioned](#) Gov. Jindal's relationship with the plaintiffs' bar. Jindal has received hundreds of thousands of dollars from plaintiffs' lawyers, according to campaign finance [reports](#). For instance, Jindal last year enjoyed a \$5,000 per couple [fundraiser](#) with Burton LeBlanc, the vice president of the American Association of Justice. Forbes also found it [curious](#) that Jindal tapped LeBlanc's law firm, Baron & Budd, which grew rich from asbestos lawsuits, to represent the state in litigation against British Petroleum (BP) in the wake of the Gulf oil spill. And though the state has now addressed legacy lawsuits, as noted above, some, including U.S. Sen. **David Vitter**, had accused Jindal of creating a "[trial lawyer bonanza](#)" by not taking a more active role in brokering reform sooner. More recently ATRA and others expressed [disappointment](#) after Jindal endorsed the "[trial lawyers' candidate](#)" in a runoff election for a seat on the Louisiana Supreme Court. That Jindal's candidate won the December 8 runoff is no doubt a cause for celebration among the governor's trial lawyer allies.

DISHONORABLE MENTIONS

“Dishonorable Mentions” recognize particularly abusive practices, unsound court decisions or other actions that erode the fairness of a state’s civil justice system.

MISSOURI SUPREME COURT STRIKES DOWN NONECONOMIC DAMAGES LIMIT

In July 2012 a divided Missouri Supreme Court [struck down](#) the state’s \$350,000 limit on noneconomic damages in medical liability lawsuits. In doing so the high court’s activist majority overruled 20 years of [precedent](#) that had held limits on noneconomic damages to be “rationally related to the general goal of preserving adequate, affordable healthcare for all Missourians.” In effect, the court has now sided with personal injury lawyers over doctors and those who rely on accessible, affordable medical care.

Missouri enacted the \$350,000 limit on subjective damages for pain and suffering as the average award against medical care providers [increased](#) by 52% between 2001 and 2005. Especially for surgeons this represented the continuation of a deteriorating situation as the average payout on claims increased approximately 84% from 1999 to 2005. Over the same period, Missouri’s medical liability insurers [experienced](#) significant losses and had to increase premiums to avoid collapse. Those higher premiums in turn put greater financial strain on the medical community. Many physicians, particularly high-risk specialists, could no longer afford insurance and some chose to relocate as a result. The high court’s latest decision, reestablishing unlimited pain and suffering damages, threatens a return to the troubling environment doctors and their patients in Missouri suffered not long ago.

As with its infamous 2007 [medical-monitoring](#) decision in which the high court allowed plaintiffs to seek damages without having suffered an injury, Missouri again is an outlier, joining a minority of states in which high court decisions have stymied elected legislators and governors trying to head off physician shortages with reasonable limits on inherently subjective awards for pain and suffering. In fact, as noted among this report’s Points of Light (*see p. 36*), the high court in neighboring Kansas in 2012 upheld a \$250,000 noneconomic damages limit applicable not only in medical malpractice cases, but all personal injury cases. So don’t be surprised to see Show Me State doctors moving west to the Sunflower State.



WASHINGTON SUPREME COURTS HITS PROTECTIVE EQUIPMENT MAKER WITH LIABILITY

In a sharply divided [decision](#) in August, the Washington Supreme Court overturned a lower court’s dismissal of a case brought against manufacturers of respirators, federally-certified masks worn to protect against toxic substances in the workplace, finding that the equipment makers had a duty to warn of the dangers of exposure to asbestos. And although respirator manufacturers make products that shield workers from various contaminants, they are [increasingly](#) named among numerous defendants in asbestos and silica-related lawsuits because so many companies that actually made asbestos-containing products have been bankrupted and personal injury lawyers now look for new, still-solvent targets.

Leo Macias, who worked for 24 years as a tool keeper in a shipyard in Seattle brought



one such case after he was diagnosed with mesothelioma. Mr. Macias claimed that his duties in cleaning respirators, during which he did not wear protective equipment himself, exposed him to asbestos dust that caused his injury.



Washington law appeared to favor the respirator makers since they did not make, sell or profit from the asbestos to which Mr. Macias was exposed, and it's absurd to suggest they be required to warn specifically against countless contaminants from which their respirators offer protection.

Nonetheless, the court majority distinguished two earlier rulings in which the court found that manufacturers do not have a duty to warn about products containing asbestos sold by others because it found the danger of asbestos exposure “inherent in the use and maintenance” of respirators. The dissenting justices, however, found that manufacturers should not be liable unless they are in the chain of distribution of the asbestos-containing products. “If anything,” the dissenters reasoned, “the safety purpose of the respirators cuts against imposing liability here.”

Such an expansion of liability hurts not only respirator makers but the broader public interest. The financial impact of such litigation provides a strong disincentive for respirator makers and other manufacturers of protective equipment to continue making and selling their products in the United States. In fact, a significant amount of respirator manufacturing has [moved](#) out of United States to places such as China and Mexico, where companies are not subject to American tort liability. Should the supply of respirators fail to keep pace with workers' needs for them, needless exposures to harmful contaminants could be considerable, and the risk to public health and safety could be enormous in the wake of a contagious disease outbreak, natural disaster or terrorist attack.

More troubling still is the notion that the Macias decision may not be an aberration. Some Washington court watchers have expressed concern that, while the Evergreen State is no California or West Virginia, its high court is generally moving in the wrong direction with a decidedly [pro-liability majority](#).

POINTS OF LIGHT

There are five ways to douse the flames in Judicial Hellholes and help out-of-balance jurisdictions to develop more evenhanded civil courts:

- 1 Constructive media attention and public education can help encourage reform;
- 2 Trial court judges can engage in self-correction;
- 3 Appellate courts can overturn bad trial court decisions and limit future judicial malfeasance;
- 4 Legislatures can enact statutory reforms; and
- 5 Voters can reject litigation-loving judges or enact ballot referenda to address particular problems.

In its “Points of Light” section, the Judicial Hellholes report highlights jurisdictions in which judges, legislators, the electorate and/or the media have intervened to stem abusive judicial practices. These jurisdictions set an example for how a courthouse, city, county or state can emerge from the depths of a hellhole or otherwise keep itself from sinking to those depths in the first place. This year’s report again focuses on both judicial and legislative actions.

IN THE COURTS

CALIFORNIA SUPREME COURT FINDS COMPANIES ARE NOT LIABLE FOR PRODUCTS OF OTHERS ATTACHED TO THEIRS AFTER SALE.

The California Supreme Court unanimously [held](#) in *O’Neil v. Crane Co.* that a manufacturer is not subject to liability for a worker’s exposure to asbestos when its own products are later insulated with asbestos made by another company. While “manufacturers, distributors, and retailers have a duty to ensure the safety of their products,” the court [found](#) in its January 2012 opinion, “we have never held that these responsibilities extend to preventing injuries caused by other products that might foreseeably be used in conjunction with a defendant’s product.” The court recognized that “[i]t is unfair to require manufacturers of nondefective products to shoulder a burden of liability when they derived no economic benefit from the sale of the products that injured the plaintiff.” This should be an influential decision in that it was the product of extensive analysis and comes from a court credited with developing much of modern product liability law in a populous state, with significant asbestos litigation, not known to favor defendants. ATRA joined an [amicus brief](#) filed in the case, supporting dismissal. Prior to the ruling plaintiffs’ law firms based in Texas had opened offices in Los Angeles hoping the theory would be accepted. But this high court decision may put a crimp in their growth plans, and it is already sharply limiting traction for third-party duty-to-warn claims nationwide. None of which is to say plaintiffs’ lawyers won’t keep trying to make asbestos hay in the California sunshine, especially in Los Angeles.

ILLINOIS SUPREME COURT FINDS THAT

LANDOWNERS ARE NOT LIABLE TO TRESPASSERS WHO IGNORE OBVIOUS DANGERS. A unanimous Illinois Supreme Court [overturned](#) a \$3.9 million award to a boy who lost his leg below the knee when he attempted to jump onto a moving freight train while showing off. Choate and his friends had ignored fences and posted warning signs, and were not even trying to get to the other side of the tracks, the court found. While his friends screamed at him to stop, Choate, who was 12-years-old at the time, repeatedly attempted to jump onboard the moving train. On his third try, he slipped and his foot fell under a train wheel. And though a Cook County

Circuit Court jury initially awarded him \$6.5 million in damages, that amount was reduced to reflect a jury finding that he was 40 percent responsible for his injuries. An intermediate appellate court affirmed the reduced judgment, but the Illinois Supreme Court ruled that the circuit court should have dismissed the case as a matter of law. Why?



Because “a moving train presents a danger that is so obvious that any child allowed at large can reasonably be expected to appreciate the risk involved in coming within the area made dangerous by it,” said Justice Charles E. Freeman, writing for the Court. “It is always unfortunate when a child gets injured while playing, but the responsibility for a child’s safety lies primarily with his parents, whose duty it is to see that the child does not endanger himself. . . . No fence would have prevented such bravado” and it “has never been part of our law that

a landowner may be liable to a trespasser who proceeds to wantonly expose himself to unmistakable danger in total disregard of a fully understood risk, simply for the thrill of venture,” the court appropriately concluded.

KANSAS SUPREME COURT REJECTS ATTEMPT TO NULLIFY LIMIT ON PAIN & SUFFERING DAMAGES. In stark contrast to the Missouri Supreme Court (*see* Dishonorable Mentions, p. 33), the Kansas Supreme Court [upheld](#) a \$250,000 limit on subjective noneconomic damages in [personal injury cases](#), including medical malpractice claims. Noneconomic losses include claims for pain and suffering, mental anguish, and losses that cannot be objectively expressed in dollars and cents. The Kansas law does not place any limit on recovery of economic damages, such as expenses for medical bills or lost income due to an injury. Healthcare providers in Kansas sought to keep the limit in place, [arguing](#) that its elimination would lead to higher malpractice insurance premiums and reduced access to healthcare as discouraged doctors retire early or otherwise move their practices to other states. The law has been in place since 1988. This was not the first time the state’s high court upheld the constitutionality of the noneconomic damages limit. The court upheld the limit in [1990](#) with a ruling largely relied upon for precedent in this year’s decision. The ruling reaffirms Kansas’s standing among the majority of states that have upheld similarly reasonable limits on noneconomic damages. No one should be surprised when Missouri doctors move to Kansas.

MISSISSIPPI SUPREME COURT REINS IN ATTORNEY GENERAL’S ALLIANCE WITH PLAINTIFFS’ LAWYERS. Mississippi Attorney General Jim Hood, possibly the most [storied user](#) of contingent-fee agreements in the hiring of private-sector personal injury lawyers to enforce state law, will now need to comply with good-government safeguards if he intends to persist in the controversial practice. In a pair of rulings this year issued in a [consumer protection](#) lawsuit against Microsoft and a [tax collection](#) case against MCI, the Mississippi Supreme Court ruled that the attorney general may not enter settlement agreements that require defendants to pay the fees of contingent-fee lawyers directly. Settlements are public funds that must be deposited into the state treasury, the court found. Agreeing with the state’s [auditor](#), the court found that the attorney general may only pay private attorneys fees out of his approved legislative appropriation or contingent fund. The auditor had challenged respective payments of \$10 million and \$14 million to private lawyers in the two cases. It remains to be seen whether the rulings will provide needed oversight of the attorney generals’ ability to bypass the legislative appropriations process or will simply lead him to take the extra step of depositing settlement money in a state account, then writing a multi-million dollar check to the private lawyers. As noted in the legislative Points of Light, the Mississippi Legislature’s [enactment](#) of the Transparency in Private Attorney Contracts Act this May also should help safeguard the public and protect the due process rights of defendants by requiring the private lawyers to keep detailed time records, placing reasonable limits on contingent fees, precluding private lawyers from being compensated based on the amount of fines they impose, and establishing an “Outside Counsel Oversight Commission,” comprising the governor, lieutenant governor and secretary of state.

NEW JERSEY SUPERIOR COURT RECOGNIZES THAT BRAND-NAME MANUFACTURERS ARE NOT LIABLE FOR INJURIES CAUSED BY GENERIC PRODUCTS. Last year’s Judicial Hellholes report placed Atlantic County, New Jersey on the Watch List because of its reputation as a magnet for massive lawsuits against the very drug makers that form the state’s economic backbone. As promised, ATRA has watched the Superior Court there closely and is

pleased to report positive news. In June 2012, Judge Carol Higbee issued a particularly [strong and well-reasoned ruling](#) rejecting an invitation from plaintiffs' lawyers, made in several cases before her court and in courts across the country, to hold a brand-name drug manufacturer liable for injuries allegedly resulting from a generic version of its drug made and sold by a competing company. Judge Higbee logically concluded that, regardless of how artful and creative the plaintiffs' claims may be, a brand-name drug maker cannot be liable for allegedly harmful generic products it did not make. Judge Higbee took a strong stance against altering fundamental principles of law merely to allow recovery against a business viewed as a deep pocket. While Judge Higbee recognized that a U.S. Supreme Court decision did not permit individuals to sue generic drug makers for allegedly inadequate product labeling, she found that ruling "does not change New Jersey law," including the "essential element of a plaintiff's prima facie products liability action [that he or she show] . . . proof that the manufacturer actually produced the product which gave rise to the plaintiff's injury." Only two courts, in outlier decisions, have permitted these types of claims to move forward, while about 70 courts have applied reasoning similar to Judge Higbee's in [declining to adopt](#) such novel theories. Her welcome decision keeps the Garden State firmly within the mainstream of product liability law.

PENNSYLVANIA SUPREME COURT REJECTS 'ANY EXPOSURE' LAWSUITS. In May the Pennsylvania Supreme Court [reinstated](#) a trial court judge's decision to reject as scientifically unsupported expert testimony offered by the plaintiff in an attempt to argue that exposure to any amount of asbestos fibers, no matter how small, can be a substantial factor in causing an asbestos-related disease. The trial judge, **Robert J. Colville** of Allegheny County (Pittsburgh), was one of the first judges in the country to pull the curtain back on this "any exposure" theory. What he saw was not pretty. In an apparent attempt to draw as many companies into asbestos litigation as possible, the plaintiff's expert was relying on illogical and unscientific guesswork that is not supported in any published literature. After reviewing an extensive record and holding a three-day hearing in which the plaintiff's expert and others testified, Judge Colville exposed the logical and scientific flaws in their theory. He concluded that the expert should not be permitted to testify without at least some reasonable attempt to quantify the plaintiff's dose (exposure to asbestos fibers) and demonstrate that said dose exceeded a dangerous level. An intermediate appellate court, however, reversed Judge Colville's ruling, finding that he abused his discretion in making such a judgment. In reversing the appellate court, the Pennsylvania Supreme Court concluded, "Simply put, one cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that a disease is dose responsive." As legal commentators have [observed](#), "The any exposure theory is the engine driving most of today's asbestos cases. Without it, most of the low-dose asbestos cases pending in today's courts would have no causation support and could not reasonably be prosecuted." Appropriately, at least 20 courts have now rejected the any exposure theory or similar approaches in asbestos and other toxic tort litigation. The issue is now before the Virginia Supreme Court and on a petition for review to the Maryland Court of Appeals.

SUPREME COURT OF TEXAS ADOPTS 'LEARNED INTERMEDIARY' DOCTRINE. In June the Texas Supreme Court [adopted](#) the learned intermediary doctrine, recognizing that prescription drug makers have a duty to accurately educate physicians on the potential risks and benefits of drugs. A prescribing doctor then can discuss that information with his or her patients based on each patient's specific medical history and health condition. Under the [learned intermediary doctrine](#), so long as a drug company conveys adequate warnings and instructions regarding use of its products to doctors, it does not have an additional duty to attempt to explain that information directly to consumers. Texas was the largest state [lacking](#) clear law on the application of the learned intermediary rule. As the high court recognized, its decision to adopt the learned intermediary doctrine "places us alongside the vast majority of other jurisdictions that have considered the issue." It reasoned, in part, "Because patients can obtain prescription drugs only through their prescribing physician or another authorized intermediary and because the 'learned intermediary' is best suited to weigh the patient's individual needs in con-



junction with the risks and benefits of the prescription drug, we are in agreement with the overwhelming majority of other courts that have considered the learned intermediary doctrine and hold that, within the physician-patient relationship, the learned intermediary doctrine applies and generally limits the drug manufacturer's duty to warn to the prescribing physician." In adopting the learned intermediary doctrine, the Court reversed a poorly-reasoned appellate court ruling that would have made Texas, which has made great strides to improve its litigation climate, an outlier in product liability law. [West Virginia](#), a perennial Judicial Hellhole, remains the only state that wholly refuses to apply the learned intermediary doctrine.

IN THE LEGISLATURES

As anemic economic growth and high unemployment continued to plague much of the country for yet another year, many governors and state lawmakers remained determined to improve their states' competitiveness. Though the number of positive new tort reforms enacted in 2012 falls well short of that in the banner year of 2011, smart states kept working to make themselves more attractive to employers.

Two trends are of particular note. First, as part of a healthy move toward greater transparency, three states enacted good-government laws placing safeguards on the hiring of private personal injury attorneys by state officials on a contingent-fee basis. These laws are designed to reduce the incentives in such pay-to-play arrangements to position lawyers' self-interest in profits ahead of the public's interest in justice. Such questionable practices have contributed to the poor reputations of several jurisdictions featured in this report, including Louisiana, Nevada, Pennsylvania and West Virginia.

The second trend, continued in five states in 2012, is toward enactments that preclude courts from radically expanding the liability of home or business owners to trespassers, as proposed by the American Law Institute's (ALI) most recent Restatement of Torts. Six states took such action last year by similarly codifying the traditional rule that a possessor of property generally owes no duty of care to a trespasser, with certain well-defined exceptions.

Following below in alphabetical order is a state-by-state listing of positive new reforms:



ALABAMA

- ◆ Codified the traditional scope of liability to trespassers ([S.B. 342](#)).

ARIZONA

- ◆ Provided that businesses in compliance with state or federal laws regulating their products or services are not subject to punitive damages absent a showing of misconduct in the regulatory process ([H.B. 2503](#)).
- ◆ Placed safeguards on state hiring of private lawyers on a contingent-fee basis ([S.B. 1132](#)).
- ◆ Promoted representative juries by making additional pay available to jurors serving on lengthy trials who are not otherwise compensated by their employers ([S.B. 1142](#)).
- ◆ Codified the traditional scope of liability to trespassers ([S.B. 1410](#)).

COLORADO

- ◆ Amended the Colorado Open Records Act to clarify that civil government investigatory files are generally protected from disclosure, overturning the 2011 Colorado Court of Appeals [decision](#) in *Land Owners United LLC v. Waters*. Without this law, personal information about consumer victims and proprietary information of businesses could be subject to open records requests ([H.B. 1036](#)).

IOWA

- ◆ Placed safeguards on state hiring of private lawyers on a contingent-fee basis ([H.F. 563](#)).

LOUISIANA

- ◆ With key leadership from **Neil Abramson, Chairman of the House Civil Law and Procedure Committee**, the Pelican State enacted long sought class-action venue reform that will stop the gamesmanship of plaintiffs' lawyers, who would file multiple, identical class actions in Louisiana courts until one was assigned to a friendly judge, then dismiss the others ([H.B. 464](#)).
- ◆ Enacted "legacy lawsuit" reform, providing oil and gas producers with some protection from extortionate lawsuits that have hindered onshore energy production. It provides energy producers the chance to admit responsibility for cleaning up pollution related to past drilling without conceding larger damages. The law also creates a system wherein the Department of Natural Resources will develop a cleanup plan for polluted lands with input from the public before submission to departments of Environmental Quality and Agriculture for their analysis ([H.B. 618](#)).

MISSISSIPPI

- ◆ Led by **Mark Baker, Chairman of the House Judiciary A Committee**, with key support from **House Speaker Philip Gunn** and **Senate Judiciary A Committee Chairman W. Briggs Hopson III**, Mississippi safeguarded state hiring of private lawyers on a contingent-fee basis ([H.B. 211](#)). Not surprisingly, current **Attorney General Jim Hood** fought final passage of the legislation with everything he had, including [campaign communications](#) designed to scare citizens and rally them against the much needed good-government legislation.



MISSOURI

- ◆ Codified the traditional scope of liability to trespassers ([S.B. 628](#)).

OHIO

- ◆ Codified the traditional scope of liability to trespassers ([S.B. 202](#)).
- ◆ Shortly before this report went to press, lawmakers passed asbestos transparency legislation ([H.B. 380](#)) that will keep asbestos claimants' from so-called "double-dipping" – seeking compensation both from bankruptcy trust funds and separate lawsuits. **Gov. John Kasich** is expected to sign the bill into law, [reportedly](#) the first of its kind in the nation.

RHODE ISLAND

- ◆ Expanded the type of medical services and expense affidavits that can be introduced into evidence without the provider being required to testify in court ([H.B. 7559](#)).

TENNESSEE

- ◆ Reduced the state's excessive interest rate on court judgments to the Federal Reserve's weekly average prime loan rate so long as the rate does not exceed 10% ([H.B. 2982](#)).
- ◆ Codified the traditional scope of liability to trespassers ([S.B. 2719](#)).

WISCONSIN

- ◆ Eliminated civil punitive and compensatory damages under the Wisconsin Fair Employment Act (WFEA) of 2009. WFEA essentially obligates Wisconsin employers to defend employment claims both administratively and again in civil courts where plaintiffs' attorneys had sought lucrative contingency shares of punitive and compensatory damages beyond what was administratively available by statute. Those with claims can still opt to pursue them in state and federal civil courts, but they can no longer seek to double-dip after making an administrative claim ([S.B. 202](#)).

SPECIAL FEATURES

FOOD FOR THOUGHT: CONSUMER PROTECTION LAWSUIT ABUSE ON THE RISE

Consumers familiar with Nutella™ know it as a tasty, chocolaty hazelnut spread. Nutella’s federally mandated nutritional [labeling](#) makes clear that it contains over 200 calories per spoonful and a significant amount of fat. So how can a lawsuit plausibly claim consumers were misled by advertising to believe that Nutella is some kind of health food?

Yet a proposed [settlement](#) of class action lawsuits in California and New Jersey would compensate those who purchased Nutella anywhere in the United States during a roughly three-year period with \$4 per jar, up to 5 jars, for a maximum award of \$20 per household. Consumers do not have to show, or even claim, they were deceived. Nor do they need to present receipts. Those who filled out a one-page [form](#) by July 2012 certifying how much Nutella they purchased may, at some point, get their portrait of Andrew Jackson. This “consumer protection” lawsuit stemmed from an [advertisement](#) in which a mother claimed that it is hard to get her kids to eat breakfast, but spreading Nutella on healthy foods can help.



Undoubtedly, the lawyers who ginned up the litigation will get a great deal more than \$20 each. They [sought](#) \$3 million in attorneys’ fees, \$78,888 in expenses, and one-third of the value of the settlement – about [\\$4 million](#). Fortunately, the court didn’t grant them that big a payday, but they’ll be the only real winner. Why? Because even those lovers of Nutella who’ll get their \$20 if they go to the trouble of filling out and submitting the claim form will invariably pay more for Nutella in the future as the litigation’s costs are ultimately passed on to them. But the biggest loss may be measured in the public’s eroding respect for the civil justice system when it’s abused in cases such as this.

Another breakfast food maker being squeezed in California courts by opportunistic class-action lawyers is Kellogg. The proposed [settlement](#) it reached with plaintiffs’ lawyers obligated Kellogg to pay \$10 million for having asserted that kids are more attentive when they eat Frosted Mini-Wheats cereal for breakfast. Giving kids something frosted for breakfast is probably going to increase their attentiveness, but the “science” adduced by plaintiffs supports only an 11% boost in attentiveness, not the 20% boost advertised by the manufacturer. While each Mini-Wheats purchaser would receive up to \$15, the lawyers would pocket \$2 million in attorneys’ fees for their efforts. And, recognizing that most people will not bother filling out forms for such a [paltry](#) sum, about half of the proposed settlement would have come in the form of \$5.5 million “worth” of food given to unnamed charities. It was this last factor that primarily led a unanimous panel of the U.S. Court of Appeals for the Ninth Circuit to [reject](#) the settlement this year, finding no tie between the donations and consumers who were allegedly injured. The court also found that the vagueness of how the food donation would be valued (i.e., at Kellogg’s cost, wholesale value, or retail value) could allow plaintiffs’ lawyers to improperly justify an inflated award of attorneys’ fees. But California taxpayers were forced nonetheless to provide court resources for this nonsense, even as court budgets are being slashed and civil dockets grow ever longer.



Moving to lunch, McDonald’s was recently forced to fight off a consumer protection suit that claimed it had engaged in an “unfair” practice by including toys in its Happy Meals. The claim alleged that McDonald’s knew such toy offerings would “result in kids nagging parents” to take them to McDonald’s. Parents, the court was asked to believe, are powerless to control the [demands](#) of their six-year-olds. The [complaint](#), also filed in California, asserted a vast conspiracy to “subvert parental authority” and manipulate

young children to “insidiously and deceptively access parents’ wallets.” Usually these types of lawsuits settle, as the Nutella and Frosted Mini-Wheats cases show, but this one was actually dismissed. Why? Consumers received exactly what they paid for – a Happy Meal with a toy. Rather than using a state consumer protection law as a means to extract a large payday for attorneys, an [agenda-driven group](#) had attempted to use a lawsuit to regulate and limit the food choices available to consumers. They were not successful – at least not this time around. But no one should expect the radical food police to simply cease and desist.

If reading about all this tedious litigation that exploits well-intentioned but overly broad consumer protection laws has made you hungry, maybe you need a snack. Nature Valley [granola bars](#) are among many food products hit with [lawsuits](#) after advertising them as “100% natural.” [Plaintiffs’ lawyers](#) who view the food industry as deep-pockets claim that such products, when they include ingredients such as high fructose corn syrup rather than straight sugar, or [genetically modified](#) ingredients like soy, yellow corn flour, soy flour and soy lecithin, fall short of 100%. These lawsuits claim that consumers paid a premium for the all natural product, even though the ingredients were clearly listed on the label.



Perhaps the most infamous, if somewhat encouraging, of the recent consumer protection food lawsuits was the class action launched against Taco Bell. This federal lawsuit, driven by a notorious personal injury law firm based in Alabama, also was filed in . . . wait for it . . . California, [claiming](#) that the fast-food chain misled consumers about the content of its taco filling. The plaintiffs alleged that the meat used by Taco Bell was not pure “beef,” as advertised, and sought to require Taco Bell advertising to refer instead to its “taco meat filling.” Taco Bell felt it was defamed by the lawsuit, which the plaintiffs’ [publicized](#) in the media. It [fought back](#) in newspaper [ads](#), social media, and a series of [videos](#) giving its side: Sure, its beef contains other ingredients for flavor and texture – 3% water, 4% seasonings, and 5% other ingredients, such as oats and sugar – the company explained, just like mama’s homemade meatballs or dad’s delicious burgers from the grill. When it became clear that Taco Bell would not be bullied into an expeditious and lucrative settlement for the parasitic plaintiffs’ lawyers, they voluntarily withdrew the lawsuit in April 2011, issuing their own deceptive [statement](#), claiming falsely that Taco Bell had made “changes in marketing and product disclosures.” But, according to Taco Bell, it had done no such thing and the company [demanded an apology](#). It didn’t get one and isn’t holding its breath, but I did score a big win, albeit after considerable legal costs that its loyal customers will bear over time.

Aside from these ridiculous types of food suits, plaintiffs’ lawyers also are increasingly using laws meant to help consumers get their money back when misled into making a purchase as an alternative to personal injury lawsuits. An extraordinary example comes from Massachusetts this year, where the state’s highest court is currently [reviewing](#) a case in which a judge accepted the invitation of a plaintiff’s lawyer to use the state’s consumer protection law to override a jury’s decision in a wrongful death case. In that case, a young man who had been drinking heavily entered an off-limits area of a bar to talk on his cell phone and somehow fell down a stairway leading to the



basement. There were no witnesses to the tragic accident. A jury found that the bar was not responsible for his death. But the plaintiffs’ lawyers had also asserted a creative claim under the state’s consumer protection law, known as Chapter 93A. Since consumer protection claims in Massachusetts are not entitled to a jury trial, the jury issued only an advisory verdict on the Chapter 93A claim, finding that the bar did not engage in any unfair or deceptive conduct. Remarkably, the judge [disregarded](#) the jury’s conclusion and entered a verdict for the plaintiff on the consumer protection claim. He found that because the bar constructed the stairway at issue, years earlier, without proper permits, and since the stairway was not up to code, the bar had engaged in an unfair trade practice. By applying the

consumer protection law, the judge transformed a defense verdict into a plaintiff’s verdict and, given the generous recovery allowed by Chapter 93A, hit the small business with triple damages and required its owners to pay the plaintiff’s attorneys fees – amounting to a nearly \$7 million award.

As this case shows, consumer protection claims can provide for significantly higher awards for damages than personal injury suits and allow a plaintiff to recover attorneys' fees, even though each side is responsible for paying its own attorneys in most other types of lawsuits. The reason is simple – consumer protection laws include such incentives to make it worthwhile to seek recovery for small losses stemming from everyday consumer purchases. Given the vagueness of many such laws, which broadly prohibit “unfair and deceptive” conduct, plaintiffs' lawyers routinely tack consumer protection claims onto all sorts of lawsuits. Plaintiffs' lawyers also use these broad consumer protection laws to circumvent the evidence required in product liability and other types of personal injury lawsuits, such as an actual physical injury, causation, and damages.

For instance, instead of showing that a prescription drug has an inadequate warning label, personal injury lawyers have [alleged](#) that a drug is simply not as safe or effective as patients were led to believe, or that the patient would not have purchased the drug had she fully appreciated the risks, even when the medicine helped. Another example of a product liability suit masquerading as a consumer protection claim is the one filed against cell phone manufacturers and retailers claiming that their products emit dangerous levels of radiation. Consumer protection laws provide cover to file such lawsuits even when the plaintiffs' lawyers cannot present anyone who suffered an injury from cell phone use. A federal appellate court [threw out](#) the suit on the grounds that the emission levels at issue were within those considered safe by the Federal Communications Commission, and the U.S. Supreme Court [declined](#) to review the decision last year.

When people get ripped off when purchasing goods or services, they should get their money back. But these types of lawsuits primarily benefit lawyers, and do little, if anything for consumers. In fact, they drive up prices. Courts are the first line of defense against such abuse. First and foremost, judges should not allow lawyers to use consumer protection lawsuits in situations for which they were never intended, such as personal injury or product liability claims. Legislators can also act. For example, in 2011 Tennessee enacted [legislation](#) limiting enforcement of the state consumer protection act's broad prohibition of “any act or practice that is deceptive” to enforcement by the state attorney general, while continuing to permit private lawsuits for more specific violations, and allowed only individual lawsuits, not class actions, under the consumer law.

THE WORST (AND BEST) FEDERAL APPELLATE DECISIONS OF 2012

This year the Judicial Hellholes report debuts a new section scrutinizing some of the federal appellate courts' worst and best decisions of 2012. In identifying court rulings worthy of praise or concern, the following criteria were considered: 1) did the appellate court properly apply the applicable state law; 2) did the court faithfully follow the instructions of the U.S. Supreme Court; and 3) did the federal court, as is sometimes the case in Judicial Hellholes' state courts, interpret the law in a way that allows abusive litigation? The report identifies three of this year's worst federal appellate court decisions in each of these areas, contrasting them with cases in which other courts issued sound rulings.

USING THE WRONG STATE'S LAW TO CREATE A CAUSE OF ACTION



One of the worst decisions of the year was *Glazer v. Whirlpool Corp.* (6th Cir. May 3, 2012). In May, the Sixth Circuit [affirmed](#) certification of a class action brought on behalf of 200,000 Ohio consumers of Whirlpool washing machines even though only a tiny fraction of them had experienced problems with their washers. To justify the ruling, the Sixth Circuit used decisions applying California's consumer law, even though the Supreme Court decision of some 75 years ago, *Erie v. Tompkins*, requires federal courts to apply the law of the state in which the federal court has exercised jurisdiction – here, Ohio law. California's consumer laws are widely considered among the most lawsuit-friendly in the nation, much broader in scope than Ohio law.

Specifically, the Sixth Circuit used California law to satisfy the commonality requirement for class actions even though the plaintiffs' allegations widely varied from each other. More than 20 different washing machine models were involved, the plaintiffs differed in how they used the machines, and an overwhelming majority of them never experienced any problems whatsoever. In fact, 97% of all class members never experienced the mold problem alleged in the lawsuit. To gloss over these differences, the court relied on a case involving California law to create a damages theory that plaintiffs were all injured simply because they bought washing machines: "class plaintiffs may be able to show that each class member was injured at the point of sale upon paying a premium price for the [washer] as designed, *even if the washing machines purchased by some class members have not developed the [problem]* (emphasis added)." This novel "premium price" theory was not raised by the plaintiffs and has no support in Ohio law.

The Sixth Circuit also cited a widely criticized California Supreme Court ruling, *Kwikset Corp. v. Superior Court*, to skip over the fact that the overwhelming majority of class members never experienced the alleged harm. In that ruling, the California high court allowed an action against Kwikset for advertising locks as "Made in the U.S.A." when some may have included screws or pins produced abroad. The court allowed plaintiffs to satisfy the damages requirement under a novel theory that the locksets' post-sale value might now be diminished. This ruling was criticized, including in last year's Judicial Hellholes report, because it subverted a California voter referendum requiring plaintiffs to have actually been injured by the product they are suing over. Ironically, an earlier ruling in the *Kwikset* case was the poster child for the reforms to end these shakedown "consumer" suits.

By relying on novel California law to uphold class certification governed by Ohio law, the Sixth Circuit did precisely what the Supreme Court has prohibited: it applied the law of an unrelated jurisdiction to facilitate class certification. In *Phillips Petroleum Co. v. Shutts*, where Kansas law was applied to all class members even though most plaintiffs had no connection to Kansas, the Supreme Court held that using the wrong state's law violates constitutional limitations on choice of law under the Due Process and Full Faith and Credit clauses. The U.S. Supreme Court should [hear this case](#) to stop such "law shopping," especially since the Sixth Circuit's ruling may be having a [ripple effect](#) as other courts consider class certification for similar claims.

As California voters made clear with passage of Proposition 64 last decade, "consumer" actions wherein there is no actual injury serve only the interests of plaintiffs' lawyers who gin up these class actions, hurting consumers and workers with higher prices and [unemployment](#). They should not be exported to other states.

One of the best decisions of the year was *Sikkeelee v. Precision Airmotive Corp.* (3d Cir. Oct. 17, 2012). Standing in stark contrast to the Sixth Circuit's ruling in *Glazer*, the Third Circuit required district judges to show restraint in applying Pennsylvania's product liability law. The problem is that in recent years, Pennsylvania's [product liability law](#) has fallen into a state of "profound uncertainty," with the Pennsylvania Supreme Court [acknowledging](#) that state design defect law is in a "continuing state of disrepair."

While this situation could create a quandary for federal courts applying Pennsylvania's law, the Third Circuit stepped in to require a consistent, modest approach until Pennsylvania determines its law. In a [2009 decision](#), the Third Circuit held that Pennsylvania requires plaintiffs to follow design defect standards in the Restatement Third of Torts, Products Liability, not older formulations under Restatement (Second). It affirmed that ruling in [2011](#).

In July 2012, though, U.S. District Court Judge John E. Jones III [reverted](#) to the Restatement (Second) approach in a case involving a plane crash where the defendant argued the engine was not defective under the Restatement Third. To its credit, the Third Circuit accepted an interlocutory (immediate) appeal and [summarily reversed](#) the trial court ruling. ATRA [agrees](#) with product liability lawyers who hope this ruling "puts an end to the muddle that has developed in this area, with some federal judges electing to ignore Third Circuit precedent." The Third Circuit should be commended for assuring clarity and predictability in the law.

IGNORING SUPREME COURT PRECEDENT

Another of the worst decisions of the year was *Bartlett v. Mutual Pharmaceutical Co.* (1st Cir. May 2, 2012). The First Circuit, in what has been called an "[absurd result](#)," thumbed its nose at the U.S. Supreme Court's ruling in



PLIVA v. Mensing. In *Mensing*, the Supreme Court held that federal law preempts state failure-to-warn claims against manufacturers of generic drugs. Much has been written about *Mensing* because it results in different liability laws for users of generic drugs and users of brand-name drugs.

In 2009 the U.S. Supreme Court ruled in *Wyeth v. Levine* that federal law does not preempt such failure-to-warn claims against manufacturers of brand-name drugs. As a result, users of generic drugs cannot bring failure to warn claims, but users of brand-name drugs can. The Supreme Court fully appreciated that “finding pre-emption [in *Mensing*] but not in *Wyeth* makes little [practical] sense.” But it explained that the result was necessary because of how federal law treats the two types of drugs.

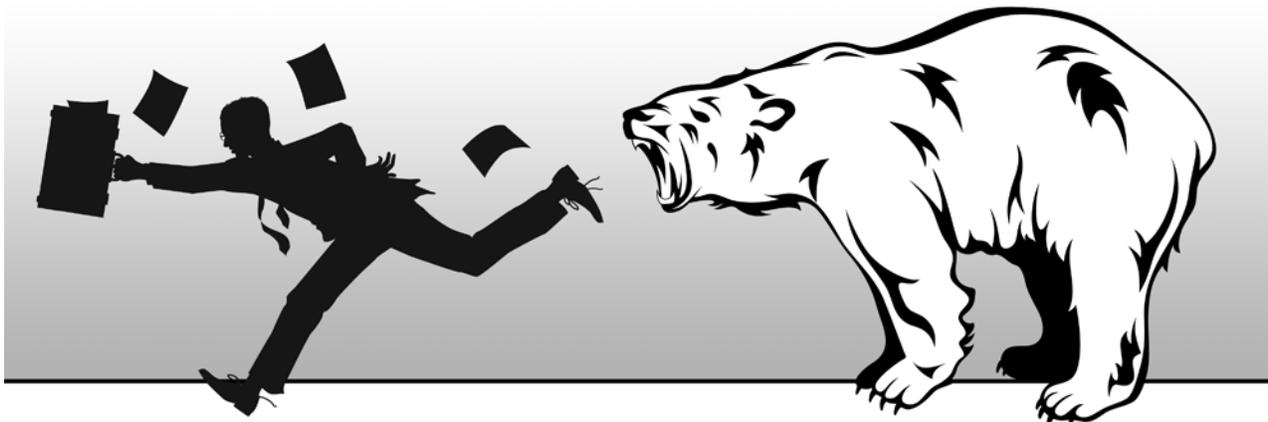
Manufacturers of brand name drugs have the power to change warning labels if courts find existing labels inadequate. By contrast, generic manufacturers must use the warnings approved for the brand-name version of a drug and cannot make changes to the labeling in response to tort suits. The high court then stated that it was up to Congress and [the Food and Drug Administration], not courts, to “change the law and regulations if they so desire.”

Despite this admonishment, the First Circuit took the law in its own hands. It [wrote](#) that it did not believe that a plaintiff should lose the right to recover “by the mere chance of her drug store’s selection of a generic.” It then concocted a design defect theory for allowing what are in essence failure-to-warn claims against generic drug manufacturers. In short, it held that a generic drug manufacturer can be subject to liability for simply selling its drugs if a jury would find that the warning is inadequate to make the drug “safe and effective.”

To explain its ruling, the First Circuit wrote that the *Mensing* decision was “technically limited” to failure-to-warn claims, and that “while the generic maker has no choice as to label, the decision to make the drug and market it . . . is wholly its own.” The First Circuit acknowledged that under such a theory, a jury would be able to “second-guess the FDA” and determine that the drug’s “risks outweighed its benefits making it unreasonably dangerous to consumers, despite [FDA’s] having never withdrawn its statutory ‘safe and effective’ designation.”

Fortunately, the Supreme Court recently [granted review](#) of the First Circuit’s ruling. The high court should ensure that federal appellate courts respect its decisions and find that Americans’ healthcare interests are better served when decisions about the availability of pharmaceutical drugs are made by FDA experts with wide access to scientific and clinical evidence – evidence well beyond that which might be adduced in a single courtroom.

Among the best decisions of the year was *Native Village of Kivalina v. ExxonMobil Corp.* (9th Cir. Sept. 21, 2012). In contrast to the First Circuit, the Ninth Circuit took the [opposite path](#) in *Kivalina* by following a Supreme Court ruling to dismiss a tort claim, even when it clearly sympathized with the plaintiffs. *Kivalina* was one of four lawsuits filed in recent years seeking to subject American energy producers to tort liability based on allegations that their products are causing global climate change. The Alaskan village of Kivalina sought hundreds of millions of dollars in tort liability because a polar ice wall protecting its arctic village has become less stable in recent years.



In dismissing the claim, the Ninth Circuit accepted that its decision had to be guided by the U.S. Supreme Court's 2011 ruling in *AEP v. Connecticut*, in which several state attorneys general sued six of the nation's largest utilities under federal tort law to require the utilities to reduce their greenhouse gas (GHG) emissions. The Supreme Court held that Congress had displaced federal common law tort actions over GHG emissions when it charged the Environmental Protection Agency under the Clean Air Act with determining whether there should be caps on these emissions and, if so, how such caps should be decided and implemented.

The Supreme Court also explained why tort law, which requires courts to determine whether certain conduct is reasonable or unreasonable, is not the way to "regulate" GHG emissions. The judiciary, the Supreme Court stated, does not have the institutional tools or competence to decide what level of emissions are "reasonable" for each defendant. Most notably, courts cannot weigh the impact any such ruling would have on the ability of people to meet their energy needs in an affordable way. Justice Ginsburg, who authored the unanimous ruling, said at the hearing that it would be wrong to "set up a district judge . . . as a kind of super EPA."

The Ninth Circuit did not try to wiggle out from under *AEP* even though Kivalina presented the issue slightly differently. The Village sought monetary damages, not injunctive relief. The court explained that although Kivalina "presents the question in a slightly different context" than in *AEP*, "If a federal common law cause of action has been extinguished by Congressional displacement, it would be incongruous to allow it to be revived in another form." At the same time, the court expressed concern for the villagers who were being "displaced."

FAILING TO STOP ABUSIVE LITIGATION

The third of the worst decisions of the year was *Maracich v. Spears* (4th Cir. Apr. 4, 2012). The Fourth Circuit allowed plaintiffs' lawyers to essentially create their own ambulances to chase. In this case, a few lawyers decided that they wanted to file a lawsuit against hundreds of car dealerships over certain fees that the lawyers argued were improperly charged to the dealers' customers. The lawyers had just one problem: none of them were retained by or even knew anyone who bought a car from many of the dealers they wanted to sue.

Rather than be deterred, the lawyers filed a "placeholder" class action to sue first and find plaintiffs later. To find plaintiffs, the lawyers filed Freedom of Information Act requests to South Carolina's DMV seeking motor vehicle records of the names, addresses and car purchase information of anyone who bought a car from the targeted dealerships. The lawyers then sent a mass mailing to the owners seeking support for the litigation.

Not surprisingly, several car owners took issue with this misuse of their confidential information, saying it was a violation of the federal Driver's Privacy Protection Act (DPPA). The owners then filed their own action against the lawyers involved.

The issue before the Fourth Circuit was whether the use of the car owners' personal information to drum up business, which is prohibited by federal law, fits under the DPPA's "litigation exception." This exception allows lawyers to investigate a matter in anticipation of litigation, not use the state's driver lists to troll for clients. Yet the Fourth Circuit [dismissed the owners' claim](#) with an overly broad interpretation of the litigation exception that allows the lawyers to use the private information not only for current clients, but to find new ones.

The U.S. Supreme Court granted *certiorari* and will [hear](#) the case [this term](#). Some legal observers have [pre-dicted](#) that because this is a new issue with no split in the courts there is a "better-than-even chance that the Court will reverse the Fourth Circuit." Otherwise, what would be next, state Medicaid records?

The last of the best decisions of the year was *EEOC v. TriCore Reference Laboratories* (10th Cir. Aug. 12, 2012). Not only did the Tenth Circuit take a clear stand against frivolous litigation in *EEOC*, it went to the encouragingly extraordinary length of imposing a sanction on the government for abusive enforcement of federal law.



This case involved an employee who returned to work following foot and ankle surgery. TriCore’s management provided the employee with extended leave, a reduced schedule, and a substantially reduced workload – essentially creating a new job for her. Even still, she made repeated errors, some of which jeopardized patient safety. TriCore placed her on unpaid leave and suggested she apply for other TriCore positions. She refused and sought social security disability benefits due to her inability to stand or walk for any length of time.

The Equal Opportunity Employment Commission (EEOC) aggressively pursued TriCore, claiming it failed to make reasonable accommodations for this employee, despite recognizing early on that the employee could not, even with accommodations, perform the essential requirements of her position. As a result of this admission, the EEOC would not be able to prove an essential element of its case against TriCore.

The Tenth Circuit took a hard stand against this frivolous enforcement act. It [affirmed](#) the trial judge’s decision to require the EEOC to reimburse \$140,571.62 in attorneys’ fees and ordered additional sanctions against the EEOC for its pursuit of a frivolous appeal. The court also found that TriCore went above and beyond its legal obligations: “Substantiating the old saw that no good deed goes unpunished,” **Circuit Judge Terrance L. O’Brien** wrote for a unanimous 3-judge panel, “the EEOC persisted in litigating this case in spite of clear evidence that TriCore went well beyond [Americans With Disabilities Act] requirements in trying to oblige an employee.”

The American Tort Reform Association urges courts to take similar stands against all abusive civil litigation.

THE MAKING OF A JUDICIAL HELLHOLE:

QUESTION: WHAT MAKES A JURISDICTION A JUDICIAL HELLHOLE?
ANSWER: THE JUDGES.

Equal Justice Under Law. It is the motto etched on the façade of the Supreme Court of the United States and the reason why few institutions in America are more respected than the judiciary.

When Americans learn about their civil justice system, they are taught that justice is blind. Litigation is fair, predictable and won or lost on the facts. Only legitimate cases go forward. Plaintiffs have the burden of proof. The rights of the parties are not compromised. And like referees and umpires in sports, judges are unbiased arbiters who enforce rules, but never determine the outcome of a case.

While most judges honor their commitment to be unbiased arbiters in the pursuit of truth and justice, Judicial Hellholes judges do not. Instead, these few jurists may favor local plaintiffs' lawyers and their clients over defendant corporations. Some, in remarkable moments of candor, have admitted their biases. More often, judges may, with the best of intentions, make rulings for the sake of expediency or efficiency that have the effect of depriving a party of its right to a proper defense.

What Judicial Hellholes have in common is that they systematically fail to adhere to core judicial tenets or principles of the law. They have strayed from the mission of providing legitimate victims a forum in which to seek just compensation from those whose wrongful acts caused their injuries.

Weaknesses in evidence are routinely overcome by pretrial and procedural rulings. Product identification and causation become "irrelevant because [they know] the jury will return a verdict in favor of the plaintiff." Judges approve novel legal theories so that even plaintiffs without injuries can win awards for "damages." Class actions are certified regardless of the commonality of claims. Defendants are named, not because they may be culpable, but because they have deep pockets or will be forced to settle at the threat of being subject to the jurisdiction. Local defendants may also be named simply to keep cases out of federal courts. Extraordinary verdicts are upheld, even when they are unsupported by the evidence and may be in violation of constitutional standards. And judges often allow cases to proceed even if the plaintiff, defendant and witnesses have no connection to the jurisdiction and events in question.

Not surprisingly, personal injury lawyers have a different name for these courts. They call them "magic jurisdictions." Personal injury lawyers are drawn like flies to these rotten jurisdictions, looking for any excuse to file lawsuits there. When Madison County, Illinois was first named the worst of Judicial Hellholes last decade, some personal injury lawyers there were reported as cheering "We're number one, we're number one."

Rulings in Judicial Hellholes often have national implications because they involve parties from across the country, can result in excessive awards that wrongfully bankrupt businesses and destroy jobs, and can leave a local judge to regulate an entire industry.

Judicial Hellholes judges hold considerable influence over the cases that appear before them. Here are some of their tricks-of-the-trade:

PRETRIAL RULINGS

- ◆ **Forum Shopping.** Judicial Hellholes are known for being plaintiff-friendly and, thus, attract personal injury cases with little or no connection to the jurisdiction. Judges in these jurisdictions often refuse to stop this forum shopping.

- ◆ **Novel Legal Theories.** Judges allow to go forward lawsuits not supported by existing law or likely developments thereof. Instead of dismissing these suits, Hellholes judges adopt new and retroactive legal theories, which often have negative consequences for the nation's economy, innovation and safety.
- ◆ **Discovery Abuse.** Judges allow unnecessarily broad, invasive and expensive discovery requests to increase the burden of litigation on defendants. Judges also may apply discovery rules in an unbalanced manner, denying defendants their fundamental right to learn about the plaintiff's case.
- ◆ **Consolidation & Joinder.** Judges join claims together into mass actions that do not have common facts and circumstances. In one notorious example, West Virginia courts consolidated more than 8,000 claims and 250 defendants in a single trial. In situations where there are so many plaintiffs and defendants, individual parties are deprived of their rights to have their cases fully and fairly heard by a jury.
- ◆ **Improper Class Action Certification.** Judges certify classes without sufficiently common sets of facts or law. These classes can confuse juries and make the cases difficult to defend. In states where class certification cannot be appealed until after a trial, improper class certification can force a company into a large, unfair settlement.
- ◆ **Unfair Case Scheduling.** Judges schedule cases in ways that are unfair or overly burdensome. For example, judges in Judicial Hellholes have scheduled numerous cases against a defendant to start on the same day or given defendants short notice before a trial begins.

DECISIONS DURING TRIAL

- ◆ **Uneven Application of Evidentiary Rules.** Judges allow plaintiffs greater flexibility in the kinds of evidence they can introduce at trial, while rejecting evidence that might favor defendants.
- ◆ **Junk Science.** Judges fail to ensure that scientific evidence admitted at trial is credible. Rather, they'll allow a plaintiff's lawyer to introduce "expert" testimony linking the defendant(s) to alleged injuries, even when the expert has no credibility within the scientific community.
- ◆ **Jury Instructions.** Giving improper or slanted jury instructions is one of the most controversial, yet underreported, abuses of discretion in Judicial Hellholes.
- ◆ **Excessive Damages.** Judges facilitate and allow to stand excessive punitive or pain and suffering awards that are influenced by improper evidentiary rulings, tainted by passion or prejudice, or unsupported by the evidence.

UNREASONABLE EXPANSIONS OF LIABILITY

- ◆ **Private Lawsuits under Loosely-Worded Consumer Protection Statutes.** As closely examined in a special feature of this report, the vague wording of state consumer protection laws has led some judges to allow plaintiffs to sue even if they can't demonstrate an actual financial loss that resulted from their reliance on allegedly deceptive conduct.
- ◆ **Logically-Stretched Public Nuisance Claims.** Similarly, the once simple concept of a "public nuisance" (e.g., an overgrown hedge obscuring a STOP sign or music that is too loud for the neighbors night after night) has been conflated into an amorphous Super Tort for pinning liability for various societal problems on manufacturers of lawful products.
- ◆ **Expansion of Damages.** There also has been a concerted effort to expand the scope of damages, which may hurt society as a whole, such as "hedonic" damages in personal injury claims, "loss of companionship" damages in animal injury cases, or emotional harm damages in wrongful death suits.

JUDICIAL INTEGRITY

- ◆ **Alliance Between State Attorneys General and Personal Injury Lawyers.** Some state attorneys general routinely work hand-in-hand with personal injury lawyers, hiring them on a contingent-fee basis. Such arrangements introduce a profit motive into government law enforcement, casting a shadow over whether government action is taken for public good or private gain.
- ◆ **Cozy Relations.** There is often excessive familiarity among jurists, personal injury lawyers, and government officials.



1101 Connecticut Avenue, NW, Suite 400
Washington, DC 20036
(202) 682.1163

www.ATRA.org